

# 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 71  
Place: Washington, D.C.  
Date: October 10, 2018

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3 KIRSTJEN M. NIELSEN, )

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5 ET AL., )

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 PROCEEDINGS

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 -- the  
24 key 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 -- that  
16 this is an urgent priority. It's a mandate,  
17 you know, and -- and it -- and it kicks in, it  
18 is 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 anyway?

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 us -- 11 years later, you didn't  
5 need the transition rules. You could have just  
6 done what you needed to do to create the bed  
7 space or get the personnel and start arresting  
8 people 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 it --

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

10 MR. TRIPP: A -- a -- a couple  
11 responses. I think those are the only portions  
12 of the statute that describe -- that actually  
13 describe the alien. The phrase "when the alien  
14 is released" doesn't describe him. It takes as  
15 a 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 -- I don't think  
22 that's right because it says when -- that might  
23 be right if it said something like the  
24 Secretary shall take into custody any alien who  
25 is inadmissible and deportable, you know, and

1 who has not been released for more than such  
2 and 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 and --

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

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

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

24 MR. TRIPP: So we understand that --  
25 that -- as (c)(1) to be a continuing

1 obligation, it does not lapse, but can I -- if  
2 I could just follow through with (a) -- with  
3 the text of (a) and just how this supports us  
4 on the custody determination, I think it would  
5 be helpful.

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

14           JUSTICE KAGAN: So, Mr. Tripp --

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

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

22           MR. TRIPP: Okay.

23           JUSTICE KAGAN: As I understand it,  
24 these (A) through (D) categories include some  
25 people who have never been in criminal custody

1 at all. So let's take spouses or children of  
2 terrorists. But there are a number of  
3 categories of people who have never been in  
4 custody at all.

5 MR. TRIPP: Right.

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

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

25 JUSTICE KAGAN: I guess I'm not -- I'm

1 not --

2 MR. TRIPP: -- it really ultimately  
3 doesn't matter.

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

10 MR. TRIPP: That's right.

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

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

18 JUSTICE KAGAN: Yes. How are you  
19 arresting these people? Are you arresting them  
20 under (c)(1)?

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

1           The -- the -- this -- all of this is  
2 pending a determination of whether the alien is  
3 to be removed. That comes from (a).

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

8           MR. TRIPP: Yes.

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

11          MR. TRIPP: Okay.

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

16          MR. TRIPP: That's right.

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

20          MR. TRIPP: Well --

21          JUSTICE KAGAN: Now you have this  
22 question about how about if there's a gap  
23 between the criminal custody, but -- but -- but  
24 your interpretation necessitates that you  
25 understand even people who have never been in

1 criminal custody as part of the (c)(1) group.

2 MR. TRIPP: That's right. I think  
3 just the one thing I would point out is in the  
4 overwhelming majority of applications of this  
5 statute, this is, I think, still totally  
6 sensible because, in the overwhelming majority  
7 of applications, the person is about criminal,  
8 and in all of the criminal ones, there's going  
9 to have been some prior criminal custody. And  
10 so that's --

11 JUSTICE KAGAN: You know --

12 MR. TRIPP: -- I think, really the  
13 paradigm of the statute.

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

21 And -- and -- and your statutory  
22 interpretation, particularly your narrow view  
23 of the term described in paragraph (1),  
24 requires that those people be understood as  
25 within the (c)(1) custody authority, and, I



1 don't know, I look at the (c)(1) custody  
2 authority and it's all about criminal custody  
3 and what happens when you're released from  
4 criminal custody, and that makes me think that  
5 your interpretation of the words described in  
6 paragraph (1) is wrong.

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

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

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

1 years, 14 years.

2 MR. TRIPP: They were released for --

3 JUSTICE BREYER: I mean, they were  
4 arrested --

5 MR. TRIPP: Yeah.

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

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

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

21 So assume, as I am assuming, that this  
22 paragraph is ambiguous at most in your favor.  
23 And if it's ambiguous, and if there is a huge,  
24 as I think, a huge constitutional question,  
25 then don't we read it not to apply or to apply

1 to those who have been properly released?

2 I take it you don't think the  
3 government could come back 50 years later and  
4 arrest somebody who's a grandfather or  
5 something, you know, he -- he stole some bus  
6 transfers 50 years earlier. Is that what you  
7 think (c) authorizes?

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

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

20 MR. TRIPP: So -- so --

21 JUSTICE BREYER: -- is given bail, a  
22 hearing, a hearing?

23 MR. TRIPP: -- a-- a -- a couple more  
24 answers to that. So, first, I don't think that  
25 hypothetical would hold out. Theft can be a

1 crime involving moral turpitude. But both the  
2 deportability and admissibility provisions on  
3 crimes involving moral turpitude -- so, if you  
4 look at, for deportable aliens --

5 JUSTICE GORSUCH: All right. But now  
6 we're --

7 MR. TRIPP: -- this is under  
8 1226(c)(1)(C).

9 JUSTICE GORSUCH: -- we're quibbling,  
10 Mr. Tripp.

11 MR. TRIPP: You need to be in jail for  
12 a year.

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

23 MR. TRIPP: So I'm not trying to  
24 quibble over what's a crime involving moral  
25 turpitude. I'm saying that there's a -- a

1 sentence -- a sentence requirement under the  
2 statute.

