



Practice Advisory

NIELSEN V. PREAP

Supreme Court Decision

July 2019

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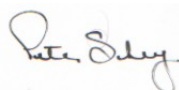
Practice Advisory Forward

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This practice advisory reviews Nielsen v. Preap, a recent Supreme Court case that challenges the government's sweeping interpretation of a 1996 mandatory detention law, which requires that certain people are detained for the duration of their deportation proceedings — without a hearing — because they have past criminal records.

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Overview: This case challenges the government’s sweeping interpretation of a 1996 mandatory detention law, which requires that certain people are detained for the duration of their deportation proceedings — without a hearing — because they have past criminal records. The government interprets the law to require detention without a hearing in cases where the person committed an offense and served a sentence years or even decades ago.

The result is that people who have never reoffended, rebuilt their lives with their families, and become productive members of their communities are subject to mandatory imprisonment as their deportation case winds its way through the immigration court system, with no hearing to determine if they need to be locked up in the first place.

Decision:

The Court first provides an overview of the applicable federal law stating, “[u]nder federal immigration law, aliens present in this country may be removed if they fall “within one or more classes of deportable aliens.” 8 U. S. C. §1227(a).” Section 1226(a) contains two sentences, one dealing with taking an alien into custody and one dealing with detention. The first sentence empowers the Secretary of Homeland Security to arrest and hold an alien “pending a decision on whether the alien is to be removed from the United States.” The second sentence *generally* gives the Secretary the discretion either to detain the alien or to release him on bond or parole. If the alien is detained, he may seek review of his detention ... and the alien may secure his release if he can convince the officer or immigration judge that he poses no flight risk and no danger to the community. (citation omitted). The Court notes, “[b]ut while 8 U. S. C. §1226(a) generally permits an alien to seek release in this way, that provision’s sentence on release states that all this is subject to an exception that is set out in §1226(c).

In looking at the statute’s exceptions:

Section 1226(c) consists of two paragraphs, one on the decision to take an alien into “[c]ustody” and another on the alien’s subsequent “[r]elease.”³ The first paragraph (on custody) sets out four categories of covered aliens, namely, those who are inadmissible or deportable on specified grounds. It then provides that the Secretary must take any alien falling into one of these categories “into custody” “when the alien is released” from criminal custody.

In reporting on the facts, “Respondents in the two cases before us are aliens who were detained under §1226(c)(2)’s mandatory-detention requirement—and thus denied a bond hearing—pending a decision on their removal. See *Preap v. Johnson*, 831 F. 3d 1193 (CA9 2016).” Furthermore, “Respondent[s] ... filed habeas petitions and a class-action complaint alleging that because they were not arrested “immediately” after release from criminal custody, they are exempt from mandatory detention under §1226(c) and are entitled to a bond hearing to determine if they should be released pending a decision on their status.”

The District Court:

certified a broad class comprising all aliens in California ““who are or will be subjected to mandatory detention under 8 U. S. C. section 1226(c) and who were not or will not have been taken into custody by the government *immediately* upon their release from criminal custody for a [s]ection 1226(c)(1) offense.’ ” 831 F. 3d, at 1198 (emphasis added). The District Court granted a preliminary injunction against the mandatory detention of the members of this

class, holding that criminal aliens are exempt from mandatory detention under §1226(c) (and are thus entitled to a bond hearing) unless they are arrested “when [they are] released,” and no later.” *Preap v. Johnson*, 303 F. R. D. 566, 577 (ND Cal. 2014) (quoting 8 U. S. C. §1226(c)(1)). The Court of Appeals for the Ninth Circuit affirmed.

The Court iterates, “Respondents contend that they are not properly subject to §1226(c)’s mandatory-detention scheme, but instead are entitled to the bond hearings available to those held under the general arrest and release authority provided in §1226(a).” Respondents’ primary textual argument turns on the interaction of paragraphs (1) and (2) of §1226(c). [T]hose paragraphs govern ... the “[c]ustody” and “[r]elease” of criminal aliens guilty of a predicate offense.

Respondents argue that they are not subject to mandatory detention because they are not “described in” §1226(c)(1) ... Indeed, respondents insist that the alien must have been arrested *immediately* after release. Since they and the other class members were not arrested immediately, respondents conclude, they are not “described in” §1226(c)(1). [L]ike others detained under §1226(a), they are owed bond hearings in which they can earn their release by proving that they pose no flight risk and no danger to others ...

