

# CURRENT DEVELOPMENTS

## MAKING SENSE OF PROLONGED IMMIGRATION DETENTION IN A POST-*JENNINGS* WORLD

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### I. INTRODUCTION

The United States government maintains the largest immigration detention system in the world.<sup>1</sup> In recent years, particularly since the Trump Administration's implementation of increasingly harsh immigration detention policies, the system has come under scrutiny by policymakers, advocacy groups, and media actors, prompting many to sound the alarm about a "crisis" of immigration detention.<sup>2</sup> The Supreme Court's 2018 decision in *Jennings v. Rodriguez*,<sup>3</sup> a case that dealt with prolonged detention of immigrants, has exacerbated this crisis by limiting the avenues through which immigrants may challenge their detention by the United States government for many months or even years. This Current Development offers a primer on the American immigration detention apparatus, with a focus on prolonged detention, and explores how lower courts have dealt with prolonged immigration detention challenges in the wake of *Jennings*.

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1. *Immigration Detention 101*, DETENTION WATCH NETWORK, <https://www.detentionwatchnetwork.org/issues/detention-101>; see also Emily Kassie, *Detained: How the US Built the World's Largest Immigrant Detention System*, GUARDIAN (Sept. 24, 2019), <https://www.theguardian.com/us-news/2019/sep/24/detained-us-largest-immigrant-detention-trump>.

2. See Chelsea Bethea, *A Medical Emergency, and the Growing Crisis at Immigration Detention Centers*, NEW YORKER (Sept. 13, 2017), <https://www.newyorker.com/news/news-desk/a-medical-emergency-and-the-growing-crisis-at-immigration-detention-centers>; see also Allyson Hobbs & Ana Raquel Minian, *A Firsthand Look at the Horrors of Immigration Detention*, WASH. POST (June 25, 2018), <https://www.washingtonpost.com/news/made-by-history/wp/2018/06/25/a-firsthand-look-at-the-horrors-of-immigration-detention/>.

3. *Jennings v. Rodriguez*, 138 S.Ct. 830 (2018).

## II. IMMIGRATION DETENTION: SOURCES OF AUTHORITY AND JUSTIFICATIONS

Regulation of immigration detention has long been considered to be among the Executive Branch's plenary powers, with few limitations on or judicial review of that power.<sup>4</sup> Officially, immigration detention is civil, not criminal nor punitive,<sup>5</sup> because most immigration law violations are civil in nature.<sup>6</sup> The immigrant detention system has grown significantly in recent decades. Following the massive expansion of the government's authority to detain certain immigrants in the 1990s, the number of non-citizens in immigration detention more than tripled,<sup>7</sup> and the average timespan an immigrant spends in Immigration and Customs Enforcement (ICE) custody increased significantly.<sup>8</sup>

If immigration law violations are mostly civil, why detain immigrants in the first place? There are two main justifications for immigration detention, but both have been countered with empirical evidence. The official stated purpose of immigration detention is to facilitate the removal of non-citizens who do not have permission to remain in the country.<sup>9</sup> In other words, detention is meant to ensure that non-citizens without valid immigration status appear for their removal hearings and be easily deported if they are found to have no claim to remain in the country. Immigration restrictionists often claim that non-citizens in removal proceedings do not appear for their hearings once released from detention, but long-term studies show that the vast majority of immigrants appear in court.<sup>10</sup>

Another justification for immigration detention, often touted by the Trump Administration, is that it deters unauthorized immigration.<sup>11</sup> Under this logic, detaining people without immigration status sends a message to would-be unauthorized immigrants considering migrating to the United States without proper status.<sup>12</sup> For example, in August 2019, a Department of Homeland Security (DHS) official defended a new policy of detaining immigrants in removal proceedings indefinitely, claiming that the new policy will act "as a

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4. Catherine Y. Kim, *Plenary Power in the Modern Administrative State*, 96 N.C. L. REV., 77, 79 (2017) (arguing that modern courts continue to cite plenary power doctrine to deny review of immigration decisions that would plainly violate constitutional rights outside of the immigration context).

5. Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 44 (2010).

6. *Immigration Detention in the United States by Agency*, AM. IMMIGR. COUNCIL 10 (Jan. 2, 2020), [https://www.americanimmigrationcouncil.org/sites/default/files/research/immigration\\_detention\\_in\\_the\\_united\\_states\\_by\\_agency.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/immigration_detention_in_the_united_states_by_agency.pdf).