3 JUSTICE SOTOMAYOR: Let's say --

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

11 MR. TRIPP: Our position is absolutely  
12 that this -- that this applies regardless of  
13 the timing.

14 JUSTICE BREYER: Okay. Okay.

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

17 JUSTICE BREYER: Okay.

18 MR. TRIPP: So -- so we're not -- not  
19 looking at that yet.

20 JUSTICE BREYER: So your position is  
21 yes, he's 50.

22 MR. TRIPP: And then --

23 JUSTICE BREYER: Okay. Now --

24 MR. TRIPP: -- to get into the  
25 constitutional question --

1 JUSTICE BREYER: But wait. Let me ask  
2 another question, please, because I have the  
3 answer now what your position is.

4 Okay. Now my second question is this:  
5 There is support for your position in the  
6 cases, and the cases that support it, I  
7 thought, were the cases that says when the  
8 government misses a bail deadline, then you can  
9 go ahead and have the bail hearing anyway, see,  
10 when there's a bail deadline missed, because  
11 that's not really said about what happens when  
12 you miss the bail deadline.

13 MR. TRIPP: Right.

14 JUSTICE BREYER: And the same is true  
15 here.

16 MR. TRIPP: That's right.

17 JUSTICE BREYER: Now that I thought  
18 was your strong -- to me the strongest  
19 argument.

20 MR. TRIPP: Right. And that --

21 JUSTICE BREYER: So I thought then --  
22 and this is my question -- I thought then, is  
23 this like those cases? And the answer I  
24 thought was: Well, yes, in the sense that  
25 there is A, no statement of what happens when

1 you miss the deadline, right there, and, B, the  
2 government, well, says -- all right. A is good  
3 enough.

4 But, there is a big difference. In  
5 the bail cases, the result of missing the  
6 deadline, the result of reading in no deadline  
7 is you're going to have a bail hearing. The  
8 community will be protected, right? The  
9 community will be protected with a bail  
10 hearing. And the individual will not be hurt  
11 much because all he'd be missing is a hearing  
12 that he should have had anyway.

13 But, in this case, if you read the  
14 statute the same way, what you're doing to the  
15 individual is many who are not -- no danger to  
16 the community, no danger to the community,  
17 you're depriving them of a hearing that could  
18 mean their release and you're keeping them  
19 instead for 11, 12, 13, 14 years.

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

25 MR. TRIPP: So I --

1 JUSTICE BREYER: So I thought in terms  
2 of the purposes -- are you following what I'm  
3 saying?

4 MR. TRIPP: Yes.

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

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

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

25 JUSTICE ALITO: Mr. Tripp?



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

2 JUSTICE ALITO: Mr. Tripp?

3 MR. TRIPP: Congress looked at this  
4 issue. They -- they -- they worked with it for  
5 years and years and years. And I think,  
6 basically, at the end of the day, Congress's  
7 answer was enough is enough, if you're an  
8 alien, you come here, you commit one of these  
9 crimes, you've effectively forfeited whatever  
10 right you have to remain at large in the  
11 community.

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

17 We have Mr. -- so Mr. Mony Preap, he  
18 was out for seven years and then he was  
19 rearrested for a domestic abuse charge which he  
20 pleaded down to battery. We have Mr. Rodriguez  
21 Moya --

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

24 MR. TRIPP: He did get cancellation of  
25 removal. But then we have Mr. Rodriguez Moya,

1     who was out for three years, he got a bond  
2     hearing, he was released, and he attempted to  
3     murder his ex-girlfriend and succeeded in  
4     murdering her new boyfriend.

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

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

19            And I think really what those --

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

1           MR. TRIPP: Yeah. So I -- I think the  
2 short answer is we really don't know. There's  
3 -- there's nothing in the record on that. And  
4 there aren't any published statistics on this  
5 either.

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

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

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

21           And I think, as the Court is painfully  
22 aware, that can -- that can be difficult and  
23 time-consuming. And then even when --

24           JUSTICE BREYER: What about saying a  
25 reasonable time, the word -- the words that we

1 know are there, "upon his release," means a  
2 reasonable time within his release, you know, a  
3 reasonable time. Therefore, the people who  
4 have been hiding in the mountains for 10 years,  
5 we say, well, yeah, that's a reasonable time.  
6 But the people who have families and have jobs  
7 and have lived as citizens of the community for  
8 14 years, that was not a reasonable time when  
9 you went 14 years later.

10 What about that typical legal term in  
11 order to satisfy what the government says, as  
12 you say, is its major interest?

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

21 And I think what -- what that's  
22 getting at is -- I -- I think that -- that it  
23 would have been perfectly rational for Congress  
24 to add a statute of limitations here, to say  
25 something in (c)(2) like an alien may be

1 released only if it's for witness protection or  
2 if --

3 JUSTICE SOTOMAYOR: That only works --

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

6 JUSTICE KAGAN: But are you saying --

7 MR. TRIPP: -- and is potentially  
8 eligible for --

9 JUSTICE SOTOMAYOR: You -- you --

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

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

1 JUSTICE KAGAN: Right. Well, that's  
2 what I'm saying.

3 JUSTICE ALITO: Well, that may or may  
4 not --

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

11 Would they have constitutional --  
12 serious constitutional claims in your view?

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

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

24 JUSTICE GINSBURG: But you -- could  
25 you explain then why Preap himself was eligible

1 for relief?

