

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

KIRSTJEN M. NIELSEN,)
SECRETARY OF HOMELAND SECURITY,)
ET AL.,)
 Petitioners,)
 v.) No. 16-1363
MONY PREAP, ET AL.,)
 Respondents.)

Pages: 1 through 71

Place: Washington, D.C.

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11

12 Washington, D.C.

13 Wednesday, October 10, 2018

14

15 The above-entitled matter came on for
16 oral argument before the Supreme Court of the
17 United States at 10:05 a.m.

18

19 APPEARANCES:

20 ZACHARY D. TRIPP, Assistant to the Solicitor General,
21 Department of Justice, Washington, D.C.; on behalf
22 of the Petitioners.

23 CECILLIA D. WANG, ESQ., New York, New York; on behalf
24 of the Respondents.

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1 P R O C E E D I N G S

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 16-1363,
5 Nielsen, Secretary of Homeland Security, versus
6 Preap.

7 Mr. Tripp.

8 ORAL ARGUMENT OF ZACHARY D. TRIPP

9 ON BEHALF OF THE PETITIONERS

10 MR. TRIPP: Mr. Chief Justice, and may
11 it please the Court:

12 A criminal alien does not become
13 exempt from mandatory detention by the
14 happenstance that DHS did not arrest them
15 immediately or promptly after they got out of
16 jail or prison. And the best way to illustrate
17 this point is just to look at the statutory
18 text.

19 And -- and the -- the key provision
20 we're talking about here is 1226(c)(2). This
21 is the prohibition against releasing a detained
22 criminal alien. And this is on page 4 of our
23 merits brief. And what it says is that the
24 Secretary may release an alien described in
25 paragraph (1) only if it is for witness

1 protection.

2 And it's undisputed here that the
3 witness protection exception does not apply and
4 that this categorically prohibits the release
5 on bond of anybody who is an alien described in
6 paragraph (1).

7 So then the question is, who are those
8 aliens? And on -- and in paragraph (1) -- it's
9 on the prior page, and it just answers that in
10 no uncertain terms. It says, the Secretary
11 shall take into custody "any alien who is
12 inadmissible" or "is deportable" under these
13 different provisions that relate to their
14 criminal history or terrorist activities.

15 And so an alien described in -- in
16 paragraph (1) is any alien who is inadmissible
17 or is deportable under one of these provisions.

18 In -- in the next part of the
19 statute --

20 JUSTICE SOTOMAYOR: So what meaning do
21 you give to when the alien is released? Does
22 it command you to do anything?

23 MR. TRIPP: Yeah, the -- the key
24 function of that, so -- is to tell the
25 Secretary when to act, right? So it's aligned

1 flush left, along with the command that the
2 Secretary shall --

3 JUSTICE SOTOMAYOR: So you don't see
4 any sense of urgency in your acting, no sense
5 of encouraging you --

6 MR. TRIPP: Oh, no, we --

7 JUSTICE SOTOMAYOR: -- in some way to
8 actually do what the statute says --

9 MR. TRIPP: We -- we --

10 JUSTICE SOTOMAYOR: -- which is to
11 take custody of somebody?

12 MR. TRIPP: -- we absolutely think
13 that this conveys a sense of urgency, and I
14 think we're in full agreement with Respondents
15 that this is directing -- that -- that this is
16 an urgent priority. It's a mandate, you know,
17 and -- and it -- and it kicks in, it is
18 triggered as soon as the alien is released.

19 It is -- our -- our key point is that
20 the phrase "when the alien is released" --

21 JUSTICE SOTOMAYOR: So tell me why
22 would you have -- need transition rules under
23 your reading of this statute, which there were.
24 And the transition rules said you have two
25 years, essentially, to put in place enough

1 personnel and facilities to do what the statute
2 requires you to do.

3 Why did you need that two-year period
4 if, in your view, you have absolute
5 discretion --

6 MR. TRIPP: It's --

7 JUSTICE SOTOMAYOR: -- to pick an
8 alien up whenever you want to any way?

9 MR. TRIPP: I -- I think that's really
10 not a fair characterization of our position.
11 Our understanding is that this is a mandate.
12 It -- it is triggered immediately. In a very
13 large number of cases, the arrest is going to
14 occur immediately. This is a mandate. And
15 this statute was going to direct that many more
16 aliens be arrested.

17 And so under our standard -- our, you
18 know -- and the real concern with the
19 transition period rules was a lack of bed
20 space.

21 And under both of our interpretations,
22 this is going to drive up the number of aliens
23 who are arrested.

24 JUSTICE SOTOMAYOR: No, no, no. But
25 why did you need the transition rules at all?

1 If you have discretion, as you claim to have,
2 to decide when you're going to pick up an
3 alien, either the day of release or, in one
4 case, before -- 11 years later, you didn't need
5 the transition rules. You could have just done
6 what you needed to do to create the bed space
7 or get the personnel and start arresting people
8 when you thought you could.

9 MR. TRIPP: But, again, I want to be
10 clear, we don't interpret this to say that we
11 can arrest the person whenever we want. We --
12 we understand this to be a continuing urgent
13 obligation to arrest them right now.

14 We need to arrest them when they get
15 out. We need to arrest them the next day, the
16 next month, whenever it happens. But, you
17 know, sometimes it may not occur for years --

18 JUSTICE SOTOMAYOR: So let's go to --

19 MR. TRIPP: -- because DHS doesn't
20 know where the person is.

21 JUSTICE SOTOMAYOR: -- let's go to the
22 release provision.

23 MR. TRIPP: Right.

24 JUSTICE SOTOMAYOR: Paragraph (1) is
25 an entire paragraph. It describes a type of

1 alien and an alien who's picked up at a
2 particular time.

3 So, if the statute intended this lack
4 of authority to kick in if the alien only met
5 (A) through (D), why doesn't the statute say
6 that?

7 MR. TRIPP: Well, I guess --

8 JUSTICE SOTOMAYOR: Why doesn't it say
9 paragraph (1), (A) through (D)?

10 MR. TRIPP: A -- a couple responses.
11 I think those are the only portions of the
12 statute that describe -- that actually describe
13 the alien. The phrase "when the alien is
14 released" doesn't describe him. It takes as a
15 given that he's already been fully described.

16 JUSTICE SOTOMAYOR: It -- it describes
17 the type of alien we're talking about.

18 MR. TRIPP: I -- I don't think --

19 JUSTICE SOTOMAYOR: It describes the
20 person who's subject to this provision.

21 MR. TRIPP: I -- I don't think that's
22 right because it says when -- that might be
23 right if it said something like the Secretary
24 shall take into custody any alien who is
25 inadmissible and deportable, you know, and who

1 has not been released for more than such and
2 such amount of time.

3 But that's not what it says. It says
4 when the alien is released, which I think takes
5 as a given that he's already been fully
6 described.

7 But another, I think, important answer
8 to this is the text of 1226(a), which I'd also
9 like to -- to walk through. Their basic theory
10 is that these arrests are happening under (a).
11 I don't think they're right about that, but
12 even if they were, they would still lose.

13 So under -- this is in the Pet. App.,
14 actually, at 141a. And 1226(a), this is the
15 background rule, and it has -- like (C), it has
16 these two sentences. The first is about
17 arrest, and the second is about custody.

18 And the first sentence says, "on a
19 warrant issued by the Attorney General, an
20 alien may be arrested and detained, pending a
21 decision on whether he is to be removed."

22 And so what (c)(1) does is it takes
23 that discretionary authority and it turns it
24 into a mandate to the Secretary that she shall
25 arrest these certain criminal aliens. But what

1 --

2 JUSTICE GINSBURG: Mr. Tripp, is your
3 -- your position then it is totally irrelevant
4 whether the -- the change in custody is
5 immediate or it's seven years down the road?
6 Whenever it occurs, the Attorney General has no
7 discretion to have a bond hearing? Whenever it
8 occurs, seven years, eight years, 10 years, the
9 person is detained without bond, right?

10 MR. TRIPP: Yes, that's absolutely our
11 -- our understanding of (c)(2), yeah. And --

12 JUSTICE GORSUCH: Along those lines,
13 Mr. Tripp, does the government have any view
14 about if ever the obligation under (c) lapses?
15 Could it be 30 years? Could it be --

16 MR. TRIPP: Under (c)(1)?

17 JUSTICE GORSUCH: Yeah. The
18 obligation to take into custody under (c)(1).
19 Thirty years, and the government was aware of
20 him the entire time and chose not to act. Kind
21 of a laches argument. Is there any limit on
22 the government's power?

23 MR. TRIPP: So we understand that --
24 that -- (c)(1) to be a continuing obligation,
25 it does not lapse, but can I -- if I could just

1 follow through with (a) -- with the text of (a)
2 and just how this supports us on the custody
3 determination, I think it would be helpful.