7. *Issue Brief: Prolonged Immigration Detention of Individuals Who Are Challenging Removal*, ACLU 1 (July 2009), [https://www.aclu.org/sites/default/files/field\\_document/prolonged\\_detention\\_issue\\_brief.pdf](https://www.aclu.org/sites/default/files/field_document/prolonged_detention_issue_brief.pdf) [hereinafter *Issue Brief*].

8. See Isabela Dias, *ICE is Detaining More People Than Ever-And For Longer*, PACIFIC STANDARD (Aug. 1, 2019), <https://psmag.com/news/ice-is-detaining-more-people-than-ever-and-for-longer> (noting that the number of people detained by ICE had increased by 3000 people in just one week in July 2019).

9. Emily Ryo, *Detention as Deterrence*, 71 STAN. L. REV. ONLINE 237, 238 (2019).

10. Aaron Reichlin-Melnick, *Setting the Record Straight: Asylum Seekers Show Up for Court*, IMMIGR. IMPACT (Jan. 30, 2019), <https://immigrationimpact.com/2019/01/30/asylum-seekers-show-up-for-court/#.XlbuoRNKhN0>.

11. Alexandra Hutzler, *Trump's Immigration Official Says Plan to Detain Migrant Families Longer Solves Border Facility Overcrowding*, NEWSWEEK (Aug. 23, 2019), <https://www.newsweek.com/trump-official-defends-plan-detain-migrant-families-indefinitely-1455912>.

12. Ryo, *supra* note 9, at 238.

‘deterrent’ to illegal immigration because migrants now know that they will be detained indefinitely rather than released into the United States . . .”<sup>13</sup> Whether immigration detention functions as an effective deterrent, however, remains an open question.<sup>14</sup> The little research in this area suggests that immigration detention does not deter unauthorized migration because people generally do not know the law, do not make rational decisions, and often-times choose to commit the legal violation anyways because the perceived benefits often outweigh the perceived costs.<sup>15</sup>

### III. THE QUASI-PUNITIVE CHARACTER OF IMMIGRATION DETENTION

Although immigration detention is not supposed to be punitive or criminal, the reality is that it closely resembles the criminal incarceration system,<sup>16</sup> leading some scholars to refer to the “quasi-punitive” character of the immigration detention apparatus.<sup>17</sup> Detained immigrants are housed in jail-like facilities or actual jails contracted out by ICE, the agency located within DHS responsible for managing the bulk of immigration detention.<sup>18</sup> Immigration detention conditions are on par with, or sometimes worse than, those in criminal incarceration.<sup>19</sup> According to one scholar, the government’s standards for detaining immigrants “inappropriately draw from criminal incarceration policies and practices designed for criminal pretrial detainees, and are overly restrictive for most immigration detainees.”<sup>20</sup> Finally, immigrant detainees themselves experience their detention as a form of punishment.<sup>21</sup>

Immigration detention takes its toll in other ways as well. Immigration detention centers, including those run by ICE, private companies, and contracted-out municipal or county facilities, are remote and far-removed from urban centers.<sup>22</sup> This isolates detainees from family members, community support networks, and critically, legal representation to help them defend themselves against deportation.<sup>23</sup> While obtaining relief in immigration court is quite challenging for everyone, there are particular difficulties associated with seeking immigration relief from within detention. It is extremely

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13. Hultzer, *supra* note 11.

14. See Ryo, *supra* note 9, at 250.

15. *Id.*

16. See Kalhan, *supra* note 5, at 50.

17. *Id.* at 43.

18. While ICE handles the bulk of adult immigration detention in the United States, Customs and Border Protection (CBP), also within DHS, and the Office of Refugee Resettlement (ORR), within the Department of Justice, also detain certain groups of non-citizens. See generally *Immigration Detention in the United States by Agency*, *supra* note 6.

19. See Kalhan, *supra* note 5, at 50.

20. *Id.* (internal quotation marks omitted).

21. See Emily Ryo, *Fostering Legal Cynicism Through Immigration Detention*, 90 S. CAL. L. REV. 999, 1024-31 (2018).

22. Emily Ryo & Ian Peacock, *A National Study of Immigration Detention in the United States*, 92 S. CAL. L. REV. 1, 6 (2018).