2 MR. TRIPP: Because not all -- only  
3 some criminal aliens and -- and more -- more  
4 LPRs have -- have eligibility for relief. If  
5 you're not an LPR, the -- the barrier is -- is  
6 -- is much broader.

7 But -- but also I think -- again, I  
8 think even just the facts of this case show  
9 that the danger of recidivism does not  
10 disappear after you pass some number of years.

11 JUSTICE BREYER: Of course it does.  
12 Look, would you do me one favor? First, assume  
13 I'm right, which I know is a heroic assumption.

14 (Laughter.)

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

22 Now, if I'm right on those two things,  
23 why would the government really care? Why does  
24 the government care? Why wouldn't it want to  
25 say, okay, we'll give him a bail hearing? The

1 -- the baddies will be in jail, and the ones  
2 who are no risk won't be.

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

16 And so Congress, you know, they  
17 experimented with this. That was the rule for  
18 many decades, until Congress started narrowing  
19 down and -- and building out these statutes --

20 JUSTICE ALITO: Well, Mr. Tripp --

21 MR. TRIPP: -- with mandatory  
22 detention.

23 JUSTICE ALITO: -- you've been --  
24 you've been pushed on the question whether  
25 there might be some circumstances in which an



1 alien who would otherwise fall within the  
2 statute would have a constitutional right to a  
3 bail hearing, but I thought the question that  
4 we agreed to decide related to the -- what the  
5 Ninth Circuit saw as a requirement that the  
6 alien that -- that Homeland Security take the  
7 alien into custody immediately, and that was  
8 the class of aliens that was certified by the  
9 district court.

10 So, if we were to reverse that  
11 determination, would that preclude a challenge  
12 by -- an individual challenge, an as-applied  
13 challenge by an alien who fell within the --  
14 the circumstances that have been described?

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

20 JUSTICE KAGAN: And -- and do you  
21 agree that an alien could bring that challenge,  
22 notwithstanding 1226(e)? So 1226(e), right, is  
23 -- is -- is the jurisdictional provision.

24 MR. TRIPP: Yes.

25 JUSTICE KAGAN: Does that at all

1 prevent an alien from bringing the kind of  
2 challenge that Justice Alito is talking about?

3 MR. TRIPP: I -- I think -- our  
4 understanding is no, actually, aliens bring  
5 these kinds of claims in the prolonged  
6 detention context with some frequency.

7 But if I could reserve the balance of  
8 my time.

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 counsel.

11 Ms. Wang.

12 ORAL ARGUMENT OF CECILLIA D. WANG  
13 ON BEHALF OF THE RESPONDENTS

14 MS. WANG: Mr. Chief Justice, and may  
15 it please the Court:

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

23 Second, it's not true that Congress  
24 wanted to detain and deport all criminal  
25 aliens, as the government claims in its reply

1 brief at page 12.

2 And, three, if Congress really wanted  
3 what the executive branch claims here, it would  
4 have simply written a statute that says people  
5 in these four categories shall be detained  
6 without a hearing until removed.

7 That is not what Congress did.  
8 Instead, Congress wrote a statute, 1226(c), as  
9 an exception to the general detention scheme in  
10 1226(a) which applies except as provided in  
11 subsection (c), not as except -- not except as  
12 provided in section (c)(2), as the government  
13 would have it.

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

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

25 But that's not what Congress said. It

1 said except -- as an alien described in  
2 paragraph (1), not an alien described in  
3 paragraph (1)(A) through (D).

4 And the government's reading, trying  
5 to pull section (2), (c)(2), out as that  
6 free-standing authorization, leads to three  
7 serious anomalies that they struggle to  
8 explain, as they did with you, Justice Kagan.

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

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

1 requirement.

2 In -- in addition to the example you  
3 gave, Justice Kagan, of a child or a spouse of  
4 a terrorist, there's a very typical situation:  
5 I'm an immigrant. I show up for my Green Card  
6 interview. And I live in California or  
7 Washington, and I confidently say, yes, I use  
8 marijuana on a regular basis. I've never been  
9 arrested. I've never been convicted of a  
10 controlled substance offense. But based on my  
11 admission to possession of a controlled  
12 substance, I might then be subject to mandatory  
13 detention on the spot as I sit there in a CIS  
14 office under the government's reading.

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

1 it applies to aliens released after October 8,  
2 1998.

3 That leads to a further anomaly, the  
4 third anomaly, which, as Judge Baron explained  
5 in his opinion in Castaneda, 810 F.3d at 29,  
6 that the transition period rule, again, which  
7 was meant to be an intermediate step up, is  
8 less broad -- excuse me, is broader than the  
9 permanent rule in Section 1226(c).

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

17 As far as the alien is concerned,  
18 these two are identically situated, and yet one  
19 gets the benefit of a bail hearing and the  
20 other doesn't.

