

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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

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

2 (10:05 a.m.)

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

7 Mr. Tripp.

8 ORAL ARGUMENT OF ZACHARY D. TRIPP

9 ON BEHALF OF THE PETITIONERS

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

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

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

1 protection.

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

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

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

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

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

23 MR. TRIPP: Yeah, the -- the -- 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.)

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