4 So as I -- there's this first
5 discretionary authority to arrest the alien and
6 then the next sentence talks about what do you
7 do after he's been arrested, and what it says
8 is, except as provided in subsection (c) of
9 this section and pending such decision, the
10 Secretary either may continue to detain him or
11 may release him on bond.

12 JUSTICE KAGAN: So, Mr. Tripp --

13 MR. TRIPP: But, of course, what (c)
14 says is you can't release him at all.

15 JUSTICE KAGAN: -- just to think about
16 how these two provisions interact with each
17 other, I'm wondering if you can tell me with
18 respect to a group of people who are not
19 involved here.

20 MR. TRIPP: Okay.

21 JUSTICE KAGAN: As I understand it,
22 these (A) through (D) categories include some
23 people who have never been in criminal custody
24 at all. So let's take spouses or children of
25 terrorists. But there are a number of

1 categories of people who have never been in
2 custody at all.

3 MR. TRIPP: Right.

4 JUSTICE KAGAN: So they fit within
5 this (A) through (D) category. I'm wondering
6 where you think the authority to detain them
7 comes from. Does the authority to detain them
8 come from (c) or does it come from (a)?

9 MR. TRIPP: The authority to -- so I
10 think, actually, for all of them, the authority
11 to do the arrest comes from (a). And -- and --
12 and -- but what happens with (c) is (c)(1)
13 makes the arrest mandatory, and we do think it
14 makes it mandatory including for those people
15 who have never been in custody at all, that the
16 "when the alien is released" describes when the
17 duty is triggered, but there are some aliens,
18 in particular with the (c)(1)(D) category that
19 you're talking about, the national security
20 terrorist ones where the person has never been
21 in any prior custody. But, again, it --

22 JUSTICE KAGAN: I guess I'm not -- I'm
23 not --

24 MR. TRIPP: -- it really ultimately
25 doesn't matter.

1 JUSTICE KAGAN: Well, it sort of
2 matters to me, I think. You know, you could be
3 saying, if I -- if I understand your -- your
4 view of described in paragraph (1), these
5 aliens are described in paragraph (1) even
6 though they've never been in criminal custody.

7 MR. TRIPP: That's right.

8 JUSTICE KAGAN: So that would suggest
9 that (c)(1) is authorizing their detention, and
10 that's what you're saying?

11 MR. TRIPP: No. Sorry, (c) -- well,
12 (c) -- (c)(1) is about arrest, just like the
13 first sentence of (a) is about arrest. This is
14 a --

15 JUSTICE KAGAN: Yes. How are you
16 arresting these people? Are you arresting them
17 under (c)(1)?

18 MR. TRIPP: I think actually, frankly,
19 the answer is that we're arresting them under
20 both (a) and (c)(1). You know, the arrests,
21 they have to be upon a warrant. That
22 requirement comes from (a).

23 The -- the -- this -- all of this is
24 pending a determination of whether the alien is
25 to be removed. That comes from (a).

1 JUSTICE KAGAN: Well, when you say
2 you're arresting them under both, are you
3 saying that with respect to everybody under
4 (c)(1), you're also arresting --

5 MR. TRIPP: Yes.

6 JUSTICE KAGAN: -- them under (a)?
7 Okay. So that I'm not interested in.

8 MR. TRIPP: Okay.

9 JUSTICE KAGAN: You know, that kind of
10 -- you're saying that those people are under
11 (c)(1) to the same extent as people who have
12 been in criminal custody?

13 MR. TRIPP: That's right.

14 JUSTICE KAGAN: So that seems odd to
15 me because (c)(1) seems to me all about people
16 who have been in criminal custody.

17 MR. TRIPP: Well --

18 JUSTICE KAGAN: Now you have this
19 question about how about if there's a gap
20 between the criminal custody, but -- but -- but
21 your interpretation necessitates that you
22 understand even people who have never been in
23 criminal custody as part of the (c)(1) group.

24 MR. TRIPP: That's right. I think
25 just the one thing I would point out is in the

1 overwhelming majority of applications of this
2 statute, this is, I think, still totally
3 sensible because, in the overwhelming majority
4 of applications, the person is about criminal,
5 and in all of the criminal ones, there's going
6 to have been some prior criminal custody. And
7 so that's --

8 JUSTICE KAGAN: You know --

9 MR. TRIPP: -- I think, really the
10 paradigm of the statute.

11 JUSTICE KAGAN: -- yes, this is --
12 this is a small group relatively, but it's
13 definitely a group. There are quite a number
14 of subcategories that have never been in
15 criminal custody here, and we could go over
16 what they are if anybody's interested, but
17 there are a number.

18 And -- and -- and your statutory
19 interpretation, particularly your narrow view
20 of the term described in paragraph (1),
21 requires that those people be understood as
22 within the (c)(1) custody authority, and, I
23 don't know, I look at the (c)(1) custody
24 authority and it's all about criminal custody
25 and what happens when you're released from

1 criminal custody, and that makes me think that
2 your interpretation of the words described in
3 paragraph (1) is wrong.

4 MR. TRIPP: I -- I -- I -- I think
5 it's more that you may disagree about whether
6 the duty to arrest -- the mandate to arrest
7 them in (c)(1) kicks in when an alien has --
8 has not been in prior criminal custody, in some
9 prior state or federal criminal custody, but
10 even -- even if you disagree with us on that,
11 so, first of all, all of the Respondents here
12 have been in some prior custody.

13 And, of -- of -- of course, what --
14 what we're really saying is that, you know, the
15 -- the timing of their arrest, the timing of
16 their release is just -- is -- is totally
17 irrelevant when it comes to (c)(2). And I
18 think one --

19 JUSTICE BREYER: What about the first
20 part? I mean, we've read the briefs. You've
21 read them. It seemed to me reading them there
22 are people here who have been detained for 11
23 years, 14 years.

24 MR. TRIPP: They were released for --

25 JUSTICE BREYER: I mean, they were

1 arrested --

2 MR. TRIPP: Yeah.

3 JUSTICE BREYER: -- 14 years after
4 being released, and one for taking bus
5 transfers. He had been arrested and put on
6 probation or something for stealing bus
7 transfers.

8 Well, all you have to do is read the
9 briefs. To me, I'm not saying to you, that
10 isn't a parade of possible future horrors.
11 Those are the horrors. Every person in the
12 United States, just about, if he's arrested has
13 the right to a bail hearing.

14 As you know from my opinion in
15 Jennings, I think that's unconstitutional. But
16 the Court didn't decide the contrary, all
17 right?

18 So assume, as I am assuming, that this
19 paragraph is ambiguous at most in your favor.
20 And if it's ambiguous, and if there is a huge,
21 as I think, a huge constitutional question,
22 then don't we read it not to apply or to apply
23 to those who have been properly released?

24 I take it you don't think the
25 government could come back 50 years later and

1 arrest somebody who's a grandfather or
2 something, you know, he -- he stole some bus
3 transfers 50 years earlier. Is that what you
4 think (c) authorizes?

5 MR. TRIPP: So a -- a couple of
6 responses to that. So, first, of course, our
7 -- our -- our top line answer is that this
8 statute is not ambiguous, that the only
9 plausible reading of this might --

10 JUSTICE BREYER: So you think a person
11 50 years later, who is on his death bed, after
12 stealing some bus transfers, that this -- this
13 paragraph says that the Attorney General shall
14 release him and hold him without bail, even
15 though in this country a triple ax murderer --

16 MR. TRIPP: So -- so --

17 JUSTICE BREYER: -- is given bail, a
18 hearing, a hearing?

19 MR. TRIPP: -- a couple more answers
20 to that. So, first, I don't think that
21 hypothetical would hold out. Theft can be a
22 crime involving moral turpitude. But both the
23 deportability and admissibility provisions on
24 crimes involving moral turpitude -- so, if you
25 look at, for deportable aliens --

1 JUSTICE GORSUCH: All right. But now
2 we're --

3 MR. TRIPP: -- this is under
4 1226(c)(1)(C).

5 JUSTICE GORSUCH: -- we're quibbling,
6 Mr. Tripp.

7 MR. TRIPP: You need to be in jail for
8 a year.

9 JUSTICE GORSUCH: Mr. Tripp, we're
10 quibbling, all right? Justice Breyer's
11 question is my question and I really wish you'd
12 answer it. We can quibble over what
13 constitutes a crime of moral turpitude, but
14 they're legion, they're legion, and whether
15 it's a bus transfer or whatever hypothetical,
16 it doesn't matter. All right. Fifty years
17 later, a minor crime, you say, yes, the
18 government must come and arrest him, right?

