

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DAVID JENNINGS, ET AL., :

4 Petitioners : No. 15-1204

5 v. :

6 ALEJANDRO RODRIGUEZ, ET AL., :

7 INDIVIDUALLY AND ON BEHALF OF :

8 ALL OTHERS SIMILARLY SITUATED, :

9 Respondents. :

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11 Washington, D.C.

12 Wednesday, November 30, 2016

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14 The above-entitled matter came on for oral
15 argument before the Supreme Court of the United States
16 at 10:03 a.m.

17 APPEARANCES:

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20 the Petitioners.

21 AHILAN T. ARULANANTHAM, ESQ., Los Angeles, Cal.; on
22 behalf of the Respondents.

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

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this morning in Case No. 15-1204, Jennings v.
5 Rodriguez.

6 General Gershengorn.

7 ORAL ARGUMENT OF IAN H. GERSHENGORN

8 ON BEHALF OF THE PETITIONERS

9 GENERAL GERSHENGORN: Mr. Chief Justice, and
10 may it please the Court:

11 Congress provided extensive substantive and
12 procedural protections for aliens whom the government
13 wishes to remove, but at the same time, addressed the
14 real concerns about recidivism and flight risk by
15 providing for mandatory detention during removal
16 proceedings for certain categories of criminal aliens
17 and aliens arriving at our shores.

18 The Ninth Circuit undid that legislative
19 balance, invoking principles of constitutional avoidance
20 to require the government to release those aliens unless
21 the government can prove by a preponderance of the
22 evidence every six months that detention remains
23 necessary.

24 The Ninth Circuit's decision is a serious
25 misuse of the constitutional avoidance canon. With

1 respect to arriving aliens, there is no constitutional
2 problem to avoid. As even the Ninth Circuit recognized,
3 the statute is constitutional in the vast majority of
4 applications, and any concerns about outlier cases
5 involving lawful permanent residents can be dressed in
6 as-applied challenges.

7 And with respect to criminal aliens, the
8 text of the statute forecloses the Ninth Circuit's
9 approach, and in any event, the statute is
10 constitutional as written under this Court's decision in
11 Demore.

12 The net result of the Ninth Circuit's
13 one-size-fits-all rule is -- is a regime that's at odds
14 with the text that Congress enacted. It undermines
15 DHS's enforcement priorities, and it creates incentives
16 for individual aliens to delay their removal
17 proceedings.

18 JUSTICE GINSBURG: What about 1225(a), that
19 is, aliens who don't fit in either of the categories
20 that you discussed? They are not entrants, and they are
21 not people who have committed qualifying criminal
22 offenses. So they are the 1225(a) people.

23 GENERAL GERSHENGORN: That's right, Your
24 Honor. So for those individuals, they have had bond
25 hearings, or at least they often have had bond hearings.

1 And -- and so we're talking about individuals who either
2 had bond hearings and had them denied or have been
3 unable to post bond.

4 With respect to those --

5 JUSTICE SOTOMAYOR: What would be the
6 constitutional entitlement to keeping those people, if
7 they're not a flight risk or a -- a risk to the safety
8 of the country?

9 GENERAL GERSHENGORN: So --

10 JUSTICE SOTOMAYOR: Or to others? However
11 you want to define that danger element.

12 So what's the constitutional entitlement,
13 just arbitrarily, to keep someone who's neither of those
14 two things?

15 GENERAL GERSHENGORN: So with respect to the
16 1225(a)(1) individuals that Justice Ginsburg was talking
17 about, those are individuals who have had bond hearings
18 and had them denied or have been unable to post bond.
19 And the requirement that we are concerned about there is
20 that the government bears the burden of proof to show by
21 clear and convincing evidence every six months that they
22 are not a flight risk or not a -- or not likely to -- to
23 recidivate.

24 And --

25 JUSTICE GINSBURG: Clarify two things. One,

1 what are the -- what have the people in that category
2 done that would make them subject to removal; and two,
3 does the government read the bond specification in
4 1225(a) as discretionary?

5 GENERAL GERSHENGORN: So, Your Honor, the --
6 I think the government's practice with respect to the
7 latter question is to provide bond hearings consistent
8 with the -- consistent with the statute is my
9 understanding, and that -- and so those are people who
10 have had bond hearings and we do provide them there.

11 And, I'm sorry, Your Honor, your first
12 question?

13 JUSTICE GINSBURG: Who would --

14 GENERAL GERSHENGORN: So they may be
15 individuals who have -- who have entered illegally but
16 have not committed the kinds of crimes that would make
17 them inadmissible under 1182(a)(2) or -- or deportable
18 under -- that would subject them -- the types of crimes
19 that would subject you to 1226(c) for the mandatory
20 detention there. And so, again, for that class, we are
21 objecting principally to the clear and convincing
22 evidence standard which we think the Ninth Circuit
23 really had no basis in the statute for adopting. And
24 there are --

25 JUSTICE KENNEDY: Am I right that in -- in

1 bail hearings, it's clear and convincing to show that
2 there is a public danger, but only by a preponderance of
3 the evidence to show flight risk in regular bail
4 hearings?

5 GENERAL GERSHENGORN: So, Your Honor, it
6 does vary by the type of crime. In some cases it's the
7 alien who has to -- I'm sorry. In some cases it's the
8 criminal who has to show by a preponderance that he is
9 not likely to -- to recidivate or to be a flight risk.
10 In some cases the government bears the burden by showing
11 in clear and convincing evidence.

12 JUSTICE SOTOMAYOR: May I ask a --

13 JUSTICE KENNEDY: I think -- I'll check it.
14 I think not for flight risk.

15 GENERAL GERSHENGORN: That might be right,
16 Your Honor.

17 Yes. I'm sorry, Justice --

18 JUSTICE SOTOMAYOR: Clarifying question.
19 For an alien who is found in the United States
20 illegally, has not been admitted, are they held under
21 1225(b) or are they held under 1226(a)?

22 GENERAL GERSHENGORN: So they are held
23 under -- if they are not -- if they are not detained
24 within 100 miles of the border or within 14 days, so
25 they've been there longer than those two things, then

1 they are under 1220 -- 1226(a) and not 1226(c).

2 JUSTICE SOTOMAYOR: So what happens to -- I
3 don't know how many of these would exist, but an alien
4 who has resided within 14 miles of the border, not 14 --
5 how many miles?

6 GENERAL GERSHENGORN: Within a hundred miles
7 of the border and 14 --

8 JUSTICE SOTOMAYOR: Hundred miles from the
9 border, that's possible, who has been there for 20
10 years, they would still be held under 1225?

11 GENERAL GERSHENGORN: So I'm sorry, Your
12 Honor. They would be held under 1226(a). So this is
13 on -- on -- they -- if they hadn't committed other
14 crimes, and -- and so, therefore, were not subject to
15 the mandatory detention under 1226(c).

16 JUSTICE SOTOMAYOR: I'm assuming no criminal
17 alien.

18 GENERAL GERSHENGORN: Okay.

19 JUSTICE SOTOMAYOR: I'm talking about an
20 alien who has come into the United States illegally
21 without being admitted who takes up residence 50 miles
22 from the border.

23 GENERAL GERSHENGORN: The answer is they are
24 held under 1226(a) and that they get a bond hearing
25 under -- and this is at page 156a of the appendix.

1 JUSTICE SOTOMAYOR: Let me finish my -- your
2 question. Earlier you said you were objecting to the
3 burden of proof.

4 GENERAL GERSHENGORN: Yes, Your Honor.

5 JUSTICE SOTOMAYOR: Are you objecting to the
6 concept that prolonged detention without reason is not
7 appropriate for these aliens?

8 GENERAL GERSHENGORN: So, Your Honor, we
9 believe that they -- and I don't think --

10 JUSTICE SOTOMAYOR: And the reasons being
11 flight risk or danger.

12 GENERAL GERSHENGORN: We believe that the --
13 whatever due process rights that they have are met by
14 the statutory scheme which gives them an initial bond
15 hearing and then allows them, if there are changed
16 circumstances, to seek a redetermination. And we
17 believe that that satisfies --

18 JUSTICE SOTOMAYOR: Except that that bond
19 hearing, that additional regulation says that the length
20 of detention is not one of the factors that justifies
21 reconsideration.