23. *Id.*

difficult to access legal assistance, gather evidence, and fully present a claim for relief while detained in remote prisons and detention centers.<sup>24</sup>

#### IV. RELEASE FROM IMMIGRATION DETENTION

When a person is first detained by ICE, ICE must assess the person's flight and public safety risk; following this assessment, it makes a determination as to whether it will release the person.<sup>25</sup> If ICE determines that the person should not be released, the non-citizen can challenge their detention by requesting a custody review, or bond hearing, from an immigration judge.<sup>26</sup> At the hearing, the burden is on the non-citizen to show that they are not a flight risk (i.e., they will appear for future hearings, including their removal hearing) and that they do not pose a danger to the community.<sup>27</sup> The immigration judge may also consider several discretionary factors as to whether to grant bond, including the length of time the person has lived in the United States, their family ties in the country, and their employment history.<sup>28</sup>

However, release from immigration detention proves impossible for many. Certain classes of immigrants are not eligible for release and are denied bond hearings.<sup>29</sup> Section 1226(c) of the Immigration and Nationality Act (INA) applies to immigrants convicted of certain crimes; such non-citizens are subject to mandatory detention, and they may only be released if it is necessary for witness protection or a criminal investigation.<sup>30</sup> Other groups of non-citizens, while not subject to mandatory detention, may not be released for other reasons. For example, asylum-seekers who arrive at the U.S. border asking for protection, who do not have family members in the country, are often considered to be a high flight risk and are denied bond; thus, they are forced to remain in detention throughout the course of their legal proceedings (and beyond, if they are denied relief and they appeal).<sup>31</sup> Still, others may have been granted bond but cannot afford to pay the bond set by the immigration judge.<sup>32</sup>

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24. *Detained Removal Defense*, PANGEA LEGAL SERVS., <https://www.pangealegal.org/detained-removal-defense> (“Detainees are housed hundreds of miles away from their families. Their ability to communicate with the outside world and prepare for their immigration case is severely restricted. Detainees usually don’t even get a chance to appear in person in immigration court but are piped in by videoconference. Often, having an attorney is a person’s only chance to adequately present their case to remain in the United States.”).

25. *Seeking Release from Immigration Detention*, AM. IMMIGR. COUNCIL 2 (Sept. 13, 2019), [https://www.americanimmigrationcouncil.org/sites/default/files/research/seeking\\_release\\_from\\_immigration\\_detention.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/seeking_release_from_immigration_detention.pdf).

26. *Id.* at 3.

27. *Id.*

28. *See* *Matter of Guerra*, 24 I. & N. Dec. 37, 40 (BIA 2006).

29. 8 U.S.C. § 1226(c) (1996).

30. *Id.*

31. AM. IMMIGR. COUNCIL, *supra* note 25.

32. *Id.*

Bonds as high as \$50,000 have been reported,<sup>33</sup> which in reality amounts to a constructive denial.

## V. PROLONGED IMMIGRATION DETENTION

This inability of many non-citizens to obtain release from detention has resulted in a particularly concerning phenomenon: prolonged detention, which refers to confinement for six months or longer.<sup>34</sup> A number of factors have compounded the increase in prolonged detention, including repeated efforts by the Trump Administration to expand the government's authority to detain immigrants<sup>35</sup> and a staggering backlog in the immigration adjudication system.<sup>36</sup> As of August 2019, over one million cases were pending in immigration court, and the average period non-citizens had been waiting to have their cases adjudicated was almost two years.<sup>37</sup> Appealing an unfavorable decision from the immigration judge can take many more years, and those immigrants who are detained without an option for release must remain locked up until they are either granted relief or deported.<sup>38</sup> Other immigrants in detention have received removal orders, but for a range of reasons, ICE cannot deport them.<sup>39</sup>

Whether they are still litigating their removal cases or have been issued removal orders, non-citizens may languish in immigrant detention for months or even years.<sup>40</sup> ICE appears to designate certain facilities for what it calls "long-term cases;" for example, in a study of a rural Alabama county jail leased partially by ICE for immigrant detainees, fifty-nine of sixty-seven detainees interviewed had been held for over one year.<sup>41</sup> The study detailed deplorable detention conditions, including food shortages, overcrowding, detainees unable to practice their religions, and a lack of recreational space such that these "long-term" detainees are forced to spend "years without

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33. Liz Robbins, 'A Light for Me in the Darkness': For Migrant Detainees, A Bond Forged by Letter, N.Y. TIMES (Feb. 7, 2019), <https://www.nytimes.com/2019/02/07/us/immigrant-detainee-letters.html> (detailing a \$50,000 bond set for a Cameroonian asylum-seeker with no criminal history).