19 MR. TRIPP: So I'm not trying to
20 quibble over what's a crime involving moral
21 turpitude. I'm saying that there's a -- a
22 sentence -- a sentence requirement under the
23 statute.

24 JUSTICE SOTOMAYOR: Let's say --

25 JUSTICE BREYER: What is the answer,

1 though? Is the government's position that this
2 paragraph, which says shall be arrested upon
3 release, applies to a person who has been
4 released 50 years before? What is your
5 position? I'm not even criticizing you, though
6 I was.

7 MR. TRIPP: Our position is absolutely
8 that this -- that this applies regardless of
9 the time in.

10 JUSTICE BREYER: Okay. Okay.

11 MR. TRIPP: This statute went into
12 effect in 1998. It's not retroactive.

13 JUSTICE BREYER: Okay.

14 MR. TRIPP: So -- so we're not -- not
15 looking at that yet.

16 JUSTICE BREYER: So your position is
17 yes, he's 50.

18 MR. TRIPP: And then --

19 JUSTICE BREYER: Okay. Now --

20 MR. TRIPP: -- to get into the
21 constitutional question --

22 JUSTICE BREYER: But wait. Let me ask
23 another question, please, because I have the
24 answer now what your position is.

25 Okay. Now my second question is this:

1 There is support for your position in the
2 cases, and the cases that support it, I
3 thought, were the cases that says when the
4 government misses a bail deadline, then you can
5 go ahead and have the bail hearing anyway, see,
6 when there's a bail deadline missed, because
7 that's not really said about what happens when
8 you miss the bail deadline.

9 MR. TRIPP: Right.

10 JUSTICE BREYER: And the same is true
11 here.

12 MR. TRIPP: That's right.

13 JUSTICE BREYER: And that I thought
14 was your strong -- to me the strongest
15 argument.

16 MR. TRIPP: Right. And that --

17 JUSTICE BREYER: So I thought then --
18 and this is my question -- I thought then, is
19 this like those cases? And the answer I
20 thought was: Well, yes, in the sense that
21 there is A, no statement of what happens when
22 you miss the deadline, right there, and, B, the
23 government, well, says -- all right. A is good
24 enough.

25 But there is a big difference. In the

1 bail cases, the result of missing the deadline,
2 the result of reading in no deadline is you're
3 going to have a bail hearing. The community
4 will be protected, right? The community will
5 be protected with a bail hearing. And the
6 individual will not be hurt much because all
7 he'd be missing is a hearing that he should
8 have had anyway.

9 But, in this case, if you read the
10 statute the same way, what you're doing to the
11 individual is many who are no danger to the
12 community, no danger to the community, you're
13 depriving them of a hearing that could mean
14 their release and you're keeping them instead
15 for 11, 12, 13, 14 years.

16 And what you're doing to the
17 community, reading it your way, if we read it
18 the opposite way, nothing. You'll have the
19 bail hearing. The dangerous people won't get
20 out.

21 MR. TRIPP: So I --

22 JUSTICE BREYER: So I thought in terms
23 of the purposes -- are you following what I'm
24 saying?

25 MR. TRIPP: Yes.

1 JUSTICE BREYER: You see, in terms of
2 the purposes of the bail statute or this
3 statute or any other statute, we read it
4 technically your way, and we hurt everybody in
5 terms of the purposes. We read it the opposite
6 way and we hurt virtually nobody.

7 MR. TRIPP: So this is the piece I --
8 I want to push back on hard. I think this
9 is -- the Montalvo-Murillo, these better late
10 than never cases, I think, are squarely on
11 point for our understanding of (c)(1). And --
12 and the key point, as you said, is that, you
13 know -- well, a couple things.

14 One is, you know, what is the
15 authority that you would lose? The authority
16 we would lose is (c)(2), the authority to hold
17 them without a bail hearing. And the whole
18 point of this statute is to stop doing bail
19 hearings on the ground -- on the traditional
20 bail factors of flight risk and recidivism.

21 JUSTICE ALITO: Mr. Tripp?

22 MR. TRIPP: That's the entire point.

23 JUSTICE ALITO: Mr. Tripp?

24 MR. TRIPP: Congress looked at this
25 issue. They -- they -- they worked with it for

1 years and years and years. And I think,
2 basically, at the end of the day, Congress's
3 answer was enough is enough, that if you're an
4 alien, you come here, you commit one of these
5 crimes, you've effectively forfeited whatever
6 right you have to remain at large in the
7 community.

8 And so to be looking back at the bail
9 factors is to defeat the -- the purpose of the
10 statute. And we have two, I think, very
11 powerful examples here, just among the named
12 plaintiffs. Right?

13 We have Mr. -- so Mr. Mony Preap, he
14 was out for seven years and then he was
15 rearrested for a domestic abuse charge which he
16 pleaded down to battery. We have Mr. Rodriguez
17 Moya --

18 JUSTICE GINSBURG: And yet he -- yet
19 he got cancellation of removal, didn't he?

20 MR. TRIPP: He did get cancellation of
21 removal. But then we have Mr. Rodriguez Moya,
22 who was out for three years, he got a bond
23 hearing, he was released, and he attempted to
24 murder his ex-girlfriend and succeeded in
25 murdering her new boyfriend.

1 JUSTICE ALITO: Now, Mr. Tripp, what
2 is the definition of the class that was
3 certified by the district court? Does it
4 consist of -- solely of people who have been --
5 who were released from criminal custody many
6 years ago?

7 MR. TRIPP: No, not even close. It's
8 -- it's any -- any criminal alien who is not
9 arrested immediately. So there's an
10 extraordinary mismatch between the kinds of
11 claims that were -- that -- that I think
12 Respondents are getting at, these sort of
13 long-, long-term ones, and what we're talking
14 about here.

15 And I think really what those --

16 JUSTICE KAGAN: Do you have any sense,
17 understanding, even estimate of the -- in the
18 whole class, how many people are people who
19 were detained a day later? How many people
20 were -- you know, were detained a year plus
21 later?

22 MR. TRIPP: Yeah. So I -- I think the
23 short answer is we really don't know. There's
24 -- there's nothing in the record on that. And
25 there aren't any published statistics on this

1 either.

2 I think one thing that might help is
3 if I could just take a step back and explain
4 the many reasons why gaps in custody can occur
5 and why they're often fairly long.

6 So -- so, first, in order to arrest an
7 alien under one of these provisions, DHS, of
8 course, first needs to know that the person is
9 actually an alien and that they've actually
10 committed one of these crimes.

11 And in many cases, that's going to
12 take like real leg work by DHS officers on --
13 on the ground, pulling the records of
14 conviction, looking to see the statute,
15 comparing the elements of the statute to the
16 elements of the generic offense.

17 And I think, as the Court is painfully
18 aware, that can -- that can be difficult and
19 time-consuming. And then even when --

20 JUSTICE BREYER: What about saying a
21 reasonable time, the word -- the words that we
22 know are there, "upon his release," means a
23 reasonable time within his release, you know, a
24 reasonable time. Therefore, the people who
25 have been hiding in the mountains for 10 years,

1 we say, well, yeah, that's a reasonable time.
2 But the people who have families and have jobs
3 and have lived as citizens of the community for
4 14 years, that was not a reasonable time when
5 you went 14 years later.

6 What about that typical legal term in
7 order to satisfy what the government says, as
8 you say, is its major interest?

9 MR. TRIPP: So I think a couple of
10 responses. So, first, (c)(2) doesn't have a
11 timing requirement at all, and that's the
12 statute that we are relying on. And I think,
13 second, what you're really getting at and I
14 think the force of what you're saying is that
15 it feels different when the alien's been out
16 for a really, really long period of time.

17 And I think what -- what that's
18 getting at is -- I -- I think that -- that it
19 would have been perfectly rational for Congress
20 to add a statute of limitations here, to say
21 something in (c)(2) like an alien may be
22 released only if it's for witness protection or
23 if --

24 JUSTICE SOTOMAYOR: That only works --

25 MR. TRIPP: -- the person has been out

1 for 10 years and hasn't gotten into trouble --

2 JUSTICE KAGAN: But are you saying --

3 MR. TRIPP: -- and is potentially

4 eligible for --

5 JUSTICE SOTOMAYOR: You -- you --

6 JUSTICE KAGAN: -- but are you saying,
7 Mr. Tripp, that there's no constitutional claim
8 as to any of these people, even if a person has
9 been out for 15 years, has established ties in
10 the community? Are you saying that there's no
11 constitutional problem with that?

