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Applying Constitutional Due Process Rights in Immigration Detainment

Gabrielle Risolvato

Every United States citizen has a constitutional right to due process, preventing prolonged detainment without a hearing. These same rights are currently not afforded to every person on United States' soil.¹ Detainment of noncitizens happens on a regular basis throughout the immigration system for a multitude of reasons, most notably when noncitizens are faced with a removal order.² A removal order begins what is supposed to be a 90-day removal process, formerly known as the deportation process, where the attorney general then detains the noncitizen and removes the noncitizen from the United States.³ Removal orders effectively bar a noncitizen from the United States either for a period of ten years or permanently.⁴

However, the removal process is not that simple. After receiving a removal order, a noncitizen may seek to vacate the order by a claim of humanitarian relief, as in *Garland v. Gonzalez* and *Johnson v. Arteaga-Martinez*, cases currently before the Supreme Court.⁵ *Garland v. Gonzalez* along with *Johnson v. Arteaga-Martinez* are bringing current immigration detainment practices to light when it comes to noncitizens facing removal and highlighting the lack of due process rights afforded to noncitizens.⁶ Petitioners in both cases are hoping to remedy the loss of rights by clarifying the limitations on detention without access to a bond hearing.⁷

The noncitizen petitioners in the *Garland v. Gonzalez* case were detained while facing removal proceedings.⁸ The noncitizens in this case unlawfully re-

¹ Shalini Bhargava Ray, *Justices will revisit whether certain noncitizens in lengthy detention are entitled to bond hearings*, SCOTUSBLOG (Jan. 10, 2022), <https://www.scotusblog.com/2022/01/justices-will-revisit-whether-certain-noncitizens-in-lengthy-detention-are-entitled-to-bond-hearings/>.

² 8 U.S.C. § 1231 (2012).

³ United States Department of Justice, EOIR Policy Manual, *Section 7.2 Deportation Proceedings and Exclusion Proceedings*, <https://www.justice.gov/eoir/eoir-policy-manual/7/2>.

⁴ TRAC Immigration, *Removal Orders Granted by Immigration Judges as of 2022*, https://trac.syr.edu/phptools/immigration/court_backlog/apprep_removal.php.

⁵ Bhargava Ray, *supra* note 1.

⁶ *Id.*

⁷ *Id.*

⁸ Respondent's Br. *Garland v. Gonzalez* 142 S.Ct. 1, 4-6 (Dec. 16, 2020), https://www.supremecourt.gov/DocketPDF/20/20-322/163915/20201216122959483_20-322%20Barr%20v%20Aleman%20Gonzalez%20Brief%20in%20Opposition.pdf.

entered the United States, subjecting them to a summary reinstatement of removal.⁹ However, these noncitizens all had a bona fide claim to a “reasonable fear or persecution” under asylum law as determined by the Department of Homeland Security (“DHS”).¹⁰ A “reasonable fear of persecution” is demonstrated by a reasonable possibility of being persecuted or tortured on the basis of race, religion, nationality, political opinion, or membership in a particular social group.¹¹ This determination by DHS puts noncitizens into withholding-only proceedings.¹² That is, there is a pending case that would protect the noncitizens from potential persecution they would face if removed to their home country of Mexico and allow them to stay in the United States.¹³

All of these noncitizens have been detained for longer than six months while facing withholding proceedings, which could take years to adjudicate.¹⁴ Without the right to a bond hearing by an impartial immigration judge, these noncitizens could remain in detention for years awaiting a judgement as to their ability to remain living in the United States or face removal to their home country.¹⁵

Similarly, in *Johnson v. Arteaga-Martinez*, the respondent is a noncitizen facing a removal order but applied for withholding and deferral of removal.¹⁶ He is a Mexican citizen who entered the United States without inspection multiple times, with the most recent entry being six years prior to his reinstatement of removal orders.¹⁷ Arteaga-Martinez also applied for withholding of his removal, and DHS again found he had a reasonable fear of persecution.¹⁸ While waiting for an outcome, Arteaga-Martinez remained in detention in accordance with the Immigration and Nationality Act (“INA”).¹⁹ While detained, he filed a petition for a writ of habeas corpus challenging his detention

⁹ Alison Draikiwicz and Victoria Quilty, Cornell Law School Legal Information Institute, LII Supreme Court Bulletin, *Garland v. Gonzalez*, <https://www.law.cornell.edu/supct/cert/20-322>.

¹⁰ *Supra* note 8.

¹¹ American Immigration Council, *Asylum in the United States Fact Sheet* (Jun. 11, 2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/asylum_in_the_united_states_0.pdf.

¹² *Id.*

¹³ Draikiwicz, *supra* note 9.

¹⁴ Bhargava Ray, *supra* note 1.

¹⁵ *Id.*

¹⁶ *Johnson v. Arteaga-Martinez* No. 19-896, *Supreme Court Oral Arguments*, https://ballotpedia.org/Johnson_v._Arteaga-Martinez.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ 8 U.S. Code § 1231 (2012).

of more than six months while his appeals were ongoing.²⁰ After the initial denial by the district court, he was granted a bond hearing on appeal by the Third Circuit Court of Appeals and was eligible to be released on bond.²¹ The Solicitor General and the acting director of Immigration and Customs Enforcement (“ICE”) then appealed the case to the Supreme Court.²²