The Court notes, “[f]irst, respondents’ position runs aground on the plain text of §1226(c). Respondents are right that only an alien “described in paragraph (1)” faces mandatory detention, but they are wrong about which aliens are “described in” paragraph (1).”

Paragraph (1) provides that the Secretary “shall take” into custody any “alien” having certain characteristics and that the Secretary must do this “when the alien is released” from criminal custody... As an initial matter, no one can deny that the adjectival clauses modify (and in that sense “describ[e]”) the noun “alien” or that the adverbial clause “when . . . released” modifies the verb “shall take.” And since an adverb cannot modify a noun, the “when released” clause cannot modify “alien.” Again, what modifies (and in that sense “describe[s]”) the noun “alien” are the adjectival clauses that appear in subparagraphs (A)–(D).

Respondents and the dissent contend that this grammatical point is not the end of the matter—that an adverb can “describe” a person even though it cannot modify the noun used to denote that person ... The preliminary point about grammar merely complements what is critical, and indeed conclusive in these cases: the particular meaning of the term “described” as it appears in §1226(c)(2).

The Court asserted, “[t]he “when . . . released” clause could not ... describe aliens in that sense; it plays no role in identifying ... *which* aliens she must immediately arrest. Since it is the Secretary’s action that *determines* who is arrested upon release, “being arrested upon release” cannot be one of her criteria in figuring out whom to arrest.

Here grammar and usage establish that “the” is “a function word . . . indicat[ing] that a following noun ... is definite or has been previously specified by context.” (citation omitted) For “the alien”—in the clause “when the alien is released”—to have been previously specified, its scope must have been settled by the time the “when . . . released” clause appears at the tail end of paragraph (1).

[W]e hold that the scope of “the alien” is fixed by the predicate offenses identified in subparagraphs (A)–(D). And since only those subparagraphs settle who is “described in paragraph (1),” anyone who fits *their* description falls under paragraph (2)’s detention mandate—even if (as with respondents) the Secretary did not arrest them immediately “when” they were “released.”

The Supreme Court noted, “the Ninth Circuit reasoned ... aliens must be arrested under the general arrest authority in subsection (a) in order to get a bond hearing under subsection (a) ... And in order to face mandatory detention under subsection (c), criminal aliens must have been arrested under subsection (c). But since subsection (c) authorizes only immediate arrest, the argument continues, those arrested later fall under subsection (a), not (c). Accordingly, the court concluded, those arrested well after release escape subsection (c)’s detention mandate. See 831 F. 3d, at 1201–1203. But this argument misreads the structure of §1226 ...

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Although the Ninth Circuit viewed subsections (a) as establishing separate sources of arrest and release authority, in fact subsection (c) is simply a limit on the authority conferred by subsection (a)... We read each of subsection (c)’s two provisions—paragraph (1) on arrest, and paragraph (2) on release—as modifying its counterpart sentence in subsection (a).

The Secretary *must* arrest those aliens guilty of a predicate offense. And subsection (c)(2) limits subsection (a)’s second sentence by cutting back the Secretary’s discretion over the decision to release ... Accordingly, all the relevant detainees will have been arrested by authority that springs from subsection (a), and so, contrary to the Court of Appeals’ view, that fact alone will not spare them from subsection (c)(2)’s prohibition on release.

The text of §1226 itself contemplates that aliens arrested under subsection (a) may face mandatory detention under subsection (c). The second sentence in subsection (a)—which generally authorizes the Secretary to *release* an alien pending removal proceedings—features an exception “as provided in subsection (c).” But if the Court of Appeals were right that subsection (c)(2)’s prohibition on release applies only to those arrested pursuant to subsection (c)(1), there would have been no need to specify that such aliens are exempt from subsection (a)’s release provision.

[A]ssume with the Court of Appeals that only someone arrested under authority created by §1226(c)(1) ... may be detained without a bond hearing. And assume that subsection (c)(1) requires *immediate* arrest. Even then, the Secretary’s failure to abide by this time limit would not cut off her power to arrest under subsection (c)(1). [A] statutory rule that officials “‘shall’ act within a specified time” does not by itself “preclud[e] action later.” (*citation omitted*).

