2021

Immigration Detention: Eroding or Reinforcing a Theory of Immigration Exceptionalism?

Kate Aschenbrenner

IMMIGRATION DETENTION: EROSION OR REINFORCEMENT OF A THEORY OF IMMIGRATION EXCEPTIONALISM?

KATE ASCHENBRENNER RODRIGUEZ*

TABLE OF CONTENTS

I. INTRODUCTION

The Trump-era executive branch repeatedly asserted allegedly unlimited executive power over immigration law and policy, including the detention of

* Associate Professor of Law, Immigration Clinic, Dwayne O. Andreas School of Law, Barry University, Florida; LLM with distinction, Georgetown University Law Center; J.D., cum laude, New York University School of Law; B.A., magna cum laude with honors, Knox College. Much gratitude to Dean Leticia Diaz for supporting this research with a summer research grant.

noncitizens, to the detriment of affected noncitizens.[1] At its height during fiscal year 2019, the average daily number of individuals in the custody of United States Immigration and Customs Enforcement ("ICE") was 50,165.[2] As of early January 2021, amid the still worsening coronavirus pandemic, more than 16,000 individuals remained in ICE custody.[3] When President Biden took office on January 20, 2021, he immediately revised ICE's enforcement priorities and attempted a 100 day pause on removals.[4] He is considering ending the detention of noncitizens in private prisons,[5] and has been urged to end the detention of noncitizens altogether.[6] Despite these significant steps forward, more than 14,000 individuals remain in ICE custody as of January 29, 2021.[7]

These numbers include individuals with legal status and individuals applying for asylum because they have fled persecution in their home countries.[8] Many of these individuals go on to win their immigration cases and remain lawfully in the United States.[9] In the meantime, however, they have been separated from their families and may have lost jobs, homes, relationships, and years of their lives as a result of their detention.[10] They have also been placed at increased risk of

---

1. *See, e.g.*, Sarah Pierce & Jessica Bolter, *Dismantling and Reconstructing the U.S. Immigration System: A Catalog of Changes under the Trump Presidency*, MIGRATION POL'Y INST. (July 2020), https://www.migrationpolicy.org/sites/default/files/publications/MPI_US-Immigration-Trump-Presidency-Final.pdf; Sarah Stillman, *The Race to Dismantle Trump's Immigration Policies*, NEW YORKER (Feb. 8, 2021), https://www.newyorker.com/magazine/2021/02/08/the-race-to-dismantle-trumps-immigration-policies (describing project logging more than one–thousand fifty eight changes to immigration law and policy between 2017 and the end of the Trump administration).

2. *ICE Guidance on COVID–19*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/coronavirus (last visited Apr. 9, 2021).

3. *Id.*

4. Revision of Civil Enforcement Policies and Priorities, Exec. Order No. 13,993, 86 Fed. Reg. 7051 (Jan. 25, 2021). *But see* Texas v. United States, No. 6:21–cv–00003, 2021 WL 247877, at *1 (S.D. Tx. Jan. 26, 2021) (issuing a temporary restraining order against the 100 day pause on removals).

5. *See* Noah Lanard, *Biden Pledged to Close For–Profit ICE Detention Centers. Will He Follow Through?*, MOTHER JONES (Jan. 27, 2021), https://www.motherjones.com/politics/2021/01/biden-pledged-to-close-for-profit-ice-detention-centers-will-he-follow-through/; *cf.* Reforming Our Incarceration System To Eliminate the Use of Privately Operated Criminal Detention Facilities, Exec. Order No. 14,006, 86 Fed. Reg. 7483 (Jan. 29, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/executive-order-reforming-our-incarceration-system-to-eliminate-the-use-of-privately-operated-criminal-detention-facilities/ (ending the use of private prisons for criminal, but not civil, immigration detention).

6. Lanard, *supra* note 5.

7. U.S. IMMIGR. AND CUSTOMS ENF'T, *supra* note 2.

8. *See, e.g.*, Jennings v. Rodriguez, 138 S. Ct. 830, 836–39 (2018).

9. *See id.* at 858 (Breyer, J., dissenting).

10. *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Respondents at 10–25, Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (No. 15–1204).

contracting and suffering serious illness as a result of COVID-19.[11] The federal courts have played an important role in recognizing and protecting the constitutional rights of noncitizens, including ICE detainees, but their ability to act has been at least somewhat constrained by the plenary power doctrine and the theory of immigration exceptionalism.

The Supreme Court in its October 2016 term had the chance to address the constitutionality of this detention and due process protections for pre-final order immigration detainees.[12] Observers hoped that the Court would make use of the opportunity of the juxtaposition of *Jennings* and two other immigration cases before the Court at the same time to confront the role of the plenary power doctrine and constitutional law in immigration cases.[13] The plenary power doctrine is the concept that Congress has the absolute power, immune from judicial review, to decide which noncitizens to admit into and deport from the United States.[14] Courts have traditionally applied the plenary power doctrine to find "the power of the federal government over immigration to be nearly unlimited and the constitutional rights of immigrants to be extremely limited-and, in many cases, virtually nonexistent."[15] The plenary power doctrine has deep roots in the history

---

11. *See, e.g.*, Fraihat v. U.S. Immigr. and Customs Enf't, 445 F. Supp. 3d 709, 721–22 (C.D. Cal. 2020).

12. *Jennings*, 138 S. Ct. 830.

13. *See, e.g.*, Kate Aschenbrenner Rodriguez, *Eroding Immigration Exceptionalism: Administrative Law in the Supreme Court's Immigration Jurisprudence*, 86 U. CIN. L. REV. 215 (2018); Alina Das, *Administrative Constitutionalism in Immigration Law*, 98 B.U. L. REV. 485, 497 (2018). In addition to Jennings, the Court also heard *Sessions v. Morales-Santana*, 136 Sup. Ct. 2545 (2016), an equal protection challenge to a law providing different residency requirements for unmarried men and women to pass United States citizenship to their children, and *Sessions v. Dimaya*, 137 S. Ct. 31 (2016), considering whether 18 U.S.C. §16(b), the definition of crime of violence, is unconstitutionally vague as incorporated into the aggravated felony ground of removability at INA §101(a)(43)(F). The constitutional issues (rather than constitutional avoidance or deciding the case on some other basis) also featured prominently during oral arguments in *Morales-Santana* and *Dimaya*. *See, e.g.*, Amy Howe, *Argument Analysis: Searching for a Remedy for Constitutional Violation on Citizenship*, SCOTUSBLOG (Nov. 9, 2016, 2:37 PM), http://www.scotusblog.com; Kevin Johnson, *Argument Analysis: Is the Statutory Phrase "Crime of Violence" in the Immigration Laws Void for Vagueness?*, SCOTUSBLOG (Jan. 18, 2017, 2:32 PM), http://www.scotusblog.com.

14. *See* Kate Aschenbrenner Rodriguez, *Irreconcilable Similarities: The Inconsistent Analysis of 212(c) and 212(h) Waivers*, 69 OKLA. L. REV. 111, 115–18 (2017); Kevin Johnson, *Immigration in the Supreme Court, 2009-13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57, 58–59 (2015). *See also* Fong Yue Ting. v. United States, 149 U.S. 698, 706–15 (1893); Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892); Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 609 (1889).

15. Brian Slocum, *Canons, the Plenary Power Doctrine, and Immigration Law*, 34 FLA. ST. U. L. REV. 363, 365 (2007); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L. J. 545, 547 (1990).

of immigration jurisprudence and a strong hold on immigration law. While scholars have predicted the demise of the plenary power doctrine for decades,[16] and courts have in fact applied ordinary principles of law to review immigration laws, the plenary power doctrine has retained at least some hold with courts reviewing substantive provisions of immigration law.[17] The opportunity for the Court to bring some resolution to this troubled area of the law in the 2016 term was, therefore, quite significant.

Ultimately, however, these hopes for a clear statement by the Supreme Court on the viability of the plenary power doctrine and the constitutionality of extended pre-final removal order detention did not come to pass. When the Court eventually issued its decision in *Jennings* in February 2018, it reversed the decision of the United States Circuit Court of Appeals for the Ninth Circuit ("Ninth Circuit") holding that the Immigration and Nationality Act must be interpreted to provide noncitizens in pending removal proceedings with regular bond hearings to avoid constitutional violations.[18] The majority for the Supreme Court held that the Ninth's application of the doctrine of constitutional avoidance was inappropriate, declined to decide the case on constitutional grounds, and remanded the case to the Ninth Circuit for it to consider the constitutional issues anew.[19] As a result, approximately 20,000 individuals each year must remain detained during the pendency of their removal proceedings, many for a year or more, with no right to a bond hearing.[20] The result in *Jennings v. Rodriguez* is a tremendous loss for immigrants and immigrant rights advocates. In addition to its troubling impact on immigration detainees, at first blush the Court's decision seems disappointing doctrinally as well. A more intensive examination of the Court's decision, however, reveals that there may be a kernel of opportunity in the Court's decision.

I have previously argued that the caselaw in several different contexts demonstrates a slow and uneven erosion of the theory of immigration

---

16. *See, e.g.*, Kevin Johnson, *Keynote to Immigration in the Trump Era Symposium: Judicial Review and the Immigration Laws*, 48 SW. L. REV. 463 (2019); Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257, 287 (2000); Johnson, *supra* note 14 , at 59–60; Michael Kagan, *Plenary Power Is Dead! Long Live Plenary Power!*, 114 MICH. L. REV. FIRST IMPRESSIONS 21, 27–29 (2015) ("A sober observer would point out that immigration law scholars have been predicting the imminent demise of the plenary power doctrine for at least three decades."); Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925, 936–37 (1995); Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339, 339–40 (2002); Motomura, *supra* note 15, at 547.

17. *See, e.g.*, Demore v. Kim, 538 U.S. 510 (2003).

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

19. *Id.*

20. *Id.* at 860 (Breyer, J., dissenting).

exceptionalism.[21] Immigration exceptionalism, explained briefly, is the idea that immigration law is special and should not be subject to the same constraints existing in other areas of the law.[22] Despite often applying administrative and constitutional law principles, the courts fail to fully engage on the administrative and constitutional questions in these cases, resulting in many unanswered questions and inconsistencies in applying administrative and constitutional law principles.[23] I argued that these gaps are vestiges of immigration exceptionalism – a function of the courts' lingering hesitation in applying administrative and constitutional principles to immigration questions, as well as a practical consequence of the fact that courts and litigants historically have been slow to consider the impact of administrative law in immigration cases.[24]

While the Supreme Court's decision in *Jennings* may not initially appear to fit this pattern of an erosion of the theory of immigration exceptionalism and the plenary power doctrine, I will argue in this article that in fact it does. First, the majority's decision at least implicitly acknowledges that noncitizens have constitutional rights. Second, and perhaps more significant, the doctrine of constitutional avoidance has been used heavily (some say overused) in the immigration context to avoid direct confrontation of constitutional issues.[25] This reliance on constitutional avoidance rather than deciding cases squarely on the constitutional issues is a vestige of the plenary power doctrine, just like the gaps in analysis discussed previously. The Supreme Court's decision in *Jennings* should and has in fact pushed some courts to address constitutional rights and issues explicitly rather than hiding behind the veil of constitutional avoidance, thereby contributing to the continued erosion of the doctrine of immigration exceptionalism.[26] While notable, this trend has not, however, been universal. There are significant exceptions, to the point that it is sometimes difficult to tell whether we are moving in the direction of erosion, or instead, of reinforcement of the theory of immigration exceptionalism.[27] As we (hopefully) begin to transition away from an era of increased assertion of allegedly unlimited executive power over immigration law and policy to the detriment of the affected noncitizens, these successes and failures are particularly important to recognize and analyze.

---

21. Rodriguez, *supra* note 14 (in the context of the availability of waivers under INA § 212(h) and the former INA § (212(c)); Rodriguez, *supra* note 13 (in the context of the Supreme Court's recent immigration jurisprudence, from the October 2010 through the October 2015 terms).

22. Rodriguez, *supra* note 14; Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1363 (1999) (defining immigration exceptionalism as "the view that immigration and alienage law should be exempt from the usual limits on government decision-making").

23. Rodriguez, *supra* note 14; Rodriguez, *supra* note 13.

24. Rodriguez, *supra* note 14; Rodriguez, *supra* note 13.

25. *See, e.g.*, Motomura, *supra* note 15, at 549–50; Das, *supra* note 13, at 490–93.

26. *See infra* Section III.C.

27. *See infra* Section III.A, III.B.

In Section I of this paper, I discuss the historical use of constitutional avoidance in immigration cases by the Supreme Court.[28] Section II focuses on *Jennings v. Rodriguez* itself. Finally, in section III, I analyze the aftermath and implications of the Supreme Court's decision in *Jennings* for the future of constitutional avoidance in immigration cases, the plenary power doctrine, and a theory of immigration exceptionalism more broadly.

