

Legal Sidebar

Supreme Court to Hear Challenge to Aliens’ Detention Pending Removal Proceedings

11/28/2016

On November 30, 2016, the Supreme Court is [scheduled](#) to hear oral arguments in *Jennings v. Rodriguez*. [One of four immigration-related cases](#) currently on the Court’s docket for its October 2016 Term, this case could have significant implications for the executive branch’s practice of detaining certain aliens while simultaneously seeking removal orders against them. It could also answer long-standing questions about how to reconcile High Court precedents regarding the detention of aliens [during](#) and [after](#) removal proceedings, as well as the continuing validity of [mid-Twentieth Century decisions](#) regarding Congress’s “plenary power” over aliens’ admission into the country.

This Sidebar briefly explains the legal issues in *Jennings*, and explores what the High Court’s decision could mean for detention practices specifically and immigration law more generally.

The Legal Issues in Jennings

At its core, the litigation in *Jennings* centers upon three separate provisions of the Immigration and Nationality Act (INA) that the executive branch has historically construed to require or authorize the detention of aliens throughout the course of removal proceedings (i.e., from the time when DHS charges the alien with being [inadmissible](#) or [deportable](#) until the alien is [ordered to be removed](#); other provisions of the INA address aliens’ detention after the issuance of a removal order). As **Table 1** explains, two of these provisions—INA §§ 235(b) and 236(c)—have been construed by the Executive Branch to require that “[arriving aliens](#)” who are subject to [expedited removal](#) and aliens inadmissible or deportable on [certain criminal and terrorism grounds](#) be detained without bond hearings before an immigration judge and released only in narrow circumstances. The third provision—INA § 236(a)—has been similarly construed to permit the detention of other aliens who are not subject to detention under [other provisions of the INA](#), although these aliens may be released if they [can demonstrate](#) their suitability for release.

Table 1: INA Provisions at Issue in *Jennings v. Rodriguez*

Provision	Aliens Affected	Executive Branch Interpretation
INA § 235(b)	“ Arriving aliens ” subject to expedited removal	Detention is <i>required</i> until the alien is removed (in the case of aliens who are found not to have a credible fear of persecution), or pending consideration of the alien’s application for asylum (in the case of aliens found to have a credible fear). No bond hearing before an immigration judge is provided. Release is generally possible only if immigration officials decide to “ parole ” the alien into the United States.
INA	Aliens inadmissible	Detention pending removal proceedings is <i>required</i> . No bond

§ 236(c)	or deportable on certain criminal and terrorism grounds	hearing before an immigration judge is provided. Release is generally possible only if immigration officials decide the alien’s release is “necessary” for witness-protection purposes and certain other conditions are met.
INA § 236(a)	Aliens not subject to detention under other provisions of the INA	Detention pending removal proceedings is <i>authorized</i> . Those detained may seek bond hearings before immigration judges. Release is authorized if the alien can demonstrate his or her suitability for release.

In 2007, a group of aliens in California [brought suit](#), alleging that their prolonged detention pursuant to these three provisions of the INA runs afoul of the [Due Process Clause](#) of the U.S. Constitution, which [has been seen](#) to protect “unlawfully present” and other aliens. The U.S. District Court for the Central District of California and the U.S. Court of Appeals for the Ninth Circuit (“Ninth Circuit”) [generally agreed](#), rejecting the federal government’s argument that INA §§ 235(b), 236(a), and 236(c) require or authorize that certain aliens be detained throughout the entire course of removal proceedings. In so doing, the Ninth Circuit, in particular, noted the [“serious constitutional problem\[s\]”](#) that would be raised by a [“statute permitting indefinite detention of an alien,”](#) given that [“\[c\]ivil detention,”](#) such as that in immigration proceedings, affects a [“protected interest in avoiding physical restraint.”](#) Accordingly, the Ninth Circuit relied on the doctrine of [constitutional avoidance](#)—which calls for courts to [avoid reaching constitutional issues](#) if possible—to construe the three provisions as requiring or authorizing that aliens be detained for only a relatively brief period for purposes of removal proceedings. Once this [“presumptively reasonable” period of six months](#) has passed, in the Ninth Circuit’s view, the aliens’ liberty interest is such that there must be [“special justification”](#) for any further detention.