Especially relevant here is our decision in *United States v. Montalvo-Murillo*, 495 U. S. 711 (1990). There we held that “a provision that a detention hearing ‘shall be held immediately upon the [detainee’s] first appearance before the judicial officer’ did not bar detention after a tardy hearing.” *Barnhart*, 537 U. S., at 159 (quoting *Montalvo-Murillo*, 495 U. S., at 714) ... Instead, we gave effect to the principle that “‘if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction.’” *Barnhart*, 537 U. S., at 159 (quoting *United States v. James Daniel Good Real Property*, 510 U. S. 43, 63 (1993)).

Congress was “presumably aware that we do not readily infer congressional intent to limit an agency’s power to get a mandatory job done merely from a specification to act by a certain time.” *Barnhart*, 537 U. S., at 160 (relying on *Brock v. Pierce County*, 476 U. S. 253 (1986)). Here this principle entails that even if subsection (c)(1) were the sole source of authority to arrest aliens without granting them hearings, that authority would not evaporate just because officials had transgressed subsection (c)(1)’s command to arrest aliens immediately “when . . . released.”

In those cases, respondents argue, the governmental authority at issue would have disappeared entirely if time limits were enforced—whereas here the Secretary could still arrest aliens well after their release under the general language in §1226(a).

But the whole premise of respondents’ argument is that if the Secretary could no longer act under §1226(c), she *would* lose a specific power—the power to arrest and detain criminal aliens without a bond hearing. If that is so, then as in other cases, accepting respondents’ deadline- based argument would be inconsistent with “the design and function of the statute.” *Montalvo-Murillo*, 495 U. S. at 719.

It is irrelevant that the Secretary could go on detaining criminal aliens subject to a bond hearing. . . . [a]nd having thus required the Secretary to impose mandatory detention without bond hearings immediately, for safety’s sake, Congress could not have meant for judges to “enforce” this duty in case of delay by—of all things—prohibiting its execution. Cf. *Montalvo-Murillo*, 495 U. S., at 720

Especially hard to swallow is respondents’ insistence that for an alien to be subject to mandatory detention under §1226(c), the alien must be arrested on the day he walks out of jail. “Assessing the situation in realistic and practical terms, it is inevitable that” respondents’ unsparing deadline will often be missed for reasons beyond the Federal Government’s control. *Montalvo-Murillo*, 495 U. S., at 720. Cf. *Regions Hospital v. Shalala*, 522 U. S. 448, 459, n. 3 (1998).

Respondents protest that reading §1226(c) in the manner set forth here would render key language superfluous, lead to anomalies, and violate the canon of constitutional avoidance. We answer these objections in turn.

First, respondents claim that if they face mandatory detention even though they were arrested well after their release, then “when . . . released” adds nothing to paragraph (1). The Court does not agree and states, “it clarifies when the duty to arrest is triggered: upon release from criminal custody, not before such release or after the completion of noncustodial portions of a criminal sentence . . .

The “when . . . released” clause also serves another purpose: exhorting the Secretary to act quickly. And this point answers respondents’ second surplusage claim: that the “Transition Period Custody Rules” enacted along with §1226(c) would have been superfluous if §1226(c) did not call for immediate arrests, since those rules authorized delays in §1226(c)’s implementation while the Government expanded its capacities. See *Matter of Garvin-Noble*, 21 I. & N. Dec. 672, 675 (BIA 1997). This argument again confuses what the Secretary is obligated to do with the consequences that follow if the Secretary fails (for whatever reason) to fulfill that obligation.

The Court of Appeals objected that the Government's reading of §1226(c) would have the bizarre result that some aliens whom the Secretary need not arrest at all must nonetheless be detained without a hearing if they *are* arrested. (citation omitted)... Paragraph (2) requires the detention of aliens "described in paragraph (1)." While most of the aliens described there have been convicted of a criminal offense, this need not be true of aliens captured by subparagraph (D)... But if, as the Government maintains, *any* alien who falls under subparagraphs (A)–(D) is thereby ineligible for release from immigration custody, then the Secretary would be forbidden to release even these aliens who were never convicted or perhaps even charged with a crime, once she arrested them.