34. Respondents' Supplemental Brief at 11, *Jennings v. Rodriguez*, 138 S.Ct. 830 (2018) (No. 15-1204), 2017 WL 430386, at \*1 ("In the immigration context, detention becomes prolonged after six months.").

35. See, e.g., *Attorney General Barr Strips Bond Eligibility From Asylum Seekers: Matter of M-S-Analysis and Q&A*, NAT'L IMMIGR. JUST. CTR. (Apr. 17, 2019), <https://immigrantjustice.org/staff/blog/attorney-general-barr-strips-bond-eligibility-asylum-seekers-matter-m-s-analysis-and-qa>.

36. *Immigration Court Backlog Surpasses One Million Cases*, TRAC IMMIGR. (Nov. 6, 2018), <https://trac.syr.edu/immigration/reports/536/>.

37. Respondents' Supplemental Brief, *supra* note 34.

38. JAYA RAMJI-NOGALES, ANDREW SCHOENHOLTZ, & PHILIP SCHRAG, *REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM 13-14* (2009) (detailing the process for appealing immigration court decisions).

39. For example, ICE is unable to secure travel documents from an embassy or consulate; some countries refuse to receive their own nationals as deportees from the United States. This poses a situation similar to that in *Zadvydvas v. Davis*. See *infra* note 48.

40. *Issue Brief*, *supra* note 7, at 4.

41. Southern Poverty Law Center, National Immigration Project, and Adelante Alabama Worker Center, *Shadow Prisons: Immigrant Detention in the South* at 52 (2016), [https://www.splcenter.org/sites/default/files/ijp\\_shadow\\_prisons\\_immigrant\\_detention\\_report.pdf](https://www.splcenter.org/sites/default/files/ijp_shadow_prisons_immigrant_detention_report.pdf).

feeling the sun on their skin.”<sup>42</sup> In one case identified by the American Civil Liberties Union, a non-citizen had been in ICE custody for fifteen years.<sup>43</sup>

## VI. DOES PROLONGED IMMIGRATION DETENTION VIOLATE DUE PROCESS? THE LEAD-UP TO *JENNINGS* AND BEYOND

Due process requires a sufficiently strong justification for detention that outweighs its deprivation of liberty; as detention becomes prolonged, however, the liberty deprivation becomes greater, requiring an even stronger justification for the continued confinement.<sup>44</sup> As discussed *supra*, many immigrants subject to prolonged detention have not been afforded a bond hearing, the most basic element of due process. While prolonged detention without a hearing would clearly violate due process in other areas of the American legal system,<sup>45</sup> the question of whether prolonged immigration detention violates due process poses complications that have made courts hesitant to clearly articulate a constitutional violation.<sup>46</sup> These complications include but are not limited to: the government’s broad authority to detain non-citizens; non-citizens’ (particularly arriving asylum-seekers’) abrogated liberty rights; and the purportedly civil nature of immigration detention.

While the Supreme Court has addressed the due process implications of the government’s authority to exclude, detain, and deport immigrants in varying capacities,<sup>47</sup> it specifically addressed the government’s power to subject immigrants to prolonged detention in two cases in the early 2000s. In 2001, the Court decided *Zadvydas v. Davis*, which stands for the proposition that prolonged detention becomes presumptively unreasonable under the post-removal detention statute after six months where there is no prospect for the non-citizen’s removal in the reasonably foreseeable future.<sup>48</sup> In 2003, in *Demore v. Kim*, the Court cabined its holding from two years earlier, ruling that mandatory detention of immigrants convicted of certain crimes pending their removal was not unconstitutional *per se* and clarifying that such detention was permissible because it was for a “short[] duration” and has a “definite

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42. *Id.* at 8.

43. *Issue Brief*, *supra* note 7, at 4.

44. *Id.* at 5.

45. Ahilan Arulanantham & Michael Tan, *Is It Constitutional to Lock Up Immigrants Indefinitely?*, ACLU (Mar. 5, 2018), <https://www.aclu.org/blog/immigrants-rights/immigrants-rights-and-detention/it-constitutional-lock-immigrants> (“Nowhere else in the U.S. legal system do we let the government take people’s freedom away for months or years without a hearing before a judge who determines whether their incarceration is necessary.”).

