



THE FIFTH CIRCUIT RETREATS FROM DUE PROCESS IN SOSNAVA RODRIGUEZ V. ORTEGA

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The Fifth Circuit has now erased the constitutional protection that a divided panel recognized only months ago in *Sosnava Rodriguez v. Ortega*. On October 23, 2026, the en banc court [reversed](#) the district courts and held that three longtime Texas residents who entered without inspection were not entitled to a bond hearing before being detained during their removal proceedings.

The decision is a stark reversal of the panel opinion we discussed in our [July 19 blog, "Beyond Loper Bright: Rodriguez v. Ortega and the Fifth Amendment Limit on Mandatory Immigration Detention."](#) Relying on the Supreme Court's recognition that due process protects people physically present in the United States regardless of their immigration status, the panel had held that due process requires bond hearings within 90 days for similarly situated detainees. The full court vacated that ruling and has now rejected its central premise.

What the en banc court held

The majority treated the petitioners, who had entered the United States without inspection, as applicants for admission subject to mandatory detention under 8 U.S.C. § 1225(b)(2)(A). It concluded that they had no constitutional right to an individualized bond hearing and that the duration of their detention did not warrant habeas relief. The court therefore reversed the three district court judgments and vacated the writs of habeas corpus.

The practical consequence is severe. In Texas, Louisiana, and Mississippi, a noncitizen whom the government classifies as an applicant for admission because of an entry without inspection may now be detained throughout removal proceedings without an immigration judge ever deciding whether confinement is necessary. The person's length of residence in the U.S., family

ties, lack of criminal history, and ability to establish that he presents neither danger nor flight risk do not trigger a hearing under the en banc majority's rule.

THE MAJORITY TRANSFORMS ADMISSION DOCTRINE INTO A DETENTION RULE

Judge Wilson's majority begins with the petitioners' concession that they are "applicants for admission" detained under § 1225(b)(2)(A), and then gives that statutory classification sweeping constitutional significance. Relying principally on [*Department of Homeland Security v. Thuraissigiam*](#), which upheld the limitation on federal court review of expedited removal orders at 8 U.S.C. § 1252(e)(2), the majority reasons that an unadmitted noncitizen may invoke only the procedures Congress has supplied for determining admission. Lengthy residence in the U.S., family and community ties, and arrest deep inside the country do not alter that conclusion. In the majority's view, formal admission—not physical presence or the strength of a person's connections to the country—marks the constitutional boundary.

The majority also rejects procedural due process balancing under [*Mathews v. Eldridge*](#), which would require balancing the private individual's interest, the government interest, and the likelihood of an erroneous deprivation. Because Congress made detention mandatory under its reading of § 1225(b)(2)(A), it treats dangerousness and flight risk as legally irrelevant. A hearing cannot be constitutionally required, it says, to decide facts that the statute does not make material. That reasoning is circular: the statutory denial of individualized consideration becomes the reason the Constitution cannot require individualized consideration.

On substantive due process, the majority defines the asserted right narrowly—as freedom from immigration custody while removal proceedings remain pending—and finds no deeply rooted historical right of that description. It applies rational-basis review and regards detention as reasonably connected to ensuring a noncitizen's appearance and effectuating removal. It further limits [*Zadvydas v. Davis*](#), which emphasized that a noncitizen who has been ordered removed cannot be detained indefinitely, to post-removal-order detention where removal is no longer realistically attainable, declining to treat six months as a constitutional benchmark during ongoing proceedings. Under the majority's rule, detention remains permissible so long as it has a nominal

endpoint—removal or release—and removal remains a viable prospect.

JUDGE HO'S CONCURRENCE: A BROADER THEORY OF POLITICAL CONTROL

Judge Ho's lengthy concurrence goes further than the majority. It situates the dispute within the political branches' asserted plenary power over admission and removal and warns against converting due process into a judicial license to revise Congress's detention choices. Its central move is to characterize detention as an incident of exclusion rather than as an ordinary deprivation of liberty. If a person has never been admitted, the concurrence reasons, continued physical presence cannot generate a constitutional entitlement to remain free while the government decides whether removal will occur.

The concurrence is rhetorically powerful but analytically troubling. It collapses two different questions—whether a person may lawfully remain in the United States and whether the government may imprison that person without proving that detention is necessary. A bond hearing does not confer lawful status, prevent removal, or second-guess Congress's admissibility rules. It asks only whether incarceration is justified while those rules are administered. Treating that modest procedural safeguard as an intrusion upon sovereign control obscures the liberty interest actually at stake.