12 MR. TRIPP: So, I mean, we -- we
13 certainly don't think there's a substantial
14 constitutional problem that they have
15 identified. I mean, Demore versus Kim squarely
16 upheld this statute. They are not asking the
17 Court to overrule Demore. They're not saying
18 that it's wrongly decided. Their only argument
19 is that Demore only applies if the person was
20 arrested within a day of when they were
21 released.

22 JUSTICE KAGAN: Right. Well, that's
23 what I'm saying.

24 JUSTICE ALITO: Well, that may or may
25 not --

1 JUSTICE KAGAN: That's what I'm
2 saying. I mean, assume that this class were
3 made up of people who hadn't -- who had lived
4 after release from criminal custody for a very
5 substantial period of time, whatever it is,
6 five years, 10 years, 15 years.

7 Would they have constitutional --
8 serious constitutional claims in your view?

9 MR. TRIPP: I -- I think the answer is
10 no under the analysis in Demore. So, first of
11 all, when a -- when a criminal alien is finally
12 put into removal proceedings, they know this is
13 happening, they've been arrested, all of that.

14 The -- the incentive to flee is not
15 insubstantial. Their -- their criminal
16 conviction is almost always going to establish
17 that they are removable, and they're often
18 going to be ineligible for any kind of relief.
19 So this -- the -- it's not going to look --

20 JUSTICE GINSBURG: But you -- could
21 you explain then why Preap himself was eligible
22 for relief?

23 MR. TRIPP: Because not -- only some
24 criminal aliens and -- and more -- more LPRs
25 have eligibility for relief. If you're not an

1 LPR, the -- the barrier is -- is -- is much
2 broader.

3 But -- but also I think -- again, I
4 think even just the facts of this case show
5 that the danger of recidivism does not
6 disappear after you pass some number of years.

7 JUSTICE BREYER: Look, would you do me
8 one favor? First, assume I'm right, which I
9 know is a heroic assumption.

10 (Laughter.)

11 JUSTICE BREYER: But -- but -- but
12 assume that there's a constitutional problem in
13 a country which gives every triple ax murderer
14 a bail hearing, but these people don't, okay?
15 All you're involved is a bail hearing. Now
16 assume another thing with me, which you don't
17 want to, that the statute is ambiguous.

18 Now, if I'm right on those two things,
19 why would the government really care? Why does
20 the government care? Why wouldn't it want to
21 say, okay, we'll give him a bail hearing? The
22 -- the baddies will be in jail, and the ones
23 who are no risk won't be.

24 MR. TRIPP: I -- I think the real
25 concern is really what Congress was getting at

1 here, is that making this prediction of which
2 criminal aliens are going to flee and which are
3 going to re-offend is actually really, really
4 hard, right? And I think, you know, the -- the
5 example of Mr. Rodriguez Moya, I think, drives
6 that home, you know, that when IJs were doing
7 this with the criminal alien in front of them,
8 on the basis of the traditional bail factors,
9 Congress's basic judgment was that too many of
10 them were going to be released and that it
11 actually wasn't working.

12 And so Congress, you know, they
13 experimented with this. That was the rule for
14 many decades, until Congress started narrowing
15 down and -- and building out these statutes --

16 JUSTICE ALITO: Well, Mr. Tripp --

17 MR. TRIPP: -- for mandatory
18 detention.

19 JUSTICE ALITO: -- you've been --
20 you've been pushed on the question whether
21 there might be some circumstances in which an
22 alien who would otherwise fall within the
23 statute would have a constitutional right to a
24 bail hearing, but I thought the question that
25 we agreed to decide related to the -- what the

1 Ninth Circuit saw as a requirement that the
2 alien that -- that Homeland Security take the
3 alien into custody immediately, and that was
4 the class of aliens that was certified by the
5 district court.

6 So, if we were to reverse that
7 determination, would that preclude a challenge
8 by -- an individual challenge, an as-applied
9 challenge by an alien who fell within the --
10 the circumstances that have been described?

11 MR. TRIPP: No, of course not. That
12 safety valve is always available, and I think
13 it's frankly much -- much more faithful to what
14 Congress was trying to -- to accomplish here.
15 And if I --

16 JUSTICE KAGAN: And -- and do you
17 agree that an alien could bring that challenge,
18 notwithstanding 1226(e)? So 1226(e), right, is
19 -- is -- is the jurisdictional provision.

20 MR. TRIPP: Yes.

21 JUSTICE KAGAN: Does that at all
22 prevent an alien from bringing the kind of
23 challenge that Justice Alito is talking about?

24 MR. TRIPP: I -- I think -- our
25 understanding is no, actually, aliens bring

1 these kinds of claims in the prolonged
2 detention context with some frequency.

3 If I -- if I could reserve the balance
4 of my time.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Ms. Wang.

8 ORAL ARGUMENT OF CECILLIA D. WANG
9 ON BEHALF OF THE RESPONDENTS

10 MS. WANG: Mr. Chief Justice, and may
11 it please the Court:

12 The government's reading is contrary
13 to the text, structure, and purpose of the
14 statute in at least three ways. One, it
15 negates Congress's directive to use finite
16 mandatory detention resources on those who
17 would otherwise be released into the community
18 from criminal custody.

19 Second, it's not true that Congress
20 wanted to detain and deport all criminal
21 aliens, as the government claims in its reply
22 brief at page 12.

23 And, three, if Congress really wanted
24 what the executive branch claims here, it would
25 have simply written a statute that says people

1 in these four categories shall be detained
2 without a hearing until removed.

3 That is not what Congress did.
4 Instead, Congress wrote a statute, 1226(c), as
5 an exception to the general detention scheme in
6 1226(a) which applies except as provided in
7 subsection (c), not as except -- not except as
8 provided in section (c)(2), as the government
9 would have it.

10 Congress wrote section 1226(c) in two
11 paragraphs. The first paragraph says who gets
12 taken into custody and when, and the second
13 paragraph says of those people in paragraph (1)
14 who can be released.

15 Now the government claims instead, in
16 a stretch of a reading, that you focus only on
17 paragraphs (A) through (D) in paragraph (1).
18 In other words, they say, section (c)(2) stands
19 alone as an authorization for mandatory
20 detention.

21 But that's not what Congress said. It
22 said except -- as an alien described in
23 paragraph (1), not an alien described in
24 paragraph (1)(A) through (D).

25 And the government's reading, trying

1 to pull section (2), (c)(2), out as that
2 free-standing authorization, leads to three
3 serious anomalies that they struggle to
4 explain, as they did with you, Justice Kagan.

5 The first anomaly is, as you noted,
6 that the transition rules, which were meant to
7 be a ramp-up to the permanent rule, are
8 completely superfluous. If the government
9 really could delay, for whatever reason,
10 picking up people subject to mandatory
11 detention for as long as it needs or wants,
12 then Congress would not need to have that
13 intermediate step.

14 The second anomaly with the
15 government's reading is -- and the government
16 struggled with this in response, again, to your
17 questions, Justice Kagan -- is that if the only
18 qualification to be subject to mandatory
19 detention is that you fall into one of the four
20 categories in A through D, they necessarily
21 read out the prior criminal custody
22 requirement.

23 In -- in addition to the example you
24 gave, Justice Kagan, of a child or a spouse of
25 a terrorist, there's a very typical situation:

1 I'm an immigrant. I show up for my Green Card
2 interview. And I live in California or
3 Washington, and I confidently say, yes, I use
4 marijuana on a regular basis. I've never been
5 arrested. I've never been convicted of a
6 controlled substance offense. But based on my
7 admission to possession of a controlled
8 substance, I might then be subject to mandatory
9 detention on the spot as I sit there in a CIS
10 office under the government's reading.

11 Now the government acknowledges that
12 eliminating a prior criminal custody
13 requirement would be anomalous, and they do
14 find, they do acknowledge there's a prior
15 criminal custody requirement. But instead of
16 finding that in the natural and obvious place
17 within the four corners of this statute, that
18 is, as Justice Sotomayor pointed out, the
19 phrase "when the alien is released," they go
20 hunting around back to the uncodified effective
21 date provision for Section 1226(c), which says
22 it applies to aliens released after October 8,
23 1998.

24 That leads to a further anomaly, the
25 third anomaly, which, as Judge Baron explained

1 in his opinion in Castaneda, 810 F.3d at 29,
2 that the transition period rule, again, which
3 was meant to be an intermediate step up, is
4 less broad -- excuse me, is broader than the
5 permanent rule in Section 1226(c).

6 JUSTICE GINSBURG: Ms. Wang, there's
7 another anomaly. Maybe you can explain it to
8 me. Let's take two people, identical crimes,
9 one of the ones in A through D. One of them
10 gets picked up immediately and no bail hearing.
11 The other doesn't get picked up until two years
12 later, bail hearing.

