

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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KIRSTJEN M. NIELSEN, )  
SECRETARY OF HOMELAND SECURITY, )  
ET AL., )  
                                ) Petitioners, )  
                                ) v. ) No. 16-1363  
MONY PREAP, ET AL., )  
                                ) Respondents. )  
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Pages: 1 through 70

Place: Washington, D.C.

Date: October 10, 2018

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## HERITAGE REPORTING CORPORATION

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6 Petitioners, )

7 v. ) No. 16-1363

8 MONY PREAP, ET AL., )

9 Respondents. )

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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.

25

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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 the -- the key provision we're  
20 talking about here is 1226(c)(2). This is the  
21 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?

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 case  
4 before -- 11 years later, you didn't need the  
5 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  
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 describes the  
17 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 what  
16     they are if anybody's interested, but there are  
17     a number.

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



1 that makes me think that your interpretation of  
2 the words described in paragraph 1 is wrong.

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

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

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

23 MR. TRIPP: They were released for --

24 JUSTICE BREYER: I mean, they were  
25 arrested --

1 MR. TRIPP: Yeah.

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

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

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

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

23 I take it you don't think the  
24 government could come back 50 years later and  
25 arrest somebody who's a grandfather or

1 something, you know, he -- he stole some bus  
2 transfers 50 years earlier. Is that what you  
3 think (c) authorizes?

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

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

15 MR. TRIPP: So -- so --

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

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

25 JUSTICE GORSUCH: All right. But now

1 we're --

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

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

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

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

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

23 JUSTICE SOTOMAYOR: Let's say --

24 JUSTICE BREYER: What is the answer,  
25 though? Is the government's position that this

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

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

9 JUSTICE BREYER: Okay. Okay.

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

12 JUSTICE BREYER: Okay.

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

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

17 MR. TRIPP: And then --

18 JUSTICE BREYER: Okay. Now --

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

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

24 Okay. Now my second question is this:  
25 There is support for your position in the

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

8 MR. TRIPP: Right.

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

11 MR. TRIPP: That's right.

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

15 MR. TRIPP: Right. And that --

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

24 But there is a big difference. In the  
25 bail cases, the result of missing the deadline,

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

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

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

20 MR. TRIPP: So I --

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

24 MR. TRIPP: Yes.

25 JUSTICE BREYER: You see, in terms of

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

6 MR. TRIPP: So this is the piece I --  
7 I want to push back on hard. I think this  
8 is -- the Montalvo-Murillo, these better late  
9 than never cases, I think, are squarely on  
10 point for our understanding of (c)(1).

11 And -- and the key point, as you said,  
12 is that, you know -- well, a couple things.

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

20 JUSTICE ALITO: Mr. Tripp?

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

22 JUSTICE ALITO: Mr. Tripp?

23 MR. TRIPP: Congress looked at this  
24 issue. They -- they -- they worked with it for  
25 years and years and years. And I think



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

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

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

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

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

25 JUSTICE ALITO: Now, Mr. Tripp, what

1 is the definition of the class that was  
2 certified by the district court? Does it  
3 consist of -- solely of people who have been --  
4 who were released from criminal custody many  
5 years ago?

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

14 And I think really what those --

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

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

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

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

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

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

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

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

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

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

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

23 JUSTICE SOTOMAYOR: That only works --

24 MR. TRIPP: -- the person has been out  
25 for 10 years and hasn't gotten into trouble --

1 JUSTICE KAGAN: But are you saying --

2 MR. TRIPP: -- and is potentially  
3 eligible for --

4 JUSTICE SOTOMAYOR: You -- you --

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

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

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

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

25 JUSTICE KAGAN: That's what I'm

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

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

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

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

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

22 MR. TRIPP: Because not -- only some  
23 criminal aliens and -- and more -- more LPRs  
24 have eligibility for relief. If you're not an  
25 LPR, the -- the barrier is -- is -- is much

1 broader.

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

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

9 (Laughter.)

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

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

23 MR. TRIPP: I -- I think the real  
24 concern is really what Congress was getting at  
25 here is that making this prediction of which

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

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

15 JUSTICE ALITO: Well, Mr. Tripp --

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

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



1 alien that -- that Homeland Security take the  
2 alien into custody immediately, and that was  
3 the class of aliens that was certified by the  
4 district court.