Yet she would be free not to arrest them to begin with (or so the Court of Appeals assumed), since she is obligated to arrest aliens "when . . . released," and there was no prior custody for *these* aliens to be "released" *from*. Therefore, the court concluded, the Government's position has the absurd implication that aliens who were never charged with a crime need not be arrested pending a removal determination, but if they *are* arrested, they must be detained and cannot be released on bond or parole.

Under the Court of Appeals' reading, the mandatory-detention scheme would be gentler on terrorists than it is on garden-variety offenders. To see why, recall first that subparagraphs (A)–(C) cover aliens who are inadmissible or deportable based on the commission of certain criminal offenses, and there is no dispute that the statute authorizes . . .

[A]liens who fall within subparagraph (D) . . . may never have been arrested on criminal charges—which according to the court below would exempt them from mandatory detention. Yet this subparagraph covers the very sort of aliens for which Congress was most likely to have wanted to require mandatory detention . . . Thus, by the Court of Appeals' logic, Congress chose to spare terrorist aliens from the rigors of mandatory detention—a mercy withheld from almost all drug offenders and tax cheats.

It would be point- less for Congress to have covered such aliens in subsections (c)(1)(A)–(D) if subsection (c)'s mandates applied only to those emerging from jail.

Thus, contrary to the Court of Appeals' interpretation of the "when released" clause as limiting the class of aliens subject to mandatory detention, we read subsection (c)(1) to specify the timing of arrest ("when the alien is released") only for the vast majority of cases: those involving criminal aliens who were once in criminal custody.

In short, we read the "when released" directive to apply when there is a release. In other situations, it is simply not relevant. It follows that both of subsection (c)'s mandates—for arrest and for release—apply to any alien linked with a predicate offense identified in subparagraphs (A)–(D), regardless of exactly when or even whether the alien was released from criminal custody.

Finally, respondents perch their reading of §1226(c) . . . on the canon of constitutional avoidance. This canon provides that "[w]hen 'a serious doubt' is raised about the constitutionality of an act of Congress, ' . . . this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.' " (citation omitted)

Respondents say we should be uneasy about endorsing any reading of §1226(c) that would mandate arrest and detention years after aliens' release from criminal custody—when many aliens will have developed strong ties to the country and a good chance of being allowed to stay if given a hearing.

In respondents' view, detention in that scenario would raise constitutional doubts under *Zadvydas v. Davis*, 533 U. S. 678 (2001), which held that detention violates due process absent "adequate procedural protections" or "special justification[s]" sufficient to outweigh one's "constitutionally protected interest in avoiding physical restraint," *id.*, at 690 (quoting *Kansas v. Hendricks*, 521 U. S. 346, 356 (1997)).

The trouble with this argument is that constitutional avoidance "comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction." *Jennings*, 583 U. S., at (slip op., at 12). The canon "has no application" absent "ambiguity." *Warger v. Shauers*, 574 U. S. 40, 50 (2014) (internal quotation marks omitted).

* * *

JUSTICE KAVANAUGH, concurring.

The sole question before us is narrow: whether, under §1226, the Executive Branch's mandatory duty to detain a particular noncitizen when the noncitizen is released from criminal custody remains mandatory if the Executive Branch fails to *immediately* detain the noncitizen when the noncitizen is released from criminal custody ...

The issue before us is entirely statutory and requires our interpretation of the strict 1996 illegal-immigration law. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 110 Stat. 3009–546.

It would be odd, in my view, if the Act (1) mandated detention of particular noncitizens because the noncitizens posed such a serious risk of danger or flight that they *must* be detained during their removal proceedings, but (2) nonetheless allowed the noncitizens to remain free during their removal proceedings if the Executive Branch failed to *immediately* detain them upon their release from criminal custody.

Interpreting that text, the Court correctly holds that the Executive Branch's detention of the particular noncitizens here remained mandatory even though the Executive Branch did not immediately detain them. Cite as: 586 U. S. _____ (2019) 1

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, concurring in part and concurring in the judgment.

Respondents consist of two classes of aliens who committed criminal offenses that require the Secretary of Homeland Security to detain them without a bond hearing under 8 U. S. C. §1226(c), but who were not detained immediately upon release from criminal custody. Respondents argued that, by failing to immediately detain them, the Secretary lost the authority to deny them a bond hearing when they were rearrested.

At least three statutory provisions limit judicial review here, and I am skeptical whether the District Courts had Article III jurisdiction to certify the classes.