46. See Hillel R. Smith, *Immigration Detention: A Legal Overview*, CONG. RES. SERV. at 20 (Sept. 16, 2019), <https://fas.org/sgp/crs/homsec/R45915.pdf>.

47. See, e.g., U.S. ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950) (affirming the Attorney General’s authority to detain and exclude a non-citizen without a hearing); see also *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) (holding that continued exclusion of a non-citizen without a hearing did not deprive him of any statutory or constitutional right, even if that meant that he would be detained indefinitely on Ellis Island because no other country would admit him).

48. *Zadvydas v. Davis*, 533 U.S. 678, 680 (2001).

termination point,” the conclusion of removal proceedings.<sup>49</sup> This seems to suggest that longer and possibly indefinite periods of detention would violate the Constitution. However, the Court pointedly did not address whether there are any constitutional limits to the *duration* of such detention.<sup>50</sup> Importantly, in making this determination about the “short duration” of detention, the Court relied on statistics from the Department of Justice (DOJ) stating that the average time to complete removal proceedings was about five months, but in 2016, thirteen years after the case was decided, DOJ officials informed the Supreme Court that the statistics it had provided for the 2003 case were in error and that the average detention duration was actually over one year.<sup>51</sup>

Following *Demore v. Kim*, there was a circuit split regarding how courts dealt with prolonged mandatory detention. The Second and Ninth Circuits adopted a six-month rule requiring an automatic bond hearing for any immigrant subject to mandatory detention who was held for more than six months, and the First, Third, Sixth, and Eleventh Circuits utilized an individualized reasonableness rule requiring a fact-specific analysis of whether an alien’s detention had become unreasonable.<sup>52</sup>

In 2018, the Supreme Court again addressed the issue of prolonged detention in *Jennings v. Rodriguez*, a decision that significantly altered the landscape of prolonged immigration detention challenges.<sup>53</sup> *Jennings* was a class-action lawsuit challenging ICE’s practice of imprisoning immigrants for months or years while they litigated their removal cases.<sup>54</sup> The Supreme Court reversed a Ninth Circuit decision that read an implicit requirement in the INA for an individualized bond hearing every six months; it held that prolonged detention of certain non-citizens, including entering asylum-seekers and immigrants subject to mandatory detention without a bond hearing was authorized by the INA.<sup>55</sup> The Court tethered its holding to the interpretation of the detention provisions in the INA and declined to reach the question of constitutional due process.<sup>56</sup>

Justice Breyer wrote a blistering dissent.<sup>57</sup> He drew on sources as wide-ranging as the Declaration of Independence, the Constitution, and case law to

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49. Smith, *supra* note 46 (quoting *Demore v. Kim*, 538 U.S. 510, 529 (2003)).

50. *Id.* (emphasis added).

51. Debra Cassens Weiss, *Justice Department Discloses ‘Several Significant Errors’ in Information Provided for SCOTUS Case*, A.B.A. J. (Aug. 31, 2016), [http://www.abajournal.com/news/article/justice\\_department\\_discloses\\_several\\_significant\\_errors\\_in\\_information\\_prov](http://www.abajournal.com/news/article/justice_department_discloses_several_significant_errors_in_information_prov).

52. Reid v. Donelan, 390 F. Supp. 3d 201, 215-16 (D. Mass. 2019) (listing cases).

53. *Jennings*, 138 S.Ct. at 832.

54. *Practice Advisory: Prolonged Detention Challenges after Jennings v. Rodriguez*, ACLU 2 (March 21, 2018), <https://www.aclu.org/other/practice-advisory-prolonged-detention-challenges-after-jennings-v-rodriguez>.

55. *Id.*

56. *Jennings*, 138 S.Ct. at 832.