22 GENERAL GERSHENGORN: That's correct, Your
23 Honor, under our --

24 JUSTICE SOTOMAYOR: And so if these are
25 people who have been here for decades, let's say, don't

1 you think due process would require some periodic review
2 to ensure that these people are properly being held?

3 GENERAL GERSHENGORN: So, Your Honor, we
4 don't think that. But two things: First of all, the
5 Ninth Circuit went beyond that and -- and -- and imposed
6 a clear and convincing evidence standard which we think
7 really does materially change the calculus and change
8 the government's burden there; and, second, we do think
9 that the initial bond hearing in conjunction with the --
10 with the opportunity to bring forth changed
11 circumstances -- and that may be -- that could be --

12 JUSTICE SOTOMAYOR: Except that regulations
13 are saying that you don't consider the length of
14 detention. But that's what a judge does in bail
15 hearings. That's what a judge does in almost every
16 other detention, which is, at a certain point, your --
17 your calculus changes, the balance changes when the
18 detention becomes unreasonable.

19 GENERAL GERSHENGORN: Your Honor, so if I
20 can --

21 JUSTICE SOTOMAYOR: The length of detention
22 becomes unreasonable.

23 GENERAL GERSHENGORN: Yeah. If I could step
24 back. We do think that the way to think about the case
25 for -- for the people who are not in the arriving aliens

1 category is that the -- as long -- what -- what the
2 Court said in Demore, and I think this is the focus of
3 Justice Kennedy's concurrence in Demore, that if the
4 purpose of detention is being served, that the
5 government is moving reason -- reasonably quickly to --
6 to accomplish removal, and so that we are not in a
7 Zadvydas situation where the end of the government
8 detention can't be observed, then the -- then absent --
9 absent very unusual circumstances, that -- that
10 detention is constitutional. And so we do think that --
11 we do think that the scheme we have in place for the
12 1226(a) individuals that Your Honor is identifying is
13 constitutional.

14 I will say that hasn't --

15 JUSTICE KAGAN: May I ask, General -- I'm
16 sorry.

17 GENERAL GERSHENGORN: No, Your Honor, I was
18 going to shift to something else.

19 JUSTICE KAGAN: I was going to shift to
20 something else too.

21 GENERAL GERSHENGORN: Let's do it.

22 JUSTICE KAGAN: Let's -- let's shift to
23 1226(c).

24 GENERAL GERSHENGORN: Okay.

25 JUSTICE KAGAN: And not focus on the statute

1 so much but focus on the constitutional question, and I
2 think your brief indicates that you think that there are
3 some constitutional bounds, and so I'd like you to talk
4 to me about what those constitutional bounds are and --
5 and when a judge would find them.

6 GENERAL GERSHENGORN: So, Your Honor, we
7 think the constitutional bound is -- is the standard
8 that Justice Kennedy's concurrence set forth in Demore,
9 and we think it is that where there be, as -- as he said
10 there -- were there to be an unreasonable delay by the
11 government -- he said the INS, but by the government in
12 pursuing and completing deportation proceedings, it
13 could become necessary, then, to inquire whether the
14 purpose of detention is not to facilitate deportation
15 but for some other reason.

16 So it seems to us that the analysis that a
17 court would undertake is, has there been some sort of
18 unusual situation or misconduct on the part of the
19 government or delay on the part of the government that
20 suggests the purpose of detention was not to effectuate
21 removal, but as long as --

22 JUSTICE KAGAN: What happens if -- what
23 happens if you can't point to any particular evidence of
24 government misconduct, but that you're in a situation
25 where the government just has very, very big backlogs

1 and everything is taking a long time? So let's say the
2 average would be that the government wouldn't make a
3 decision for three years. Could the Court simply say,
4 well, three years is too long? It doesn't really matter
5 what kind of evidence you have; three years is too long.

6 GENERAL GERSHENGORN: So, Your Honor, I -- I
7 think our position in that -- in that situation would be
8 that as long as the government was diligently -- we -- I
9 mean, if it were 20 years, I mean, we could go on, then,
10 of course, that might be a concern that, in fact, we
11 were no longer trying to effectuate removal. I think we
12 would make the argument in the three years Your Honor
13 was hypothesizing, but that's not the situation we have
14 here. It's been steady --

15 JUSTICE BREYER: Right. That's -- that's --
16 right there you said, of course, 20 years, dot, dot,
17 dot, dot. As soon as you utter words like that, you are
18 outside. And it's in conceding, I take it, that where
19 it says, the AG may release an alien described in
20 paragraph 1, these are the criminal ones.

21 GENERAL GERSHENGORN: This is 1226(a).

22 JUSTICE BREYER: This is 1226(2). It's
23 (c) (2).

24 GENERAL GERSHENGORN: I'm sorry --

25 JUSTICE BREYER: The words that are

1 strongest for you, in my opinion, are those words, "only
2 if."

3 GENERAL GERSHENGORN: Yes.

4 JUSTICE BREYER: "Only if."

5 GENERAL GERSHENGORN: Correct, and --

6 JUSTICE BREYER: Only if the witness
7 program. Now, you're saying, well, it's not really only
8 if. There are exceptional circumstances where he has
9 been there for 20 years and we haven't started the
10 removal proceeding, or let's say he has an emergency
11 operation, has to be in the hospital, we all can
12 exercise our wonderful legal imaginations and think of
13 weird instances where it's going to prove that "only if"
14 isn't literally "only if" witness.

15 GENERAL GERSHENGORN: So, Your Honor, I want
16 to be clear about what I'm saying there. I don't think
17 the Attorney General has discretion to release in a
18 situation I was just discussing with Justice Kagan.

19 JUSTICE BREYER: No. I knew that. I know
20 that.

21 GENERAL GERSHENGORN: I think that's a
22 constitutional requirement. In other words, due process
23 would be implicated at that -- at that point. So I'm
24 not saying that at some point the Attorney General has
25 discretion to release. The statute is mandatory, and we

1 read the statute --

2 JUSTICE BREYER: It says "only if." Only if
3 you go to the witness program.

4 GENERAL GERSHENGORN: Correct.

5 JUSTICE BREYER: But my point was, and you
6 did it accidentally but on purpose. You said, well, 20
7 years would be different, and -- and --

8 GENERAL GERSHENGORN: I did it -- to be
9 clear, Your Honor, I did it as a matter of
10 constitutional law.

11 JUSTICE BREYER: Why? Why do it as a
12 matter -- why not just say --

13 GENERAL GERSHENGORN: Because we don't --

14 JUSTICE BREYER: -- like all -- many type
15 same things in the law, words like "any" or "only if"
16 are always interpreted in light of unusual
17 circumstances, not being absolute and you get something
18 unusual.

19 GENERAL GERSHENGORN: Right.

20 JUSTICE BREYER: Okay. Now, why not do that
21 rather than appeal to the Constitution? That may be a
22 picky point, but -- but one --

23 GENERAL GERSHENGORN: But I think it's
24 important.

25 JUSTICE KAGAN: The one -- that's --

1 GENERAL GERSHENGORN: Justice Kagan --

2 JUSTICE KAGAN: -- I asked about it.

3 GENERAL GERSHENGORN: I was just going to
4 say, Justice Kagan had asked me to set aside the
5 statute, so it really was a constitutional analysis.

6 JUSTICE BREYER: Yes.

7 GENERAL GERSHENGORN: And we don't -- we
8 really think that Congress -- this was a deliberate
9 categorical judgment by Congress based on experience
10 over a long number of years where Congress had tried to
11 deal with the concerns about recidivism and flight for
12 criminal aliens through a number of different
13 mechanisms. And what Congress found was that -- that it
14 was very hard to predict and it had very serious
15 consequences, and Congress opted for a categorical
16 judgment.

17 CHIEF JUSTICE ROBERTS: I suppose it's an
18 area where your safety valve, the availability of habeas
19 corpus might come into play..