First, §1252(b)(9) bars judicial review of "all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States," except for review of "a final order" or other circumstances not present here. These cases raise questions of law or fact arising from removal proceedings—"[d]etention is necessarily a part of [the] deportation procedure" that culminates in the removal of the alien, *Carlson v. Landon*, 342 U. S. 524, 538 (1952)—and they

do not come to us on review of final orders of removal. Thus, for the reasons I set forth in *Jennings, supra*, at (slip op., at 1–11), no court has jurisdiction over these class actions.

Second, §1226(e) provides that “[n]o court may set aside any action or decision by the [Secretary] under this section regarding the detention or release of any alien or the grant, revocation, or *denial of bond* or parole.” (Emphasis added.) This provision “unequivocally deprives federal courts of jurisdiction to set aside ‘any action or decision’ by the [Secretary]” regarding detention, discretionary or otherwise. (citation omitted).

The Court once again reads this language as permitting judicial review for challenges to the “statutory framework as a whole.” (*citation omitted*) But the text of the statute contains no such exception. Accordingly, I continue to think that no court has jurisdiction over these kinds of actions.

Third, §1252(f)(1) deprives district courts of “jurisdiction or authority to enjoin or restrain the operation of [§§1221–1232] other than with respect to the application of such provisions to an individual alien against whom proceedings under [§§1221–1232] have been initiated.” The text of §1252(f)(1) explicitly prohibits the classwide injunctive relief ordered by the Northern District of California in this instance, given that the class includes future, yet-to-be detained aliens against whom proceedings have not been initiated.

Finally, I harbor two concerns about whether the class actions were moot at the time of certification. First, as the Court recognizes, class actions are ordinarily “moot if no named class representative with an unexpired claim remain[s] at the time of class certification.” (citation omitted). At the time of class certification, all six of the named plaintiffs had received bond hearings or cancellation of removal. As I understand the plaintiffs’ arguments, that was the full relief that they sought ...

The Court concludes that some of the named plaintiffs still faced the threat of rearrest and mandatory detention at the time of class certification because the bond hearings that they received were provided as part of a preliminary injunction in a separate case that was later dissolved. But whether the plaintiffs actually faced that threat has not been addressed by the parties, and I question whether this future contingency was sufficiently imminent to support Article III jurisdiction.

We have held that a court has Article III jurisdiction to certify a class action when the named plaintiffs’ claims have become moot if the claim is “so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative’s individual interest expires.” *United States Parole Comm’n*

I am not persuaded that the plaintiffs’ claims are so “inherently transitory” as to preclude a ruling on class certification, especially since both District Courts certified the classes here within a year of the filing of the complaints.

JUSTICE BREYER, with whom JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, dissenting.

A provision of the Immigration and Nationality Act, 8 U. S. C. §1226(c), focuses upon potentially deportable noncitizens who have committed certain offenses or have ties to terrorism. It requires the Secretary of Homeland Security to take those aliens into custody “when . . . released” from prison and to hold them *without a bail hearing* until Government authorities decide

whether to deport them. The question is whether this provision limits the class of persons in the “no-bail-hearing” category to only those aliens who were taken into custody “when . . . released” from prison, or whether it also places in that “no- bail-hearing” category those aliens who were taken into custody years or decades after their release from prison.

Do the words “an alien described in paragraph (1)” refer only to those aliens whom the Secretary, following paragraph (1)’s instructions, has “take[n] into custody . . . when the alien is re- leased” from, say, state or federal prison? Or do these words refer instead to *all* aliens who have *ever* committed one of the offenses listed in paragraph (1), regardless of when these aliens were “released” from prison?

Here . . . the Court goes much further. The majority concludes that paragraph (2) forbids bail hearings for aliens regardless of whether they are taken into custody “when . . . released” from prison. Under the majority’s view, the statute forbids bail hearings even for aliens whom the Secretary has detained years or decades after their release from prison.

The language of the statute will not bear the broad interpretation the majority now adopts. Rather, the ordi- nary meaning of the statute’s language, the statute’s structure, and relevant canons of interpretation all argue convincingly to the contrary. I respectfully dissent.