21 Why does that make sense?

22 MS. WANG: Your Honor, well, the  
23 person who is detained immediately falls under  
24 Congress's scheme. Congress provided that if  
25 you're within categories A through D and you

1 are taken into custody, when you're released  
2 from your criminal custody, and you aren't  
3 needed for witness protection purposes,  
4 mandatory detention --

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

11 MS. WANG: My first response to you,  
12 Justice Ginsburg, would be that's what the  
13 statute provides.

14 And the second response is that the  
15 Court decided in Demore in 2003 that applying  
16 the mandatory detention rule, at least, not  
17 considering the question before the Court now,  
18 is constitutional.

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

1           The first is the text and the  
2           structure of the statute, which indicate if the  
3           person is not taken into custody when they're  
4           released from criminal custody by ICE, then  
5           they're under 1226(a) and you get a hearing.

6           JUSTICE ALITO: What do you think  
7           "when" -- what do you think "when means"? Does  
8           it mean immediately?

9           MS. WANG: Your Honor, we --

10          JUSTICE ALITO: Does "when" mean  
11          immediately?

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

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

19          MS. WANG: No, Your Honor. We would  
20          ask the Court to affirm the Ninth Circuit,  
21          which said that a reasonable degree of  
22          immediacy is appropriate.

23          JUSTICE ALITO: What -- what does --

24          JUSTICE KAVANAUGH: Is that different  
25          from --



1           JUSTICE ALITO:  What does "a  
2     reasonable degree of immediacy" mean?  I mean,  
3     let's -- I don't know how many people will be  
4     released from criminal custody today in, let's  
5     say, the State of California, but I'm sure  
6     there are dozens, probably hundreds.  I don't  
7     know.  A lot.

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

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

19           MS. WANG:  Congress provided for how  
20    they would do that, Justice Alito.  Congress  
21    was thinking about state and local cooperation  
22    at the same time they were enacting  
23    Section 1226(c).  And what they did was set up  
24    mechanisms for state and local cooperation with  
25    federal authorities through statutes:  through

1 Section 1226(d), an adjacent provision; through  
2 1257(g), also known colloquially as 287(g)  
3 agreements; and through 1373, all in Title 8.

4 The major innovation that Congress  
5 wanted and got during that same time frame as  
6 the '96 Act is described in the Senate report,  
7 104.48, at pages 15 to 16, an automated  
8 fingerprint system.

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

14 JUSTICE ALITO: So the first part of  
15 your answer is that -- that the state -- the  
16 state governments, the municipal governments  
17 are going to provide this information to -- to  
18 the Department of Homeland Security?

19 MS. WANG: That is what Congress  
20 anticipated when it wrote this statute in '96,  
21 yes.

22 JUSTICE ALITO: And is that what is  
23 happening now?

24 MS. WANG: Your Honor, it's largely  
25 what is happening now. The government cites

1 some data from 1996. There's also data we've  
2 cited that show that, in fiscal years '15  
3 through '17, 94 percent of federal requests to  
4 state and local jurisdictions were complied  
5 with.

6 But -- but I think the larger point,  
7 Justice Alito, is that Congress -- we have to  
8 read what Congress was doing in 1996. And  
9 whatever's happening today with controversies  
10 over so-called sanctuary jurisdictions don't  
11 really shed light on what Congress wanted in  
12 '96.

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

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

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

1 jurisdictions.

2 I'd note, finally, Justice Alito, that  
3 -- that the Court dealt with similar parallel  
4 arguments by the government in the Pereira and  
5 Moncrief cases, and the Court said, look, the  
6 government can point to these practical  
7 considerations, but at the end of the day,  
8 we're looking at the words that Congress wrote.

9 And the practical considerations that  
10 pertain in the current environment in 19 -- in  
11 -- sorry, 20 -- 2018 don't really shed light.  
12 If -- yes --

13 JUSTICE GORSUCH: Well, Ms. Wang, on  
14 the --

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

21 In simple terms, that's the question  
22 before us, right?

23 MS. WANG: Yes, Your Honor. And to  
24 answer your question, I believe the Court  
25 should affirm the Ninth Circuit, which, again,

1 said the government should act, shall take the  
2 alien into custody with -- with a reasonable  
3 degree of immediacy.

4 Now I note that the BIA, the Board of  
5 Immigration Appeals, in Rojas said 48 hours is  
6 outside that time limit.

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

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

19 MS. WANG: That's exactly right,  
20 Justice Breyer.

21 JUSTICE BREYER: I'm not sure the  
22 Ninth Circuit said that.

23 MS. WANG: That's right.

24 CHIEF JUSTICE ROBERTS: Well, is that  
25 -- I mean, there's a difference between

1 "reasonable degree of immediacy" and  
2 "reasonable time." I -- I don't see how  
3 immediate is immediate. You can't have a  
4 reasonable degree of immediacy. If it's an  
5 hour later, it's not immediate.

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

12 It's not reasonable to -- to -- if --  
13 if they don't have enough people to do it, if  
14 it takes a week, if it takes -- I don't know  
15 what's reasonable in this situation. A month?