20 GENERAL GERSHENGORN: Absolutely, Your
21 Honor. And I think that goes into the interpretation of
22 constitutional avoidance, both with respect to criminal
23 aliens and arriving aliens. What Congress understood
24 was that it was legislating against the backdrop of
25 habeas, which provides the kind of failsafe that Justice

1 Kennedy had identified in Demore. And, therefore,
2 Congress legislated on an absolute -- with absolute
3 text, and that doesn't admit for the kind of exceptions
4 that I think Your Honor is pressing. I understand --

5 JUSTICE KAGAN: But if I could go back,
6 General, to the constitutional point. Because if you
7 put Demore aside, I think we would all look at our
8 precedent and we would say, you can't just lock people
9 up without any finding of dangerousness, without any
10 finding of flight risk, for an indefinite period of
11 time, and not run into due process.

12 Now, you have Demore, but Demore was based
13 on the assumption that it was going to be a brief time.
14 It was based on statistics that have now proved to be
15 inaccurate. And the question is, why the Constitution
16 itself -- and you can do it through habeas proceedings
17 or whatever the procedure is -- but why the Constitution
18 itself does not set an outer bound in the way that we've
19 consistently required in, for example, civil commitment
20 cases?

21 GENERAL GERSHENGORN: All right. So, Your
22 Honor, you've packed a lot in there, and I'd like to --
23 I'd like to take on a number of things there.

24 But the answer to your last question is that
25 I don't think it's the focus on the amount of time

1 that's really the way the Court should look at it here.
2 And this, I think, was the insight in Justice Kennedy's
3 concurrence in Demore. The amount of time increases
4 here in part precisely because, as I indicated at the
5 start, Congress has provided a substantial number of
6 substantive and procedural protections for individuals:
7 They have the right to lawyer at their own expense.
8 They have the right to an interpreter. They have the
9 right to present evidence and to gather evidence and to
10 use subpoenas to get evidence. They can appeal to the
11 BIA. They can appeal to the Court of Appeals.

12 But with that process comes time. And I
13 think a focus on just the length of time without the
14 reasons for the delay, without looking at the fact that
15 aliens routinely and understandably file for
16 continuances, and to impose a rigid six-month rule like
17 the Court of Appeals did is really a mistake.

18 With respect to Demore, I really would like
19 to address Your Honor's concern there on a number of
20 situations. Your Honor is right that the statistics we
21 provided to the Court were inaccurate, and we apologize.

22 JUSTICE KAGAN: So I wasn't even blaming
23 you, because I think it was partly the statistics that
24 were provided and partly what the Court did with them.
25 It doesn't really matter who was to blame or who wasn't

1 to blame. I was just suggesting that, in fact,
2 Demore -- Demore says that the average is five months;
3 it turns out that the average is more like a little bit
4 over a year.

5 GENERAL GERSHENGORN: So, Your Honor, so
6 I -- the reason why I think Demore still is good is this
7 reason: I think Demore rested on two pillars.

8 First was the judgment that flight risk and
9 recidivism are real problems and that IJ's are really
10 bad at predicting, and that, therefore, Congress could
11 make a categorical judgment in this area of immigration
12 law that mandatory detention was appropriate.

13 And, second, that unlike Zadvydas, the
14 purpose of the detention was still being served. The
15 purpose of the detention was to effectuate removal, and
16 the detention was not going to be permanent and it was
17 not going to be indefinite. Those are true.

18 It is true that this Court assumed
19 incorrectly that the length of detention was five and a
20 half months. But in Kim -- in Demore itself, the alien
21 had already been in -- had been detained for more than
22 six months, for 197 days, and the Court was sending that
23 individual back for an IJ hearing and a BIA appeal. And
24 so even under the Court's erroneous assumption that
25 there was going to be five and a half months tacked on,

1 we're talking about a detention for a year.

2 Now, with respect to the time limits, they
3 are not trivial. These are serious -- these are serious
4 matters, and we recognize that. The current median time
5 for -- for the Demore figures is around 233 days now,
6 but it's gone from seven to nine months over the years.
7 And the average time, which is not what we think the
8 Court --

9 JUSTICE SOTOMAYOR: So when is it, in theory
10 --

11 GENERAL GERSHENGORN: -- it's more like 10
12 to 12 months.

13 I'm sorry.

14 JUSTICE SOTOMAYOR: -- when it's not the
15 alien's fault, and you seem to suggest that if budgetary
16 matters or personnel matters are what are inflicting the
17 delay that that's okay. Is there any -- you said 20
18 years is the end point. But given that we have a due
19 process right not to be held indefinitely, even though
20 it may have a distant point of release somewhere in an
21 unknown period, because the government now, I
22 understand, if a alien asks for an adjournment, BIA
23 judges who are overbooked are sometimes taking months to
24 give them another date.

25 At what point does the government's behavior

1 come into this analysis?

2 GENERAL GERSHENGORN: So, Your Honor, I
3 think the government's behavior --

4 JUSTICE SOTOMAYOR: Intentionally or not. I
5 mean, I would assume that if the government was just
6 delaying because it wanted to, you would say that's
7 unconstitutional.

8 GENERAL GERSHENGORN: Absolutely, Your
9 Honor. And that is --

10 JUSTICE SOTOMAYOR: All right. But at what
11 point does indefinite, albeit with a lengthy, far-off
12 detention date, become unconstitutional?

13 GENERAL GERSHENGORN: So, Your Honor, we
14 don't think that the mere date itself is what makes it
15 unconstitutional. But to be clear --

16 JUSTICE SOTOMAYOR: No. What makes it
17 unconstitutional in my mind is the unreasonable delay or
18 detention.

19 GENERAL GERSHENGORN: Right. The -- so a
20 couple of points on that, Your Honor.

21 First of all, the -- it is not our view that
22 most of the delays that we are talking about here in the
23 lengthy cases are situations that are resulting from
24 government-resource problems or things of that nature.
25 A lot -- the record indicates that aliens routinely seek

1 continuances and they seek multiple continuances. And
2 they do that for good reason, which is to build a
3 record. What most of the aliens here are seeking is
4 discretionary relief. And if they're seeking
5 discretionary relief, then they're going to want to
6 build the record.

7 So I don't think the record is -- is that
8 most of the delay is IJ, lack of immigration judges or
9 BIA resources. And, indeed, UR expedites the
10 proceedings that involve detained aliens. And so that
11 is a -- a government policy to deal with Your Honor's
12 question.

13 JUSTICE ALITO: Assuming -- assuming that
14 there is a constitutional limit of the type that's been
15 discussed, is that -- do you think that can be addressed
16 in a class action, or is it something that can be
17 addressed only in individual habeas cases?

18 GENERAL GERSHENGORN: So, Your Honor, we
19 think it's clearly the latter, and we really think that
20 that is one of the major flaws of the Ninth Circuit's
21 decision, is that it adopted a class-wide rigid rule
22 that applies to aliens no matter what is the cause of
23 the delay, no matter whether the alien is a criminal
24 alien or arriving alien, no matter whether the alien is
25 seeking discretionary relief or not discretionary

1 relief. That one-size-fits-all approach is not the
2 right way to do it. The way to do it is in individual,
3 as-applied challenges through habeas proceedings, which
4 is what the Court --

5 JUSTICE KAGAN: I guess I don't quite
6 understand that. Why couldn't a court, whether it's the
7 Ninth Circuit or whether it's this Court in reviewing
8 the Ninth Circuit, say, here are the constitutional
9 guidelines. Here's the way to -- it might -- it might
10 not be a one-size-fits-all. It might be a presumptive
11 limit, but the ability to go beyond that in individual
12 cases, but to set those -- to set those guideposts and
13 then let the individual determinations take place.

14 GENERAL GERSHENGORN: So in theory, Your
15 Honor, the short answer is the Due Process Clause
16 doesn't usually permit that kind of broad-based approach
17 that doesn't take advantage -- take cognizance of the
18 various differences between the aliens on the ground. I
19 think, for example, the difference between --

20 JUSTICE KAGAN: Well, wouldn't it be better
21 to set some guideposts that everybody in the country
22 would know to follow rather than having one suit pop up
23 here and one suit pop up here and another in another
24 place and everybody would be treated differently? That
25 does not seem like a good immigration system.