This is not the first time that the Supreme Court has seen a case regarding lengthy detention of a noncitizen with a removal order.²³ The Court heard *Zadvydas v. Davis* in 2001.²⁴ No other country would accept the noncitizen in this case, and thus he was detained for over a year and a half.²⁵ The Supreme Court refrained from setting any time limit on the detention during removal proceedings under 8 U.S.C. § 1231.²⁶ However, the decision discussed the problematic nature in regards to the constitutionality of indefinite detention under the detention statute.²⁷ The holding in this case declared six months to be a presumptively reasonable length of detention.²⁸ At the six month mark, if the noncitizen is able to show that there is no significant likelihood of removal in the foreseeable future, and the government is not able to refute the claim, the noncitizen must be released.²⁹

As it sits now, the detention of a noncitizen pursuant to a removal order should only happen if it is reasonably foreseeable that the noncitizen will be removed.³⁰ In both of the pending cases there is an appeals process that may take years, and the plaintiffs may eventually be granted status to remain in the United States.³¹ Each noncitizen has faced over six months of detention, which is the presumptive limit under current precedent.³²

This precedent, however, creates ambiguity. The lack of a bright-line rule as to the right to a hearing after six months of detention leaves space to question how and to whom constitutional rights apply. The Constitution states

²⁰ *Supra* note 16.

²¹ *Id.*

²² *Id.*

²³ *Zadvydas v. Davis*, 121 S.Ct. 2491, 2499 (2001).

²⁴ *Id.* at 2496.

²⁵ *Id.*

²⁶ *Id.* at 2504.

²⁷ *Id.* at 2505.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 2499.

³¹ *Id.*

³² *Id.*

“no person” shall be deprived of the enumerated rights listed.³³ There is no language which specifies the difference of applications of due process rights or the ability to choose which individuals under United States’ jurisdiction are to be excluded from their right to United States’ law of life, liberty, or property without due process of law.³⁴ In fact, as far back as 1982 the Supreme Court held that undocumented noncitizens were covered under the Equal Protection Clause of the Fourteenth Amendment, reiterating that “No state shall . . . deny to anyone within its jurisdiction the protection of the laws.”³⁵ This precedent should be seen as far reaching and applicable to the due process rights of all undocumented noncitizens.

With current trends in the country regarding immigration law, these cases face profound backlash and a steep upward battle. During the Trump presidency, the immigration system in the U.S. had many new restrictions enacted to prevent noncitizens from a path to live freely within the U.S.³⁶ This came with a large increase in the number of noncitizens being detained within U.S. borders and an increase in removal orders. Both of these changes added even more immigration detentions.³⁷ Because ICE is a department of the Executive Branch, the orders and procedures change with each administration. Under current policy, the Enforcement and Removal Operations of the Department of Homeland Security are responsible for deciding not only the amount of bond but also who is eligible for bond in these types of cases.³⁸ This subject of the U.S. Government both adjudicates these bond determinations and prosecutes in removal proceedings.³⁹ The noncitizen petitioners in *Gonzales* argue that this type of bond hearing is far from impartial and does not equate to a bond hearing from a neutral immigration judge.⁴⁰ They further state that the

³³ U.S. Const. amend. XIV, § 1.

³⁴ *Id.*

³⁵ American Immigration Council, *Public Education for Immigrant Students: Understanding Plyler v. Doe*, (Oct. 24, 2016), <https://www.americanimmigrationcouncil.org/research/plyler-v-doe-public-education-immigrant-students>.

³⁶ See generally Stuart Anderson, *A Review of Trump Immigration Policy*, FORBES (Aug. 26, 2020), <https://www.forbes.com/sites/stuartanderson/2020/08/26/fact-check-and-review-of-trump-immigration-policy/?sh=409b4ccb56c0>.

³⁷ TRAC Immigration, *Removal Orders Granted by Immigration Judges as of 2022*, https://trac.syr.edu/phptools/immigration/court_backlog/apprep_removal.php.

³⁸ U.S. Dept. of Justice, EOIR Policy Manual, *Section 9.4 Detention Review*, <https://www.justice.gov/eoir/eoir-policy-manual/9/4>.

³⁹ *Id.*

⁴⁰ *Garland* Respondents’ Brief, *supra* note 10, at 4–8.

correct interpretation of Congress' intention was in fact an impartial hearing when creating INA § 1231(a)(6).⁴¹

Lack of representation for detained noncitizens is extremely common and a contributing factor as to why we have not seen a case like this in front of the Supreme Court before.⁴² An in-depth study by the American Immigration Council in 2016 shows that only 37 percent of immigration cases had legal representation for the noncitizen.⁴³ Even more alarming is that only fourteen percent of detained noncitizens had an attorney to represent them during their court appearances.⁴⁴ Furthermore, detained noncitizens with an attorney were four times more likely to be released from detention than those who did not have an attorney.⁴⁵ There is a large disparity in legal remedies afforded to those without representation.⁴⁶ Detained noncitizens with counsel are eleven times more likely to seek relief, such as withholding, than those without.⁴⁷ Only three percent of those without counsel sought relief.⁴⁸ This data further decies the need for the application of formal due process rights within the immigration detention system as the lack of access to attorneys directly impacts noncitizens' access to freedom.⁴⁹

The outcomes of *Garland v. Gonzalez* and *Johnson v. Arteaga-Martinez* will set clear precedent as to the application of constitutional rights and even further, human rights, of noncitizens detained under United States' law and on United States' land. Without affording the same rights to all people on United States' soil, a clear constitutional issue arises. This issue reaches further than immigration law and creates a system where lines can be drawn as to where constitutional limits exist for individuals who are on United States' land and governed by United States' law. Ultimately, constitutional protections are weakened for everyone within the United States' jurisdiction when conscious decisions are made to exclude those living under United States' rule of law from constitutional rights and protections.

⁴¹ *Id.*

⁴² Ingrid Eagly and Steven Shafer, *Access to Counsel in Immigration Court*, AM. IMMIGR. COUNCIL, (Sept. 2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*