13 As far as the alien is concerned,
14 these two are identically situated, and yet one
15 gets the benefit of a bail hearing and the
16 other doesn't.

17 Why does that make sense?

18 MS. WANG: Your Honor, well, the
19 person who is detained immediately falls under
20 Congress's scheme. Congress provided that if
21 you're within categories A through D and you
22 are taken into custody, when you're released
23 from your criminal custody, and you aren't
24 needed for witness protection purposes,
25 mandatory detention --

1 JUSTICE GINSBURG: But suppose I'm the
2 -- I'm the alien in the category that's picked
3 up immediately, and I ask you, explain to me
4 why I don't get a hearing and yet someone who
5 had the benefit of being out for two years,
6 three years, does get a hearing.

7 MS. WANG: My first response to you,
8 Justice Ginsburg, would be that's what the
9 statute provides.

10 And the second response is that the
11 Court decided in Demore in 2003 that applying
12 the mandatory detention rule, at least, not
13 considering the question before the Court now,
14 is constitutional.

15 And that brings me, I think, to the --
16 to answer the question about constitutional
17 avoidance that you brought up, Justice Breyer,
18 that when Congress -- there are two reasons the
19 government says better late than never. There
20 are lots of reasons why this Congress did not
21 want better late than never.

22 The first is the text and the
23 structure of the statute, which indicate if the
24 person is not taken into custody when they're
25 released from criminal custody by ICE, then

1 they're under 1226(a) and you get a hearing.

2 JUSTICE ALITO: What do you think
3 "when" -- what do you think "when means"? Does
4 it mean immediately?

5 MS. WANG: Your Honor, we --

6 JUSTICE ALITO: Does "when" mean
7 immediately?

8 MS. WANG: Yes, Your Honor. And we
9 would ask the Court to affirm --

10 JUSTICE ALITO: Immediately? So as
11 soon as the person is -- walks out of the door
12 of the prison or the jail, if -- if ICE doesn't
13 take the person into custody at that point,
14 that's the end of it?

15 MS. WANG: No, Your Honor. We would
16 ask the Court to affirm the Ninth Circuit,
17 which said that a reasonable degree of
18 immediacy is appropriate.

19 JUSTICE ALITO: What -- what does --

20 JUSTICE KAVANAUGH: Is that different
21 from --

22 JUSTICE ALITO: What does "a
23 reasonable degree of immediacy" mean? I mean,
24 let's -- I don't know how many people will be
25 released from criminal custody today in, let's

1 say, the State of California, but I'm sure
2 there are dozens, probably hundreds. I don't
3 know. A lot.

4 How is the federal government going to
5 be able to determine quickly, within 48 hours
6 or any short period of time, whether those
7 individuals would be subject to the mandatory
8 detention requirement of this statute?

9 California is not going to tell the
10 federal government, look, we're releasing this
11 person and this person is an alien, not a
12 citizen, and this is what the person was
13 convicted of. How are they supposed to do
14 that?

15 MS. WANG: Congress provided for how
16 they would do that, Justice Alito. Congress
17 was thinking about state and local cooperation
18 at the same time they were enacting
19 Section 1226(c). And what they did was set up
20 mechanisms for state and local cooperation with
21 federal authorities through statutes: through
22 Section 1226(d), an adjacent provision; through
23 1257(g), also known colloquially as 287(g)
24 agreements; and through 1373, all in Title 8.

25 The major innovation that Congress

1 wanted and got during that same time frame as
2 the '96 Act is described in the Senate report,
3 104.48, at pages 15 to 16, an automated
4 fingerprint system.

5 So Congress when it was writing
6 Section 1226(c) knew that they didn't have in
7 place all the pieces needed for this mechanism
8 to work, but they were putting other statutes
9 there.

10 JUSTICE ALITO: So the first part of
11 your answer is that -- that the state -- the
12 state governments, the municipal governments
13 are going to provide this information to -- to
14 the Department of Homeland Security?

15 MS. WANG: That is what Congress
16 anticipated when it wrote this statute in '96,
17 yes.

18 JUSTICE ALITO: And is that what is
19 happening now?

20 MS. WANG: Your Honor, it's largely
21 what is happening now. The government cites
22 some data from 1996. There's also data we've
23 cited that show that, in fiscal years '15
24 through '17, 94 percent of federal requests to
25 state and local jurisdictions were complied

1 with.

2 But -- but I think the larger point,
3 Justice Alito, is that Congress -- we have to
4 read what Congress was doing in 1996. And
5 whatever's happening today with controversies
6 over so-called sanctuary jurisdictions don't
7 really shed light on what Congress wanted in
8 '96.

9 What does shed light on what Congress
10 wanted in '96 is what they actually enacted.

11 JUSTICE ALITO: Yeah, and what they
12 enacted was a provision that says the Attorney
13 General, now, the Secretary shall take into
14 custody any alien who satisfies certain
15 requirements when the alien is released.

16 MS. WANG: Yes, Your Honor. And to
17 the extent Congress was thinking about state
18 and local cooperation, they dealt with that
19 through the other three statutes I mentioned
20 and through automated fingerprinting, and
21 communication between feds and state and local
22 jurisdictions.

23 I'd note, finally, Justice Alito, that
24 -- that the Court dealt with similar parallel
25 arguments by the government in the Pereira and

1 Moncrief cases, and the Court said, look, the
2 government can point to these practical
3 considerations, but at the end of the day,
4 we're looking at the words that Congress wrote.

5 And the practical considerations that
6 pertain in the current environment in 19 -- in
7 -- sorry, 20 -- 2018 don't really shed light.
8 If --

9 JUSTICE GORSUCH: Well, Ms. Wang, on
10 the --

11 JUSTICE ALITO: But we have to decide
12 whether "when the alien is released" means, as
13 you say, as the Ninth Circuit said,
14 immediately, within 48 hours, within some
15 reasonable period, or after the alien is
16 released.

17 In simple terms, that's the question
18 before us, right?

19 MS. WANG: Yes, Your Honor. And to
20 answer your question, I believe the Court
21 should affirm the Ninth Circuit, which, again,
22 said the government should act, shall take the
23 alien into custody with -- with a reasonable
24 degree of immediacy.

25 Now I note that the BIA, the Board of

1 Immigration Appeals, in Rojas said 48 hours is
2 outside that time limit.

3 We think the same day would be
4 appropriate. We -- we don't think if ICE shows
5 up to pick someone up on their release date and
6 they encounter them in the parking lot or at
7 the bus stop or -- or anywhere the same date, I
8 think that suffices and I think --

9 JUSTICE BREYER: What's wrong with
10 when a -- a reasonable time has been in the law
11 since Lord Cooke, I mean, and courts have
12 managed to deal with it. So why wouldn't we
13 avoid these problems if we just say, when they
14 say on release, you say a reasonable time?

15 MS. WANG: That's exactly right,
16 Justice Breyer.

17 JUSTICE BREYER: I'm not sure the
18 Ninth Circuit said that.

19 MS. WANG: That's right.

20 CHIEF JUSTICE ROBERTS: Well, is that
21 -- I mean, there's a difference between
22 "reasonable degree of immediacy" and
23 "reasonable time." I -- I don't see how
24 immediate is immediate. You can't have a
25 reasonable degree of immediacy. If it's an

1 hour later, it's not immediate.

2 Now which are you arguing for,
3 reasonable degree of immediacy, which strikes
4 me as a very short time, or a reasonable time?
5 Reasonable time would depend, for example, on
6 the resources that are available to the
7 Department of Homeland Security.

8 It's not reasonable to -- to -- if
9 they don't have enough people to do it, if it
10 takes a week, if it takes -- I don't know
11 what's reasonable in this situation. A month?

12 But a reasonable degree of immediacy
13 is something else. That strikes me as a half
14 hour or something, because, otherwise, it's not
15 immediate.

16 MS. WANG: I think --

17 CHIEF JUSTICE ROBERTS: So which is
18 it, reasonable degree of immediacy or
19 reasonable time?

20 MS. WANG: Your Honor, I think that
21 the Ninth Circuit was using the phrase
22 "reasonable" with respect to a temporal scope,
23 not with respect to whether the government was
24 making reasonable efforts or acting in good
25 faith.

1 The statute says "when," which, as the
2 BIA acknowledged, connotes immediacy.

3 CHIEF JUSTICE ROBERTS: Yeah, but as
4 Judge -- Judge Kayatta pointed out in his
5 opinion, "when" could be -- you know, if you're
6 saying it's not immediate, then who knows?
7 Maybe it's a year. Maybe it's six months.