To ensure that such “justification” is present, the lower courts in *Jennings* required that aliens within the Ninth Circuit’s jurisdiction be afforded bond hearings before immigration judges at [periodical intervals](#), with the possibility of release into the United States. In addition, the lower courts prescribed that, in these hearings, the federal government must demonstrate, by [clear and convincing evidence](#), that the alien is a flight risk or a danger to the community in order to justify the alien’s continued detention, and that the length of the alien’s prior detention [must be weighed](#) in favor of release.

Potential Implications of the Supreme Court’s Decision in Jennings

Having granted the federal government’s [petition for review](#) of the Ninth Circuit’s decision, the Supreme Court may now weigh in on how INA §§ 235(b), 236(a), and 236(c) are to be construed and what, if any, limitations the Due Process Clause imposes upon the government’s ability to detain aliens pending removal proceedings. Depending upon how the High Court rules, its decision could have significant practical and legal implications.

On a practical level, [hundreds of thousands of aliens](#) are detained pending removal proceedings each year, some for periods sufficiently long to require “special justification” and procedural protections in the Ninth Circuit’s view. If the High Court were to hold that such protections are constitutionally required, the process of removing aliens from the United States would likely be affected, with more aliens being afforded bond hearings and, potentially, released into the United States pending removal. In some cases, these would be aliens who historically were released in only narrow circumstances. For example, “arriving aliens” have heretofore not been granted bond hearings before immigration judges, but rather released from detention only in immigration officials’ discretion. However, if the Supreme Court were to adopt the same reasoning as the Ninth Circuit in *Jennings*, “arriving aliens” would be entitled to bond hearings before immigration judges and released if the government could not show that their continued detention is warranted.

In terms of immigration law, the Supreme Court’s decision in *Jennings* could also help resolve long-standing questions about how to reconcile the Court’s earlier decisions in [Demore v. Kim](#) and [Zadvydas v. Davis](#), as well as whether the Court’s 1953 decision in [Shaughnessy v. United States ex rel. Mezei](#) and [related decisions](#) remain good law. In its 2003 decision in [Demore](#), the High Court rejected a due process challenge to an alien’s detention pending removal

proceedings under INA § 236(c), one of the three provisions at issue in *Jennings*, on the grounds that such detention “serves [an]immigration purpose” and is generally of a relatively short duration. However, two years earlier, in its 2001 decision in *Zadvydas*, the Court had held that due process concerns required construing [INA § 241](#)—a provision not at issue in *Jennings*—as permitting the detention of aliens who have been ordered removed “only for [the] period reasonably necessary to secure the alien’s removal.” [Commentators have attempted](#) to reconcile these decisions in various ways. For example, in *Jennings*, the federal government [argues](#) that *Zadvydas* was an exceptional case, limited to detention *after* the issuance of a removal order, and *Demore* should be seen to govern as to detention *pending* removal proceedings. The petitioner aliens in *Jennings*, in contrast, assert that “[Demore carved out a narrow exception to the general rule](#)” as to due process set forth in *Zadvydas*, and should not be construed to mean that any and all detention pending removal proceedings is necessarily permissible. The High Court’s decision in *Jennings* could resolve this debate.

The Supreme Court’s decision in *Jennings* could also clarify whether and to what degree [Shaughnessy](#) and related decisions from the mid-Twentieth Century remain good law. These cases are often cited in support of Congress’s “plenary power” over the admission of aliens into the United States and, more specifically, for the proposition that “[\[w\]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.](#)” However, the lower courts’ order that “arriving aliens” be afforded bond hearings and, potentially, released into the United States in *Jennings* is arguably inconsistent with these cases, and the Ninth Circuit, in particular, suggested that *Mezei* and associated decisions are “[inapposite](#)” in light of subsequent legal developments. It remains to be seen whether the High Court takes a similar view and what, if any, limits the Court might be willing to afford aliens who are detained for removal when seeking admission to the United States.

Posted at 11/28/2016 10:09 AM