II. CONSTITUTIONAL AVOIDANCE IN IMMIGRATION DETENTION CASES

A. The Canon of Constitutional Avoidance

Constitutional avoidance is a canon of statutory construction with deep roots in American jurisprudence. Its use has been traced back to the early 1800's, predating even the Supreme Court's decision on judicial review in *Marbury v. Madison*.[29] The canon has at least two different formulations.[30] The first principle of constitutional avoidance states simply that courts should avoid deciding constitutional questions if it is possible to do so.[31] This principle has been described as the "last resort rule"[32] or "procedural avoidance."[33]

The second principle of constitutional avoidance is focused on statutory interpretation, calling for statutes to be interpreted to avoid constitutional problems. The older formulation of this principle, sometimes called "classical avoidance," calls for courts to choose the constitutional interpretation of a statute where both a constitutional and an unconstitutional interpretation are fairly possible.[34] In its most common formulation today, application of the canon is triggered if "an otherwise acceptable construction of a statute would raise serious constitutional problems, and . . . an alternative interpretation of the statute is fairly

---

28. Clark v. Martinez, 543 U.S. 371 (2005); Zadvydas v. Davis, 533 U.S. 678 (2001); INS v. St. Cyr, 533 U.S. 289 (2001); Jean v. Nelson, 472 U.S. 846 (1985).

29. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). *Compare* Adrian Vermeule, *Saving Constructions*, 85 CONST. COMMENT. 1945, 1948 (1997) (tracing its use back to *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12 (1800)), *with* Lisa Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1006 n.7, 1015–16 (1994) (tracing its use back to *Ex Parte Randolph*, 20 F.Cas. 242, 254 (C.C.D. Va. 1833) (No. 11,558)).

30. *Compare* Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1574–75 (2000) ("two distinct principles of avoidance"), *with* Vermeule, *supra* note 29 ("*Ashwander v. Tennessee Valley Authority* catalogued no fewer than seven doctrines, interpretive canons, and general principles of judicial decision making."); Kloppenberg, *supra* note 29, at 1005 ("seven components of the avoidance doctrine").

31. *See* Young, *supra* note 30, at 1574–75; Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936).

32. Kloppenberg, *supra* note 29, at 1025–27; Young, *supra* note 30, at 1574–75.

33. Vermeule, *supra* note 29, at 1948–49; Young, *supra* note 30, at 1574–75.

34. *See* Young, *supra* note 30, at 1574–76; Vermeule, *supra* note 30, at 1948–49.

possible."[35] Under these circumstances, the court should construe the statute to avoid the constitutional problem.[36] This version of the canon of constitutional avoidance is sometimes known as "modern avoidance."[37] Scholars have sometimes described it as requiring the courts to adopt a "second best" interpretation of the statute in order to avoid a serious constitutional issue.[38] To make precise the distinction between classical and modern avoidance, classical avoidance applies only when the court holds that a possible interpretation is actually unconstitutional, while modern avoidance kicks in even in cases of "constitutional doubt."[39]

Constitutional avoidance generally is sometimes described as a substantive or normative canon, a "policy-based directive[] about how statutory ambiguity should be resolved[,]" as opposed to a textual canon.[40] It is widely considered to be a prudential rule, that is a "nonconstitutional, self-imposed restraint[]."[41] Debate over the appropriate use of the canon is closely intertwined with big-picture structural questions regarding our system of government: "the proper scope of federal judicial review and the allocation of power among the three branches of the federal government and the states."[42] Courts and commentators have invoked multiple different and conflicting rationale in support of the application of this canon.[43] Some take the position that the canon is a way of ensuring that the courts do not encroach on the other branches of government.[44] Specifically, some argue that it is a way of fulfilling Congressional intent or, relatedly, that a court should operate from a presumption that Congress did not intend to violate the

35. Immigration & Naturalization Serv. v. St. Cyr, 533 U.S. 289, 299–300 (2001) (internal quotations omitted) (citing Crowell v. Benson, 285 U.S. 22, 62 (1932)); Jennings v. Rodriguez, 138 S. Ct. 830, 842–43 (2018). *See also, e.g.*, NORMAN SINGER & SHAMBIE SINGER, 2A SUTHERLAND STATUTORY CONSTRUCTION § 45:11 (7th ed. 2020); Young, *supra* note 30, at 1574–76; Vermeule, *supra* note 29, at 1948–49.

36. *St. Cyr*, 533 U.S. at 300 (citing Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 341, 345–48 (1936) (Brandeis, J., concurring); United States *ex rel.* Attorney Gen. v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909); *Jennings*, 138 S.Ct. at 842–43.

37. Young, *supra* note 30, at 1574–76; Vermeule, *supra* note 29, at 1948–49.

38. Slocum, *supra* note 15, at 366, 369, 378–81 ("[T]he canon of constitutional avoidance . . . requires courts to adopt a plausible-but not necessarily the most persuasive-interpretation of a statute in order to avoid serious constitutional issues.").

39. Young, *supra* note 30, at 1576–77; Rust v. Sullivan, 500 U.S. 173, 190–91 (1991).

40. Slocum, *supra* note 15, at 365–66; Young, *supra* note 30, at 1551 (describing constitutional avoidance as a normative canon designed to push statutory interpretations in the direction of the underlying constitutional values).

41. Kloppenberg, *supra* note 29, at 1016, 1005 n.7.

42. Kloppenberg, *supra* note 29, at 1005 n.7.

43. Kloppenberg, *supra* note 29, at 1015–16.

44. Kloppenberg, *supra* note 29, at 1015–16.

Constitution.[45] Others argue that the canon is instead concerned with protecting substantive values, either the value of a constitutional system or the underlying values engrained in the constitutional provisions at issue.[46] At least one scholar has suggested an additional reason for applying the canon: "[t]he usual reason for applying the canon is to avoid defining what the Constitution means with virtually irrevocable finality, and yet to provide a just result."[47]

Some scholars and judges have criticized the use of the canon of constitutional avoidance on a number of different grounds.[48] Some say that it unnecessarily and unwisely expands the reach of the Constitution.[49] Others are concerned that it is too easy to find constitutional doubt and the canon therefore allows judges to too easily rewrite statutes according to their own preference.[50] Still others argue that it violates separation of powers because it allows the judiciary to intrude on both the legislative and the executive functions.[51] A related criticism notes that constitutional avoidance is frequently justified by the assertion that it is intended to promote the intent of Congress but fails to promote Congress' actual preferences.[52] A recent empirical study suggests that some of this criticism is overstated.[53] Despite these criticisms, the canon of constitutional avoidance nevertheless remains firmly entrenched in the jurisprudence.[54]

---

45. *See, e.g.*, Slocum, *supra* note 15, at 375, 405 ("The Court . . . believes that applying it gives effect to congressional intent because Congress would prefer the statutory interpretation that does not raise constitutional doubts."). *See also* Immigration & Naturalization Serv. v. St. Cyr, 533 U.S. 289, 300–01, n.12 (2001).

46. Young, *supra* note 30, at 1551.

47. Motomura, *supra* note 15, at 573.

48. *See, e.g.*, Slocum, *supra* note 15, at 405–06; Young, *supra* note 30, at 1551–52.

49. *See, e.g.*, Richard A. Posner, *Statutory Interpretation – In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 815–16 (1983) ("The practical effect of interpreting statutes to avoid raising constitutional questions is therefore to enlarge the already vast reach of constitutional prohibition beyond even the most extravagant modern interpretation of the Constitution—to create a judge-made constitutional 'penumbra' that has much the same prohibitory effect as the judge-made (or at least judge-amplified) Constitution itself. And we do not need that.").

50. *See, e.g.*, Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401, 1405–06 (2002).

51. *E.g.*, William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 834 (2001).

52. *See, e.g.*, Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 92 (1995).

53. Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 830–31 (2017) (suggesting that empirical evidence may not support some of the scholarly critiques of the substantive canons, including the canon of constitutional avoidance).

54. *See, e.g.*, Slocum, *supra* note 15, at 375 ("The Court considers the validity of the canon to be beyond debate . . . ."); Anita S. Krishnakumar, *Passive Avoidance*, 71 STAN. L REV. 513, 516–20 (2019) (describing the particularly significant role that constitutional avoidance played in the early years of the

Constitutional avoidance is a generally applicable canon of statutory construction, invoked across all areas of the law.[55] It is not particular to the immigration context.[56] In fact, given the strong hold of the plenary power doctrine in immigration law, it might reasonably be expected that the canon of constitutional avoidance would not play any role in immigration cases. Why should courts be concerned about avoiding significant constitutional questions if the underlying constitutional rights and protections have no application in the immigration context?[57] In fact, however, courts have regularly and for many years applied the canon of constitutional avoidance to determine the meaning of statutes in the immigration context.[58] Its use in questions of immigration law is firmly accepted, all the way up to the Supreme Court.[59] In fact, some scholars have argued that the canon of constitutional avoidance has been *overused* in immigration cases.[60]

B. Constitutional Avoidance and Immigration Detention

The remainder of this section will discuss when and how constitutional avoidance has been used to interpret immigration statutes relating to the detention of noncitizens by the Supreme Court. It aims not to discuss every single case in which the canon of constitutional avoidance has played any role, but rather to provide a representative sampling of cases. It will focus on three major cases over the last almost forty years in which the Supreme Court relied on the canon of constitutional avoidance to decide an immigration case involving the detention of

---

Roberts Supreme Court); Kelley, *supra* note 51, at 832–33 (tracing the canon back to 1804 and citing thirty Supreme Court cases in the decade preceding the article in which the canon was invoked or urged to be invoked by at least one Justice); Motomura, *supra* note 15, at 561 ("[R]eliance on the canon, whether stated or unstated, seems to be a fact of everyday judicial life.").

55. *See* Slocum, *supra* note 15, at 375.

56. Slocum, *supra* note 15, at 375.

57. *See, e.g.*, Slocum, *supra* note 15, at 375 ("If the plenary power doctrine foreclosed constitutional challenges, however, there would be little legitimate role for the avoidance canon.").

58. *See, e.g.*, United States v. Witkovich, 353 U.S. 194, 200–01 (1957); Rosenberg v. Fleuti, 374 U.S. 449, 451 (1963); Immigration & Naturalization Serv. v. St. Cyr, 533 U.S. 289, 299–300 (2001). *See also* the immigration detention cases discussed *infra* Section I.B.

59. Two early examples of the use of constitutional avoidance by the Supreme Court in the immigration context are *Witkovich*, 353 U.S. at 194 and *Rosenberg*, 374 U.S. at 449. A prominent and more modern example is *St. Cyr*, 533 U.S. at 289.

60. *See, e.g.*, Motomura, *supra* note 15; *cf.* Slocum, *supra* note 15, at 366, 368–69, 376, 384 ("Courts have frequently used this canon in immigration cases, often in what can be described as an aggressive fashion." Professor Slocum in his article ultimately argues that substantive canons of statutory construction, including the canon of constitutional avoidance, have a continued place in immigration cases.).

noncitizens: *Jean v. Nelson* from 1985,[61] *Zadvydas v. Davis* from 2001,[62] and *Clark v. Martinez* from 2005.[63] Its goal is to demonstrate just how entrenched the canon of constitutional avoidance is in immigration jurisprudence and to trace its use and development over time prior to the Supreme Court's consideration of *Jennings*.

i. *Jean v. Nelson*

In 1985, in *Jean v. Nelson*, the Court used constitutional avoidance to decide a potentially significant case for immigrants' rights.[64] *Jean* was a class action lawsuit brought by a group of undocumented Haitians who were denied parole under a new Immigration and Naturalization Service (INS) policy.[65] The district court found that the INS's policy should have been effected via notice and comment rulemaking under the Administrative Procedures Act (APA) but that petitioners had failed to prove their Fifth Amendment Equal Protection Claim that they were discriminated against because of their race and national origin.[66] Following the district court's decision, the INS properly promulgated a new parole rule that "require[d] even-handed treatment and prohibit[ed] the consideration of race and national origin in the parole decision."[67] The Eleventh Circuit, sitting *en banc*, held that the APA claim was moot as all parole decisions were made under the new parole rule and that "the Fifth Amendment did not apply to the consideration of unadmitted aliens for parole."[68] Finally, the Eleventh Circuit ordered the case to be remanded to the district court for it to review whether parole decisions were being made pursuant to the new regulation, which is in an individualized and non-discriminatory fashion.[69]

The Supreme Court granted certiorari following the Eleventh Circuit's en banc decision.[70] Both Petitioners and Respondents urged the Court to reach the constitutional issue.[71] At the time that *Jean* reached the Supreme Court, scholars were already predicting the demise of the plenary power doctrine.[72] Observers hoped that *Jean* would be the Court's opportunity to move this demise forward in

61. Jean v. Nelson, 472 U.S. 846 (1985).

62. Zadvydas v. Davis, 533 U.S. 678 (2001).

63. Clark v. Martinez, 543 U.S. 371 (2005).

64. Jean v. Nelson, 472 U.S. 846 (1985).

65. *Id.* at 848–49.

66. *Id.* at 850.

67. *Id.* at 850–51.

68. *Id.* at 852.

69. *Id.* at 852–53.

70. Jean v. Nelson, 469 U.S. 1071, 1071 (1984).

71. *Jean*, 472 U.S. at 854.

72. *See, e.g.*, Motomura, *supra* note 15, at 547; Stephen Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 296–99; Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 57–58 (1984).

a more concrete and explicit way.[73] These hopes prior to the Court's decision in *Jean* are strikingly similar to commentary that preceded the Court's decision in *Jennings*, some thirty years later.