1 GENERAL GERSHENGORN: So the first thing I
2 would say, Your Honor, is that the one thing that we
3 know shouldn't be the case is what the Ninth Circuit has
4 done, which is the opposite of that, which is apply a
5 single standard to everybody regardless of -- regardless
6 of the cause of the delay. I mean, this gets at the
7 very concern that the Court -- that the dissent in
8 Zadvydas, Justice Kennedy's dissent, and then the
9 majority in Demore highlighted, which is that kind of
10 rigid rule creates an incentive for an alien to delay,
11 and we wouldn't adopt the clear-and-convincing standard,
12 which --

13 JUSTICE KAGAN: Well, I wasn't -- I wasn't
14 suggesting a rule that was quite as rigid as that. But
15 I was suggesting more that the Court, say, pick up some
16 of your language in your brief and say that the
17 detention has to serve the purposes for which the
18 detention is meant. And, presumptively, that is -- pick
19 a number -- nine months, a year --

20 GENERAL GERSHENGORN: So, Your Honor --

21 JUSTICE KAGAN: -- six months, whatever,
22 something pretty reasonable, but only presumptively if
23 there is some exceptional circumstance that could be
24 extended.

25 GENERAL GERSHENGORN: So, Your Honor, I

1 think it would be within the Court's power to do that.
2 We don't think that's the way we would approach. I
3 think our -- our --

4 JUSTICE KAGAN: I'm sorry. You do or you
5 don't?

6 GENERAL GERSHENGORN: We do not think that's
7 the way we would advise the Court to approach --

8 JUSTICE KAGAN: No, no, no. I'm sorry --

9 GENERAL GERSHENGORN: We think the Court
10 would have power to do that --

11 JUSTICE KAGAN: Okay. Sorry.

12 GENERAL GERSHENGORN: -- but we don't think
13 that's the way the Court should do it. But what the
14 Court is -- what the Court has generally done in a due
15 process situation is have as-applied challenges, and we
16 think that's the sensible way to go --

17 JUSTICE KAGAN: Well --

18 GENERAL GERSHENGORN: -- given the
19 tremendous variation --

20 JUSTICE KENNEDY: In a class action, the
21 Court has to grant or deny relief. And I don't know.
22 What would be the relief if -- if the Court says, well,
23 we're not going to say, you know, what the situation is
24 going to be for any of the members of this class, but
25 here are our thoughts about how individual determination

1 should be made.

2 GENERAL GERSHENGORN: I agree with that,
3 Your Honor, and that is why we don't think that's what
4 the courts should do. I think -- and so -- I mean, to
5 be clear, I think the Court has the power to give
6 guidance, but we don't think that that is the -- the
7 approach that's most consistent with the Due Process
8 Clause or the way to think about these categories of
9 cases.

10 JUSTICE SOTOMAYOR: Well, how about the ABA
11 amicus brief here?

12 GENERAL GERSHENGORN: I'm sorry. Can I just
13 finish --

14 JUSTICE SOTOMAYOR: Is that -- go ahead.

15 GENERAL GERSHENGORN: We do suggest in our
16 brief that there are -- there are indicators, you know,
17 that -- that 90 percent of the IJ hearings are done
18 within 14 months, and 90 percent of the BIA proceedings
19 are done within 19 months. And what I think those -- we
20 would -- those -- we would offer those to the Court, not
21 as -- as indication that the Due Process Clause has been
22 violated, but those are situations in which one might
23 reasonably, in a -- in a as-applied challenge take
24 advantage of -- take Justice Kennedy's opinion up on its
25 standard and -- and do the kind of searching inquiry

1 that we would think about.

2 JUSTICE SOTOMAYOR: We are in an upended
3 world when we think 14 months or 19 months is a
4 reasonable time to detain a person.

5 GENERAL GERSHENGORN: So, Your Honor, what I
6 -- I totally understand --

7 JUSTICE SOTOMAYOR: -- understand that.

8 GENERAL GERSHENGORN: But what I'm trying to
9 suggest to Your Honor is that that is part and parcel of
10 an overall scheme that offers tremendous process to the
11 individual alien, and that part of the reason for that
12 delay is the government --

13 JUSTICE SOTOMAYOR: But you would think that
14 that process, at least with respect to 1226(b), is to
15 ensure that the person is not a flight risk or a danger.

16 GENERAL GERSHENGORN: Your Honor, it is --
17 it is to effectuate Congress's categorical judgment that
18 those -- either that there -- that they -- is a risk, a
19 flight risk, and a risk of recidivism, and that it's
20 very hard to predict those.

21 JUSTICE BREYER: I have a couple of
22 questions I'd like to ask, actually, because it's a
23 complicated statute. And you can correct me. I think
24 you have some extra --

25 CHIEF JUSTICE ROBERTS: Yeah. I'll -- I'll

1 give you extra time to answer the questions if --

2 JUSTICE BREYER: We're -- we're talking
3 about three categories. The first category is people
4 who show up on the border. That's mostly 1225. I've
5 looked at that. I don't see any words there that would
6 prevent interpreting the statute from saying, of course,
7 you have a bail hearing after six months, and under
8 whatever standards. I'm not going with the Ninth
9 Circuit standards, et cetera. I don't see the words.
10 So put that in your mind, because you're going to tell
11 me the words in a minute.

12 GENERAL GERSHENGORN: Right.

13 JUSTICE BREYER: But the more important
14 part, I think, is the criminal part. And there I have
15 divided my mind into three -- three stages.

16 Stage one, the person is released from jail,
17 let's say. And the statute says, Attorney General, pick
18 him up. And then there is a period of time where he
19 says, I have a right to stay in the United States, and
20 the AG says you don't. And during that period of time
21 we have the "only if" language.

22 And then we go to the period of there is a
23 final removal order, and that's a 90-day order. And
24 there I see no way around the statute. I agree with
25 you. That 90 days, you cannot get out of the statute.

1 I mean, it's definite.

2 Then the removal period ends, and we are in
3 Zadvydas. And unlike you, I don't think Demore
4 overruled Zadvydas. Demore was talking about a brief
5 period of time.

6 So now, let's start with the criminal.

7 GENERAL GERSHENGORN: Okay.

8 JUSTICE BREYER: Let's look at that statute.
9 As you would like to interpret it, during that first
10 period -- remember, the second period I'm with you, the
11 90 days. The third period settled. That's Zadvydas.
12 You got to let him go after six months. So we are
13 talking about the first period.

14 If there's a -- I think -- take my word for
15 it. I might be wrong. I go back and did it. I wrote
16 the Zadvydas thing. I think it said six months.

17 (Laughter.)

18 GENERAL GERSHENGORN: I trust you on that.

19 JUSTICE BREYER: I might be wrong. I'm
20 often wrong in what I think I said. All right?

21 (Laughter.)

22 JUSTICE BREYER: So -- so we are in the
23 first part.

24 Now, on that first part, it's a pretty odd
25 statute that can say you don't have -- you -- we can

1 keep you for two years, you know, or three, or four.
 2 You've just been out of jail, hey, your term is over.
 3 Your punishment's over, but you've got four more years
 4 here of punishment while we try to get to stage two,
 5 which is called the removal order. That's what's
 6 bothering me.

7 It is bothering me that, as a lawyer, it
 8 produces an odd statute. As a person who tries to
 9 interpret the Constitution, I'd say what happened to the
 10 notion that you do let people out on bail when, in fact,
 11 they're not a flight risk. And how can they be punished
 12 for four more years? Maybe it's the Constitution.
 13 Maybe there is a way around that "only if" language.
 14 But the concern is the same.

15 So now -- now you have all my questions out
 16 there, and I -- I know they're -- they're -- do what you
 17 can.

18 (Laughter.)

19 GENERAL GERSHENGORN: Okay. And I'll try to
 20 be -- I'll try to be brief because I'm cognizant of the
 21 Chief Justice's generosity here.