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

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

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

19 MR. TRIPP: Yes.

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

23 MR. TRIPP: I -- I think -- our  
24 understanding is no, actually, aliens bring  
25 these kinds of claims in the prolonged

1 detention context with some frequency.

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

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 counsel.

6 Ms. Wang.

7 ORAL ARGUMENT OF CECILLIA D. WANG

8 ON BEHALF OF THE RESPONDENTS

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

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

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

22 And, three, if Congress really wanted  
23 what the executive branch claims here, it would  
24 have simply written a statute that says people  
25 in these four categories shall be detained

1 without a hearing until removed.

2 That is not what Congress did.

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

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

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

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

24 And the government's reading, trying  
25 to pull section (2), (c)(2), out as that

1 free-standing authorization, leads to three  
2 serious anomalies that they struggle to  
3 explain, as they did with you, Justice Kagan.

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

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

22           In -- in addition to the example you  
23 gave, Justice Kagan, of a child or a spouse of  
24 a terrorist, there's a very typical situation:  
25 I'm an immigrant. I show up for my Green Card

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

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

23 That leads to a further anomaly, the  
24 third anomaly, which, as Judge Baron explained  
25 in his opinion in *Castaneda*, 810 F.3d at 29,

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

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

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

16 Why does that make sense?

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

25 JUSTICE GINSBURG: But suppose I'm the

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

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

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

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

21 The first is the text and the  
22 structure of the statute, which indicate if the  
23 person is not taken into custody when they're  
24 released from criminal custody by ICE, then  
25 they're under 1226(a) and you get a hearing.

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

4 MS. WANG: Your Honor, we --

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

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

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

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

18 JUSTICE ALITO: What -- what does --

19 JUSTICE KAVANAUGH: Is that different  
20 from --

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



1     there are dozens, probably hundreds. I don't  
2     know. A lot.

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

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

14            MS. WANG: Congress provided for how  
15    they would do that, Justice Alito.

16            Congress was thinking about state and  
17    local cooperation at the same time they were  
18    enacting Section 1226(c). And what they did  
19    was set up mechanisms for state and local  
20    cooperation with federal authorities through  
21    statutes, through Section 1226(d), an adjacent  
22    provision, through 1257(g), also known  
23    colloquially as 287(g) agreements, and through  
24    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 reasonable  
23 time. I -- I don't see how immediate is  
24 immediate. You can't have a reasonable degree  
25 of immediacy. If it's an hour later, it's not

1 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 -- cut to the chase.

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

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

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

24 "Alien" is a noun. Adverbs don't  
25 usually modify nouns. They usually modify

1 verbs. And the verb here is "shall take into  
2 custody."

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

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

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

19 So, first, for all the reasons I've  
20 already said --

21 JUSTICE GORSUCH: Usually they modify  
22 the verb.

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

24 JUSTICE GORSUCH: So let's start  
25 there.

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

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

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

7 JUSTICE GORSUCH: So why would I do  
8 that?

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

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

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

23 The second reason is, yes, it may be  
24 uncommon for an adverbial phrase to describe a  
25 noun, but it can happen. Let me give you a

1 hypothetical example that -- that -- that  
2 tracks this statute.

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

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

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

17 (Laughter.)

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

25 The second section, you're saying,

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

7                 So I'm not sure it gets around the  
8     problem. Help me out.

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

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



1 paragraph (2) phrase. And I think that's --  
2 that's simply what Congress meant.

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

6 MS. WANG: Yes, Justice Kavanaugh.  
7 And the consequence --

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

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

20 How do you respond to that?

21 MS. WANG: Well, Justice Kavanaugh,  
22 we're not asking you to superimpose a time  
23 limit. We're asking you to give meaning to all  
24 the words of the statute that Congress enacted,  
25 which say --

1 JUSTICE KAVANAUGH: But you're --

2 MS. WANG: -- but --

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

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

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

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

19 Second, remember --

20 JUSTICE KAVANAUGH: Well, the -- a  
21 soft target would be what Justice Breyer might  
22 say, reasonable time. And Congress could have  
23 put that in, but -- and maybe we should,  
24 Justice Breyer's idea, but Congress didn't do  
25 that.