8 MS. WANG: Well, Your Honor, I think
9 it would certainly not be in any sense of the
10 word "when released," "when the alien is
11 released." A year would not suffice. I think
12 Justice Breyer --

13 CHIEF JUSTICE ROBERTS: Okay. Well,
14 can you give me a time?

15 MS. WANG: Sure. I think the same day
16 would be fine, Your Honor, and, as I noted, the
17 BIA said in the Rojas case, which the
18 government asks the Court to -- to defer to,
19 that -- that 48 hours is not within the scope
20 of the "when the alien is released" phrase.

21 CHIEF JUSTICE ROBERTS: Okay. So it
22 seems to me that reasonable time isn't really
23 giving any flexibility to the statute if you
24 say it has to be 48 hours.

25 MS. WANG: Your Honor, we think 48

1 hours is too long, as Rojas said. If the
2 Court --

3 CHIEF JUSTICE ROBERTS: Well, okay.
4 So you think it's the same day?

5 MS. WANG: We -- we think it's the
6 same day, Your Honor. If the Court -- I think,
7 just to -- to get to Justice Breyer's question,
8 there's no doubt -- and, again, the government
9 accuses -- accuses us of cherry-picking cases
10 in which the gap was long.

11 In fact, the -- the data the
12 government has provided in the companion case,
13 or the parallel case, of Gordon in the First
14 Circuit shows that years' delay is the mine run
15 of cases. That data shows that the average
16 delay between criminal custody release and ICE
17 picking the person up is three years.

18 JUSTICE KAGAN: In -- in your --

19 JUSTICE KAVANAUGH: Why don't --

20 JUSTICE KAGAN: In your class, how
21 many people have been -- what percentage of the
22 class has been out for, let's say -- let's just
23 call it a year plus?

24 MS. WANG: Justice Kagan, we didn't
25 get discovery in this case that's before the

1 Court. We only had the discovery in the Gordon
2 case in the First Circuit. So I unfortunately
3 don't have the numbers for this class.

4 JUSTICE SOTOMAYOR: Ms. Wang, you --

5 JUSTICE KAGAN: What -- what -- what
6 was the answer on that case?

7 MS. WANG: In Gordon, the average
8 delay was three years. The median delay was 13
9 months.

10 JUSTICE KAGAN: In -- in that class?

11 MS. WANG: In that class, correct, in
12 the Gordon case. And that was, again, based on
13 data the government provided us.

14 JUSTICE SOTOMAYOR: Ms. Wang, let's
15 assume a situation, hypothetical. The
16 government goes to the jail that day. They're
17 told they're going to -- the prisoner's going
18 to get out at 10 in the morning, but he gets
19 out at 7. They then go looking for him, and
20 he's now gone underground, never shows up at
21 the parole office, never talks to family or
22 friends. They look for him periodically over a
23 period of time. And all of a sudden he's
24 rearrested.

25 Do you see that as a different

1 reasonable time situation than what happens
2 here, which is that the government -- for
3 example, I understand from the briefs that
4 sometimes they put in a detainer and don't even
5 bother to show up?

6 MS. WANG: That's right, Justice
7 Sotomayor. And --

8 JUSTICE SOTOMAYOR: So, if there is a
9 difference, why are we marking a temporal limit
10 on what "reasonable effort to comply with the
11 statute" might mean? It seems to me Justice
12 Breyer's right, that the law is filled with the
13 reasonable effort to comply with the terms of a
14 command, but I don't see how we can set a
15 temporal limit to that reasonable effort in the
16 way that you're promoting.

17 MS. WANG: I think you can, Justice
18 Sotomayor, because, again, I'm trying to stay
19 true to the words Congress wrote. Congress
20 used the phrase "when the alien is released,"
21 which clearly, as everyone acknowledges, has a
22 temporal component.

23 They didn't write a statute that
24 pegged mandatory detention to some kind of good
25 faith or reasonable effort standard for the

1 government.

2 And just to give a counter-example,
3 let's say the government -- and I want to say,
4 first, I agree with you, the record here, the
5 amicus brief filed by the Advancement Project
6 and other civil rights groups shows most of
7 these people who are picked up years later,
8 like Mr. Santos Rodriguez, who was detained
9 many years after he was released from criminal
10 custody at -- at home, these people are being
11 picked up, as Judge Kleinfeld in the Ninth
12 Circuit noted during oral argument, in front of
13 their house, mowing the lawn, at the job,
14 sometimes in an interview that they voluntarily
15 appear for with the agency.

16 So it's not a case where the
17 government is -- is, you know, dealing with
18 someone who's a fugitive, who's trying to hide.
19 But to get back to your --

20 JUSTICE GORSUCH: Ms. Wang, your --
21 your --

22 MS. WANG: I'm sorry. Yes.

23 JUSTICE GORSUCH: Oh, no, if you go
24 ahead and finish --

25 MR. WANG: Yeah, I'm sorry.

1 JUSTICE GORSUCH: -- but I've got a
2 question after.

3 MS. WANG: I will quickly just get to
4 the --

5 JUSTICE GORSUCH: Please.

6 MS. WANG: -- cut to the chase.

7 So, Justice Sotomayor, I think the
8 statute Congress wrote speaks in temporal
9 terms. And if the government, for whatever
10 reason, doesn't take custody when the alien is
11 released, we think same day is fine, then the
12 person gets a hearing under subsection (a).
13 And that's the only consequence, as Justice
14 Breyer noted.

15 JUSTICE GORSUCH: Okay. You've hinged
16 a lot on the language, and you've told us to
17 ignore what's happened after 1996 and, in
18 response to Justice Sotomayor, went back to
19 that language, "when the alien is released."

20 But, if we're going to focus really
21 carefully on the language, what do we do about
22 the fact that that is an adverbial phrase? And
23 you're asking us to suggest that it modifies
24 the noun "alien" and limits the class of aliens
25 that are involved.

1 "Alien" is a noun. Adverbs don't
2 usually modify nouns. They usually modify
3 verbs. And the verb here is "shall take into
4 custody."

5 So why isn't it that the duty, "shall
6 take into custody," is modified by the adverb,
7 "when the alien is released," okay, and so the
8 government's obligation begins at that moment.
9 We know that's when the "shall take into
10 custody" duty starts. But the class of aliens,
11 the who, the noun, has nothing to do with the
12 adverb.

13 Now that's the question my fifth grade
14 grammar teacher would have, all right? And so
15 I pose it to you.

16 MS. WANG: Well, I think I'm a
17 grammarian too. The reason why, Justice
18 Gorsuch, is that sometimes adverbial phrases do
19 describe a noun, just as they do in this
20 statute.

21 So, first, for all the reasons I've
22 already said --

23 JUSTICE GORSUCH: Usually they modify
24 the verb.

25 MS. WANG: I'll -- I will --

1 JUSTICE GORSUCH: So let's start
2 there.

3 MS. WANG: -- I will concede that.

4 JUSTICE GORSUCH: Why should we --
5 you're asking us to take a rather unusual view
6 of grammar, one I think I'd have to delve
7 pretty deep in the footnotes to find.

8 MS. WANG: It wouldn't be the --

9 JUSTICE GORSUCH: So why would I do
10 that?

11 MS. WANG: It wouldn't be the first
12 time Congress tortured grammar, but --

13 JUSTICE GORSUCH: This -- this, I
14 won't argue with you about.

15 MS. WANG: Right. So -- so two -- two
16 reasons, Justice Gorsuch. For the reasons I've
17 already said, I think it's clear from the
18 structure of the statute and the plain language
19 that Congress meant for people -- for -- for
20 paragraph (2), to -- to describe a subset of
21 people who were taken into custody in paragraph
22 (1). In all of paragraph (1), not omitting the
23 flush language, as -- as my friend describes
24 it.

25 The second reason is, yes, it may be

1 uncommon for an adverbial phrase to describe a
2 noun, but it can happen. Let me give you a
3 hypothetical example that -- that -- that
4 tracks this statute.

5 I might tell you in a two-paragraph
6 instruction, number one, harvest the grapes in
7 vineyards A, B, and C when they ripen.
8 Paragraph two: Make the wine from the grapes
9 described in paragraph (1).

10 The grapes refer to both the temporal
11 component, I want you to harvest them when
12 they're ripe, not when they're over-ripe, not
13 when they're under-ripe, and it's from those
14 three vineyards.

15 JUSTICE GORSUCH: I'm not sure I -- I
16 mean, I follow the example, but I'm not sure I
17 buy it, and let me tell you why. And it's a
18 neat example. I commend you. Well done.

19 (Laughter.)

20 JUSTICE GORSUCH: I think -- I think
21 my fifth grade grammar teacher would love this
22 discussion, but I would say to you or I'd
23 challenge you with this, that, again, there
24 you're modifying the verb, when you're supposed
25 to harvest it, okay? And that's the first --

1 the first section.