Judge Ho's approach also gives insufficient weight to the traditional role of habeas corpus. Habeas is not a demand for admission; it is the historic mechanism for testing executive custody. A theory that places detention beyond meaningful judicial scrutiny whenever the government invokes the admission fiction risks allowing a statutory label to do what the Suspension Clause and Due Process Clause were designed to prevent: make executive imprisonment effectively self-justifying.

THE DISSENTS BETTER UNDERSTAND THE CONSTITUTIONAL QUESTION

The dissents resist the majority's attempt to turn the entry fiction into a constitutional eraser. Judge Southwick's principal dissent, joined by five judges, returns to the Fifth Amendment's text and the Supreme Court's recognition in *Zadvydas* that its protection extends to all persons within the United States,

regardless of whether their presence is lawful, unlawful, temporary, or permanent. These petitioners at issue were not arriving at the border. They had lived here for many years, raised U.S. citizen children, and were arrested in settled communities. The dissents persuasively argue that *Thuraissigiam*, involving a recent entrant apprehended near the border who sought additional review of an asylum determination, should not extinguish the liberty interests of longtime residents challenging imprisonment rather than exclusion.

The separate dissents by Judges Haynes, Higginson, and Douglas reinforce different aspects of the same constitutional error. They emphasize that habeas courts have historically examined whether executive detention serves a lawful purpose; that civil confinement cannot become punishment by administrative declaration; and that due process ordinarily demands some opportunity to test whether detention bears a real relationship to danger, flight risk, or removal. Their disagreement with the majority is not about creating an absolute right to release. Rather, they insist on preserving a neutral hearing at which the government must justify continued confinement.

The dissents offer the better argument. The majority permits Congress's choice of a detention category to determine the scope of the very liberty interest against which that category must be measured. It treats decades of residence as constitutionally meaningless, conflates release from custody with admission into the country, and reduces habeas review to confirming that the government selected the right statutory box. The dissents preserve the more fundamental rule: immigration power is broad, but it does not place executive imprisonment beyond the Constitution.

Moreover, a bond hearing is not an extravagant remedy. It does not guarantee release. It merely allows an immigration judge to consider evidence, evaluate danger and flight risk, and determine whether detention serves a legitimate civil purpose. For the government to imprison a father, worker, or longtime community member while removal proceedings unfold—and never explain to a neutral adjudicator why that imprisonment is necessary—is precisely the kind of arbitrary deprivation the Due Process Clause should forbid.

THE ADVOCATES' RESPONSE

The [American Immigration Council](#) and the [National Immigration Project](#) condemned the ruling in forceful terms. Rebecca Cassler, senior litigation

attorney at the Council, called it “an affront to the U.S. Constitution” and distilled the issue to its core: if the government seeks to deprive a person of liberty, it must explain why detention is necessary, and the detained person must be able to ask a judge to review that decision.

When courts degrade the meaning of liberty for some, we all suffer the consequences.

— Rebecca Cassler, American Immigration Council

Ellie Norton, supervising attorney at the National Immigration Project, emphasized the human stakes. The case concerns three fathers who had lived in the United States for years and supported U.S. citizen children, yet were separated from their families without a chance to seek release from an immigration judge. She also warned that transfers into detention facilities within the Fifth Circuit may be used to place people under this restrictive rule.

WHY THE RULING EXTENDS BEYOND IMMIGRATION DETENTION

The majority’s logic should concern more than just immigration lawyers. Constitutional guarantees are most vulnerable when courts permit the government to place a disfavored group outside their protection. Although the immediate holding governs immigration detention within the Fifth Circuit, its reasoning diminishes the principle that physical liberty may not be taken without a meaningful opportunity to be heard.

The ruling also sharpens a geographic split over the governing detention statute. The Second, Sixth, and Eleventh Circuits have rejected the government’s position and held that longtime residents arrested in the interior after entering without inspection are detained under INA § 236(a), not § 235(b)(2)(A), and therefore may seek bond from an immigration judge. The Seventh Circuit has also indicated that it would reject the government’s interpretation. By contrast, the Fifth and Eighth Circuits have accepted the government’s mandatory-detention theory. The relevant discretionary-bond provision is INA § 236(a); INA § 236(c) concerns mandatory detention for specified criminal and related grounds.