16 But a reasonable degree of immediacy  
17 is something else. That strikes me as a half  
18 hour or something, because, otherwise, it's not  
19 immediate.

20 MS. WANG: I think --

21 CHIEF JUSTICE ROBERTS: So which is  
22 it, reasonable degree of immediacy or  
23 reasonable time?

24 MS. WANG: Your Honor, I think that  
25 the Ninth Circuit was using the phrase

1 "reasonable" with respect to a temporal scope,  
2 not with respect to whether the government was  
3 making reasonable efforts or acting in good  
4 faith.

5 The statute says "when," which, as the  
6 BIA acknowledged, connotes immediacy.

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

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

17 CHIEF JUSTICE ROBERTS: Okay. Well,  
18 can you give me a time?

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

25 CHIEF JUSTICE ROBERTS: Okay. So it

1 seems to me that reasonable time isn't really  
2 giving any flexibility to the statute if you  
3 say it has to be 48 hours.

4 MS. WANG: Your Honor, we think 48  
5 hours is too long, as Rojas said. If the  
6 Court --

7 CHIEF JUSTICE ROBERTS: Okay. So you  
8 think it's the same day?

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

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

22 JUSTICE KAGAN: In -- in your --

23 JUSTICE KAVANAUGH: Why don't -- why

24 --

25 JUSTICE KAGAN: In your class, how



1 many people have been -- what percentage of the  
2 class has been out for, let's say -- let's just  
3 call it a year plus?

4 MS. WANG: Justice Kagan, we didn't  
5 get discovery in this case that's before the  
6 Court. We only had the discovery in the Gordon  
7 case in the First Circuit. So I unfortunately  
8 don't have the numbers for this class.

9 JUSTICE SOTOMAYOR: Ms. Wang, you --

10 JUSTICE KAGAN: What -- what -- what  
11 was the answer on that case?

12 MS. WANG: In Gordon, the average  
13 delay was three years. The median delay was 13  
14 months.

15 JUSTICE KAGAN: In -- in that class?

16 MS. WANG: In that class, correct, in  
17 the Gordon case. And that was, again, based on  
18 data the government provided us.

19 JUSTICE SOTOMAYOR: Ms. Wang, let's  
20 assume a situation, hypothetical. The  
21 government goes to the jail that day. They're  
22 told they're going to -- the prisoner's going  
23 to get out at 10 in the morning, but he gets  
24 out at 7. They then go looking for him, and  
25 he's now gone underground, never shows up at

1 the parole office, never talks to family or  
2 friends. They look for him periodically over a  
3 period of time. And all of a sudden he's  
4 rearrested.

5 Do you see that as a different  
6 reasonable time situation than what happens  
7 here, which is that the government -- for  
8 example, I understand from the briefs that  
9 sometimes they put in a detainer and don't even  
10 bother to show up?

11 MS. WANG: That's right, Justice  
12 Sotomayor. And --

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

22 MS. WANG: I think you can, Justice  
23 Sotomayor, because, again, I'm trying to stay  
24 true to the words Congress wrote. Congress  
25 used the phrase "when the alien is released,"

1 which clearly, as everyone acknowledges, has a  
2 temporal component.

3           They didn't write a statute that  
4 pegged mandatory detention to some kind of good  
5 faith or reasonable effort standard for the  
6 government.

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

21           So it's not a case where the  
22 government is -- is, you know, dealing with  
23 someone who's a fugitive, who's trying to hide.  
24 But to get back to your --

25           JUSTICE GORSUCH: Ms. Wang, your --

1 your --

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

3 JUSTICE GORSUCH: Oh, no, if you go  
4 ahead and finish --

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

6 JUSTICE GORSUCH: -- but I've got a  
7 question after.

8 MS. WANG: I will quickly just get to  
9 the --

10 JUSTICE GORSUCH: Please.

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

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

20 JUSTICE GORSUCH: Okay. You've hinged  
21 a lot on the language, and you've told us to  
22 ignore what's happened after 1996 and, in  
23 response to Justice Sotomayor, went back to  
24 that language, "when the alien is released."

25 But, if we're going to focus really

1 carefully on the language, what do we do about  
2 the fact that that is an adverbial phrase? And  
3 you're asking us to suggest that it modifies  
4 the noun "alien" and limits the class of aliens  
5 that are involved.

6 "Alien" is a noun. Adverbs don't  
7 usually modify nouns. They usually modify  
8 verbs. And the verb here is "shall take into  
9 custody."

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

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

21 MS. WANG: Well, I think I'm a  
22 grammarian too. The reason why, Justice  
23 Gorsuch, is that sometimes adverbial phrases do  
24 describe a noun, just as they do in this  
25 statute.

1           So, first, for all the reasons I've  
2 already said. I --

3           JUSTICE GORSUCH: Usually, they modify  
4 the verb.

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

6           JUSTICE GORSUCH: So let's start  
7 there.

8           MS. WANG: -- I will concede that.  
9 Right --

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

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

15          JUSTICE GORSUCH: So why would I do  
16 that?

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

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

21          MS. WANG: Right. So -- so two -- two  
22 reasons, Justice Gorsuch. For the reasons I've  
23 already said, I think it's clear from the  
24 structure of the statute and the plain language  
25 that Congress meant for people -- for -- for

1 paragraph (2), to -- to describe a subset of  
2 people who were taken into custody in paragraph  
3 (1). In all of paragraph (1), not omitting the  
4 flush language, as -- as my friend describes  
5 it.