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

6           We go to the dictionary definition --

7           JUSTICE KAVANAUGH: Well, in the  
8 follow-up on --

9           Ms. Wang: -- as Judge Breyer noted --

10          JUSTICE KAVANAUGH: -- the Chief  
11 Justice's point. Reasonable immediacy is  
12 different from reasonable time in your view?

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

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

25          So the only consequences is you get a

1 hearing. And so the bad ones, as Justice  
2 Breyer said, the "baddies," will be detained.  
3 And I want to point out that the --

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

7 MS. WANG: But, Your Honor --

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

15 MS. WANG: That's right. But the  
16 question here is what's the class, what's the  
17 class. Congress wrote the statute to say take  
18 them into custody when released.

19 Otherwise, except as provided in -- in  
20 paragraph C, Subsection (c). And so the  
21 consequence is a hearing.

22 And I wanted to point out that the  
23 bipartisan group, a former INS and DHS general  
24 counsels, said at page 10 of their brief they  
25 agree with our reading of the statute, and they

1 say: Detention under Section 1226(a) is not  
2 meaningfully more burdensome for the  
3 government.

4 CHIEF JUSTICE ROBERTS: Well, they  
5 might agree, but every other circuit, four of  
6 them, and an equally divided first circuit,  
7 disagree?

8 MS. WANG: Well, some of the circuits,  
9 Your Honor, deferred to the BIA's reading,  
10 which the government's asking partly to defer  
11 to and partly not, since they disagree with the  
12 BIA's reading of paragraph 1, but not with  
13 paragraph 2.

14 And for -- and the Fourth Circuit  
15 actually read the -- the Rojas decision  
16 incorrectly and deferred on the when release  
17 ground.

18 I think that the -- the First Circuit  
19 panel in Judge Baron and the Ninth Circuit  
20 below got this right. That reading gives full  
21 meaning to every word in the statute. It makes  
22 sense of the two-paragraph structure and the  
23 fact that (c) is written as an exception to  
24 (a).

25 And I want to point out that at the

1 time Congress wrote this statute, this Court  
2 had never before approved of civil detention,  
3 executive detention, without individualized  
4 hearings on flight risk and danger.

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

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

20 MS. WANG: Congress was -- was  
21 certainly trying to deal with what they  
22 considered to be a problem with non-citizens  
23 who've committed crimes. The question, again,  
24 is who were they targeting with this statute?

25 JUSTICE KAVANAUGH: Right.

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

7 My friend --

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

16 Now, why -- if that's the case, and it  
17 -- it obviously is, why would Congress think  
18 differently about someone who has been out for  
19 a week?

20 MS. WANG: For two reasons, Your  
21 Honor. The first is the legislative history,  
22 especially as -- as outlined in the members of  
23 Congress dark green brief, makes it clear.

24 Congress wanted ICE, then INS, to  
25 focus limited capacity, limited capacity to

1 detain, on people already in criminal custody  
2 who would otherwise be released. They said, in  
3 other words, don't spread yourself thin.

4 My friend said it takes more effort to  
5 go find people in the community. That's  
6 exactly right. And that's the problem Congress  
7 --

8 JUSTICE BREYER: They face that --

9 MS. WANG: Wanted to --

10 JUSTICE BREYER: -- but would you  
11 think of, I see the problem of reasonable time,  
12 but Demore concerned a case where the Court  
13 thought that these people were detained without  
14 bail hearings for less than six months.

15 Zadvydas interprets a silent statute  
16 to imply a six-month limitation on other but  
17 related holding of aliens. So what would you  
18 think of reading this statute in order, in my  
19 opinion, not to violate a principle that goes  
20 back to if not -- not the Magna Carta, at least  
21 to Blackstone, that we read this statute the  
22 same way?

23 There it is. We have a degree of  
24 clarity. We say -- we use -- we go to  
25 Zadvydas, and we go to the history of bail and



1 we say, all right, six months.

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

3 CHIEF JUSTICE ROBERTS: Sure.

4 MS. WANG: Your Honor, I think that,  
5 Justice Breyer, the six months would be an  
6 extraordinary amount of time and just gets a  
7 little far afield from the words Congress  
8 chose.