The relevant statute, 8 U. S. C. §1226, is entitled “Ap- prehension and detention of aliens.” Its first subsection, subsection (a), is entitled “Ar- rest, detention, and release.” Subsection (a) sets forth the background rule. It gives the Secretary of Homeland Security (formerly the Attorney General) the authority to “arres[t] and detai[n]” an “alien . . . pending a decision on whether the alien is to be removed from the United States.” §1226(a). See *ante*, at 3, n. 2. It adds that the Secretary “may release the alien” on “bond” or “conditional parole.” §1226(a)(2). Federal regulations provide that a person detained under this subsection must receive a bail hearing. 8 CFR §§236.1(d)(1), 1236.1(d)(1) (2018).

With respect to release, however, subsection (a) adds the words “[e]xcept as provided in subsection (c).” 8 U. S. C. §1226(a). The subsection containing the exception to which (a) refers—namely, subsection (c)—is entitled “Detention of criminal aliens.” It consists of two paragraphs. Paragraph (1), entitled “Custody,” says that the Secretary “shall take into custody any alien who” is “inadmissible” or “deportable” (by reason of having committed certain offenses or having ties to terrorism) “*when the alien is released*,” presumably from local, state, or federal criminal custody. §1226(c)(1)

Paragraph (2), entitled “Release,” says that the Secretary “may release *an alien described in paragraph (1)* only if ” the alien falls within a special category—not relevant here—related to witness protection. §1226(c)(2) (emphasis added). We held last Term in *Jennings* that paragraph (2) forbids a bail hearing for “an alien described in paragraph (1)” unless the witness protection exception applies.

Here we focus on the meaning of a key phrase in paragraph (2): “an alien described in paragraph (1).” This is the phrase that identifies the aliens to whom paragraph (2) (and its “no-bail-hearing” requirement) applies. Does paragraph (1) “describ[e]” *all* ABCD aliens, even those whom the Secretary has “take[n] into custody” many years after their release from prison? Or does it “describ[e]” only those aliens whom the Secretary has “take[n] into custody . . . when the alien [was] released” from prison?

[T]he Government’s reading of the statute—namely, that paragraph (2) forbids bail hear- ings for all ABCD aliens regardless of whether they were detained “when . . . released” from criminal custody— would significantly expand the Secretary’s authority to deny bail hearings. Under the Government’s view, the aliens subject to detention without a bail hearing may have been released

from criminal custody years earlier, and may have established families and put down roots in a community.

Thus, in terms of potential consequences and basic American legal traditions, see *infra*, at 11–12, the question before us is not a “narrow” one, (citation omitted).

Why would Congress have granted the Secretary such broad authority to deny bail hearings, especially when doing so would run contrary to basic American and common-law traditions? (citation omitted). The answer is that Congress did not do so. Ordinary tools of statutory interpretation demonstrate that the authority Congress granted to the Secretary is far more limited.

Justice Breyer asserted “[t]he statute’s language, its structure, and relevant canons of interpretation make clear that the Secretary cannot hold an alien without a bail hearing unless the alien is “take[n] into custody . . . when the alien is released” from criminal custody. §1226(c)(1).”

Consider the statute’s language. Paragraph (1) of sub-section (c) provides that the Secretary “shall take into custody” any ABCD alien—that is, any alien who is “inadmissible” or “deportable” under the subparagraphs labeled “A,” “B,” “C,” and “D”—“when the alien is released” from, say, state or federal prison. *Ibid.* Paragraph (2), meanwhile, generally forbids a bail hearing for “an alien described in paragraph (1).” §1226(c)(2).

The key phrase in paragraph (2) is “an alien *described* in paragraph (1).” As a matter of ordinary meaning and usage, the words “take into custody . . . when the alien is released” in paragraph (1) form part of the *description* of the “alien”: An “alien described in paragraph (1)” is an ABCD alien whom the Secretary has “take[n] into custody . . . when the alien is released” from prison.

The majority emphasizes a grammatical point—namely, that ordinarily only adjectives or adjectival phrases “modify” nouns. *Ante*, at 12. But the statute does not use the word “modify.” It uses the word “described.” While the word “describe” will in some contexts refer only to the words that directly “modify” a noun, normally it has a broader meaning.

They demonstrate that a noun often is “described” by more than just the adjectives that modify it.
..

By the same logic, the alien in paragraph (1) is “described” not only by the four clauses—A, B, C, and D—that directly modify the word “alien,” but *also* by the verb (“shall take”) and that verb’s modifier (“when the alien is released”).