The result in *Jean*, like that in *Jennings*, was disappointing. Justice Rehnquist, for a seven-member majority, relied on the canon of constitutional avoidance rather than addressing the constitutional arguments.[74] The Court stated: "'Prior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision.' . . . Of course, the fact that courts should not decide constitutional issues unnecessarily does not permit a court to press statutory construction 'to the point of disingenuous evasion' to avoid a constitutional question."[75]

The Court discussed the meaning and rationale for the avoidance canon, but this discussion lasted less than a page, consisted primarily of quotations from prior cases, and was by no means intensive.[76] The Court then criticized the Eleventh Circuit for jumping to the constitutional issue without first addressing the statute and the regulation.[77] After a very brief discussion of the statute and regulation, the Court agreed with the en banc Eleventh Circuit that the case should be remanded to the District Court to determine whether individualized parole decisions without regard for race or national origin were being made pursuant to the statute and regulations.[78]

The application of constitutional avoidance in *Jean* was conducted in a somewhat unusual manner. The Court did not consider two or more possible interpretations of a provision of law, at least one of which presented serious constitutional questions. Instead, the Court glossed over the question of interpretation all together by accepting the parties' interpretation of the statute and regulation at issue.[79] As the dissent pointed out, that interpretation does not stem directly from the statutory language.[80]

---

73. *See, e.g.*, Motomura, *supra* note 15, at 547–48.

74. *Jean*, 472 U.S. at 855. Justice Marshall, joined by Justice Brennan, in dissent would have decided the constitutional issue and held that "petitioners have a Fifth Amendment Right to parole decisions free from invidious discrimination based on race or national origin." *Id.* at 858 (Marshall, J., dissenting). The dissent did not disagree with the majority's explanation of the canon of constitutional avoidance but did disagree with the premise that the regulation prohibited consideration of race and national origin. *Id.* at 858–59.

75. *Id.* at 854 (first quoting Gulf Oil Co. v. Bernard, 452 U.S. 89, 99 (1981)); then quoting United States v. Locke, 471 U.S. 84, 96 (1984).

76. *Jean*, 472 U.S. at 854.

77. *Id.* at 854–55.

78. *Id.* at 857.

79. *Id.* at 850–51.

80. *Id.* at 858–64 (Marshall, J., dissenting).

ii. *Zadvydas v. Davis*

Zadvydas v. Davis, issued at the very end of the Supreme Court's October 2000 term, was the second immigration case in 2001 where the Supreme Court invoked constitutional avoidance.[81] It was decided just three days after the Supreme Court's decision in *INS v. St. Cyr*, where the Court relied in part on the canon of constitutional avoidance to hold that the jurisdiction-stripping provisions of two new statutes did not preclude habeas jurisdiction because to do so would raise substantial constitutional questions under the suspension clause of the Constitution.[82]

In *Zadvydas*, the Court was concerned with the detention of noncitizens following a removal order.[83] Ordinarily, a detained noncitizen with a removal order will be physically removed from the United States within a ninety-day statutory removal period.[84] The statute in INA § 241(a)(6) allows for the detention of certain noncitizens past that ninety-day period when the government has been unable to remove them.[85] The Court in *Zadvydas* considered the post-removal order detention of two separate noncitizens: Kestutis Zadvydas and Kim Ho Ma.[86] Both Zadvydas and Ma were deportable as a result of criminal convictions and were ordered removed.[87] When the government was unable to physically remove them, they remained detained for an extended period of time past the statutory ninety-day period.[88] Each filed a petition for a writ of habeas corpus challenging his continued detention.[89]

In Zadvydas's case, the district court held that Zadvydas's continued detention was unconstitutional, but it was reversed by the Fifth Circuit Court of Appeals.[90] The Fifth Circuit found his detention constitutional because "eventual deportation was not 'impossible,' good faith efforts to remove him from the United States continued, and his detention was subject to periodic administrative review."[91] In Ma's case, the district court also held that Ma's continued detention was unconstitutional.[92] The Ninth Circuit affirmed his release on statutory grounds, interpreting the statute in light of the constitutional concerns to prohibit detention

---

81. Zadvydas v. Davis, 533 U.S. 678 (2001).

82. I.N.S. v. St. Cyr, 533 U.S. 289, 298–99 (2001).

83. *Zadvydas*, 533 U.S. at 683.

84. Immigration and Nationality Act of 1952, Pub. L. No. 414, 66 Stat. 477, § 241(a)(1) (codified at 8 U.S.C. § 1231(a)(1) (2020)).

85. 8 U.S.C. § 1231(a)(6).

86. *Zadvydas*, 533 U.S. at 684–86.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 685.

91. *Id.*

92. *Zadvydas*, 533 U.S. at 686.

for more than a reasonable time after the statutory ninety-day removal period.[93] The Supreme Court granted certiorari in both cases, agreeing to hear both the statutory and constitutional arguments, and consolidated the cases for argument and decision.[94]

Justice Breyer wrote the majority opinion for the Supreme Court, joined by Justices Stevens, O'Connor, Souter, and Ginsburg.[95] The Court held that, in light of the serious constitutional concerns presented by indefinite detention, the post-removal period detention provision should be construed to "limit[] an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States."[96] "[F]or the sake of uniform administration in the federal courts," the Court set a presumptively reasonable period of six months for continued detention, explaining that, after the six-month period, continued detention is authorized only if there is a significant likelihood of removal in the reasonably foreseeable future.[97]

Zadvydas is a typical modern constitutional avoidance case concerned with the interpretation of a single statutory provision that, depending on how it is interpreted, may present serious constitutional issues. The most straightforward reading of the plain text of the statute would seem to authorize indefinite detention at the will of the executive. The majority opinion for the Court, however, held that this statutory language was ambiguous.[98] In order to avoid "a 'serious doubt' with its constitutionality," it went well beyond the text of the statute in interpreting it.[99] It justifies doing so by citing to an earlier constitutional avoidance case, *United States v. Witkovich*, for the proposition that "[w]e have read significant limitations into other immigration statutes in order to avoid their constitutional invalidation."[100]

The Court's discussion of the canon of constitutional avoidance itself is, as in most of the other cases discussed, brief, but its application in the cases before it is lengthy. The Court began its application with an in-depth analysis of the underlying constitutional norm, a liberty interest under the Fifth Amendment's due process clause.[101] Unlike many constitutional avoidance cases, the language of this constitutional analysis is strong and definite. The Court leaves no doubt and acknowledges no remaining questions regarding its conclusion that the interpretation most consistent with the plain language of the statute violates the due process rights of detainees like Zadvydas and Ma. Given the decisive nature of

93. *Id.*

94. *Id.*

95. *Id.* at 681.

96. *Id.* at 689.

97. *Id.* at 701.

98. *Zadvydas*, 533 U.S. at 689, 697.

99. *Id.* at 689 (citing Crowell v. Benson, 285 U.S. 22, 62 (1932)).

100. *Zadvyas*, 533 U.S. at 689 (citing United States v. Witkovich, 353 U.S. 194, 195 (1957)).

101. *Zadvydas*, 533 U.S. at 690–92.

its conclusion, one might wonder why the Court did not simply decide the case on a constitutional basis rather than employing constitutional avoidance. The Court attempts to answer this question itself, framing its choice as a simple, straightforward application of the avoidance canon – Congress did not make its intent to authorize indefinite detention in the statute sufficiently clear, so the Court will interpret the statutory language to avoid the "serious constitutional threat."[102]

The Court explicitly acknowledges the plenary power doctrine in its decision.[103] It does not question its identity as a foundational doctrine in immigration law, or its application in the instant case. In fact, in some respects the Court subscribes to an expansive interpretation of the doctrine, discussing the need for the judiciary to defer not only to the legislature but to the executive as well.[104] The Court does, however, draw language from other cases, including *Chae Chan Ping* itself, to argue that the plenary power doctrine does not mean that Congress' power over immigration is unlimited:

> [T]hat power is subject to important constitutional limitations. See INS v. Chadha, 462 U.S. 919, 941–42 . . . (1983) (Congress must choose "a constitutionally permissible means of implementing" that power); The Chinese Exclusion Case, 130 U.S. 581, 604 . . . (1889) (congressional authority limited "by the Constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations").[105]

In this respect, then, the Court endorses only a very weak version of the doctrine.

Justices Scalia, Thomas, Kennedy, and Rehnquist dissented from the Court's opinion.[106] In an opinion written by Justice Kennedy, the dissenting justices argue that the majority improperly invoked the canon of constitutional avoidance.[107] They accuse the Court of "misunderstand[ing] the principle of constitutional avoidance which it seeks to invoke."[108] The dissent takes the position that constitutional avoidance allows the Court to select between "fairly possible" constructions of the

---

102. *Id.* at 696–99.

103. *Id.* at 695.

104. *Id.*

105. *Id.* at 695.

106. All four dissenters join Part I of Justice Kennedy's dissent, discussed here, regarding the interpretation of the statute. *Id.* at 702, 706–18 (5-4 opinion) (Scalia, J., dissenting) (Kennedy, J., dissenting). Justices Scalia and Thomas would have held that noncitizens like Zadvydas and Ma had no constitutional right to release. *Id.* at 703 (Scalia, J., dissenting). In Part II of Justice Kennedy's dissent, not joined by Justices Scalia and Thomas, Justices Kennedy and Rehnquist acknowledge that post-removal order detention might present constitutional issues in some cases, but argue that this is not so in the cases before the Court. *Id.* at 718–25 (Kennedy, J., dissenting).

107. *Id.* at 707 (Kennedy, J., dissenting).

108. *Id.*

statute and would hold that the majority's construction of the post-removal order detention statute is not plausible: "The requirement the majority reads into the law simply bears no relation to the text; and in fact it defeats the statutory purpose and design."[109] The dissent distinguishes *Witkovich* by finding that there, the limitation in the statue was consistent with the statutory purpose, whereas in the instant case, the limitation was contrary to congressional intent.[110]

iii. *Clark v. Martinez*

In *Clark v. Martinez*,[111] the Supreme Court was interpreting the same statutory provision, INA § 241(a)(6),[112] that was at issue in *Zadvydas v. Davis*.[113] Instead of being concerned with the detention of *deportable* noncitizens after the statutory removal period, however, *Clark* involved the post-removal order detention of *inadmissible* noncitizens.[114] *Clark* concerned the detention of two separate noncitizens, Sergio Suarez Martinez and Daniel Benitez.[115] Both Martinez and Benitez were Cubans who had come to the United States through the Mariel boatlift in 1980 and had been subsequently paroled into the United States.[116] Each had a number of criminal convictions in the United States that rendered him ineligible for adjustment of status to lawful permanent residency under the Cuban Adjustment Act.[117] As a result, both were placed into removal/exclusion proceedings and ordered removed/excluded from the United States.[118] Due to the lack of a repatriation agreement with Cuba, neither was able to be removed and both remained detained following the expiration of the statutory removal period.[119]

---

109. *Id.*

110. *Zadvydas*, 533 U.S. at 709–10.

111. Clark v. Martinez, 543 U.S. 371, 377–78 (2005).

112. 8 U.S.C. § 1231(a)(6) (2014).

113. *Zadvydas*, 533 U.S. at 682.

114. *Clark*, 543 U.S. at 373.

115. *Id.* at 374–77.

116. *Id.* at 374.

117. *Id.* at 374–75.

118. *Id.* at 375. Benitez was placed into proceedings prior to the changes made by IIRIRA taking effect in 1996 and was therefore placed into exclusion proceedings and ordered excluded. Martinez was placed into proceedings in 2000, after IIRIRA, and was therefore charged as inadmissible and ordered removed. *Id.* at 375 n.2.

119. *Id.* at 375–76.

Justice Scalia, after dissenting in *Zadvydas*,[120] wrote the majority opinion in *Clark*.[121] He was joined by Justices Stevens, O'Connor, Kennedy, Souter, Ginsburg, and Breyer.[122] The Court held that because INA § 241(a)(6) had been interpreted in *Zadvydas* as allowing detention of deportable noncitizens for only as long as was reasonably necessary to effectuate their deportation it must be interpreted in the same way for inadmissible noncitizens.[123] That is, the same statutory provision cannot be interpreted differently in different contexts.[124] Although the Court provides only limited citations for this principle, it appears to treat it as a generally applicable principle of statutory construction.[125] The Court gives examples from other contexts, including interpretations resulting from the application of the rule of lenity.[126]

While the Court does not describe the canon of constitutional avoidance as being the primary basis for its decision, *Clark* can be construed as a constitutional avoidance case. The Court explains that "when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court."[127] The Court was, then, relying at least in part on the canon of constitutional avoidance to reach its decision.

This characterization is further borne out by the fact that the Court in *Clark* does discuss the canon of constitutional avoidance and its invocation in *Zadvydas* at length.[128] Indeed, the Court's discussion of constitutional avoidance in *Clark* is more detailed and less formulaic than its treatment in many cases where resolution did turn on the canon. The Court emphasized throughout its decision that the canon is a tool of *statutory* interpretation, not a means for the Court to make *constitutional* determinations.[129] The Court also noted on multiple occasions that

---

120. *Zadvydas*, 533 U.S. at 702–05.

121. *Clark*, 534 U.S. at 372–87. Justice Scalia authored a dissenting opinion in *Zadvydas* taking the position that the Court should have held that Zadvydas and Ma had no constitutional right at stake, *Zadvydas*, 533 U.S. at 702–05 (Scalia, J., dissenting), and joined Justice Kennedy's dissenting opinion arguing that the majority wrongly applied the canon of constitutional avoidance because their interpretation of the statute was not plausible. *Id.* at 702, 706–18 (Kennedy, J., dissenting).

122. *Clark*, 534 U.S. at 372. Like Justice Scalia, Justice Kennedy also wrote a dissenting opinion in *Zadvyas*. *Zadvydas*, 533 U.S. at 705–25. Justice O'Connor wrote a concurring opinion in *Clark* to emphasize that detention of inadmissible noncitizens ordered removed for longer than six months remains possible. *Clark*, 534 U.S. at 387–88.

