



# Can Aliens in Immigration Proceedings Be Detained Indefinitely? High Court Rules on Statutory, but not Constitutional Authority

Updated April 3, 2018

Recently, the Supreme Court in *Jennings v. Rodriguez* interpreted provisions of the Immigration and Nationality Act (INA) as authorizing the potentially indefinite detention of certain categories of aliens, without bond, who are awaiting removal proceedings. The Court reversed a [decision](#) by the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit), which upheld a federal district court's [injunction](#) requiring aliens detained under one of three statutes to be afforded a bond hearing, and potentially be released from custody, if held longer than six months. Because the indefinite detention of at least some categories of aliens covered by the challenged statutes would arguably raise constitutional concerns, the Ninth Circuit had construed the statutes so that the period in which they authorized detention without bail was limited to six months. But the Supreme Court ruled that this interpretation was implausible given the statutes' text, and the Court held that the statutes provided no limit to the length of an alien's detention pending removal proceedings. Upon remand, the lower courts may confront the constitutional question their earlier interpretation of the challenged statutes was intended to avoid: Is it constitutionally permissible for the government to indefinitely detain aliens during immigration proceedings?

## Background

As a general matter, aliens in proceedings which may lead to removal from the United States are potentially subject to detention to ensure their presence at those proceedings and, in some cases, to alleviate any threat that those aliens would pose to the community if released. The immigration detention scheme is multifaceted, with different rules depending upon whether the alien is arriving or apprehended in the United States and whether the alien has engaged in certain proscribed conduct. In some cases, detention is discretionary, and an alien may be released on parole or bond pending the outcome of proceedings. In other instances, detention is required, with the relevant statute making no mention of the possibility of release from custody. The *Jennings* case focused on three statutes governing the detention of aliens during removal proceedings, none of which expressly require detained aliens to be given bond hearings:

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LSB10112

- (1) [INA § 235\(b\)](#), which generally *requires* the detention of “arriving aliens,” as well as certain other aliens who have not been admitted or paroled into the United States and are subject [to removal](#);
- (2) [INA § 236\(c\)](#), which generally *requires* the detention of aliens who are removable because of specified criminal activity or security grounds upon their release from criminal incarceration; and
- (3) [INA § 236\(a\)](#), which generally authorizes the detention of aliens arrested pending removal proceedings, and permits (but does not require) aliens not subject to mandatory detention to be released on parole or bail.

*Jennings* involved a [class action](#) by aliens within the Central District of California who had been detained under one of the three detention statutes, in many cases for more than a year. The plaintiffs [claimed](#) that their prolonged detention without a bond hearing violated their due process rights. This claim was premised primarily upon the plaintiffs’ reading of two Supreme Court cases, *Zadvydas v. Davis* and *Demore v. Kim*. In *Zadvydas*, the Court concluded that “serious constitutional concerns” would be raised if lawfully admitted aliens were indefinitely detained *after* removal proceedings against them had been completed. Accordingly, the *Zadvydas* Court construed the [challenged statute](#), which provides that certain aliens ordered removed “may” be detained following a statutorily prescribed 90-day mandatory detention period, to have an implicit temporal limitation of six months. If that six-month period elapses and the alien’s removal had not been effectuated, the *Zadvydas* Court held, the alien generally would need to be released from custody. On the other hand, two years later, in *Demore v. Kim*, the Court held that the mandatory detention of certain aliens *pending* removal proceedings—including lawfully admitted aliens—was constitutionally permissible. The relationship between the *Zadvydas* and *Demore* rulings has been open to debate. Some have construed the rulings to mean that the standards for mandatory, indefinite detention *prior to* a final order of removal differ from those governing detention *after* a final order is issued. However, [several lower courts](#) have suggested that mandatory detention pending a final order of removal may, if “prolonged,” raise similar constitutional issues as those raised after a final order.