22 I do think that the statute squarely
 23 forecloses it at both stages, Your Honor. If we're at
 24 page 156(a) --

25 JUSTICE BREYER: Yeah.

1 GENERAL GERSHENGORN: -- of the appendix to
2 the petition, the statute starts out 1226(a) that, "The
3 alien may be arrested and detained pending a decision on
4 whether the alien is to be removed" --

5 JUSTICE BREYER: May. May.

6 GENERAL GERSHENGORN: -- "from the United
7 States."

8 But then -- it does say "may" there, but
9 then it says, "Except as provided in Subsection C of the
10 section and pending such decision, the Attorney General
11 may continue" --

12 JUSTICE BREYER: May.

13 GENERAL GERSHENGORN: But it says "except
14 for Subsection C," and then Subsection C is the one that
15 says, unambiguously, "Shall be taken into custody and
16 released only if."

17 JUSTICE BREYER: C is the criminals. C is
18 the criminals, isn't it?

19 GENERAL GERSHENGORN: Yes, Your Honor.

20 JUSTICE BREYER: Okay. I agree. Criminal
21 is a different matter. I'm just talking about -- go
22 ahead. Go ahead.

23 GENERAL GERSHENGORN: All right. Thank you.
24 I'll reserve the balance of my time.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Mr. Arulanantham.

2 ORAL ARGUMENT OF AHILAN T. ARULANANTHAM

3 ON BEHALF OF THE RESPONDENTS

4 MR. ARULANANTHAM: Thank you, Mr. Chief
5 Justice, and may it please the Court:

6 I actually think the dispute between the
7 parties is narrower than it seems based on what my
8 friend, Acting Solicitor General, has just said, because
9 we agree that length by itself doesn't make detention
10 unconstitutional. We agree that there doesn't need to
11 be a hard cap on detention. We're just talking about
12 the need for an inquiry, that is, the need for a hearing
13 that is individualized rather than a categorical
14 presumption that someone is a danger and flight risk.

15 JUSTICE ALITO: Are you making a statutory
16 argument? And the Ninth Circuit's decision was based on
17 the -- an interpretation of the statute, wasn't it?

18 MR. ARULANANTHAM: Yes. And what --

19 JUSTICE ALITO: So are you making a
20 statutory argument or are you making a constitutional
21 argument?

22 MR. ARULANANTHAM: We are making both.
23 Section one makes the constitutional argument. But I
24 still think the dispute is -- is narrower, because
25 really, the primary focus, Your Honor, is about whether

1 the mechanism for implementing that, whether it's
2 constitutional or statutory constraint, has to be
3 habeas, or instead, as Justice Kagan suggested, it could
4 be as I understood --

5 JUSTICE ALITO: Well, I understand that.
6 But to me, at least, it makes a difference whether we're
7 interpreting the statute or whether we're interpreting
8 the Constitution.

9 MR. ARULANANTHAM: It -- it --

10 JUSTICE ALITO: And I'll tell you, on the
11 language of the statute, I think you have a pretty
12 tough -- you have a pretty tough argument.

13 MR. ARULANANTHAM: Your Honor, we concede
14 that as to 1226(c), the -- what you're calling the
15 criminal or mandatory detention subclass, we have to win
16 that there is a serious constitutional problem because
17 their interpretation is not -- I mean, they're
18 completely unreasonable --

19 JUSTICE ALITO: Well, you can't -- you're --
20 is that a constitutional argument or a statutory
21 argument?

22 MR. ARULANANTHAM: Well, if there's an alien
23 --

24 JUSTICE ALITO: Constitutional avoidance
25 isn't just sort of, well, we really don't think we can

1 interpret the statute this way, but we don't have the
2 guts to say that it's unconstitutional. So we're going
3 to put the two things together and say, well, by
4 constitutional avoidance --

5 MR. ARULANANTHAM: Well, I think --

6 JUSTICE ALITO: -- is what it means -- this
7 is what it means.

8 MR. ARULANANTHAM: Understood, Your Honor.
9 But we think that the constitutional -- the statutory
10 interpretation here is no less plausible than the one in
11 Zadvydas. I mean, Zadvydas, you've got a 90-day
12 mandatory detention period followed by a requirement for
13 release and then an exception. And the exception says
14 you may --

15 JUSTICE BREYER: What do you do with "only
16 if"?

17 MR. ARULANANTHAM: Well, "only if" applies
18 to the initial detention. It authorizes people to be
19 released even immediately after they are being picked up
20 if they are in the Witness Protection Program. But it
21 still doesn't speak clearly to what happens when
22 detention becomes prolonged.

23 And as I said, in Zadvydas, the statute said
24 you can detain beyond the removal period. But the Court
25 found that that wasn't clear enough to authorize

1 long-term detention in Justice Breyer's --

2 JUSTICE BREYER: You've got most -- most --

3 Zadvydas turned on the "may," you see. It gave him

4 permission. And as -- as he just pointed out, there's

5 may, may, may, may, may, but then in the criminal side,

6 see, on the criminal side -- I'm not talking about

7 people on the border. I -- you -- pretty strong

8 argument, people on the border -- but there it says,

9 "The Attorney General may release an alien described in

10 paragraph (1)" -- those are the criminals coming out --

11 "only if" -- and then it's the Witness Protection

12 Program.

13 So he says, how do you get around that one?

14 MR. ARULANANTHAM: Understood, Your Honor.

15 I -- I only want to say one more thing about the

16 statute, because I -- I don't want to belabor the point.

17 But five months -- four months after the Zadvydas

18 decision, Congress passed the Patriot Act.

19 The Patriot Act didn't only -- it clearly

20 authorized long-term detention in six-month intervals;

21 it said six months. It did it not only in post order

22 cases, which was speaking directly to Zadvydas, but also

23 in pending cases, that is, cases like this one.

24 So Subsection (a) (7) of that statute

25 authorizes long-term detention, six-month intervals

1 while the case is pending. And it authorizes
2 substantive review over whether the detention should
3 continue, whether the certification remains valid, but
4 only in national security cases, and that's the rest of
5 our statutory argument. I mean, that provision that
6 specifically authorizes long-term detention, it is
7 limited to national security cases, in pending cases,
8 really makes -- makes the government's interpretation
9 hard to make sense of, because why -- you know, under
10 their view they actually have more authority to detain
11 people with simple possession offenses or with petty
12 thefts than they have people who are accused of
13 terrorism grounds. And they actually have even more
14 authority in terrorism cases under 1226(c), under
15 (c)(1)(D), than they have under the Patriot Act that
16 Congress gave them four months after.

17 JUSTICE ALITO: So are you saying that
18 1226(a), the Patriot Act provision, makes the
19 government's interpretation of 1226(c) superfluous?

20 MR. ARULANANTHAM: Yes, as to terrorism
21 cases, as to all the terrorism cases, that is cases
22 where a person is inadmissible or deportable on a
23 terrorism ground, they already had on their view more
24 authority in 1996 than Congress gave them --

25 JUSTICE ALITO: Well, there -- there are

1 different -- there are quite noticeable differences
2 between the two provisions, so I don't know how far this
3 argument can go.

4 For one thing, the -- the list of -- in
5 1226(a) -- (a) -- (a)(3)(A), there are listed one, two,
6 three, four, five, six categories, and four of those are
7 not included in the Patriot Act provision; isn't that
8 right?

9 MR. ARULANANTHAM: That's true, but the
10 terrorism grounds are invoked.

11 JUSTICE ALITO: That's one thing --

12 MR. ARULANANTHAM: And the Patriot Act
13 presumably did -- meant to focus on terrorism.

14 JUSTICE ALITO: Yes. Okay. That's one
15 thing.

16 Under 1226(c)(1), the Attorney General shall
17 take any -- shall take into custody any alien who under
18 then sub (d) of that is inadmissible or deportable. So
19 the person must be inadmissible or deportable. And
20 under 1226(a), the Attorney General -- (a)(1)(A), the
21 Attorney General -- well, what is it, (a)(3)(A), the
22 Attorney General has reasonable grounds to believe. So
23 it's a different standard.

24 MR. ARULANANTHAM: Yes. Although the
25 government interprets the language you read about in --

1 is it admissible just to mean that they believe whether
2 or not it's been charged.

3 But I don't want to belabor the point, Your
4 Honor. We have to establish there is a serious
5 constitutional problem. There's no question about that.