123. *Clark*, 534 U.S. at 378, 380–81.

124. *Id.* at 378, 380–81.

125. *Id.* at 380. The dissent, as discussed *infra*, disagrees with this characterization. *Id.* at 392–401 (Thomas, J., dissenting).

126. *Id.* at 380.

127. *Id.* at 380–81.

128. *Id.* at 380–82, 385.

129. *Clark*, 534 U.S. at 380–82, 385.

the canon did not allow the courts to interpret a statute in any way they pleased but was rather a means of selecting between two or more reasonable interpretations. Summing up both of these considerations, the Court stated: "[O]ne of the canon's chief justifications is that it allows courts to *avoid* the decision of constitutional questions. It is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts."[130]

Justice Thomas authored a dissenting opinion in *Clark*, joined in part by Chief Justice Rehnquist.[131] Justice Thomas characterizes the majority's conclusion in the case as flowing from the canon of constitutional avoidance, not as a general principle of statutory interpretation.[132] As a result of this conclusion, he goes on to argue that what he calls the majority's "lowest common denominator principle" is inconsistent with the canon of constitutional avoidance.[133] Justice Thomas's dissent discusses the canon of constitutional avoidance even more extensively than does the majority opinion.[134] He traces the development of constitutional avoidance from a principle that required the courts to determine that a construction of the statute was in fact unconstitutional to one that also responded to "constitutional doubts."[135] He then argues that, in the typical case, courts have always analyzed the constitutional question as to only the plaintiff before the court, not as to third parties.[136]

Finally, Justice Thomas in dissent argues that *Zadvydas* was wrongly decided and should not be accorded *stare decisis* effect.[137] He focuses on the fact that the canon of constitutional avoidance was inappropriately applied because the statute is not ambiguous and because the decision is really a constitutional decision in disguise.[138]

C. Preliminary Observations

Several conclusions can be drawn about the statue of canon of constitutional avoidance and the plenary power doctrine prior to the Supreme Court's

---

130. *Id.* at 381.

131. *Id.* at 388 (Thomas, J., dissenting). Justice Rehnquist joined as to Part I.A only, the portion of the dissent that argued that the majority's interpretation of the Court's decision in *Zadvydas* was implausible because it failed to acknowledge the distinction *Zadvydas* made between inadmissible and deportable noncitizens. *Id.* at 388–92.

132. *Id.* at 388–401.

133. *Id.* at 395–401.

134. *Id.* at 388–404.

135. *Clark*, 534 U.S. at 395 (citing, inter alia, Rust v. Sullivan, 500 U.S. 173 (1991)).

136. *Id.* at 395–98.

137. *Id.* at 401–04.

138. *Id.* at 401–04.

consideration of *Jennings v. Rodriguez* from this discussion of *Jean*, *Zadvydas*, and *Clark*. First, the use of constitutional avoidance in immigration detention cases specifically and immigration cases generally was well established and provided courts with considerable discretion to interpret statutes to avoid constitutional problems. Second, this use was both encouraged by and further entrenched the plenary power doctrine and a theory of immigration exceptionalism. While nominally protecting the rights of immigrants, reliance on constitutional avoidance rather than directly considering the underlying constitutional issue may have in fact made immigrants more vulnerable. This section will discuss each of these conclusions in turn.

i. The Canon of Constitutional Avoidance

Jean, *Zadvydas*, and *Clark* demonstrate that the application of the canon of constitutional avoidance in immigration detention cases is uncontroversial. Both the last resort rule and modern constitutional avoidance are reflected in the Supreme Court's immigration detention jurisprudence. *Jean* is one example of the application of the less common last resort rule. As a result, it is sometimes not discussed in analyses of the Supreme Court's invocation of constitutional avoidance in immigration cases.[139] The last resort rule is, however, generally considered part of the doctrine of constitutional avoidance[140] and *Jean* is a relevant part of the conversation here. *Zadvydas* is one example of the application of modern constitutional avoidance. If *Clark* is read as a constitutional avoidance case, it would also fall into this category.

In both the last resort rule cases and the modern avoidance cases, the content of the rule itself is relatively straightforward and unchanging. The basic meaning of the canon of constitutional avoidance is not a heavily litigated or discussed issue. The more difficult questions in constitutional avoidance are the closely related questions of *when* and *how* the canon should be invoked.[141]

With respect to *when*, I mean when the application of the doctrine is triggered. Is constitutional avoidance an absolute rule, or do courts have some leeway in deciding when to exercise it and when to decide constitutional issues directly? When is a potential constitutional issue "serious" enough to prompt use of the canon? With respect to *how*, I mean how far can and should a court go in interpreting a statute to avoid constitutional issues. Otherwise stated, what is the

---

139. *Compare* Das, *supra* note 13, at 498–501 *with* Motomura, *supra* note 15, at 577–78, 590–93.

140. *See* Young, *supra* note 30, at 1574–75; Kloppenberg, *supra* note 29. *But see* Krishnakumar, *supra* note 54, at 544 (describing the last resort rule as a related procedural doctrine rather than a variation of the constitutional avoidance canon).

141. *Cf.* Kloppenberg, *supra* note 29, at 1028 (discussing specifically the last resort rule) ("The critical problem facing a judge as she implements the doctrine of avoiding unnecessary constitutional decisions is determining *which* constitutional determinations are necessary and *when* those determinations become necessary.").

line between permissible construction of a statute Congress has written and impermissible judicial re-writing of that statute?[142] I note that these questions are closely related because the answer to the question of *how* often drives the answer to the question of *when*. That is, the doctrine of modern avoidance instructs courts to choose between plausible constructions of the statute to avoid constitutional issues. How much leeway a Court has before a construction becomes implausible may determine whether or not constitutional avoidance comes into play.

The Court in *Zadvydas* and by extension in *Clark* added significant limitations to the relevant statute's reach that were tied only loosely, if at all, to the plain language of the statute.[143] While precise line drawing is not possible, the answer to these questions of when and how prior to the Court's decision in *Jennings* then appeared to be quite far—that is, courts had significant leeway to determine *when* to invoke the canon of constitutional avoidance and significant latitude in *how* to interpret a statute to avoid constitutional problems. The Court in *Clark* did use some language indicating an intent to narrow these answers, repeatedly emphasizing that the possible multiple interpretations of the statute must all be plausible.[144] This language was tempered, however, by the fact that the *Clark* Court did ultimately endorse *Zadvydas*'s broad interpretation of the statutory language.

ii. The Plenary Power Doctrine

If a strong interpretation of the plenary power doctrine and immigration exceptionalism had governed, the Court in all three cases could have said that they would not interfere with the process and rights set out by Congress and the executive. In fact, the Court did not so hold in any of the three cases. All three cases did enforce, if not explicitly recognize, some level of constitutional or sub-constitutional protection for noncitizens.

The Court's decision in *Jean* was perhaps the weakest of the three in this regard, but nevertheless acknowledged some rights for noncitizens. This may be attributed at least in part to the fact that *Jean* was, as discussed above, a "last resort rule" constitutional avoidance case.[145] The Court in *Jean* did not recognize a Fifth Amendment equal protection right against discrimination based on race or national origin for noncitizens in immigration proceedings.[146] The Court did, however, hold that the statute and the regulations required parole determinations to be made in an individualized and non-discriminatory manner, and remanded the case to the district court to determine whether immigration officers were in fact complying

142. *See, e.g.*, Rosenberg v. Fleuti, 374 U.S. 449, 463 (1963) (Clark, J., dissenting) ("I dissent from the Court's judgment and opinion because 'statutory construction' means to me that the Court can *construe* statutes but it cannot *construct* them.").

143. *See supra* Sections I.B.2–3.

144. *Clark*, 534 U.S. at 380–82, 385.

145. *See supra* Section I.B.1.

146. *Jean*, 472 U.S. at 852–53; Motomura, *supra* note 15 at 590–93.

with these requirements.[147] In essence, the Court in *Jean* made a small step forward in recognizing immigrants' rights, rather than the larger, more decisive step requested by the litigants and their advocates.

The Court's decisions in *Zadvydas* and *Clark* provided more robust protection to noncitizens' rights in immigration proceedings. The Court in *Zadvydas* and *Clark* protected a Fifth Amendment due process liberty interest by holding that INA § 241(a)(6) allowed post-removal order detention of both deportable and inadmissible noncitizens for only so long as reasonably necessary to effectuate their deportation.[148]

It is difficult to criticize decisions that resulted in the advancement of rights and protections for noncitizens and were perhaps the best realistic outcome given the plenary power doctrine and other existing political impediments to advancing immigrants' rights. In some respects, these cases can be viewed as slowly chipping away at the plenary power doctrine by their incremental recognition of the constitutional rights of noncitizens. However, the use of the canon of constitutional avoidance instead of directly confronting constitutional issues has led to a number of problems. Professor Motomura suggested more than thirty years ago that constitutional avoidance was a transitional phase that would lead to the recognition of actual constitutional rights, but recognized that some constitutional norms seemed to have gotten "stuck" in the transition even then.[149] The continued reliance on the canon of constitutional avoidance by the Supreme Court in the three cases discussed above shows that a number of norms remain stuck now, three decades later. As a result, a number of the concerns identified by Professor Motomura, awkward or unpredictable solutions; misdirected judicial review; and a lack of dialogue, particularly regarding the future of immigration law, continue to occur today.[150]

In addition, the canon of constitutional avoidance has in some respects further entrenched the plenary power doctrine. It enables courts to avoid addressing the plenary power doctrine, thereby allowing the plenary power doctrine to continue to exist.[151] In fact, constitutional avoidance not only does not lead to the demise of the plenary power doctrine, it actually promotes its continued

---

147. *Jean*, 472 U.S. at 852–53.

148. *Zadvydas*, 533 U.S. at 690–96; *Clark*, 534 U.S. at 378, 380–81. *See also supra* Sections I.B.2–3.

149. Motomura, *supra* note 15; *cf.* Das *supra* note 13, at 538 ("The development of constitutional principles in immigration has stagnated.").

150. Motomura, *supra* note 15, at 600–13.

151. *See, e.g.*, Das, *supra* note 13, at 501 ("Although not fully liberated from the dictates of the plenary power doctrine or years of precedent recognizing limitations on the extent to which immigrants may avail themselves of certain constitutional protections, federal courts have taken steps forward to enforce constitutional norms through statutory interpretation."). Professor Das analyzes the use of constitutional avoidance by the Supreme Court in *Witkovich*, *St. Cyr*, *Zadvydas*, and *Clark* before arguing that the impact of the federal courts is limited and the executive branch should play a greater role in developing and enforcing constitutional norms in immigration cases. *Id.* at 498–502, 538–39.

hegemony. By allowing courts to avoid directly addressing constitutional rights for noncitizens in immigration proceedings, constitutional avoidance to some degree perpetuates the position that noncitizens have no such constitutional rights. The effect is circular—the plenary power doctrine pushed courts to rely on the canon of constitutional avoidance instead of directly confronting constitutional issues and the application of the canon of constitutional avoidance reinforces the continued viability of the plenary power doctrine.

Finally, the use of the canon of constitutional avoidance has led to ambiguity and uncertainty in the applicability and interpretation of some constitutional norms in the immigration context. For example, despite the extensive discussion and strong language finding a Fifth Amendment due process liberty interest for detained noncitizens in *Zadvydas*, the Supreme Court just two years later in *Demore v. Kim* found no Fifth Amendment liberty interest for a different group of detained immigrants.[152] Because *Zadvydas* was decided based on an interpretation of the *statute* (albeit on the basis of constitutional avoidance) rather than on an interpretation of the *Constitution*, there was no direct precedent to prevent the Court's problematic decision in *Demore*. This has the effect of increasing unpredictability for noncitizens, a group already particularly vulnerable to insecurity and instability.

III. *JENNINGS V. RODRIGUEZ*

A. State of the Law on Immigration Detention

As discussed in subsection I.C above, the applicability of constitutional avoidance in immigration detention cases and the basic substance of the canon appear well-settled in *Jean*, *Zadvydas*, and *Clark*. On the other hand, the substantive issue at stake, immigration detention, has been and remains a live controversy. Noncitizens continue to challenge various aspects of their detention for immigration purposes.[153] The lower federal courts wrestle with interpreting and analyzing the constitutionality of the various statutes authorizing the detention of different categories of noncitizens during different portions of their removal proceedings. One illustration of the tangled and inconsistent mess of these cases is a third case on the detention of noncitizens decided by the Supreme Court in 2003, in between its decisions in *Zadvydas* and *Clark*—*Demore v. Kim*.[154]

Instead of the post-removal order detention challenged in *Zadvydas* and *Clark*, *Demore* concerned the mandatory detention with no possibility for bond of a noncitizen while his removal proceedings were pending.[155] Hyung Joon Kim, a

152. *See Zadvydas*, 533 U.S. at 690–96; Demore v. Kim, 538 U.S. 510 (2003); Section I.B.2, *infra*. *Demore v. Kim* will be discussed in more detail *infra* Section II.A.

153. *See, e.g.*, Demore v. Kim, 538 U.S. 510 (2003); Jennings v. Rodriguez, 138 S.Ct. 830 (2018).