Litigation in *Jennings* lasted several years and involved repeated decisions and orders by the district court and the Ninth Circuit. In 2015, the Ninth Circuit [upheld](#) a permanent injunction requiring the Department of Homeland Security (DHS) to provide aliens in the Central District of California who have been detained longer than six months under INA §§ 235(b), 236(a), and 236(c) with individualized bond hearings. In its opinion, the Ninth Circuit expressed concern that the detention statutes, if construed to permit the indefinite detention of aliens pending removal proceedings, would raise “[serious constitutional concerns](#)” given the reasoning of the Supreme Court in *Zadvydas*. Although the Supreme Court in *Demore* had upheld DHS’s authority to detain aliens without bond under [one of these statutes](#), the Ninth Circuit [construed](#) *Demore*’s holding as being limited to the constitutionality of “brief periods” of detention, and not to situations where detention of an alien lasted an extended period. The Ninth Circuit noted that the constitutional concerns identified in *Zadvydas* involved aliens within the United States, and reviewing courts had typically considered aliens seeking initial admission into the country as having [less due process protection](#). Nonetheless, the Ninth Circuit believed that the constitutional concerns raised by *Zadvydas* were pertinent to INA § 235(b), notwithstanding that this provision primarily addresses aliens seeking initial entry to the United States. The Ninth Circuit reasoned that the statute still raised constitutional issues, because it could in [some circumstances](#) apply to returning lawful permanent residents (LPRs) who [are entitled](#) to more robust protections than aliens seeking initial entry into the United States.

Recognizing the constitutional limits placed on the federal government’s authority to detain individuals, the Ninth Circuit [ruled](#) that the INA’s detention statutes “should be construed through the prism of constitutional avoidance” as containing implicit time limitations. Applying this standard, the appellate court interpreted the mandatory detention provisions of [INA §§ 235\(b\) and 236\(c\) to expire after six months’ detention](#). After that point, the government could only detain an alien under INA § 236(a), at which point the alien would be eligible for bond and possible release. The Ninth Circuit [further affirmed](#)

the lower court's injunction requiring periodic bond hearings every six months, and requiring aliens to be granted bond and released from custody unless the government proved by clear and convincing evidence that further detention was warranted.

## The Supreme Court's Decision

The Supreme Court [granted](#) certiorari to the government's appeal of *Jennings*, and after [holding](#) the case over from the October 2016 term, issued its decision in February 2018. In a 5-3 decision, the Supreme Court [reversed](#) the Ninth Circuit's decision. In the [plurality opinion](#) written by Justice Alito (joined in full by Chief Justice Roberts and Justice Kennedy, and joined in part by Justices Thomas, Gorsuch, and Sotomayor), the Court first addressed whether it had [jurisdiction](#) to review the plaintiffs' claims in light of an [INA provision](#) generally limiting judicial review of actions to remove an alien except as part of the review of a final order of removal or other specified circumstances. The Court [determined](#) that this provision did not foreclose the plaintiffs' challenge, as the question of whether certain INA provisions permit indefinite detention did not relate either to an order of removal, the government's decision to seek removal, or the process by which an alien's removability would be determined. The Court also [ruled](#) that [INA § 236\(e\)](#), which bars judicial review of the government's "discretionary judgment" or "decision" regarding an alien's detention or release, did not preclude the plaintiffs' claims regarding their detention under § 236(a) and (c) because plaintiffs challenged the "statutory framework" allowing their detention rather than discretionary action taken against them.

On the merits of the case, the Court [rejected](#) as "implausible" the lower courts' construction of the challenged detention statutes. Here, the Court [cautioned](#) that the Ninth Circuit's reliance on the constitutional avoidance doctrine was misplaced. The Court [distinguished](#) *Zadvydas* because the [statute](#) at issue in that case did not clearly provide that an alien's detention after an initial 90-day period was required. Accordingly, in *Zadvydas*, the Court could appropriately construe that statute as containing an implicit time limitation to avoid the constitutional issue raised if the statute was read to permit the indefinite detention of an alien who, though ordered removed, could not foreseeably be transferred to another country. On the other hand, [the Jennings Court reasoned](#), both INA §§ 235(b) and 236(c) were textually clear in generally requiring the detention of covered aliens during removal proceedings, and [nothing](#) in INA § 236(a) required bond hearings after an alien was detained under that authority. [According](#) to the Court, the Ninth Circuit could not construe the statutes to require bond hearings simply to avoid ruling on whether they passed constitutional muster: "Spotting a constitutional issue does not give a court the authority to rewrite a statute as it pleases."