57. *Id.* at 876 (Breyer, J., dissenting) (“The bail questions before us are technical but at heart they are simple. We need only recall the words of the Declaration of Independence, in particular its insistence that all men and women have ‘certain unalienable Rights,’ and that among them is the right to ‘Liberty.’ We need merely remember that the Constitution’s Due Process Clause protects each person’s liberty from

argue that freedom from arbitrary detention is core to the concept of liberty.<sup>58</sup> He further asserted that the majority's position "that Congress wrote these statutory words to put thousands of individuals at risk of lengthy confinement all within the United States but all without hope of bail" was "alarming."<sup>59</sup>

Because *Jennings* explicitly stated that the INA authorizes prolonged immigration detention without a hearing, it largely foreclosed statutory arguments against prolonged detention. In the wake of *Jennings*, lower court decisions have emphasized that *Jennings* left the door open to the constitutionality of prolonged detention for immigrants subject to mandatory detention and arriving asylum-seekers.<sup>60</sup> One such example is the District Court of Massachusetts decision in *Reid v. Donelan*, in which immigrants in Massachusetts subject to mandatory detention brought a class action suit challenging their prolonged detention.<sup>61</sup> Therein, the District Court underscored that the Supreme Court had not reached the constitutional question, and thus it was free to do so.<sup>62</sup> It emphasized that the government's interest in detaining people to facilitate their removal diminishes over time and held that "mandatory detention . . . without a bond hearing violates the Due Process Clause when it becomes unreasonably prolonged in relation to its purpose in ensuring the removal of deportable criminal [non-citizens]," which the District Court defined as "one year during removal proceedings."<sup>63</sup> The District Court further clarified that this one-year presumption of unreasonableness was not a bright-line rule and that it did not exclude the possibility that mandatory detention *under* one year might also violate due process, particularly if there are unreasonable delays by the government.<sup>64</sup>

Another example is *Padilla v. ICE*, wherein the Western District of Washington addressed prolonged detention for asylum-seekers post-*Jennings*.<sup>65</sup> Detained asylum-seekers brought a class action against ICE, DHS, and the Executive Office for Immigration Review (EOIR), challenging the government's policy or practice of excessively prolonging their detention.<sup>66</sup> The District Court required the government to provide bona fide asylum-seekers with prompt bond hearings within seven days of their request or release them from detention.<sup>67</sup> The District Court further stated that it was

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arbitrary deprivation. And we need just keep in mind the fact that, since Blackstone's time and long before, liberty has included the right of a confined person to seek release on bail.").

58. *Id.*

59. *Id.*

60. See *Reid v. Donelan*, 390 F. Supp. 3d at 215; see also *Padilla v. U.S. Immigr. and Customs Enforcement*, 387 F. Supp. 3d 1219 (W.D. Wash. 2019) [hereinafter *Padilla v. ICE*].

61. *Reid v. Donelan*, 390 F. Supp. 3d at 215.

62. *Id.*

63. *Id.* at 215, 219.

64. *Id.* at 220 (emphasis added).

65. *Padilla v. ICE*, 387 F. Supp. 3d at 1219.

66. *Id.* at 1220.

67. *Id.* at 1232.



not creating an exception to *Jennings*.<sup>68</sup> Rather, it clarified that “*Jennings* made no finding regarding the constitutionality of § 1225 [the INA provision authorizing the detention of arriving asylum-seekers] and the case does not stand for the proposition that indefinite mandatory detention while awaiting determination of an asylum application is constitutionally permissible.”<sup>69</sup>

## VII. CONCLUSION

As the American Civil Liberties Union has pointed out, in failing to address in *Jennings* whether due process permits indefinite detention without hearings in the immigration system, “the Supreme Court missed an important opportunity to ensure justice for thousands of vulnerable immigrants.”<sup>70</sup> As a result of this case, more immigrants are almost certainly being detained for longer.<sup>71</sup> It is not at all clear how the government interest is served by locking up non-citizens, particularly as detention periods stretch into years. While some courts, like those in *Reid* and *Padilla*, are attempting to confront the due process question head-on, they do not represent the final say on the matter; both cases are currently pending appeal in their respective federal courts of appeal. While the legal battles drag on, thousands of detained immigrants have no choice but to wait, languishing in conditions akin to or worse than criminal incarceration, in a purportedly civil, non-punitive setting. It is easy to get bogged down in labyrinthine statutory and constitutional arguments in this particularly confusing area of the law. However, it is imperative to underscore the implications of such laws and policies: the American government is caging humans, sometimes for years at a time, largely for civil violations, and many of these people have not been afforded a hearing to determine whether they should be released.

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68. *Id.*

69. *Id.*

70. Arulanantham & Tan, *supra* note 45.

71. Kelsey Lutz, *The Implications of Jennings v. Rodriguez on Immigration Detention Policy*, MINN. L. REV. (Feb. 4, 2019), <https://minnesotalawreview.org/2019/02/04/the-implications-of-jennings-v-rodriguez-on-immigration-detention-policy/>.