2 The second section, you're saying,
3 okay, whatever you've harvested, the grapes
4 that we've described that you have harvested.
5 You still have to have harvested them. So it
6 still depends upon the verb in that second
7 paragraph, the verb plus the noun as referred
8 to in the second paragraph.

9 So I'm not sure it gets around the
10 problem. Help me out.

11 MS. WANG: I -- I guess, Justice
12 Gorsuch, I think another way to put this is
13 that what the government's referring to as an
14 adverbial phrase could be rephrased as an
15 adjective. The hypothetical we gave in our
16 brief about the red-headed man wearing the blue
17 jacket when he arrives on the 3:00 train from
18 New York, when he arrives on the 3:00 train
19 from New York is really a characteristic of the
20 man that's described.

21 In the same way, Your Honor, that I
22 think Congress in paragraph (2), again, by --
23 by using the phrase "an alien described in
24 paragraph (1)," not an alien described in
25 paragraph (1)(A) through (D). I think it

1 simply -- the -- the whole, the entirety of
2 paragraph (1) describes the alien in that
3 paragraph (2) phrase. And I think that's --
4 that's simply what Congress meant.

5 JUSTICE KAVANAUGH: But Congress would
6 have known or thought that it wasn't going to
7 be immediate in many cases, correct?

8 MS. WANG: Yes, Justice Kavanaugh.
9 And the consequence --

10 JUSTICE KAVANAUGH: And -- and yet
11 Congress did not put in a time limit, whether
12 it's reasonable time, as Justice Breyer says,
13 or a year or two years or six months or 48
14 hours.

15 And so, when you combine those two
16 points, Congress knew it wouldn't be immediate,
17 and yet Congress did not put in a time limit.
18 That raises a real question for me whether we
19 should be superimposing a time limit into the
20 statute when Congress, at least as I read it,
21 did not itself do so.

22 How do you respond to that?

23 MS. WANG: Well, Justice Kavanaugh,
24 we're not asking you to superimpose a time
25 limit. We're asking you to give meaning to all

1 the words of the statute that Congress enacted,
2 which say --

3 JUSTICE KAVANAUGH: But you're --

4 MS. WANG: -- but --

5 JUSTICE KAVANAUGH: I'm sorry to
6 interrupt -- but, when you say "when," you are
7 saying that is, in essence, a time limit of
8 immediate, same day, I think you said.

9 And my point is that's very odd when
10 you think about what Congress was doing in
11 1996, because they were well aware that would
12 not happen, A, because of resources, B, because
13 they're not learning about it right away.

14 And it would be odd to think, okay,
15 that's what this statute means, even though it
16 would often not be effectuated in that way.

17 MS. WANG: Well, Your Honor, I think,
18 again, Congress, first, as Justice Breyer
19 noted, Congress often will have kind of a soft
20 target when they legislate in this way.

21 Second, remember --

22 JUSTICE KAVANAUGH: Well, the -- a
23 soft target would be what Justice Breyer might
24 say, reasonable time. And Congress could have
25 put that in, but -- and maybe we should,

1 Justice Breyer's idea, but Congress didn't do
2 that.

3 MS. WANG: I think -- I think, Your
4 Honor, that Congress in saying "when" meant
5 what "when" means in the common sense, a
6 reasonable -- within a reasonable time of the
7 event happening.

8 We go to the dictionary definition --

9 JUSTICE KAVANAUGH: Well, in the
10 follow-up on --

11 MS. WANG: -- as Judge Breyer noted --

12 JUSTICE KAVANAUGH: -- the Chief
13 Justice's point, reasonable immediacy is
14 different from reasonable time in your view?

15 MS. WANG: I think that the Ninth
16 Circuit used "reasonable degree of immediacy"
17 and "promptly" interchangeably. And as -- as
18 the BIA again said, "when" connotes immediacy.

19 As Judge Baron pointed out, "when"
20 connotes immediacy. That's the primary
21 dictionary definition. But I do -- I do want
22 to say one other thing in response to you,
23 Justice Kavanaugh, and that is remember that
24 subsection (c), mandatory detention without any
25 individual hearing, is written as an exception

1 to subsection (a).

2 So the only consequence is you get a
3 hearing. And so the bad ones, as Justice
4 Breyer said, the "baddies," will be detained.
5 And I want to point out that the --

6 JUSTICE KAVANAUGH: The problem is
7 that Congress did not trust those hearings
8 for --

9 MS. WANG: But, Your Honor, the --

10 JUSTICE KAVANAUGH: -- a certain
11 class, is -- is my understanding, and correct
12 me if I'm wrong about that, but Congress was
13 concerned that those hearings were not working
14 in the way that Congress wanted and, therefore,
15 for a certain class of criminal or terrorist
16 aliens, said no more.

17 MS. WANG: That's right. But the
18 question here is what's the class, what's the
19 class. Congress wrote the statute to say take
20 them into custody when released. Otherwise,
21 except as provided in -- in paragraph C,
22 subsection (c). And so the consequence is a
23 hearing.

24 And I wanted to point out that the
25 bipartisan group, a former INS and DHS general

1 counsels, said at page 10 of their brief they
2 agree with our reading of the statute, and they
3 say: Detention under Section 1226(a) is not
4 meaningfully more burdensome for the
5 government.

6 JUSTICE ALITO: Yeah, I can see that
7 --

8 CHIEF JUSTICE ROBERTS: Well, they
9 might agree, but every other circuit, four of
10 them, and an equally divided First Circuit,
11 disagree?

12 MS. WANG: Well, some of the circuits,
13 Your Honor, deferred to the BIA's reading,
14 which the government's asking you partly to
15 defer to and partly not, since they disagree
16 with the BIA's reading of paragraph (1) but not
17 with paragraph (2).

18 And for -- and the Fourth Circuit
19 actually read the -- the Rojas decision
20 incorrectly and deferred on the "when release"
21 ground.

22 I think that the -- the First Circuit
23 panel in Judge Baron and the Ninth Circuit
24 below got this right. That reading gives full
25 meaning to every word in the statute. It makes

1 sense of the two-paragraph structure and the
2 fact that (c) is written as an exception to
3 (a).

4 And I want to point out that, at the
5 time Congress wrote this statute, this Court
6 had never before approved of civil detention,
7 executive detention, without individualized
8 hearings on flight risk and danger.

9 And so the Court should -- Congress
10 should be presumed to have written that
11 provision narrowly. As -- as the Ninth Circuit
12 and -- and Judge Baron pointed out, and I think
13 as Judge Breyer was alluding to, it's one thing
14 for the Court to say in Demore that the
15 government can constitutionally apply a
16 categorical and irrebuttable presumption --

17 JUSTICE KAVANAUGH: Is that
18 presumption based on what we think was really
19 going through Congress's mind at the time, or
20 is it based on a constitutional overlay?
21 Because what was really going through
22 Congress's time in 1996 was harshness on this
23 topic. Is that not right?

24 MS. WANG: Congress was -- was
25 certainly trying to deal with what they

1 considered to be a problem with non-citizens
2 who have committed crimes. The question,
3 again, is who were they targeting with this
4 statute?

5 JUSTICE KAVANAUGH: Right.

6 MS. WANG: And I think that the words
7 that Congress chose are narrow ones. They
8 clearly say that people had to be in criminal
9 custody under these four grounds, and there's a
10 serious constitutional problem if you buy the
11 government's reading.

12 My friend --

13 JUSTICE ALITO: I can see the equities
14 when the alien has been free for a number of
15 years. But Congress, wisely or not, thought
16 that this class of aliens was dangerous and
17 they should not be trusted. Bail hearings were
18 unreliable. So you would say that this statute
19 requires their detention as soon as they get
20 out.

21 Now why -- if that's the case, and it
22 -- it obviously is, why would Congress think
23 differently about someone who's been out for a
24 week?

25 MS. WANG: For two reasons, Your

1 Honor. The first is the legislative history,
2 especially as -- as outlined in the members of
3 Congress dark green brief, makes it clear.

4 Congress wanted ICE, then INS, to
5 focus limited capacity, limited capacity to
6 detain, on people already in criminal custody
7 who would otherwise be released. They said, in
8 other words, don't spread yourself thin.

9 My friend said it takes more effort to
10 go find people in the community. That's
11 exactly right. And that's the problem Congress
12 --

13 JUSTICE BREYER: They face that --

14 MS. WANG: -- wanted to --

15 JUSTICE BREYER: -- but what would you
16 think of -- I see the problem of reasonable
17 time, but Demore concerned a case where the
18 Court thought that these people were detained
19 without bail hearings for less than six months.