6 JUSTICE KAGAN: Can I ask about your
7 statutory interpretation on 1225?

8 MR. ARULANANTHAM: Yes, please, Your Honor.

9 JUSTICE KAGAN: That's the one where it
10 says, the alien shall be detained for, and then one
11 provision says, for further consideration of the
12 application for asylum, and the other says, for a
13 removal proceeding. And you say that -- that that
14 applies only until the relevant proceedings starts.

15 What applies after that, in your view, and
16 where would we find it in the statute?

17 MR. ARULANANTHAM: It's 1226(a) which says
18 the Attorney General may detain or may release pending a
19 decision on whether the alien --

20 JUSTICE KENNEDY: It's really not
21 interpreting. It says, "for the proceeding." If I tell
22 my children I'm going to visit them for Christmas, that
23 doesn't mean I have to leave on Christmas Eve.

24 MR. ARULANANTHAM: It does not, Your Honor.
25 I would hope --

1 JUSTICE KENNEDY: That's your
2 interpretation.

3 MR. ARULANANTHAM: No. Because sometimes
4 "for" is read that way. Other times "for" means for the
5 purpose of. And the way you know that in this
6 provision, Your Honor, there is two ways you know it.

7 First, if you are denied a credible fear
8 interview, when Congress rewrote this whole statute,
9 right, they wrote the word "pending" rather than "for"
10 into a different subsection, a neighboring subsection,
11 and that's the subsection for people who lose the
12 credible fear interview. They're not in our class. Our
13 class is only people who pass the credible fear
14 interview, are found to have a significant possibility
15 of prevailing in their asylum --

16 JUSTICE KENNEDY: As I under -- as I
17 understood, here the -- the authority ends once the
18 proceeding begins, then you go to 1226.

19 MR. ARULANANTHAM: That's right, then you go
20 to 1226(a). You still had detention authority. And
21 here's the other thing --

22 JUSTICE KENNEDY: It seems to me that's a
23 very odd interpretation for the statute.

24 MR. ARULANANTHAM: Well, Your Honor, the
25 other argument for that interpretation is that the

1 government already provides bond hearings to people
2 detained under cover of that same statute that you're
3 talking about, the one that says, you shall be detained
4 for further consideration of the asylum application. So
5 if you cross the border in the desert, and then are
6 arrested, and then pass your credible fear interview,
7 the government -- you're still under that same statute,
8 shall be detained for consideration of the asylum
9 application -- the government gives bond hearings to
10 those people, and it doesn't wait for six months. It
11 gives it to them as soon as they are in the immigration
12 court, and, therefore, pursuing the removal proceedings.

13 So here we have a very straightforward
14 application of Clark v. Martinez. You've got the same
15 statute. It applies to two groups. One are our class
16 members who present themselves at the border. The other
17 are the people who cross in the desert. The government
18 is already providing bond hearings to people who cross
19 in the desert. And that statute doesn't distinguish
20 between the two people.

21 JUSTICE BREYER: What happens -- what
22 happens if they present themselves at the border --

23 MR. ARULANANTHAM: Then --

24 JUSTICE BREYER: -- or the desert, and they
25 say, I have a right to live in the United States?

1 You've made a mistake in respect to me. What happens to
2 that person?

3 MR. ARULANANTHAM: If you're -- if you're
4 crossed in the desert, you get a bond hearing at --
5 assuming that you establish -- I mean, you could be
6 summarily moved, but if you --

7 JUSTICE BREYER: But, of course, I say I
8 don't want to leave. I'm a right -- I have a right to
9 live here.

10 MR. ARULANANTHAM: Right. Then -- then you
11 get a bond hearing under 1226(a). If you establish that
12 you have a credible fear --

13 JUSTICE BREYER: What happens if you're at
14 the border and you come up and you --

15 MR. ARULANANTHAM: You don't get a bond
16 hearing. Instead you're only subject to the parole
17 process under which you never get a hearing on danger
18 and flight risk. The deportation officer, the jailer,
19 is the one deciding whether you can be detained even for
20 years.

21 JUSTICE BREYER: And what's the language of
22 the statute that you believe the government points to,
23 to say you never get a bond hearing?

24 MR. ARULANANTHAM: I mean, it says, shall be
25 detained for, as Justice Kennedy said. It's -- that's

1 what the statute said. The bare reading of that
2 language to permit bond hearings for one set of people
3 who are detained under them, and if you can read it for
4 them, you can read it for the other people. This is
5 BIA's decision in the matter of XK.

6 Now, going back to the constitutional
7 question we were discussing earlier and habeas, and,
8 Your Honor, I think it's actually critically important
9 whether the enforcement mechanism for the right we are
10 talking about here is available to -- to immigrants and
11 immigration court directly or instead has to come via
12 habeas, and the reason why -- there is two reasons.

13 The first, this is a class of mostly
14 unrepresented people who are obviously not familiar with
15 our legal system. The vast majority are -- and we know
16 both from this record and from experience for years in
17 the lower courts on this, that most of them cannot file
18 habeas petitions. So if you make the only enforcement
19 mechanism habeas, you are --

20 CHIEF JUSTICE ROBERTS: You mean cannot as
21 a -- as a practical matter as opposed to a legal matter?

22 MR. ARULANANTHAM: Yes, Your Honor, no
23 suspension problem here. As a practical matter, they
24 cannot, and we know this as a matter of experience.

25 In addition, the habeas cases take months to

1 decide. There's a particular -- and in the Eleventh
2 Circuit they take about 19 months. In the Third
3 Circuit, which is the fastest circuit, they still take
4 almost six. So as a practical matter, it's not a
5 meaningful remedy for prolonged detention, if that's the
6 claim that you're bringing.

7 The second serious problem with it is that
8 this Court has never before held that a due process
9 right can be vindicated simply by the availability of
10 habeas. I mean, think about it. Pretrial detainees,
11 they have habeas. Why do they get a bond hearing in a
12 matter of days? Civil commitments. They -- they have
13 habeas. Why is there a requirement that you have a
14 hearing at the outset of civil detention? So it would
15 be a -- a fundamental shift.

16 CHIEF JUSTICE ROBERTS: I'm sorry. I missed
17 your -- your argument. They have hearings, why do they
18 meet habeas?

19 MR. ARULANANTHAM: No. Excuse me, Your
20 Honor. I apologize for that.

21 This Court has held that there is a hearing
22 requirement as a matter of due process for people in
23 pretrial detention, for people facing civil commitment,
24 et cetera, and that is not dependent on their filing a
25 habeas petition. The Due Process Clause gives that

1 right, and so the hearing has to be provided whether or
2 not you file a habeas, and so similarly here, if the Due
3 Process Clause requires a hearing at some point in time,
4 it should require that hearing whether or not the
5 detainee has a lawyer who they can get to file a habeas
6 petition.

7 JUSTICE KAGAN: But suppose the Due Process
8 Clause requires something a little bit more complex than
9 a simple date. Suppose that it does require a little
10 bit of individualized determination as to whether it
11 should be six months or, in a particular case, a little
12 bit longer, how does that get decided and what vehicle?

13 MR. ARULANANTHAM: Well, I still think the
14 vehicle would be this case, and I don't think the fact
15 that it's a class action is a barrier to that. We
16 have -- we have sought relief on behalf of people
17 detained for years, and if this Court said, for example,
18 that a detainee who is engaged in dilatory tactics is
19 not entitled to a danger and flight risk determination
20 in their case, that's relief that would then be
21 available because you'd still get the inquiry, right?
22 Because somebody has to look at the case at some point
23 and see, is this a case where there's dilatory tactics,
24 or is this a case where the person didn't spend even a
25 day in jail or --

1 CHIEF JUSTICE ROBERTS: Well, that seems to
2 me to be a strong argument against using the class
3 action as a vehicle to resolve these questions. I mean,
4 if the nature of relief depends upon peculiar
5 circumstances, it seems to me that the commonality
6 requirement is lacking.

7 MR. ARULANANTHAM: So let me give a
8 procedural and a substantive answer to that,
9 Mr. Chief Justice.

10 The government did not seek cert on class
11 cert. They litigated it. They lost it in the Ninth
12 Circuit. They actually re-raised it in the summary
13 judgment. They didn't seek review of it. So they have
14 conceded both typicality and commonality for purposes of
15 this proceedings.