154. Demore v. Kim, 538 U.S. 510 (2003).

155. *Id.*

Korean citizen and lawful permanent resident with convictions for burglary and petty theft, challenged his detention under INA § 236(c), a statute that mandated the detention of noncitizens with particular types of criminal convictions in certain circumstances while their removal proceedings are pending.[156] The Court's decision in *Demore* involved substantial disagreement among the Justices and a resulting mess of concurring and dissenting opinions.[157] Unlike the opinions for the Court in *Zadvydas* and *Clark*, however, none of the Justices, with the possible exception of Justice Breyer's dissenting opinion, relied on the canon of constitutional avoidance to decide the case. Instead, they confronted the constitutional issue directly.

Justice Rehnquist, who dissented in *Zadvydas* and *Clark*,[158] wrote the opinion of the Court, joined in full by Justice Kennedy.[159] Part I of his opinion, finding habeas jurisdiction over Kim's constitutional challenge to his detention, was joined by Justices Stevens, Souter, Ginsburg, and Breyer.[160] The remainder of his opinion, holding that Kim's mandatory detention did not violate his right to due process under the Fifth Amendment, was joined by Justices O'Connor, Scalia, and Thomas.[161] In finding Kim's detention constitutional, Justice Rehnquist emphasized the purpose of the detention, to compel noncitizens to attend their removal proceedings, and the relatively short length of the detention required, which the Court describes as "roughly a month and a half" in those cases where the noncitizen

---

156. *Id.* at 513. INA § 236(c)(1)(B) (8 U.S.C. § 1226(c)(1)(B)) provides that "[t]he Attorney General shall take into custody any alien who . . . is deportable by reason of having committed any offense covered in section 237(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) . . . when the alien is released . . . ." The government alleged that Kim was deportable under INA § 237(a)(2)(a)(ii), multiple crimes involving moral turpitude, and INA § 237(a)(2)(A)(iii), aggravated felonies, as a result of his criminal convictions. *Id.* at 513 n.1.

157. Justice O'Connor authored a concurring opinion joined by Justices Scalia and Thomas arguing against habeas jurisdiction. *Id.* at 533–40. Justice Kennedy authored a concurring opinion to emphasize his belief that pre-final removal order detention could, under some circumstances not present in the instant case, violate the due process clause of the Fifth Amendment. *Id.* at 531–33. Justice Souter authored an opinion joined by Justices Stevens and Ginsburg concurring regarding habeas jurisdiction and dissenting on the constitutional issue, asserting instead that Kim's mandatory detention violated due process. *Id.* at 540–76. Finally, Justice Breyer authored an opinion concurring on habeas jurisdiction and dissenting on the Constitutional issue for reasons different than Justice Souter's dissent. *Id.* at 576–79. Justice Breyer's dissent will be discussed in this section below.

158. In *Zadvydas*, Justice Rehnquist joined Justice Kennedy's dissent, which argued (1) that the majority improperly applied the doctrine of constitutional avoidance because their construction of the statute is implausible and (2) that post-removal order detention might present constitutional issues in some cases but did not in the cases currently before the Court. 533 U.S. at 706–25. In *Clark*, Justice Rehnquist joined the portion of Justice Thomas' dissent that argued that the majority's interpretation of the Court's decision in *Zadvydas* was implausible because it failed to acknowledge the distinction *Zadvydas* made between inadmissible and deportable noncitizens. 534 U.S. at 388–92.

159. *Demore*, 538 U.S. at 512–13.

160. *Id.* at 512, 516–17.

161. *Id.* at 512–16, 517–31.

does not appeal to the Board of Immigration Appeals.[162] Justice Kennedy's concurring opinion further emphasized the importance of the length of the detention, noting that a lawful permanent resident "could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified."[163]

As mentioned above, Justice Breyer came the closest of any of the Justices in *Demore* to invoking constitutional avoidance.[164] In his dissenting opinion, he argued that INA § 236(c) should be interpreted to require an individualized assessment of flight risk and dangerousness for noncitizens who were raising good faith, substantial challenges to their removability on the grounds that were also the basis for their detention.[165] Justice Breyer did not mention the canon of constitutional avoidance by name and did not discuss the substance of the doctrine.[166] However, he noted that his interpretation of the statute was "consistent with what the Constitution demands" and he cited to the constitutional avoidance cases *Zadvydas* and *Witkovich* in support of his decision to so interpret the statute.[167]

In the years following *Zadvydas*, *Demore*, and *Clark*, courts struggled to reconcile the approaches and outcomes of the three cases as they decided other challenges to immigration detention raised by noncitizens.[168] *Demore* obviously presented particular issues for noncitizens challenging their detention during removal proceedings, but some courts agreed with interpretations limiting *Demore* to its facts and arguing for bond hearings for immigrants detained for longer periods of time.[169] Some ammunition in this battle came when, in August 2016, the Solicitor General submitted a letter to the Supreme Court acknowledging "several significant errors" in the data it had provided to the Court in *Demore*.[170] These errors meant that the average length of detention for a noncitizen in pending removal proceedings was actually 382 days, not the 47 days reported to the Court at the time *Demore* was decided.[171] Since, as discussed previously, the short length of the detention was a major factor in the Court's decision in *Demore*,[172] this revelation

---

162. *Id.* at 517–31.

163. *Id.* at 532–33.

164. *Id.* at 576–79.

165. *Demore*, 538 U.S. at 576–79.

166. *See Demore*, 538 U.S. 510.

167. *Id.* at 578–79.

168. See Alina Das, *Unshackling Habeas Review: Chevron Deference and Statutory Interpretation in Immigration Detention Cases*, 90 N.Y.U. L. REV. 143, 157 (2015).

169. *See, e.g., id.* at 157–58.

170. Letter from Ian Heath Gershengorn, Acting Solicitor Gen., to Hon. Scott S. Harris, Clerk, Supreme Court (Aug. 26, 2016); Demore v. Kim, 538 U.S. 510 (2003).

171. Gershengorn, *supra* note 170; *Demore*, 538 U.S. 510.

172. *Demore*, 538 U.S. at 517–33.

provided support to judges and advocates seeking to distinguish cases with a longer period of detention and even to call for limiting or overruling *Demore*.[173]

Questions regarding the plenary power doctrine, the application of constitutional law in immigration cases, the canon of constitutional avoidance and immigration detention came to a head in many of these immigration detention cases, including *Jennings v. Rodriguez*.

B. *Jennings v. Rodriguez*: Pre-Supreme Court Proceedings

Jennings v. Rodriguez originated in two petitions for a writ of habeas corpus by immigration detainees in the United States District Court for the Central District of California in 2007.[174] The detainees were challenging their detention under, *inter alia*, two sections of the INA § 235(b), applying to applicants for admission, and § 236(a) and (c), governing discretionary and mandatory detention during removal proceedings.[175] The cases were consolidated and the petitioners moved for class certification.[176] The case then bounced back and forth between the district court and the Ninth Circuit for a number of years.[177]

Finally, in 2013, the Ninth Circuit issued a decision (referred to as *Rodriguez II*) affirming the district court's unpublished order granting a preliminary injunction in favor of the class members.[178] The district court then granted summary judgment and issued a permanent injunction in favor of the class members requiring, inter alia, the government to hold bond hearings in the cases of noncitizens detained under the authority of several different statutory provisions.[179] The Ninth Circuit upheld the permanent injunction in 2015 in an opinion referred to as *Rodriguez III*.[180] The Ninth Circuit held that allowing indefinite detention of these noncitizens during their removal proceedings would raise substantial constitutional concerns and therefore interpreted the statute to provide for these regular bond hearings.[181]

---

173. *See, e.g.*, Brief for Respondents at 8, 12–13, Jennings v. Rodriguez, 138 S. Ct. 830 (2018); Lukaj v. McAleenan, 420 F. Supp. 3d 1265, 1269–70, 1273–74 (M.D. Fla. 2019).

174. Rodriguez v. Robbins, 804 F.3d 1060, 1065 (9th Cir. 2015) (Herein after *Rodriguez III*).

175. Rodriguez v. Holder, No. CV 07-3239 TJH (RNBx), 2013 WL 5229795, at *1 (C.D. Cal. Aug. 6, 2013).

176. *Id.*

177. *Rodriguez III*, at 1065–66, 1071–72.

178. *See,* Rodriguez v. Robbins, 715 F.3d 1127, 1132–33 (9th Cir. 2013) (Herein after *Rodriguez II*).

179. *Rodriguez*, 715 F.3d 1127 at 3.

180. *Rodriguez III*, 804 F.3d at 1074.

181. *Id.*

The remainder of Subsection II.B will discuss the use of the canon of constitutional avoidance in *Jennings* by the Ninth Circuit.[182]

In *Rodriguez II*, the Ninth Circuit panel structured its substantive analysis of the detention provisions at stake through the framework of constitutional avoidance.[183] Its initial discussion of the canon is a classic example of modern avoidance, citing to the standard *Crowell v. Benson* without much elaboration.[184] The court does emphasize that its interpretation must not override congressional intent so as not "to usurp the policy-making and legislative functions of duly-elected representatives."[185] The court later relies on *Clark v. Martinez* to hold that, because some applications of INA § 235(b) would raise constitutional concerns, all of INA § 235(b) must be interpreted to avoid those concerns.[186] The Ninth Circuit explained:

> [T]he Supreme Court has instructed that, where one possible application of a statute raises constitutional concerns, the statute as a whole should be construed through the prism of constitutional avoidance. . . . Thus, the dispositive question is not whether the government's reading of [§ 235(b)] is permissible in some (or even most) cases, but rather whether there is any single application of the statute that calls for a limiting construction.[187]

The Ninth Circuit concluded briefly, relying on *Zadvydas* as limited by *Demore*, (1) that there is a due process liberty interest in freedom from imprisonment and (2) that at least indefinite immigration detention would raise "serious constitutional concerns."[188] To avoid raising these due process concerns, the panel interpreted the relevant statutory provisions, INA §§ 235(b) and 236(c), as including a temporal limitation.[189] That is, the statutes only applied so long as the length of the detention was reasonable, less than six months.[190] Once that reasonable period of detention was exceeded, federal authorization for the detention shifted to a discretionary

---

182. The district court's discussion of constitutional avoidance appears to have been contained primarily in its unpublished order granting a preliminary injunction in favor of the class members. *See, Rodriguez II*, 715 F.3d at 1132–33. In its decision granting the permanent injunction, the district court simply refers back to its order granting the preliminary injunction and to the Ninth Circuit's 2013 decision affirming it in *Rodriguez II*. *Rodriguez*, 2013 WL 5229795, at *1–2

183. *Rodriguez II*, 715 F.3d at 1133–34.

184. *Id.* (citing Crowell v. Benson, 285 U.S. 22, 62 (1932)).

185. *Id.* (quoting Heckler v. Mathews, 465 U.S. 728, 741 (1984)).

186. *Id.* at 1141

187. *Id.* (INA § 235(b) corresponds to 8 U.S.C. § 1225(b) (2009)).

188. *Id.* at 1134. The court then engaged in an extended discussion of its own prior precedent construing the intersection and application of *Zadyvdas* and *Demore*. *Rodriguez II*, 715 F.3d at 1134–36.

189. *Rodriguez II*, 715 F.3d at 1137–39, 1144 (INA § 235(b) corresponds to 8 U.S.C. § 1225(b) (2009); INA § 236(c) corresponds to 8 U.S.C. § 1226(c) (2009)).

190. *Id.* at 1137–39, 1144.

detention statute, INA § 236(a), allowing bond hearings for those who remained detained.[191]

In contrast, in *Rodriguez III* the Ninth Circuit panel began with a extended discussion (relative to *Rodriguez II*) of the due process liberty interest at stake in civil detention generally and in immigration cases specifically.[192] In addition to discussing the constitutionality of immigration detention at greater length, the Ninth Circuit in *Rodriguez III* appears to go further than it did in *Rodriguez II* towards concluding that prolonged immigration detention is actually unconstitutional rather than simply presenting serious constitutional questions.[193] The Ninth Circuit then went on to hold that *Rodriguez II* was the "law of the case and law of the circuit" and therefore could not be revisited.[194] The *Rodriguez III* court did not add anything to *Rodriguez II*'s discussion of constitutional avoidance.

While the Ninth Circuit's decisions in *Rodriguez II* and *Rodriguez III* are certainly an extension of the law, they do not represent radical advances with respect either to the canon of constitutional avoidance or to immigration exceptionalism. The Court's discussion of constitutional avoidance lacks detail beyond its unremarkable recitation of the standard. The Ninth Circuit references Congress' "plenary" power over immigration explicitly only in a footnote in *Rodriguez III*.[195] In fact, other Circuits reached similar conclusions for similar reasons.[196]

C. *Jennings v. Rodriguez*: Before the Supreme Court

Both procedurally and substantively, *Jennings v. Rodriguez* has a particularly protracted and complicated history before the Supreme Court. Subsection II.C.1 will examine the extended proceedings before the Supreme Court, while Subsection II.C.2 will analyze the decision of the Supreme Court.

---

191. *Id.* at 1144 (INA § 236(a) corresponds to 8 U.S.C. § 1226(a) (2009)).

192. *Rodriguez III*, 804 F.3d at 1074–78.

193. *Id.*

194. *Id.* at 1080, and 1084.

195. *Id.* at 1090 n.12 (asserting that the Court in *Rodriguez II* had considered and rejected the government's arguments regarding "the political branches' plenary control of the borders"). Despite this assertion, Congress's plenary power is not a topic that the court in *Rodriguez II* had addressed explicitly.