6 The second reason is, yes, it may be  
7 uncommon for an adverbial phrase to describe a  
8 noun, but it can happen. Let me give you a  
9 hypothetical example that -- that -- that  
10 tracks this statute.

11 I might tell you in a two-paragraph  
12 instruction, number one, harvest the grapes in  
13 vineyards A, B, and C when they ripen.  
14 Paragraph two: Make the wine from the grapes  
15 described in paragraph (1).

16 The grapes refer to both the temporal  
17 component, I want you to harvest them when  
18 they're ripe, not when they're over-ripe, not  
19 when they're under-ripe, and it's from those  
20 three vineyards.

21 JUSTICE GORSUCH: I'm not sure I -- I  
22 mean, I follow the example, but I'm not sure I  
23 buy it, and let me tell you why. And it's a  
24 neat example. I commend you. Well done.

25 (Laughter.)

1           JUSTICE GORSUCH: I think -- I think  
2 my fifth grade grammar teacher would love this  
3 discussion, but I would say to you or I'd  
4 challenge you with this, that, again, there  
5 you're modifying the verb, when you're supposed  
6 to harvest it, okay? And that's the first --  
7 the first section.

8           The second section, you're saying,  
9 okay, whatever you've harvested, the grapes  
10 that we've described that you have harvested.  
11 You still have to have harvested them. So it  
12 still depends upon the verb in that second  
13 paragraph, the verb plus the noun as referred  
14 to in the second paragraph.

15           So I'm not sure it gets around the  
16 problem. Help me out.

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



1 man that's described.

2 In the same way, Your Honor, that I  
3 think Congress in paragraph (2), again, by --  
4 by using the phrase "an alien described in  
5 paragraph (1)," not an alien described in  
6 paragraph (1)(A) through (D). I think it  
7 simply -- the -- the -- the whole, the entirety  
8 of paragraph (1) describes the alien in that  
9 paragraph (2) phrase. And I think that's --  
10 that's simply what Congress meant.

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

14 MS. WANG: Yes, Justice Kavanaugh.  
15 And the consequence --

16 JUSTICE KAVANAUGH: And -- and yet  
17 Congress did not put in a time limit, whether  
18 it's reasonable time, as Justice Breyer says,  
19 or a year or two years or six months or 48  
20 hours.

21 And so, when you combine those two  
22 points, Congress knew it wouldn't be immediate,  
23 and yet Congress did not put in a time limit.  
24 That raises a real question for me whether we  
25 should be superimposing a time limit into the

1 statute when Congress, at least as I read it,  
2 did not itself do so.

3 How do you respond to that?

4 MS. WANG: Well, Justice Kavanaugh,  
5 we're not asking you to superimpose a time  
6 limit. We're asking you to give meaning to all  
7 the words of the statute that Congress enacted,  
8 which say --

9 JUSTICE KAVANAUGH: But you're --

10 MS. WANG: -- but --

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

15 And my point is that's very odd when  
16 you think about what Congress was doing in  
17 1996, because they were well aware that would  
18 not happen, A, because of resources, B, because  
19 they're not learning about it right away.

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

23 MS. WANG: Well, Your Honor, I think,  
24 again, Congress, first, as Justice Breyer  
25 noted, Congress often will have kind of a soft

1 target when they legislate in this way.

2 Second, remember --

3 JUSTICE KAVANAUGH: Well, the -- a  
4 soft target would be what Justice Breyer might  
5 say, reasonable time. And Congress could have  
6 put that in, but -- and maybe we should,  
7 Justice Breyer's idea, but Congress didn't do  
8 that.

9 MS. WANG: I think -- I think, Your  
10 Honor, that Congress in saying "when" meant  
11 what "when" means in the common sense, a  
12 reasonable -- within a reasonable time of the  
13 event happening.

14 We go to the dictionary definition --

15 JUSTICE KAVANAUGH: Well, in the  
16 follow-up on --

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

18 JUSTICE KAVANAUGH: -- the Chief  
19 Justice's point, reasonable immediacy is  
20 different from reasonable time in your view?

21 MS. WANG: I think that the Ninth  
22 Circuit used "reasonable degree of immediacy"  
23 and "promptly" interchangeably. And as -- as  
24 the BIA again said, "when" connotes immediacy.

25 As Judge Baron pointed out, "when"

1 connotes immediacy. That's the primary  
2 dictionary definition. But I do -- I do want  
3 to say one other thing in response to you,  
4 Justice Kavanaugh, and that is remember that  
5 subsection (c), mandatory detention without any  
6 individual hearing, is written as an exception  
7 to subsection (a).

8 So the only consequence is you get a  
9 hearing. And so the bad ones, as Justice  
10 Breyer said, the "baddies," will be detained.  
11 And I want to point out that the --

12 JUSTICE KAVANAUGH: The problem is  
13 that Congress did not trust those hearings  
14 for --

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

16 JUSTICE KAVANAUGH: -- a certain  
17 class, is -- is my understanding, and correct  
18 me if I'm wrong about that, but Congress was  
19 concerned that those hearings were not working  
20 in the way that Congress wanted and, therefore,  
21 for a certain class of criminal or terrorist  
22 aliens, said no more.