16 JUSTICE ALITO: Well, but the decision of
17 the Ninth Circuit was based on interpretation of this
18 statute, and you want to go -- you want to -- you want
19 to affirm on an alternative ground, which is that it's
20 unconstitutional, so I don't know how far you can get
21 with that argument.

22 But we could -- if you want to be very
23 strict about what's before us, we could simply say the
24 Ninth Circuit's interpretation of the statute is wrong
25 and remand for further proceedings to the Ninth Circuit.

1 MR. ARULANANTHAM: Yes, Your Honor. I think
2 that -- that -- that would be consistent with the
3 class -- the way the government has litigated the class
4 certification.

5 But let me also give a substantive answer to
6 Your Honor --

7 JUSTICE KENNEDY: But -- and it would also
8 be consistent with the way the Ninth Circuit interpreted
9 the case and the case that's here. We do not have the
10 constitutional issue before us.

11 MR. ARULANANTHAM: We've argued it in
12 Section I of our brief, but you're correct that the
13 Ninth Circuit didn't rule on a constitutional ground.
14 Absolutely, Your Honor.

15 The second point I want to make, though, is
16 everybody in the class, in our view, is entitled to an
17 inquiry. Someone has to look at the detention and
18 decide, is this a detention which remains reasonable?
19 Does it continue to be reasonable in relation to its
20 purpose? That's our argument.

21 Many of the people under the injunction
22 don't get out. About 30 percent of them don't even get
23 a bond set. And even of those who do get a bond set,
24 another 30 percent don't actually get out under the
25 bond. So --

1 CHIEF JUSTICE ROBERTS: Does that represent
2 a typical remedy in habeas to require inquiries in every
3 case? Perhaps I'm wrong, but I would have thought
4 habeas is either you can be detained or you can't be
5 detained, as opposed to a procedural across-the-board
6 requirement of a hearing.

7 MR. ARULANANTHAM: No, Your Honor. For
8 example, the Hamdi decision, the Court requires
9 hearings. That particular case was a habeas, but it
10 sets a due process rule that then applies in other
11 cases. The Court has to determine the conditions under
12 which the detention would be lawful. And, as I said, to
13 confine individual detainees here to habeas petitions is
14 effectively to close the house door.

15 JUSTICE SOTOMAYOR: So tell me why the
16 regulations under 1226(a) are inadequate. There is an
17 entitlement -- Zadvydas is an administrative -- or the
18 response by the BIA or the INS, whatever they're calling
19 it today, was to create an administrative process. So
20 why is the one here inadequate?

21 MR. ARULANANTHAM: I mean, we have very few
22 quarrels with the 1226(a) regulations that govern people
23 who are entitled to bond hearings. I mean, obviously,
24 as they're promulgated, now they wholly exclude people
25 who have certain criminal convictions and --

1 JUSTICE SOTOMAYOR: Well, standing on its
2 own --

3 MR. ARULANANTHAM: Right. But --

4 JUSTICE SOTOMAYOR: -- those aliens -- those
5 aliens who have been here for a long time but didn't
6 commit a crime.

7 MR. ARULANANTHAM: Yes, Your Honor. I mean,
8 our view, it said on the briefs we believe the burden of
9 proof should be on the government by clear and
10 convincing, because that's the standard used in
11 significant deprivations of liberty and for periodic
12 hearings and such.

13 But the most important thing to us is that
14 it be a meaningful hearing. So there has to be a way
15 for the detainee to raise, I was not -- spent even a day
16 in jail. I was not sentenced to even a day in jail, and
17 yet I've spent 10 months in immigration detention.

18 Or like Mr. Rodriguez, I came here at the
19 age of one. I don't know anybody in the place I'm from,
20 so I'm not a flight risk. Or I'm going to win my case
21 because I'm eligible for cancellation of removal, which
22 is true of more than half of the mandatory subclass.
23 There has to be a way where they can make these kinds of
24 arguments.

25 JUSTICE SOTOMAYOR: Why are those arguments

1 not available in the administrative process?

2 MR. ARULANANTHAM: They are available under
3 1226(a). If we could get everyone onto that statute,
4 then they would be available and --

5 JUSTICE SOTOMAYOR: I'm looking just at that
6 statute.

7 MR. ARULANANTHAM: Yes.

8 JUSTICE SOTOMAYOR: I know you want to look
9 at 1225 and 1226(c), but I'm looking just at 1226(a).

10 MR. ARULANANTHAM: Yes. So our position is
11 all of the class should properly be understood --
12 receive the benefit of the 1226(a) procedures. And our
13 only disagreements with those are in Section III of our
14 brief, as I said, the burden of proof, and that the
15 hearings be periodic, because sometimes people get
16 detained for, you know, three, four years. I've had
17 clients detained seven years. And so there has to be
18 some kind of periodic --

19 JUSTICE SOTOMAYOR: Periodic review of
20 long-term detentions under 1226(a).

21 MR. ARULANANTHAM: Correct, Your Honor.

22 JUSTICE SOTOMAYOR: But you're not -- you're
23 not arguing that they have to be, like the Ninth Circuit
24 said, a court review. It can be simply an
25 administrative review.

1 MR. ARULANANTHAM: Oh, no, Your Honor. It
2 has to be by a neutral decisionmaker, which, you know,
3 we draw in parts from Morris v. Brewer, which Justice
4 Kennedy cited in the -- in your defense against
5 Zadvydas, that there has to be a neutral decisionmaker.
6 The ICE officials who are making these decisions are
7 essentially the jailer. They're local detention
8 officers.

9 JUSTICE SOTOMAYOR: But you're not -- you're
10 not -- you wouldn't be quarrelling if it was an
11 immigration judge.

12 MR. ARULANANTHAM: Yeah, absolutely not. An
13 immigration judge is all that we are seeking with
14 respect to that, Your Honor.

15 JUSTICE SOTOMAYOR: And that's not what
16 exists today?

17 MR. ARULANANTHAM: Correct. For -- it
18 exists for people detained under 1226(a) as they
19 understand the statute, but it doesn't apply to the
20 people with criminal convictions or --

21 JUSTICE SOTOMAYOR: I'm trying to
22 concentrate on 1226(a).

23 MR. ARULANANTHAM: Okay, Your Honor.

24 JUSTICE SOTOMAYOR: What's wrong with the
25 administrative process?

1 MR. ARULANANTHAM: For --

2 JUSTICE SOTOMAYOR: As it exists today.

3 MR. ARULANANTHAM: Only that the burden of
4 proof, in our view, should be clear and convincing on
5 the government and that there should be a periodic
6 hearing, or, as Your Honor had suggested, if you take --
7 make them say the length of detention is a relevant
8 factor so that you can get a new hearing just based on
9 the fact that the time has passed, that would help.

10 But to be clear, Your Honor, well over half
11 of this class is not under 1226(a) now; right? So we'd
12 have to win -- for it to be meaningful relief for the
13 vast majority of people, we'd also have to win that when
14 detention becomes prolonged, the regulations that govern
15 1226(a) then come to govern the -- both the arrivings
16 and the people who --

17 JUSTICE SOTOMAYOR: That -- that's pretty
18 hard to do with 1226(c) --

19 MR. ARULANANTHAM: So then --

20 JUSTICE SOTOMAYOR: -- when 1226(a) says
21 this applies to everything but. The statute is pretty
22 clear on that.

23 MR. ARULANANTHAM: Okay. So in that case,
24 Your Honor, let me go back to, then, the constitutional
25 discussion that we were having earlier. My friend had

1 suggested that that hearing that's available, even
2 perhaps only as a matter of the Due Process Clause, that
3 it's sufficient for it to focus on whether the
4 government has engaged -- you know, has run proceedings
5 very quickly so that if a person is engaged in good
6 faith litigation of a substantial defense that, in the
7 government's view, as I understand it, that's a
8 sufficient justification for detention.