Having rejected the Ninth Circuit's interpretation of INA §§ 235(b), 236(a), and 236(c) as erroneous, the Court [remanded](#) the case to the lower court to address, in the first instance, the plaintiffs' constitutional claim that their indefinite detention under these provisions violated their due process rights. In addition, having resolved the statutory interpretation question, the Court directed the Ninth Circuit to [reexamine](#) whether the plaintiffs could continue litigating their claims as a class action in light of, among other things, an [INA provision](#) that prohibits federal courts from enjoining the operation of the INA's detention statutes unless the court is reviewing a challenge by an individual alien in removal proceedings (the Ninth Circuit had [determined](#) that this provision did not bar jurisdiction to review the plaintiffs' *statutory* challenge to their indefinite detention because they were not seeking to enjoin the operation of the detention statutes, but to enjoin conduct they alleged was not authorized by those statutes).

In a [concurring opinion](#), Justice Thomas (joined in part by Justice Gorsuch) agreed that the Ninth Circuit had erroneously interpreted the challenged detention statutes. But he argued that, contrary to the opinion reached by the plurality, claims challenging detention during removal proceedings "fall within the heartland" of the INA's [jurisdiction-stripping provision](#).

In a [dissenting opinion](#), Justice Breyer (joined by Justices Ginsburg and Sotomayor) [argued](#) that INA §§ 235(b), 236(a), and 236(c) should be interpreted as requiring bond hearings after six months' detention. [Recognizing](#) that “the Constitution does not authorize arbitrary detention” and that aliens have the right to due process (including, in Justice Breyer’s [view](#), not only aliens within the United States but also those aliens seeking initial entry), Justice Breyer [argued](#) that interpreting these INA provisions as permitting indefinite detention would likely render the challenged statutes unconstitutional. Given this concern, Judge Breyer [contended](#) that INA §§ 235(b), 236(a), and 236(c) should be interpreted as authorizing bail hearings when detention is prolonged because the statutes’ language, purpose, context, and history were consistent with the underlying notion that individuals subject to detention have “the basic right to seek bail.”

## Implications of the Court’s Decision

The INA establishes a detention framework that authorizes, and in some instances, requires, the detention of aliens in removal proceedings without stating whether detention cannot last longer than a specified period. The *Jennings* Court read this framework as plainly providing for the detention of certain aliens for an indefinite period without bond, and in doing so, characterized the Ninth Circuit as having inappropriately used the constitutional avoidance doctrine to construe the challenged statutes in a manner that conflicted with their plain text.

But while the Supreme Court affirmed the government’s *statutory* authority to detain aliens for an indefinite period under the challenged statutes, the Court did not reach a fundamental question raised in the *Jennings* litigation—is the indefinite detention of aliens pending removal proceedings *constitutional*? On the one hand, the Court previously [held](#) in *Zadvydas* that the indefinite detention of aliens after a final order of removal with no clear termination point likely raises a constitutional problem as applied to many aliens. Yet the Court in *Demore* subsequently [upheld](#) the mandatory detention of an alien *pending* removal proceedings because there was a “definite termination point”—the end of proceedings. But the facts of *Demore*, which involved an alien detained for roughly six months, may be distinguishable from *Jennings*, which concerned some aliens who had been detained for years. Whether this distinction is significant will be a question that the Ninth Circuit may need to confront on remand.

Moreover, even if reviewing courts post-*Jennings* were to conclude that the challenged statutes pose constitutional concerns, those courts may need to consider whether such constitutional infirmities exist whenever the government seeks to indefinitely detain an alien for immigration purposes, or only when the alien is found in the country or otherwise has notable ties to the country (e.g., LPRs returning from abroad, but not necessarily other aliens seeking to enter the United States).

Given its [previous rulings](#), the Ninth Circuit may upon remand hold the challenged detention statutes as constitutionally impermissible, potentially triggering a future showdown in the Supreme Court over this significant question. And recently, the Supreme Court [granted certiorari](#) in another detention case from the Ninth Circuit involving the [question](#) of whether an alien who is detained under INA § 236(c) is entitled to a bond hearing if DHS does not take him into custody immediately following his release from criminal incarceration. The Court’s resolution of that question may shed further light on its view on the federal government’s detention authority. Furthermore, as the *Jennings* litigation resumes in the Ninth Circuit, Congress may consider reexamining the INA’s mandatory detention provisions to determine whether amending the relevant statutes, either to provide greater clarity or to modify their scope, is appropriate.

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