The same is true of the two paragraphs before us. The key word “described” appears not in paragraph (1), but in paragraph (2). Paragraph (2) refers back to the entirety of paragraph (1). And because paragraph (2) is the *release* provision, it contemplates that the action mandated by paragraph (1)—namely, detention—has already occurred. Thus, the function of the phrase “an alien described in, but instead to describe who must be denied bail.

In short, the language demonstrates that an alien is “described in paragraph (1)” —and therefore subject to paragraph (2)’s bar on bail hearings—only if the alien is “take[n] into custody . . . when the alien is released.”

The cross-reference to all of paragraph (1) reinforces that “an alien described in paragraph (1)” is not just an ABCD alien, but an ABCD alien whom (in the words of paragraph (1)) the Secretary “take[s] into custody . . . when the alien is released” from criminal confinement.

Second, consider the structural similarity between subsections (a) and (c). See Appendix A, *infra*. The first sentence of subsection (a) sets forth a detention rule: An “alien may be arrested and detained” pending a decision on the alien’s removal. 8 U. S. C. §1226(a). And the second sentence sets forth a release rule that allows for re-lease on bond and parole. *Ibid*. Subsection (c) has a parallel structure. The first sentence (namely, paragraph (1)) says that the Secretary must “take into custody” a subset of those aliens “when the alien is released” from criminal custody. §1226(c)(1). And the second sentence (namely, paragraph (2)) sets forth the rule that “an alien described in paragraph (1)” generally may not be released. §1226(c)(2).

[T]he second sentence of (a) applies only to those aliens who are detained following the rule in (a)’s first sentence. Parallel structure suggests that the same is true in (c): The second sentence of (c) applies only to those detained following the rule in (c)’s first sentence. Subsection (a)’s reference to (c) strengthens this structural inference: Subsection (a) says that its release rule applies “[e]xcept as provided in subsection (c)” —that is, except as provided in the *whole* of subsection (c), not simply paragraph (2) or the few lines the majority picks from (c)’s text. Thus, the release rule in each subsection (the second sentence) applies only if the Secretary complies with the detention rule in that subsection (the first sentence). In light of “the parallel structures of these provisions,” it would “flou[t] the text” to find that an alien is subject to (c)’s release rule, which forbids release, without also find- ing that the alien was detained in accordance with (c)’s detention rule, which requires the alien to be detained “when . . . released.” (*citation omitted*)

The majority responds that subsections (a) and (c) do not “establis[h] separate sources of arrest and release authority,” and that (c) is merely “a limit” on the authority granted by (a). *Ante*, at 15. But even if (c) were treated as a “limit” on the authority granted by (a), the parallel structure of the statute would still point to the same con-clusion: The Secretary must comply with the limit on detention in the first sentence of (c) in order to invoke the rule on release in the second sentence of (c).

Third, Congress’ enactment of a special “transition” statute strengthens the point. When Congress enacted subsection (c), it recognized that there might be “insufficient detention space” and “personnel” to carry out subsection (c)’s requirements. (*citation omitted*). It therefore authorized the Government to delay implementation of subsection (c)—initially for one year, then for a second year. *Ibid*.

If the majority were correct that the “when . . . released” provision does not set a time limit on the Secretary’s authority to deny bail hearings, then a special transition statute delaying implementation for one year would have been unnecessary. To avoid overcrowding, the Govern-ment simply could have delayed arresting aliens for 1, 2, 5, or 10 years, as the majority believes it can do, and then deny them bail hearings.

What need for a 1-year transition period? The majority responds that the transition statute still served a purpose: to “dela[y] the onset of the Secretary’s obligation to begin making arrests.” *Ante*, at 21. But that just raises the question: Why would Congress have needed to “dela[y] the onset of the Secretary’s obliga- tion” if it thought that the Secretary could detain aliens without a bail hearing after a year-long delay?