23 MS. WANG: That's right. But the  
24 question here is what's the class, what's the  
25 class. Congress wrote the statute to say take

1       them into custody when released. Otherwise,  
2       except as provided in -- in paragraph C,  
3       subsection (c). And so the consequence is a  
4       hearing.

5                 And I wanted to point out that the  
6       bipartisan group, a former INS and DHS general  
7       counsels, said at page 10 of their brief they  
8       agree with our reading of the statute, and they  
9       say: Detention under Section 1226(a) is not  
10      meaningfully more burdensome for the  
11      government.

12                JUSTICE ALITO: Yeah, and I can see  
13      that --

14                CHIEF JUSTICE ROBERTS: Well, they  
15      might agree, but every other circuit, four of  
16      them, and an equally divided First Circuit,  
17      disagree?

18                MS. WANG: Well, the -- some of the  
19      circuits, Your Honor, deferred to the BIA's  
20      reading, which the government's asking you  
21      partly to defer to and partly not, since they  
22      disagree with the BIA's reading of paragraph  
23      (1) but not with paragraph (2).

24                And for -- and the Fourth Circuit  
25      actually read the -- the Rojas decision

1     incorrectly and deferred on the "when release"  
2     ground.

3             I think that the -- the First Circuit  
4     panel in Judge Baron and the Ninth Circuit  
5     below got this right. That reading gives full  
6     meaning to every word in the statute. It makes  
7     sense of the two-paragraph structure and the  
8     fact that (c) is written as an exception to  
9     (a).

10            And I want to point out that, at the  
11     time Congress wrote this statute, this Court  
12     had never before approved of civil detention,  
13     executive detention, without individualized  
14     hearings on flight risk and danger.

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

23            JUSTICE KAVANAUGH: Is that  
24     presumption based on what we think was really  
25     going through Congress's mind at the time, or

1 is it based on a constitutional overlay?  
2 Because what was really going through  
3 Congress's time in 1996 was harshness on this  
4 topic. Is that not right?

5 MS. WANG: Congress was -- was  
6 certainly trying to deal with what they  
7 considered to be a problem with non-citizens  
8 who have committed crimes. The question,  
9 again, is who were they targeting with this  
10 statute?

11 JUSTICE KAVANAUGH: Right.

12 MS. WANG: And I think that the words  
13 that Congress chose are narrow ones. They  
14 clearly say that people had to be in criminal  
15 custody under these four grounds, and there's a  
16 serious constitutional problem if you buy the  
17 government's reading.

18 My friend --

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

1 out.

2 Now why -- if that's the case, and it  
3 -- it obviously is, why would Congress think  
4 differently about someone who's been out for a  
5 week?

6 MS. WANG: For two reasons, Your  
7 Honor. The first is the legislative history,  
8 especially as -- as outlined in the members of  
9 Congress dark green brief, makes it clear.

10 Congress wanted ICE, then INS, to  
11 focus limited capacity, limited capacity to  
12 detain, on people already in criminal custody  
13 who would otherwise be released. They said, in  
14 other words, don't spread yourself thin.

15 My friend said it takes more effort to  
16 go find people in the community. That's  
17 exactly right. And that's the problem Congress  
18 --

19 JUSTICE BREYER: They face that --

20 MS. WANG: -- wanted to --

21 JUSTICE BREYER: -- what would you  
22 think of -- I see the problem of reasonable  
23 time, but Demore concerned a case where the  
24 Court thought that these people were detained  
25 without bail hearings for less than six months.



1           Zadvydas interprets a silent statute  
2           to imply a six-month limitation on other but  
3           related holding of aliens. So what would you  
4           think of reading this statute in order, in my  
5           opinion, not to violate a principle that goes  
6           back to if not -- not the Magna Carta, at least  
7           to Blackstone, that we read this statute the  
8           same way?

9           There it is. We have a degree of  
10          clarity. We say -- we use -- we go to  
11          Zadvydas, and we go to the history of bail and  
12          we say, all right, six months.

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

14          CHIEF JUSTICE ROBERTS: Sure.

15          MS. WANG: Your Honor, I think that,  
16          Justice Breyer, the six months would be an  
17          extraordinary amount of time and just gets a  
18          little far afield from the words Congress  
19          chose.

20          And I remind you that the Board of  
21          Immigration Appeals said 48 hours was too long.  
22          So, if the Court wishes to draw a bright line,  
23          as you did in Zadvydas, I think that would be  
24          fine. But, really, we should follow the words  
25          Congress wrote.

1 CHIEF JUSTICE ROBERTS: Thank you, Ms.  
2 Wang.

3 Four minutes, Mr. Tripp.

4 MS. WANG: Thank you, Mr. Chief  
5 Justice.

6 REBUTTAL ARGUMENT OF ZACHARY D. TRIPP  
7 ON BEHALF OF THE PETITIONERS

8 MR. TRIPP: Thank you. Just a couple  
9 of points.

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

16 JUSTICE SOTOMAYOR: It just begs the  
17 question, because they didn't say sub --  
18 paragraph (1), A through D. They said the  
19 entire paragraph.