9 And that is actually the most serious
10 problem with their view on the Due Process Clause.
11 Because if a person has a substantial defense and they
12 are litigating that in good faith, that does not
13 necessarily mean that their detention is serving a
14 reasonable purpose. In fact, it's almost inversely
15 correlated to it; right? I mean, if a person has a
16 substantial defense, then it's far more likely that they
17 are not a flight risk because they're going to want to
18 go to immigration court to maintain their immigration
19 status.

20 And similarly, if a person has a substantial
21 defense, that means they're not in a class of people
22 that Congress wanted to mandate the deportation of,
23 which probably means they have a less serious crime. If
24 you are an aggravated felon, for example, you're not
25 eligible for LPR cancellation of removal. Most of the

1 mandatory subclass is eligible for that.

2 JUSTICE ALITO: Do you think that the flight
3 risk and danger to the community are both continuums?

4 MR. ARULANANTHAM: Yes, Your Honor, but I
5 think it has to be reasonably related to the detention.
6 So -- excuse me, Your Honor.

7 JUSTICE ALITO: Well, so if you have the
8 situation where the person is litigating in -- for -- in
9 a -- there has been lengthy litigation, but the judge
10 can't say this is done in bad faith or it's dilatory,
11 it's just very lengthy and it keeps going on and on and
12 on and on, and then you have a flight risk that's
13 someplace on this scale and you have a risk to the
14 community that's someplace on this scale, how can you
15 address how something like that can come out -- should
16 come out with any kind of a categorical role?

17 MR. ARULANANTHAM: So we don't advocate how
18 that person -- releasing that person on a categorical
19 rule. We're only talking about getting the inquiry. So
20 we agree: That is a very individualized judgment that
21 the judge has to look at: How serious is the criminal
22 history here? How strong are the equities as to flight
23 risk?

24 JUSTICE KENNEDY: You do say -- or the Ninth
25 Circuit says there has to be clear and convincing

1 evidence which is higher than the flight risk standard
2 in a standard bail case.

3 MR. ARULANANTHAM: It is, Your Honor.
4 Although, remember, these are only hearings happening
5 after six months. So, you know, you got that bail
6 hearing in a matter of days in the criminal context.
7 But --

8 JUSTICE BREYER: Is this -- is this --
9 right. I'm focusing now right on the people who want to
10 come into the United States. If they're in the desert
11 and they say, I won't go back because I have a right to
12 live here, they do get a bail hearing. So if the whole
13 is taking a long time, they'll at least have a bail
14 hearing.

15 If they're at the border and they're coming
16 in under the same statute, 1225, they say, I'm not going
17 back. I have a right to live here. And then there is
18 no hearing?

19 MR. ARULANANTHAM: That's correct, Your
20 Honor.

21 JUSTICE BREYER: Well, how can that -- I
22 don't get that, because what it says is "may"
23 throughout, until you get to the word "shall be detained
24 for a proceeding under Section 1229(a)"; is that right?

25 MR. ARULANANTHAM: That's correct.

1 JUSTICE BREYER: So I look up
 2 Section 1229(a). And Section 1229(a), which I've been
 3 reading, doesn't say anything about keeping them in
 4 detention. So why isn't it the simplest thing in the
 5 world once that person's at the border and they say,
 6 we're going to detain you for 1229(a). You say, have
 7 the 1229(a) tomorrow. And if they don't have it
 8 tomorrow, then you say, but I'm into the 1229(a); it
 9 just hasn't been scheduled yet. And therefore, you get
 10 bail after six months?

11 Have you tried that one?

12 MR. ARULANANTHAM: I mean, that's --

13 JUSTICE BREYER: What did they say?

14 MR. ARULANANTHAM: That's our statutory
 15 argument. The government says that the regulations,
 16 even though -- even though the person is in front of an
 17 immigration judge, the government says that the
 18 regulations prevent the immigration judge from having
 19 the power to release the person on bail. So even
 20 though --

21 JUSTICE BREYER: So it's the regulations;
 22 it's not the statute. So we could say -- I mean, I'm
 23 just saying -- you're going to agree with this, which is
 24 the problem. I need a disagreement.

25 But the -- the -- you could say they do it

1 for the desert. The language doesn't forbid it. It
2 throws you into 1229(a). It's possible to interpret the
3 statute as saying for purposes of a bail hearing, the
4 1229(a) starts tomorrow.

5 MR. ARULANANTHAM: Yes, sir.

6 JUSTICE BREYER: Okay. So we could do that
7 one on the statute if it is correct that you should not
8 hold a person for years in the United States without
9 giving him a chance to get back to his freedom through a
10 bail hearing, if appropriate.

11 Okay. (c). Now, I'm still stuck on (c).
12 And the reason, the value of a statutory interpretation
13 is that we're dealing with tens of thousands, hundreds
14 of thousands, or millions of people, possibly. And it's
15 an administrative agency organization, and they need a
16 rule. They need a rule. And if we can interpret the
17 statute, you can give them a rule. And that rule, then,
18 can have lots of discretion in it through bail hearings,
19 et cetera.

20 MR. ARULANANTHAM: Yes.

21 JUSTICE BREYER: But I haven't heard from
22 you yet what I -- I see no way -- if you want to tell
23 me -- I see no way of getting around the 90 days. That
24 90 days, it seems to me to be they don't get a hearing
25 around the 90 days. The removal order is there.

1 MR. ARULANANTHAM: So, Your Honor, those
2 people -- I won't indulge you with disagreement except
3 --

4 JUSTICE BREYER: Good.

5 MR. ARULANANTHAM: -- on this one point:
6 Those people are not in our class. If you are --

7 JUSTICE BREYER: You are -- you are not
8 worried on a --

9 MR. ARULANANTHAM: We are not worried. If
10 the government --

11 JUSTICE BREYER: Okay. Then after, we've
12 got Zadvydas. And then before --

13 MR. ARULANANTHAM: Correct.

14 JUSTICE BREYER: -- the 90 days starts, they
15 say, well, gee, shouldn't we -- shouldn't there be an
16 exception here so that the period between the time they
17 are released from their punishment to the time we have
18 the hearing, if that goes on for 10 years, you know, you
19 can't -- the person was supposed to be punished for six
20 months, not for 10 years.

21 MR. ARULANANTHAM: Yes. And --

22 JUSTICE BREYER: I got your argument.

23 MR. ARULANANTHAM: That's right.

24 JUSTICE BREYER: But I want to know, what do
25 I do with the language?

1 MR. ARULANANTHAM: Right.

2 JUSTICE BREYER: And -- and -- and
3 the -- the -- you know, language counts.

4 MR. ARULANANTHAM: Yes.

5 JUSTICE BREYER: So I --

6 MR. ARULANANTHAM: Yes. Two -- two thoughts
7 to work on the language, Your Honor.

8 First, assuming nobody is willing to accept
9 1226(c) can be interpreted, every court of appeals said
10 that it could be interpreted, at least to have some
11 reasonableness limit in it, whether a six-month rule or
12 another one.

13 But if -- if I can't persuade Your Honors of
14 that, the Due Process Clause often -- the court does use
15 rules of administrability where they are needed to
16 create uniformity of practice and --

17 CHIEF JUSTICE ROBERTS: Well, the court
18 below didn't reach your constitutional argument, right?

19 MR. ARULANANTHAM: It did not, Your Honor.

20 CHIEF JUSTICE ROBERTS: Well, do you expect
21 us to do it in the first instance?

22 MR. ARULANANTHAM: There's a voluminous
23 record, and it's entirely briefed, but certainly the
24 Court could. But the Court could also remand for
25 consideration --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 JUSTICE KAGAN: We're not making up a

1 statute; we're devising a constitutional limit.

2 MR. ARULANANTHAM: Correct, Your Honor.

3 These are all administrable --

4 JUSTICE KAGAN: So we're beyond --

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

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

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

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

1 be particularly persuasive.

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

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

7 (Laughter.)

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

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

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

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

1 deportation officer just chooses not to believe him.

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

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

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

15 Four minutes, General Gershengorn.

16 REBUTTAL ARGUMENT OF IAN H. GERSHENGORN

17 ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

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

1 What Justice Kennedy said --

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

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

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

25 And not only is it correct -- is that

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

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

11 GENERAL GERSHENGORN: And that's the --

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

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

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

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

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

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

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

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

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