196. Brief for Respondents at 14, Jennings v. Rodriguez, 138 S. Ct. 830 (2018) ("All six circuits to consider the question . . . read the statute to include an implicit reasonable time limitation."); Reid v. Donelan, 819 F.3d 486 (1st Cir. 2016) *opinion withdrawn on reconsideration*, Nos. 14-1270, 14–803, 14–1823, 2018 WL 4000993, at *1 (1st Cir. May 11, 2018); Lora v. Shanahan, 804 F.3d 601 (2d Cir. 2015) *vacated sub nom*, Shanahan v. Lora, 138 S. Ct. 1260; Diop v. ICE/Homeland Security, 656 F.3d 221, 232–33 (3d Cir. 2011) (reaching this holding as a constitutional matter); Ly v. Hansen, 351 F.3d 263 (6th Cir. 2003) *abrogated by* Jennings v. Rodriguez, 138 S. Ct. 830 (2018); Sopo v. U.S. Att'y Gen., 825 F.3d 1199 (11th Cir. 2016) *vacated as moot*, 890 F.3d 952 (11th Cir. 2018).

i. Proceedings before the Supreme Court

The Supreme Court granted certiorari in *Jennings v. Rodriguez* in June 2016 and the case was initially scheduled to be heard in the October 2016 term.[197] In this initial round of briefing, the government relied heavily on the theory of immigration exceptionalism, arguing explicitly that immigration is different and the Ninth Circuit's decisions in *Rodriguez II* and *III* conflicted with the plenary power doctrine.[198] They rejected what they described as a "supersized" application of the canon of constitutional avoidance to effect a wholesale rewriting of the laws relating to immigration detention and asserted that the proper remedy for prolonged detention was individual petitions for a writ of habeas corpus.[199]

Rodriguez, unsurprisingly, took the position that the Ninth Circuit had decided the case correctly, arguing that the government's detention regime raised serious constitutional problems and that constitutional avoidance should be applied to interpret the governing detention statutes as not allowing for prolonged detention with no hearing.[200] Rodriguez distinguished *Demore* on the grounds that the subclass members in Rodriguez had not conceded removability and were subject to prolonged, not brief, detention.[201]

Responding to the government's assertion of the plenary power doctrine, Rodriguez attempted to cabin the doctrine to Congress' power to admit noncitizens and cited to the Supreme Court's decision in *Zadvydas* in support of the proposition that the doctrine was subject to important constitutional limitations where freedom from physical restraint was at stake.[202]

Oral argument was held on November 30, 2016.[203] Unlike in the parties' briefs, the plenary power doctrine was not raised.[204] The parties' arguments, and the Justices' questions, focused primarily on whether this was an appropriate use of constitutional avoidance.[205] Some of the Justices also suggested concern with the direct constitutionality of the detention regime and its role in the case.[206]

Following oral argument, in December 2016, the Supreme Court issued an order directing the parties to submit briefs addressing the constitutional issues

197. Jennings v. Rodriguez, 136 S. Ct. 2489, 2489 (2016).

198. Brief for Petitioners at 11, Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

199. *Id.*

200. Brief for Respondents at 14, Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

201. *Id.* at 12–13.

202. *Id.* at 17–19.

203. Transcript of Oral Argument, Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (No. 15-1204).

204. *Id.*

205. *Id.*; *see also* Kevin Johnson, *Argument Analysis: Immigrant detention and the Constitution*, SCOTUSBLOG (Dec. 1, 2016, 11:28 AM), https://www.scotusblog.com/2016/12/argument-analysis-immigrant-detention-and-the-constitution/.

206. Transcript of Oral Argument, Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (No. 15-1204).

directly.[207] The government did not contest that noncitizens subject to immigration detention possessed due process rights protecting against arbitrary deprivations of liberty.[208] They did argue, however, that these rights were adequately protected by existing substantive and procedural safeguards and that a rigid six month rule for bond hearings was neither constitutionally required nor advisable.[209] While the government did not discuss the plenary power doctrine extensively, Congress' plenary power over immigration was invoked briefly several times.[210] Rodriguez argued to the contrary that existing processes did not adequately protect detainees' due process rights and that, because the due process clause prohibits prolonged and arbitrary detention, custody hearings were constitutionally required after six months.[211]

During this period, following the death of Justice Antonin Scalia in February 2016 and prior to the confirmation of his ultimate successor Justice Neil Gorsuch in April 2017, the Supreme Court was operating with only eight Justices.[212] Apparently deadlocked, in June 2017 the Court rescheduled *Jennings* for reargument in the October 2017 term.[213] Reargument was held on October 3, 2017 before a now full bench.[214] The parties' arguments here focused on the direct constitutional issues from the second set of briefs.[215] Arguments regarding immigration exceptionalism and the extent of the plenary power doctrine featured heavily.[216] There was significant excitement following oral argument about the very real possibility presented by *Jennings* for the Justices to not only clarify the constitutional limits on immigration detention but also redefine the role of immigration exceptionalism and the plenary power doctrine in modern immigration law.[217]

---

207. Order, Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (No. 15-1204).

208. Supplemental Brief for the Petitioners, Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (No. 15-1204).

209. *Id.*

210. *Id.*

211. Supplemental Brief for the Respondents, Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (No. 15-1204).

212. *See* Adam Liptak and Matt Flegenheimer, *Neil Gorsuch Confirmed by Senate as Supreme Court Justice*, N.Y. TIMES (April 7, 2017).

213. Kevin Johnson, *No Decision in Two Immigration-Enforcement Cases*, SCOTUSBLOG (Jun. 26, 2017, 4:02 PM), https://www.scotusblog.com/2017/06/no-decision-two-immigration-enforcement-cases/.

214. Transcript of Oral Argument, Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (No. 15-1204).

215. *Id.*; *see also* Kevin Johnson, *Argument Analysis: Justices Seem Primed to Find Constitutional Limits on the Detention of Immigrants*, SCOTUSBLOG (Oct. 4, 2017, 12:44 PM), https://www.scotusblog.com/2017/10/argument-analysis-justices-seem-primed-find-constitutional-limits-detention-immigrants/.

216. Transcript of Oral Argument, Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (No. 15-1204); Johnson, *Argument Analysis*, *supra* note 215.

217. *See, e.g.*, Johnson, *Argument Analysis*, *supra* note 215; Philip L. Torrey, Jennings v. Rodriguez *and the Future of Immigration Detention*, 20 HARV. LATINO L. REV. 171 (2017).

In November 2017, after reargument had already been held but before a decision was issued, Justice Kagan recused herself from the case.[218]

ii. The Supreme Court's Decision

The Supreme Court finally released its much-awaited decision in *Jennings* on February 27, 2018.[219] As evidenced by the patchwork of majority, concurring, and dissenting opinions joined in various part by the remaining eight Justices, the Court had some difficulty in reaching agreement on its resolution of the case.[220] Justice Alito delivered the opinion of the Court, except with regard to Part II of his opinion, where he addressed the Court's jurisdiction.[221] In Parts III through V of his opinion, Justice Alito held that the Ninth Circuit misapplied the constitutional avoidance doctrine because its construction of each of the three detention provisions at stake was "implausible."[222] He explained that identifying a constitutional issue did not authorize a court to rewrite at statute but only to "choos[e] between competing *plausible* interpretations of a statutory text."[223] The opinion described *Zadvydas* as "a notably generous application of the constitutional-avoidance canon," but stopped short of suggesting it was wrongly decided.[224] Instead, Justice Alito distinguished the plain language of the pre-final removal order statutory provisions at issue in *Jennings* from the post-final removal order provision interpreted in *Zadvydas*.[225]

Justice Alito concluded that the Ninth Circuit "had no occasion to consider respondents' constitutional arguments on their merits" and remanded the case for the Ninth Circuit to consider those arguments "in the first instance."[226] In closing, he also recommended that the Ninth Circuit reconsider the issue of class

---

218. In a letter to the parties, the Clerk of the Supreme Court explained that Justice Kagan was recusing herself because she had just learned that, as Solicitor General, she had "authorized the filing of a pleading in an earlier phase of this case." Letter from Hon. Scott S. Harris, Clerk, Supreme Court (Nov. 10, 2017), Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (No. 15-1204); *see also* Amy Howe, *Kagan Recuses from Immigrant-Detention Case*, SCOTUSBLOG (Nov. 10, 2017, 10:16 PM), https://www.scotusblog.com/2017/11/kagan-recuses-immigrant-detention-case/.

219. *Jennings*, 138 S. Ct. 830.

220. *See id.*

221. *Id.* at 836–852.

222. *Id.* at 842–52. Part I of the opinion describes the statutory scheme and the facts and procedural history of the case. *Id.* at 836–39.

223. *Id.* at 842 (quoting *Clark*, 543 U.S. at 381).

224. *Id.* at 843.

225. *Id.*

226. *Id.* at 851. *But see Rodriguez III*, 804 F.3d at 1074–78 (discussing the constitutional issue). Observers have also noted that it is not entirely accurate to say that the Ninth Circuit did not consider the constitutional issue. *See, e.g.*, Anil Kalhan (@kalhan), TWITTER (Feb. 27, 2018), https://twitter.com/kalhan/status/968523672309858304.

certification in litigation that would now be focused on constitutional due process claims.[227] Justice Alito implicitly accepted that noncitizen detainees in all categories were due some level of constitutional protection. However, despite the Court's order requesting briefing on the constitutional issues and the October 2017 reargument focusing almost exclusively on these issues, Justice Alito carefully offered no comment or opinion on the constitutionality of the various immigration detention provisions.

Justice Alito did not invoke the plenary power doctrine by name or implication.[228] While he asserted the Government's necessary power to decide who may enter and remain in the country (without citation) at the beginning of his description of the statutory scheme in Part I of the opinion, he did not belabor the point or rely on it.[229] Instead, Justice Alito treated the case as a straightforward question of statutory interpretation and the proper application of the canon of constitutional avoidance.[230] Nowhere in his opinion, even in his response to Justice Breyer's dissenting opinion in Part IV, did he allude to immigration exceptionalism.[231] He did not assert that immigration law was in any way different or special or allege that the instant case was subject to anything other than the general rules of statutory interpretation.[232]

Justices Roberts and Kennedy joined Justice Alito's decision in full.[233] Justice Sotomayor joined part III.C of Justice Alito's decision, which overturned the Ninth Circuit's requirement of additional bond hearings for those noncitizens already entitled to a bond hearing under INA § 236(a) (8 U.S.C. § 1226(a)).[234] Justice Thomas wrote an opinion concurring in part and concurring in the judgement.[235] Justice Thomas, joined by Justice Gorsuch, would have held that that the Court had no jurisdiction, vacated the permanent injunction, and remanded for the court to dismiss for lack of jurisdiction.[236] They joined Justice Alito's opinion because a majority of the court had decided to exercise jurisdiction and they agreed with

---

227. *Jennings*, 138 S. Ct. at 851–52. Observers have also noted that, while the government aggressively litigated the class certification issue before the district court and the Ninth Circuit, they did not seek certiorari on that question and it was not before the Supreme Court. *See, e.g.*, Adam Cox (@adambcox), TWITTER, (Feb. 27, 2018), https://twitter.com/adambcox/status/968526104964272128.

228. *Jennings*, 138 S. Ct. at 848–51.

229. *Id.* at 836.

230. *Id.* at 842–51. *See also* Michael Kagan, Jennings v. Rodriguez *Might Not Be About Immigration After All*, 36 YALE J. ON REG.: NOTICE & COMMENT (2018), http://yalejreg.com/nc/jennings-v-rodriguez-might-not-be-about-immigration-after-all/.

231. *Jennings*, 138 S. Ct. at 848–51.

232. *See id.*

233. *Id.* at 836.

234. *Id.*

235. *Id.* at 852–59.

236. *Id.* at 852, 859. Justice Thomas argued that jurisdiction was precluded by INA §242(b)(9), barring judicial review of any claims relating to removal other than through a petition for review from a final removal order. *Id.*

Justice Alito's disposition of the merits of the case assuming jurisdiction.[237] The concurring opinion itself focused solely on the jurisdictional issues. Justice Gorsuch joined Justice Thomas's concurring opinion except as to a footnote expressing agreement with Justice O'Connor's concurring opinion in *Demore v. Kim* on the Court's lack of jurisdiction over all issues of immigration detention.[238]

Justice Breyer wrote a dissenting opinion, joined by Justices Ginsburg and Sotomayor.[239] Like the Ninth Circuit (albeit with slightly different reasoning), he used constitutional avoidance to interpret the detention statutes as authorizing bond hearings:

> The relevant constitutional language, purposes, history, traditions, context, and case law, taken together, make it likely that, where confinement of the noncitizens before us is prolonged (presumptively longer than six months), bail proceedings are constitutionally required. Given this serious constitutional problem, I would interpret the statutory provisions before us as authorizing bail. Their language permits that reading, it furthers their basic purposes, and it is consistent with the history, tradition, and constitutional values associated with bail proceedings.[240]

Justice Breyer did not agree, however, with the additional procedural requirements imposed by the district court and the Ninth Circuit.[241] Instead, he would have applied "customary rules of procedure and burdens of proof . . . ."[242]

iii. Reactions to *Jennings*

As a result of the Supreme Court's decision in *Jennings v. Rodriguez*, thousands of noncitizens each year must remain detained during the pendency of their removal proceedings, many for a year or more, with no right to a bond hearing.[243] As Justice Breyer highlighted in his dissenting opinion, the conditions of this detention are at best less than ideal, and, at worst, truly horrific.[244] As a result

---

237. *Jennings*, 138 S. Ct. at 859.