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

21 JUSTICE SOTOMAYOR: And why isn't the  
22 verb, the adverb, part of the noun in that  
23 situation? Because, if they wanted to limit it  
24 to that class of A to D, that's the easiest  
25 thing to have done.

1 MR. TRIPP: Because --

2 JUSTICE SOTOMAYOR: Your counsel is --  
3 your adversary's right, if they wanted to limit  
4 1226(a) to (c)(2), they would have said (c)(2).

5 MR. TRIPP: So a couple of responses,  
6 but I think the main one is that the phrase  
7 "when the alien is released" does not modify  
8 who the alien is. It takes as a given he's  
9 already been fully described. And instead that  
10 --

11 JUSTICE SOTOMAYOR: No, it is -- it is  
12 --

13 MR. TRIPP: -- just modifies the  
14 duties of the Secretary.

15 JUSTICE SOTOMAYOR: You're begging the  
16 question. When he's released identifies the  
17 alien that the statute is looking at.

18 MR. TRIPP: I -- I --

19 JUSTICE SOTOMAYOR: You by yourself --  
20 you say that there's a command that you have to  
21 follow to try to take these people into  
22 custody. You say there's a command to do it,  
23 but you don't have to do it. You can choose  
24 not to do it. I don't know what kind of  
25 command that is. But you -- you at least

1 recognize that there's a sense of urgency, you  
2 should do this.

3 So why doesn't that describe the noun?

4 MR. TRIPP: So I -- I think three  
5 responses I'll just --

6 JUSTICE SOTOMAYOR: The noun and the  
7 verb, I should say.

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

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

20 JUSTICE KAVANAUGH: If -- if --

21 MR. TRIPP: -- that categorically  
22 prohibits release.

23 JUSTICE KAVANAUGH: -- if reasonable  
24 amount of time, Justice Breyer's suggestion,  
25 were part of a ruling, what do you think is a

1 reasonable amount of time or presumptively  
2 reasonable? I know that's not your preferred  
3 position, but do you have thoughts on that?

4 MR. TRIPP: I -- I think our -- our  
5 main answer is that would be really profoundly  
6 problematic because these gaps in custody are  
7 often very long. And -- and the basic reason  
8 that --

9 JUSTICE KAVANAUGH: So, therefore, you  
10 would say a long period is a reasonable period,  
11 but do you have any more meat you want to put  
12 on those bones of what a reasonable period of  
13 time would be, given all the circumstances?

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

22 And once the person's out, it's going  
23 to be much more difficult to track them down.  
24 DHS might not know where they -- where they  
25 live, how to find them. And so, you know, what

1 happens sometimes is that DHS doesn't become  
2 aware of them again until years later when they  
3 get arrested on a different offense.

4 And so I -- I think it's difficult for  
5 me to give content to that. I think the force  
6 of that argument that, you know, maybe it would  
7 be different after the passage --

8 JUSTICE SOTOMAYOR: The problem is  
9 that --

10 MR. TRIPP: -- of some long period of  
11 time --

12 JUSTICE SOTOMAYOR: -- if that's the  
13 only way you come -- that -- become aware of  
14 them, they get arrested, you can hold them.  
15 You can do what you should have done the first  
16 time, which is to --

17 MR. TRIPP: But -- but --

18 JUSTICE SOTOMAYOR: -- put a detainer  
19 on them.

20 MR. TRIPP: -- under -- under -- I  
21 mean, so with Mr. Mony Preap, we -- we did  
22 arrest him just as he got out the second time,  
23 but that second offense didn't trigger 1226(c).  
24 And so he's arguing that because he was out for  
25 years and years before he got arrested the

1 second time, that he's off the hook. And I  
2 think --

3 JUSTICE SOTOMAYOR: I guess the  
4 problem that I have is you're -- you're pitting  
5 two groups of people. I'm not nay-saying that  
6 there are people who are released on bail who  
7 are dangerous and commit -- and commit serious  
8 crimes.

9 But, if I look at the numbers that do  
10 that, they're very, very small compared to the  
11 people who are released on bail and don't  
12 commit more crimes or the number of people who  
13 get cancellation of removal for various  
14 reasons.

15 At what point do we constitutionally  
16 ignore that? We ignore that there's a whole  
17 class, a huge class of people who are being  
18 held where no one would consider them  
19 dangerous? Or --

20 CHIEF JUSTICE ROBERTS: You may answer  
21 briefly.

22 MR. TRIPP: So none of those numbers  
23 are in the record and I -- I don't think we  
24 would agree with them. But just more  
25 fundamentally, this is a statutory

1 interpretation case. I think the statute is  
2 unambiguous. (c)(2) reaches anybody with the  
3 requisite criminal history, and every one of  
4 Respondents has it, so we're asking the Court  
5 to reverse.

6 CHIEF JUSTICE ROBERTS: Thank you,  
7 counsel.

8 The case is submitted.

9 (Whereupon, at 11:07 a.m., the case  
10 was submitted.)

11  
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