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

15 CHIEF JUSTICE ROBERTS: Thank you, Ms.  
16 Wang. Four minutes, Mr. Tripp.

17 MS. WANG: Thank you, Mr. Chief  
18 Justice.

19 REBUTTAL ARGUMENT OF ZACHARY D. TRIPP  
20 ON BEHALF OF THE PETITIONERS

21 MR. TRIPP: Thank you. Just a couple  
22 of points.

23 The key question here is not the  
24 meaning of when. It's who are the aliens  
25 described in paragraph 1? And the answer is

1 it's an alien, any alien with the requisite  
2 criminal history. The time in is really not  
3 relevant.

4 JUSTICE SOTOMAYOR: This begs the  
5 question, because they didn't say sub --  
6 paragraph 1, A through D. They said the entire  
7 paragraph.

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

9 JUSTICE SOTOMAYOR: And why isn't the  
10 verb, the adverb, part of the noun in that  
11 situation? Because if they wanted to limit it  
12 to that class of A-to-D, that's the easiest  
13 thing to have done.

14 MR. TRIPP: Because --

15 JUSTICE SOTOMAYOR: Your counsel --  
16 your adversary is right, if they wanted to  
17 limit 1226(a) to (c)(2), they would have said  
18 (c)(2).

19 MR. TRIPP: So a couple of responses,  
20 but I think the main one is that the phrase  
21 "when the alien is released" does not modify  
22 who the alien is. It takes as a given he has  
23 already been fully described. And instead that  
24 --

25 JUSTICE SOTOMAYOR: No, it is -- it is

1 --

2 MR. TRIPP: -- just modifies the  
3 duties of the Secretary.

4 JUSTICE SOTOMAYOR: You are begging  
5 the question. When he is released identifies  
6 the alien that the statute is looking at.

7 MR. TRIPP: I -- I --

8 JUSTICE SOTOMAYOR: You by yourself --  
9 you say that there's a command that you have to  
10 follow to try to take these people into  
11 custody.

12 You say there's a command to do it,  
13 but you don't have to do it. You can choose  
14 not to do it. I don't know what kind of  
15 command that is. But you -- you at least  
16 recognize that there's a sense of urgency, you  
17 should do this.

18 So why doesn't that describe the noun?

19 MR. TRIPP: So I -- I think three  
20 responses --

21 JUSTICE SOTOMAYOR: The noun and the  
22 verb, I should say.

23 MR. TRIPP: So, first, we just --  
24 don't think it modifies who the alien is at  
25 all.

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

11                   JUSTICE KAVANAUGH: If --

12                   MR. TRIPP: -- that categorically  
13           prohibits release.

14                   JUSTICE KAVANAUGH: If reasonable  
15           amount of time, Justice Breyer's suggestion,  
16           were part of a ruling, what do you think is a  
17           reasonable amount of time or presumptively  
18           reasonable? I know that's not your preferred  
19           position, but do you have thoughts on that?

20                   MR. TRIPP: I -- I think -- our -- our  
21           main answer is that would be really profoundly  
22           problematic because the gaps in custody are  
23           often very long. And -- and the basic  
24           reason --

25                   JUSTICE KAVANAUGH: So, therefore, you

1 would say a long period is a reasonable period  
2 but do you have any more meat you want to put  
3 on those bones of what a reasonable period of  
4 time would be, given all the circumstances?

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

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

19 And so I -- I think it's difficult for  
20 me to give content to that. I think the force  
21 of that argument that, you know, maybe it would  
22 be different after the passage --

23 JUSTICE SOTOMAYOR: The problem is  
24 that --

25 MR. TRIPP: -- of some long period of

1 time --

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

7 MR. TRIPP: But -- but --

8 JUSTICE SOTOMAYOR: -- put a detainer  
9 on them.

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

17 JUSTICE SOTOMAYOR: I guess the  
18 problem that I have is you are pitting two  
19 groups of people. I am not nay-saying that  
20 there are people who are released on bail who  
21 are dangerous and commit -- and commit serious  
22 crimes.

23 But if I look at the numbers that do  
24 that, they're very, very small compared to the  
25 people who are released on bail and don't

1     commit more crimes or the number of people who  
2     get cancellation of removal for various  
3     reasons.

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

9             CHIEF JUSTICE ROBERTS: You may answer  
10    briefly.

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

20            CHIEF JUSTICE ROBERTS: Thank you,  
21    counsel.

22            The case is submitted.

23            (Whereupon, at 11:07 a.m., the case  
24    was submitted.)

25

## Official - Subject to Review

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