238. *Id.* at 852, 857 n.6.

239. *Id.* at 859–76.

240. *Id.* at 876.

241. *Id.*

242. *Id.*

243. *Jennings*, 138 S. Ct. at 860 (Breyer, J., dissenting) ("identifying, in 2015, 7,500 asylum seekers and 12,220 noncitizens who have finished serving sentences of criminal confinement, a portion of whom are class members detained for more than six months") (referencing Amici Curiae Brief 6, 8).

244. *See id.* at 861; *see also*, EUNICE HYUNHYE CHO ET AL., ACLU, JUSTICE-FREE ZONES: U.S. IMMIGRATION DETENTION UNDER THE TRUMP ADMINISTRATION (Apr. 30, 2020); Caitlin Dickerson et al., *Immigrants Say They Were Pressured into Unneeded Surgeries*, N.Y. TIMES (Sept. 29, 2020), https://www.nytimes.com/2020/09/29/us/ice-hysterectomies-surgeries-georgia.html.

of COVID-19, immigration detention now presents an additional grave threat to detainees' health and even life.[245] This outcome is deeply horrifying on both an individual and systemic level, and must not be minimized. It will cause immeasurable harm to countless noncitizens.[246]

Jennings also does not appear to represent a particularly significant change in the doctrine of the canon of constitutional avoidance. Justice Alito did answer the questions of *when* and *how* the doctrine should be invoked more narrowly in *Jennings* than did Justice Breyer for the Court in *Zadvydas*. The substance of the doctrine, however, was not meaningfully altered. This swing away from relying on constitutional avoidance likely represents more of a political, outcome-driven shift, dependent on who has the majority on the court, than an actual change in the law.[247] Such a shift is part of a general trend on the court, outside the immigration context, and has historical precedent.[248]

At the same time, the *Jennings* decision has the possibility of promoting positive doctrinal developments at multiple levels in immigration law. First, the Supreme Court has now squarely placed the question of the constitutionality of prolonged pre-final removal order detention with no hearing before the Ninth

---

245. *See* Dennis Kuo et al., *The Hidden Curve: Estimating the Spread of COVID-19 among People in ICE Detention*, VERA INST. OF JUST. (June 2020), https://www.vera.org/the-hidden-curve-covid-19-in-ice-detention; *see also* Noelle Smart & Adam Garcia, *Tracking COVID-19 in Immigration Detention: A Dashboard of ICE Data*, VERA INST. OF JUST. (Nov. 18, 2020), https://www.vera.org/tracking-covid-19-in-immigration-detention.

246. *See, e.g.*, Sarah Paoletti, Jennings v. Rodriguez *in an Era of Mass Incarceration of Non-Citizens*, REGULATORY REVIEW: OPINION (Jul. 23, 2018), https://www.theregreview.org/2018/07/23/paoletti-jennings-rodriguez-era-mass-incarceration-non-citizens/ (describing the increasingly common situation of a noncitizen who elected not to pursue a valid claim for relief because they would have to remain in prolonged detention in order to do so).

247. Compare Justice Breyer's decision for the Court in *Zadvydas v. Davis*, 533 U.S. 678, 682–702 (2001), with his dissenting opinion in *Jennings v. Rodriguez*, 138 S.Ct. at 859–76. *But cf.* Krishnakumar, *Passive*, *supra* note 53, at 516–20. A number of scholars have written about the frequent and aggressive use of the constitutional avoidance doctrine in the early years of Justice Roberts' tenure as Chief Justice and resulting criticism. Krishnakumar, *Passive*, *supra* note 53, at 516–20; Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2111-12 (2015); Richard M. Re, *The Doctrine of One Last Chance*, 17 GREEN BAG 2D 173, 173-74 (2014); Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181, 184 (2009). Professor Krishnakumar theorizes that the marked withdrawal of the Roberts Court from this explicit invocation of constitutional avoidance is in part due to the prior criticism. Krishnakumar, *Passive*, *supra* note 54, at 516–20.

248. Krishnakumar, *supra* note 54, at 562–68. A similar swing away from the use of the canon of constitutional avoidance occurred in the Warren Court following the Court's decision in *Witkovich* and other "cases involving the rights of persons [involved in] subversive activities." Krishnakumar, *supra* note 54, at 565–68. *Cf.* Kagan, *supra* note 230. (arguing that the Court's decision in *Jennings* stems from general principles of statutory interpretation rather than from anything particularly related to the immigration context).

Circuit. The Ninth Circuit has already suggested in *Rodriguez III* that this practice is unconstitutional.[249] A clear decision on this point could result in bond hearings and release for thousands of noncitizen detainees each year. Whether the Ninth Circuit will ultimately render a decision answering this question, however, remains uncertain. The Ninth Circuit could choose instead to dismiss the case because class certification is no longer appropriate, as Justice Alito suggested,[250] or for lack of jurisdiction, as Justice Thomas suggested.[251] Varying levels of optimism on the question of whether the Ninth Circuit will ultimately reach the constitutional questions were apparent following release of the Court's decision.[252]

Second, as previously discussed, the extensive use of the canon of constitutional avoidance in immigration cases generally, and immigration detention cases specifically, has led to incoherence and uncertainty in the case law. The Supreme Court's decision in *Jennings* limiting its use could result in greater protection of immigrants' rights by pushing courts to decide constitutional issues directly and to move away from "phantom constitutional norms."[253] Finally, as also previously discussed, courts' invocation of the canon of constitutional avoidance and the plenary power doctrine has the tendency to be mutually reinforcing. By breaking this cycle, the Supreme Court's decision in *Jennings* may represent an incremental step away from the dominance of the plenary power doctrine and immigration exceptionalism in immigration law.[254]

Justice Alito's decision for the Court creates a false dichotomy between this immediate practical harm and potential for future doctrinal gain. While Justice Alito asserts that the Ninth Circuit had not previously considered the constitutional questions, this is not strictly true.[255] As previously discussed in section II.B, the Ninth Circuit in *Rodriguez III* considered and discussed these issues at length.[256] Indeed, the opinion suggests that the panel in *Rodriguez III* might have decided the case on the basis of the constitutional arguments directly had they not considered themselves bound by the panel's invocation of constitutional avoidance in

---

249. *See Rodriguez III*, 804 F.3d at 1074–78.

250. *Jennings*, 138 S. Ct. at 851–52.

251. *Id.* at 852.

252. *Compare* Kevin Johnson, *Argument Analysis: Justices Seem Primed to Find Constitutional Limits on the Detention of Immigrants*, SCOTUSBLOG (Oct. 4, 2017, 12:44 PM), https://www.scotusblog.com/2017/10/argument-analysis-justices-seem-primed-find-constitutional-limits-detention-immigrants/, *with* Garrett Epps, *How the Supreme Court is Expanding the Immigrant Detention System* , THE ATLANTIC: POLITICS (Mar. 9, 2018), https://www.theatlantic.com/politics/archive/2018/03/jennings-v-rodriguez/555224/.

253. *See* Motomura, *Phantom Norms*, *supra* note 15.

254. *Cf.* Kagan, *supra* note 230 (suggesting that the Court's decision is more about statutory interpretation than immigration law).

255. *See, e.g.*, Anil Kalhan (@kalhan), TWITTER (Feb. 27, 2018), https://twitter.com/kalhan/status/968523672309858304.

256. *Rodriguez III*, 804 F.3d at 1074–78.

Rodriguez II.[257] Furthermore, the constitutional issues were fully briefed and argued before the Supreme Court.[258] *Jennings v. Rodriguez* offered the Court the clear opportunity to address the constitutionality of pre-final removal order immigration detention, and to define the role of the Constitution and the plenary power doctrine in modern immigration law. Following reargument in October 2017, the Court was widely expected to do so.[259]

Instead, the Court chose to push this question off by remanding it to the Ninth Circuit to decide in the first instance. To weigh the full impact of this choice on the plenary power doctrine and immigration exceptionalism, we must look at the ongoing litigation in *Jennings* itself as well as other post-*Jennings* decisions involving pre-final removal order immigration detention issued by the lower federal courts and the Supreme Court.

IV. POST-JENNINGS

Developments since the Supreme Court's decision in *Jennings* have been decidedly mixed. On the one hand, the courts in *Jennings* themselves have yet to offer the constitutional decision on the merits called for by the Supreme Court. Furthermore, the Supreme Court themselves have continued to shy away from constitutional avoidance and constitutional decisions on the merits in the context of immigration detention. On the other hand, the Central District for California in another case, and other federal district courts, have found arbitrary and prolonged immigration detention to be unconstitutional in several different contexts.

Subsection III.A below will highlight the progress (or lack thereof) of *Jennings v. Rodriguez* on remand before the Ninth Circuit and the Central District of California. Section III.B will explore the Supreme Court's decision in *Nielsen v. Preap*.[260] Section III.C will consider two district court cases, *Fraihat v. U.S. Immigration and Customs Enforcement*,[261] and *Lukaj v. McAleenan*,[262] as examples of post-*Jennings* decisions in cases challenging immigration detention that directly

257. *Id.* at 1080–81.

258. *See* Supplemental Brief for the Petitioners, Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (No. 15-1204), (2017 WL 430387); Supplemental Brief for the Respondents, Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (No. 15-1204), (2016 WL 6123731); Supplemental Reply Brief for the Petitioners, Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (No. 15-1204), (2017 WL 727754); Respondents' Supplemental Reply Brief, Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (No. 15-1204), (2017 WL 695458); Transcript of Oral Argument, Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (No. 15-1204), (Argument on October 3, 2017).

259. *See, e.g.*, Johnson, *supra* note 252 ("Ultimately, this case offers the Supreme Court the opportunity to address the modern vitality of the plenary-power doctrine and finally decide whether, and if so how, the Constitution applies to arriving aliens.").

260. Nielsen v. Preap, 139 S. Ct. 954 (2019).

261. Fraihat v. U.S. Immigr. & Customs Enf't, 445 F. Supp. 3d 709 (C.D. Ca. Apr. 20, 2020); Fraihat v. U.S. Immigr. & Customs Enf't, No. EDCV 19–1546 JGB (SHKx) 2020 U.S. Dist. LEXIS 210929 (C.D. Ca. Oct. 7, 2020).

262. Lukaj v. McAleenan, 420 F. Supp. 3d 1265 (M.D. Fla. 2019).

confront the constitutionality of arbitrary and prolonged pre-final removal order detention. Section III.D will examine what conclusions can be drawn today, three years after the Supreme Court's much anticipated decision in *Jennings v. Rodriguez*.

A. *Jennings v. Rodriguez*: After the Supreme Court

As of February 2021, three years after the Supreme Court's decision in *Jennings v. Rodriguez*, neither the Ninth Circuit nor the Central District of California have issued a decision on the constitutionality of prolonged pre-final removal order detention without a hearing. In November 2018, following the Supreme Court's decision, the Ninth Circuit remanded the case to the Central District of California for the district court to rule in the first instance on the questions of class certification and constitutionality raised by the Supreme Court, as well as any other issue the district court found relevant.[263] In the remand order, the Ninth Circuit again strongly telegraphed its belief that the statutory provisions at stake, if interpreted to allow for prolonged detention without hearing, are unconstitutional.[264] The Ninth Circuit explicitly left the permanent injunction in place in its remand, stating "[w]e have grave doubts that any statute that allows for arbitrary prolonged detention without any process is constitutional or that those who founded our democracy precisely to protect against the government's arbitrary deprivation of liberty would have thought so."[265] They specifically instructed the district court to determine "the minimum requirements of due process for each subclass."[266]

Proceedings before the district court have continued since the Ninth Circuit's remand, although they were stayed for several months during the COVID-19 pandemic.[267] The district court denied the government's motion to decertify the class,[268] and the government's appeal on this issue remains pending before the Ninth Circuit.[269] Discovery is currently ongoing before the district court, and plaintiffs have a deadline for their motion for summary judgment in June 2021.[270] Given the pace of the litigation, it seems likely to still be years before the Ninth

---

263. Rodriguez v. Marin, 909 F.3d 252, 255–56 (9th Cir. 2018).

264. *Id.*

265. *Id.* at 256.

266. *Id.* at 255.

267. *See* Order Granting Joint Stipulation to Temporarily Suspend Case Schedule, Rodriguez v. Marin, No. 07-CV-03239 (C.D. Ca. May 19, 2020), ECF No. 554; Order Granting Joint Stipulation to Temporarily Suspend Case Schedule, Rodriguez v. Marin, No. 07-CV-03239 (C.D. Ca. June 18, 2020), ECF No. 557.

268. Order Denying Motion to Decertify Class, Rodriguez v. Marin, No. 07-CV-03239 (C.D. Ca. May 28, 2020), ECF No. 555.

269. Rodriguez v. Barr, No. 20-55770, 2020 U.S. App. LEXIS 33716 (9th Cir. Oct. 26, 2020).

270. Order Granting Joint Stipulation for Scheduling Order, Rodriguez v. Marin, No. 07-CV-03239 (C.D. Ca. Sept. 18, 2020), ECF No. 562.

Circuit has the opportunity to speak again on the constitutionality of arbitrary and prolonged pre-final removal order immigration detention, and the case may once more end up before the Supreme Court. Any optimism, then, that the Supreme Court's decision would result in quick and clear resolution of the constitutional question was misplaced.