20 Zadvydas interprets a silent statute
21 to imply a six-month limitation on other but
22 related holding of aliens. So what would you
23 think of reading this statute in order, in my
24 opinion, not to violate a principle that goes
25 back to if not -- not the Magna Carta, at least

1 to Blackstone, that we read this statute the
2 same way?

3 There it is. We have a degree of
4 clarity. We say -- we use -- we go to
5 Zadvydas, and we go to the history of bail and
6 we say, all right, six months.

7 MS. WANG: Your Honor -- may I finish?

8 CHIEF JUSTICE ROBERTS: Sure.

9 MS. WANG: Your Honor, I think that,
10 Justice Breyer, the six months would be an
11 extraordinary amount of time and just gets a
12 little far afield from the words Congress
13 chose.

14 And I remind you that the Board of
15 Immigration Appeals said 48 hours was too long.
16 So, if the Court wishes to draw a bright line,
17 as you did in Zadvydas, I think that would be
18 fine. But, really, we should follow the words
19 Congress wrote.

20 CHIEF JUSTICE ROBERTS: Thank you, Ms.
21 Wang.

22 Four minutes, Mr. Tripp.

23 MS. WANG: Thank you, Mr. Chief
24 Justice.

25

1 REBUTTAL ARGUMENT OF ZACHARY D. TRIPP
2 ON BEHALF OF THE PETITIONERS

3 MR. TRIPP: Thank you. Just a couple
4 of points.

5 The key question here is not the
6 meaning of "when." It's who are the aliens
7 described in paragraph (1)? And the answer is
8 it's an alien, any alien with the requisite
9 criminal history. The time in is really not
10 relevant.

11 JUSTICE SOTOMAYOR: It just begs the
12 question, because they didn't say sub --
13 paragraph (1), A through D. They said the
14 entire paragraph.

15 MR. TRIPP: That's right. But as --

16 JUSTICE SOTOMAYOR: And why isn't the
17 verb, the adverb, part of the noun in that
18 situation? Because, if they wanted to limit it
19 to that class of A to D, that's the easiest
20 thing to have done.

21 MR. TRIPP: Because --

22 JUSTICE SOTOMAYOR: Your counsel is --
23 your adversary's right, if they wanted to limit
24 1226(a) to (c)(2), they would have said (c)(2).

25 MR. TRIPP: So a couple of responses,

1 but I think the main one is that the phrase
2 "when the alien is released" does not modify
3 who the alien is. It takes as a given he's
4 already been fully described. And instead that
5 --

6 JUSTICE SOTOMAYOR: No, it is -- it is
7 --

8 MR. TRIPP: -- just modifies the
9 duties of the Secretary.

10 JUSTICE SOTOMAYOR: You're begging the
11 question. When he's released identifies the
12 alien that the statute is looking at.

13 MR. TRIPP: I -- I --

14 JUSTICE SOTOMAYOR: You by yourself --
15 you say that there's a command that you have to
16 follow to try to take these people into
17 custody. You say there's a command to do it,
18 but you don't have to do it. You can choose
19 not to do it. I don't know what kind of
20 command that is. But you -- you at least
21 recognize that there's a sense of urgency, you
22 should do this.

23 So why doesn't that describe the noun?

24 MR. TRIPP: So I -- I think three
25 responses I'll just --

1 JUSTICE SOTOMAYOR: The noun and the
2 verb, I should say.

3 MR. TRIPP: So, first, we just don't
4 think it modifies who the alien is at all.

5 Second, even if you think that it
6 does, and there is some kind of timing
7 requirement, this Court has said again and
8 again and again that it's better to be late
9 than never. And then A drives us home, right,
10 because it has two sentences: The first is
11 about arrest and the second is about custody.
12 And it prohibits -- it has the exception for
13 (c). And the only provision in (c) that talks
14 about release is (c)(2). And that's the one --

15 JUSTICE KAVANAUGH: If --

16 MR. TRIPP: -- that categorically
17 prohibits release.

18 JUSTICE KAVANAUGH: -- if reasonable
19 amount of time, Justice Breyer's suggestion,
20 were part of a ruling, what do you think is a
21 reasonable amount of time or presumptively
22 reasonable? I know that's not your preferred
23 position, but do you have thoughts on that?

24 MR. TRIPP: I -- I think our -- our
25 main answer is that would be really profoundly

1 problematic because the gaps in custody are
2 often very long. And -- and the basic reason
3 that --

4 JUSTICE KAVANAUGH: So, therefore, you
5 would say a long period is a reasonable period,
6 but do you have any more meat you want to put
7 on those bones of what a reasonable period of
8 time would be, given all the circumstances?

9 MR. TRIPP: I guess I -- I would say
10 that, I mean, what often happens is, you know,
11 once -- once an alien gets out, so I -- I think
12 this comes across in the -- in the brief, the
13 alien is often released before DHS is even
14 aware that that's going to happen, is even
15 aware that the person is one of these aliens.

16 And once the person's out, it's going
17 to be much more difficult to track them down.
18 DHS might not know where they -- where they
19 live, how to find them. And so, you know, what
20 happens sometimes is that DHS doesn't become
21 aware of them again until years later when they
22 get arrested on a different offense.

23 And so I -- I think it's difficult for
24 me to give content to that. I think the force
25 of that argument that, you know, maybe it would

1 be different after the passage --

2 JUSTICE SOTOMAYOR: The problem is
3 that --

4 MR. TRIPP: -- of some long period of
5 time --

6 JUSTICE SOTOMAYOR: -- if that's the
7 only way you come -- that -- become aware of
8 them, they get arrested, you can hold them.
9 You can do what you should have done the first
10 time, which is to --

11 MR. TRIPP: But -- but --

12 JUSTICE SOTOMAYOR: -- put a detainer
13 on them.

14 MR. TRIPP: -- under -- under -- I
15 mean, so with Mr. Mony Preap, we did arrest him
16 just as he got out the second time, but that
17 second offense didn't trigger 1226(c). And so
18 he's arguing because he was out for years and
19 years before he got arrested the second time,
20 that he's off the hook. And I think --

21 JUSTICE SOTOMAYOR: I guess the
22 problem that I have is you're -- you're pitting
23 two groups of people. I'm not nay-saying that
24 there are people who are released on bail who
25 are dangerous and commit -- and commit serious

1 crimes.

2 But, if I look at the numbers that do
3 that, they're very, very small compared to the
4 people who are released on bail and don't
5 commit more crimes or the number of people who
6 get cancellation of removal for various
7 reasons.

8 At what point do we constitutionally
9 ignore that? We ignore that there's a whole
10 class, a huge class of people who are being
11 held where no one would consider them
12 dangerous? Or --

13 CHIEF JUSTICE ROBERTS: You may answer
14 briefly.

15 MR. TRIPP: So none of those numbers
16 are in the record and I -- I don't think we
17 would agree with them. But just more
18 fundamentally, this is a statutory
19 interpretation case. I think the statute is
20 unambiguous. (c)(2) reaches anybody with the
21 requisite criminal history, and every one of
22 Respondents has it, so we're asking the Court
23 to reverse.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 The case is submitted.

2 (Whereupon, at 11:07 a.m., the case
3 was submitted.)

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style="text-align: center;">B</p> <p>back [8] 17:25 23:8 24:8 26:3 36: 20 50:19 51:18 63:25 background [1] 9:15 bad [1] 59:3 baddies [2] 30:22 59:4 bail [29] 17:13 18:14,17 21:4,5,6,8 22:1,3,5,19 23:2,17,18,20 24:8 30: 14,15,21 31:8,24 37:10,12,15 62: 17 63:19 64:5 69:24 70:4 balance [1] 33:3 Baron [4] 36:25 58:19 60:23 61:12 barrier [1] 30:1 based [4] 36:6 48:12 61:18,20 basic [9] 9:9 31:9 68:2 basically [1] 24:2 basis [2] 31:8 36:4 battery [1] 24:16 become [3] 3:12 68:20 69:7 bed [3] 6:19 7:6 18:11 begging [1] 66:10 begins [1] 52:8 begs [1] 65:11 behalf [8] 1:21,23 2:4,7,10 3:9 33: 9 65:2 believe [1] 43:20 below [1] 60:24 benefit [2] 37:15 38:5 best [1] 3:16 better [4] 23:9 38:19,21 67:8 between [5] 14:20 25:10 42:21 44: 21 47:16 BIA [4] 43:25 46:2,17 58:18 BIA's [2] 60:13,16 big [1] 21:25 bipartisan [1] 59:25 Blackstone [1] 64:1 blue [1] 55:16 Board [2] 43:25 64:14 bond [5] 4:5 10:7,9 11:11 24:22 bones [1] 68:7 both [5] 6:21 13:20 14:2 18:22 54: 10 bother [1] 49:5 boyfriend [1] 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