That split creates a powerful incentive for DHS to transfer and detain as many noncitizens who entered without inspection as possible in jurisdictions like Texas, Louisiana, and Mississippi. Once detention is located within the Fifth Circuit, immigration judges will be expected to follow *Buenrostro-Mendez* and *Sosnava Rodriguez* and deny bond jurisdiction, even when another circuit might treat the same person as eligible to seek bond under INA § 236(a). Geography may therefore determine whether a detained person ever receives an individualized custody hearing. This forum-shifting strategy compounds the due process problem by allowing the government's choice of detention site to dictate the governing law and potentially strip people of protections available where they lived or were arrested.

THE SUPREME COURT MAY NARROW SOSNAVA'S PRACTICAL REACH

The Supreme Court has agreed to review the statutory question in [*Rhoney v. Barbosa da Cunha*](#): whether a noncitizen who entered without inspection and was later arrested in the interior is detained under INA § 235(b)(2)(A) or under the discretionary detention provision in INA § 236(a). If the Court agrees with the Second, Sixth, and Eleventh Circuits that § 236(a) governs, the practical impact of *Sosnava Rodriguez* on this category of detainees would be sharply reduced. They would be statutorily eligible to seek bond from an immigration judge, so courts ordinarily would not need to reach *Sosnava*'s constitutional holding that an "unadmitted" person detained under § 235(b)(2)(A) has no right to an individualized bond hearing.

Such a Supreme Court ruling would not formally overrule *Sosnava*. The decision would remain on the books for people properly detained under § 235(b)(2)(A), including those whose statutory classification differs from the longtime interior residents at issue in *Barbosa da Cunha*. But it would remove the statutory premise on which *Sosnava* operates for many noncitizens who entered without inspection years earlier: if § 236(a), rather than § 235, supplies the detention authority, their access to bond follows from the statute.

DOES SOSNAVA THREATEN OTHER IMMIGRATION

HABEAS CASES?

Sosnava should not control a habeas petition brought by a noncitizen who was admitted to the United States merely because the case concerns immigration detention. That category includes not only lawful permanent residents but also people admitted in nonimmigrant status—such as workers, students, visitors, and others—who may later fall out of status, become removable, or be detained while contesting removal. *Sosnava*'s central reasoning repeatedly turns on the petitioners' status as never-admitted "applicants for admission," their detention under § 235(b)(2)(A), and the entry fiction. A person who was inspected and admitted stands on materially different constitutional and statutory ground. *Sosnava*'s holding therefore should not apply to such a habeas petitioner. Indeed, *Zadvydas v. Davis* involved admitted resident aliens and confirms that habeas remains available to test statutory and constitutional limits on continued custody.

Still, the government may invoke some of *Sosnava*'s broader propositions in other detention cases—its narrow framing of the asserted liberty right, its reluctance to use *Mathews v. Eldridge* to require a hearing on facts the detention statute does not make relevant, and its distinction between pre-removal and post-removal detention. Those propositions could influence prolonged-detention litigation involving LPRs, former nonimmigrants, and other admitted noncitizens detained under INA § 236(c) or other provisions. But these habeas petitioners can argue forcefully that *Sosnava* is limited by its own rationale: it does not erase the greater due process protections accorded to admitted noncitizens, decide the constitutionality of prolonged detention under § 236(c), or disturb *Zadvydas*'s recognition that § 2241 habeas is the basic vehicle for challenging unlawful continued custody.

The better reading, therefore, is that *Sosnava* creates a serious obstacle for constitutional bond claims by people actually governed by § 235(b)(2)(A) in the Fifth Circuit, but it is not a categorical bar to immigration habeas. Its holding should not extend to LPRs, nonimmigrants, former nonimmigrants, or other people who were inspected and admitted. For every future habeas petitioner, the detention statute, admission history, procedural posture, duration of confinement, and relief sought remain critical. Challenges by admitted noncitizens should be framed through the statutory provision that authorizes custody and the Supreme Court precedents applicable to that distinct form of

detention.

WHAT COMES NEXT

The [American Immigration Council](#) and the [National Immigration Project](#) have made clear that they will continue the fight. Their forceful response also suggests that they have carefully considered the avenues that may remain after the en banc ruling, although the press release does not identify particular next steps. Those avenues may include seeking further review and continuing to challenge detention through statutory and constitutional arguments in cases presenting different facts and in jurisdictions that have rejected the Fifth Circuit's approach.

The essential constitutional question remains unchanged: Can the government imprison a person for civil immigration purposes without ever proving to a neutral adjudicator that detention serves a legitimate need? The Fifth Circuit has answered yes for noncitizens who entered without inspection. That answer elevates an entry classification over the Fifth Amendment's protection of persons and permits liberty to depend on geography. The Constitution should demand more.

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