B. *Nielsen v. Preap*

During the time that *Jennings v. Rodriguez* has remained pending on remand before the Ninth Circuit and the Central District of California, the Supreme Court heard a case involving another aspect of INA § 236(c); one of the pre-final removal order detention provisions at issue in *Jennings*. *Nielsen v. Preap* presented a narrow question: whether an individual with a criminal conviction that would otherwise be included within the statute's detention mandate was still subject to mandatory detention if not taken into immigration custody immediately "when released" from criminal custody.[271] On March 19, 2019, the Supreme Court issued its decision answering this question with a definitive "yes."[272]

As in *Jennings*, the Court had difficulty reaching consensus. Justice Alito again wrote the opinion for the Court, joined in full by Justices Roberts and Kavanaugh and in part by Justices Thomas and Gorsuch.[273] Justice Alito once more focused primarily on statutory interpretation to resolve the case, here holding, inter alia, that the rules of English grammar led to the conclusion that mandatory detention under INA section 236(c) applies to otherwise included noncitizens who are taken into custody by immigration some time after being released from criminal custody.[274] He rejected the use of constitutional avoidance on similar grounds to *Jennings*, finding the statute unambiguous and therefore not subject to different plausible interpretations.[275] A direct constitutional challenge had not been raised and was therefore not before the court.[276]

Justice Kavanaugh wrote a separate concurrence to emphasize the narrowness of the issues presented in the case.[277] Justices Thomas and Gorsuch again would have found no jurisdiction, but joined the sections of Justice Alito's decision not dealing with jurisdiction.[278] Justices Breyer, Ginsburg, Sotomayor, and Kagan dissented and would have used the statute's plain language and structure as well as applicable canons of statutory interpretation, including the canon of constitutional avoidance, to reach the contrary conclusion.[279]

---

271. Nielsen v. Preap, 139 S. Ct. 954 (2019).

272. *Id.*

273. *Id.* at 958–72.

274. *Id.* at 964–65.

275. *Id.* at 971–72.

276. *Id.* at 972.

277. *Nielsen*, 139 S. Ct. at 972–73.

278. *Id.* at 973–76.

279. *Id.* at 976–85.

Again, the Court's decision did not invoke plenary power or immigration exceptionalism. Some commentators, however, see the case as promoting immigration exceptionalism: "In *Preap*, the Court reaffirmed a jurisprudence that increasingly defies the prevailing norms of due process and judicial deference to agency interpretations. While immigration law's norm-defying character is well established, *Preap* confirms that immigration detention is perhaps the most exceptional area of one of American law's most exceptional domains."[280] Others see the Court as exercising restraint and inching away from immigration exceptionalism.[281]

A majority of the Court held that the Supreme Court had jurisdiction, thereby refusing to give the executive "carte blanche over immigration."[282] The result is damaging to noncitizens, meaning that a significant number of individuals will be subject to arbitrary and prolonged detention while their removal proceedings are pending. Had the Court held that it had no jurisdiction, however, leaving it up to the Executive to interpret the statute and impose immigration detention as he saw fit, it could have been far worse.

C. District Court Cases

District Courts throughout the country have also continued to grapple with petitions for writs of habeas corpus filed by noncitizens subject to immigration detention under INA sections 235 and 236.[283] Unlike the Central District of California in *Jennings v. Rodriguez*, a number of district courts (including the Central District in other cases) have ruled directly on the constitutionality of prolonged detention under these statutes after the Supreme Court's decision in Jennings.[284] This section will discuss two of these cases as examples of this trend: *Lukaj v. McAleenan*[285] and *Fraihat v. U.S. Immigration and Customs Enforcement*.[286]

---

280. *The Supreme Court - Leading Cases*: Nielsen v. Preap, 133 HARV. L.R. 392, 401 (2019).

281. Cecillia Wang, *Symposium: Supreme Court Not Ready to Give President Carte Blanche Over Immigration*, SCOTUSBLOG (July 25, 2019, 3:05 PM), https://www.scotusblog.com/2019/07/symposium-supreme-court-not-ready-to-give-president-carte-blanche-over-immigration/.

282. *Id.*

283. *See* TRAC Immigr., Suits Challenging the Confinement of Noncitizens Up (2018), *at* https://trac.syr.edu/immigration/reports/528/.

284. District courts prior to the Supreme Court also reached this conclusion. *See, e.g.*, ACLU, PRACTICE ADVISORY: PROLONGED DETENTION CHALLENGES AFTER *JENNINGS V. RODRIGUEZ* (Mar. 21, 2018), https://www.aclu.org/sites/default/files/field_document/2018_03_21_jennings_v_rodriguez_practice_advisory.pdf(listing cases).

285. Lukaj v. McAleenan, 420 F.Supp.3d 1265 (M.D. Fla. 2019).

286. Fraihat v. United States Immigr. and Customs Enf't, 445 F. Supp. 3d 709 (C.D. Cal. Apr. 20, 2020); Fraihat v. United States Immigr. and Customs Enf't, EDCV 19-1546 JGB (SHKx), 2020 WL 6541994, at *1 (C.D. Cal. Oct. 7, 2020).

i. *Lukaj v. McAleenan*

Lukaj v. McAleenan was decided by the United States District Court for the Middle District of Florida in October 2019.[287] Alban Lukaj was an Albanian citizen who became a lawful permanent resident of the United States after entering as a refugee but was placed into removal proceedings as the result of criminal convictions.[288] Mr. Lukaj was detained during the pendency of his removal proceedings without opportunity for bond pursuant to INA § 236(c).[289] After extensive discussion, the court held that Mr. Lukaj's prolonged detention violated his due process rights under the Fifth Amendment but did not violate his rights under the Eight Amendment.[290]

Prior to the Supreme Court's decision in *Jennings v. Rodriguez*, the Middle District was bound by the decision by the Court of Appeals for the Eleventh Circuit in *Sopo v. U.S. Attorney General*.[291] The Eleventh Circuit in *Sopo*, similar to the Ninth Circuit in *Jennings*, interpreted INA § 236(c) to authorize mandatory detention without a bond hearing only for a reasonable amount of time in order to avoid the serious constitutional issues that would otherwise result.[292] With this option no longer available post-*Jennings*, the Middle District in *Lukaj* chose to answer the Supreme Court's call to address the constitutional question directly.[293]

The court began its discussion of the law with a detailed and unequivocal statement that the protections of the due process clause of the Fifth Amendment applied to detention during deportation proceedings.[294] It distinguished Mr. Lukaj's situation from *Demore* due to the length of his detention[295] and went on to consider whether Mr. Lukaj's continued detention was reasonable in light of a list of factors very similar to those considered by the court in *Sopo* including the length and characteristics of his detention and the status of his removal proceedings.[296] Ultimately, the Court found that "Lukaj's year-long detention in a criminal facility where he has not received treatment for his medical condition and with what amounts to a restart of his entire removal proceedings constitutes an unreasonably prolonged detention in violation of the Due Process Clause that entitles him to an individualized bond hearing."[297]

This decision in *Lukaj* was ultimately vacated because, by the time of the district court's decision, Mr. Lukaj was detained pursuant to INA § 241(a), post-final

---

287. Lukaj v. McAleenan, 420 F. Supp. 3d 1265 (2019).

288. *Id.* at 1267–68.

289. *Id.*

290. *Id.* at 1276–77.

291. *Id.* at 1270–71; Sopo v. U.S. Att'y Gen., 825 F.3d 1199 (11th Cir. 2016).

292. *Sopo*, 825 F.3d at 1199.

293. *Lukaj*, 420 F. Supp. 3d at 1271.

294. *Id.* at 1269.

295. *Id.* at 1273.

296. *Id.* at 1274–76.

297. *Id.* at 1276.

removal order detention, not INA § 236(c), pre-final removal order mandatory detention.[298] The district court's initial decision in *Lukaj*, however, remains a valuable illustration of the impact of *Jennings* on the lower federal courts. It further serves as an example of a continued inching away from immigration exceptionalism rather than an outright rejection of the premise. As a result of the Supreme Court's decision in *Jennings*, the court did move from recognizing a "phantom" constitutional norm to recognizing a true constitutional norm. It did so, however, by considering almost exclusively cases decided in the immigration context, implicitly reinforcing a continued conclusion that immigration is somehow different.

ii. *Fraihat v. U.S. Immigration and Customs Enforcement*

Unlike most of the cases discussed thus far, *Fraihat* does not concern detention under or the interpretation of one of the immigration detention statutes. Instead, *Fraihat* is a class action lawsuit alleging that the conditions under which ICE detainees are held during the COVID-19 pandemic violate the U.S. Constitution.[299] Plaintiffs raise several claims under the Due Process clause of the Fifth Amendment, including medical indifference and punitive conditions of confinement during the COVID-19 pandemic and one claim that individuals with disabilities were denied the benefits of executive agency programs in violation of the Rehabilitation Act.[300] The District Court for the Central District of California certified two subclasses—individuals with (1) a risk factor or (2) a disability that causes heightened risk of severe illness from COVID-19—and issued a preliminary injunction on April 20, 2020.[301] The court held that plaintiffs "are likely to succeed on the merits of one or more of their claims, will suffer irreparable harm as a result of the deprivation of their rights, and that the balance of equities and public interest heavily weigh in favor of granting preliminary relief."[302] On October 7, 2020, the district court issued an order compelling compliance with the preliminary injunction.[303]

Fraihat can be seen as a more significant step away from immigration exceptionalism than *Lukaj* and other similar cases. In *Fraihat*, the court again recognized that ICE detainees are protected by the U.S. Constitution, including the due process clause. It did so in this instance, however, by applying mainstream cases in the immigration context instead of by continuing to treat immigration as different.

---

298. Lukaj v. McAleenan, 3:19-cv-241-J-34MCR, 2020 WL 248724, at *1 (M.D. Fla. Jan. 16, 2020).

299. *Fraihat*, 445 F. Supp. 3d at 718.

300. *Id.* at 719.

301. *Id.*

302. *Id.* at 741.

303. *Fraihat*, 2020 WL 6541994, at *12.

D. Conclusions

In 1990, Professor Motomura wrote: "[W]hat is left of the plenary power doctrine? A widely accepted view, with which I generally agree, is that the doctrine is in some state of decline."[304] In 2019, Professor Johnson wrote: "The Supreme Court's recent immigration decisions unquestionably reflect the continuation of the move of immigration law toward the legal mainstream and away from 'immigration exceptionalism.'"[305] Almost thirty years separate these two quotes, but Professor Motomura's quote could have been written today. While progress away from the plenary power doctrine and immigration exceptionalism has been made, courts, advocates, and scholars continue to operate within their framework. As the cases discussed in this section show, change has been slower, more subtle, and more uneven than predicted or desired.

Calls for the Supreme Court to explicitly denounce the plenary power doctrine began as early as the 1980s and continue today.[306] While immigration scholars and advocates continue to hope that the Supreme Court will confront the plenary power doctrine head on, it is far more likely that the doctrine will continue along its slow and non-linear path of erosion.

V. CONCLUSION

For at least the last four years, noncitizens have had to rely heavily on the federal courts to protect the rights of ICE detainees. The ability of the courts to act, however, has continued to be constrained by the plenary power doctrine and a theory of immigration exceptionalism. While the courts have made some progress away from the limitations of this framework, they have fallen far short of repudiating the concepts that immigration law is different and that the executive may operate unconstrained by the normal principles of law. While the Supreme Court's decision in *Jennings v. Rodriguez* could be seen as calling for greater clarity and more radical change on this topic, the aftermath of *Jennings*, including the ongoing litigation in the *Jennings* case itself, the Supreme Court's decision in *Nielsen v. Preap*, and the decisions of the lower federal courts in cases challenging the detention of noncitizens, have shown us that any change will continue to occur at a snail's pace, with almost as much progress backwards as forwards.

As a country, we stand on a precipice of potential for fundamental change. The Biden Administration should recognize the inability and/or unwillingness of the federal courts to move quickly and to adequately protect noncitizen detainees. The Executive Branch has the authority to act rapidly and decisively to end or

---

304. Motomura, *supra* note 15, at 549.

305. Johnson, *supra* note 16, at 473.

306. *Compare* Motomura, *supra* note 15, at 547 ("*Jean* could have been the occasion for the Court to confront squarely the 'plenary power doctrine.'") *with* Johnson, *supra* note 213 ("Ultimately, this case offers the Supreme Court the opportunity to address the modern vitality of the plenary-power doctrine and finally decide whether, and if so how, the Constitution applies to arriving aliens.").

substantially limit the civil detention of noncitizens on a systemic and an individual level.[307] As Professor Das argues, "federal agencies can and should play a larger role in enforcing constitutional norms in immigration law."[308] At the systemic level, the Biden Administration should end immigration detention or, at a minimum, stop detaining noncitizens in private prisons. If immigration detention is not completely abolished, at an individual level, the Biden Administration should create a culture within the Department of Homeland Security that respects immigrants and favors the release of ICE detainees in all but the most extreme circumstances.[309]

307. *See, e.g.*, Jennings v. Rodriguez, 138 S.Ct. 830, 836–38 (2018); Catherine Y. Kim & Amy Semet, *Presidential Ideology and Immigration Detention*, 69 DUKE L.J. 1855 (May 2020).

308. Das, *supra* note 13.

309. *Cf.* Catherine Y. Kim & Amy Semet, *Presidential Ideology and Immigration Detention*, 69 DUKE L.J. 1855 (May 2020) (analyzing custody decisions over the last twenty years and showing that noncitizens fared worse in custody determinations under the Trump administration).