The transition statute also supports this conclusion in another respect: It demonstrates that Congress anticipated that subsection (c) would apply only to aliens “released” from state or federal prison . . . Even the majority acknowledges that it would be bizarre if these aliens could be detained without a bail hearing. *Ante*, at 23. The transition statute confirms as much: It indicates that “the

provisions of [subsection (c)] shall apply to *individuals released* after” the transition period concludes. IIRIRA, §303(b)(2), 110 Stat. 3009–586 (emphasis added). From this it follows that Congress saw paragraph (2) as forbidding bail hearings only for aliens who have been “released.” That, however, can be true only if the “when . . . released” provision limits the class of aliens subject to paragraph (2)’s “no-bail-hearing” requirement. The majority’s contrary reading, under which paragraph (2) applies “regardless of . . . whether the alien was released from criminal custody,” *ante*, at 25, conflicts with how Congress itself described the scope of subsection (c) when it enacted the statute.

A well-established canon of statutory interpretation provides that, “if fairly possible,” a statute must be construed “so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.” (citation omitted). The Government’s reading of the statute, which the majority adopts, construes the statute in a way that creates serious constitutional problems. That reading would give the Secretary authority to arrest and detain aliens years after they have committed a minor crime and then hold them without a bail hearing for months or years.

Why would the law grant a bail hearing to a person accused of murder but deny it to a person who many years before committed a crime perhaps no greater than possessing a stolen bus transfer? See Appendix B, *infra*. I explained much of the constitutional problem in my dissent in *Jennings*. Rather than repeat what I wrote there, I refer the reader to that opinion.

The majority’s reading also creates other anomalies. As I have said, by permitting the Secretary to hold aliens without a bail hearing even if they were not detained “when . . . released,” the majority’s reading would allow the Secretary to hold indefinitely without bail those who have never been to prison and who received only a fine or probation as punishment.

Although the Court of Appeals correctly concluded that paragraph (2)’s prohibition on release applies only to an alien whom the Secretary “take[s] into custody when the alien is released” from criminal custody, it also held that the phrase “when the alien is released” means that the Secretary must grant a bail hearing to any alien who is not “‘immediately detained’ when released from criminal custody.”

As an initial matter, the phrase “when the alien is released” imposes an enforceable statutory deadline. I disagree with the plurality on this point because our case law makes clear that a statutory deadline against the

Here, the special transition statute Congress enacted alongside subsection (c) makes clear that Congress expected that the mandate that an alien be detained “when . . . released” would be enforceable. Congress neither wished for nor expected the Secretary to detain aliens more than a year after their release from criminal custody. (citation omitted). Why else would Congress have enacted a statute permitting the Government, due to “insufficient detention space and Immigration and Naturalization Service personnel,” to delay implementation of the entirety of subsection (c) for one year? *Ibid*.

As I have said, had Congress read the phrase “when the alien is released” as the plurality now reads it, the Government could have delayed implementation for as long as it liked without the need for any transition statute. *Supra*, at 10.

Finally, I have already mentioned the many harms that could befall aliens whom the Secretary

does not detain “when . . . released.” They range from long periods of detention, to detention years or even decades after the alien’s release from criminal custody, to the risk of splitting up families that are long established in a community. *Supra*, at 4. Thus, unlike some of our prior cases, the harm from a missed deadline hardly can be described as “insignificant.” (*citation omitted*).

The plurality objects that “Congress could not have meant for judges to ‘enforce’ ” the mandatory detention requirement “in case of delay by—of all things—forbidding its execution.” *Ante*, at 19. But treating the “when the alien is released” clause as an enforceable limit does not prohibit the Secretary from detaining the aliens that subsection (c) requires her to detain. Rather, the Secretary’s failure to comply with the “when the alien is released” clause carries only one consequence: The Secretary cannot deny a bail hearing.

So what does the phrase “when the alien is released” mean? The word “when” can, but does not always, mean “[a]t the time that,” *American Heritage Dictionary*, at 1971, or “just after the moment that,” *Webster’s Third New International Dictionary*, at 2602. But the word only “[s]ometimes impl[ies] suddenness.” *20 Oxford English Dictionary* 209 (2d ed. 1989). It often admits of at least some temporal delay.

I would interpret the word “when” in the same manner as we interpreted other parts of this statute in *Zadvydas v. Davis*, 533 U. S. 678, 700 (2001). The words “when the alien is released” require the Secretary to detain aliens under subsection (c) within a reasonable time after their release from criminal custody—presumptively no more than six months. If the Secretary does not do so, she must grant a bail hearing. This presumptive 6-month limit is consistent with how long the Government can detain certain aliens while they are awaiting removal from the country. *Id.*, at 682, 701 (interpreting a different provision, §1231(a)(6)).