



BEYOND LOPER BRIGHT: RODRIGUEZ V. ORTEGA AND THE FIFTH AMENDMENT LIMIT ON MANDATORY IMMIGRATION DETENTION

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In its June 28, 2024 decision in [Loper Bright Enterprises v. Raimondo](#), the Supreme Court abolished the long-standing Chevron doctrine. Under this doctrine, courts were required to defer to the government agency's interpretation of an ambiguous statute. Chief Justice John Roberts, writing for the majority, stated that "Chevron is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires", but made clear that prior cases decided under the Chevron framework are not automatically overruled. We have discussed Loper Bright at length in prior blogs ([here](#), [here](#), [here](#) and [here](#)).

Loper Bright has proved a powerful tool for challenging the Board of Immigration Appeal (BIA)'s reinterpretation of INA 235(2)(A) and INA 236 to hold that noncitizens who entered without inspection (EWI) are not eligible for bond. On September 5, 2025, the BIA held in [Matter of Yajure Hurtado](#), 29 I&N Dec. 216 (BIA 2025), that a noncitizen respondent who entered the US without inspection and was placed in removal proceedings is not eligible for bond under INA 235(b)(2)(A). This BIA decision was a marked reversal of policy, as bond had been permitted for noncitizens who entered without inspection for three decades, since the passage of the Immigration Act of 1996. The decision also disregarded INA 236(a), which provides for the release on bond of a noncitizen who is not ineligible under the categories prescribed in INA 236(c), which notably excludes respondents who have entered without inspection. Addressing this discrepancy, the BIA stated that "nothing in the statutory text of section 236(c), including the text of the amendments made by the Laken Riley

Act, purports to alter or undermine the provisions of section 235(b)(2)(A) of the INA, 8 U.S.C. § 1225(b)(2)(A), requiring that aliens who fall within the definition of the statute ‘shall be detained for a proceeding under section 240’.”

Aware that a federal court would not give deference to its interpretation of the ambiguity posed by two competing statutory provisions, INA 235(b)(2)(A) and INA 236(c), the BIA invoked *Loper Bright* to conclude that the language under INA 235(b)(1)(2) is clear and explicit without regard to the contradiction posed in neighboring INA 236(c), stating: “the statutory text of the INA is not ‘doubtful and ambiguous’ but is instead clear and explicit in requiring mandatory detention of all aliens who are applicants for admission, without regard to how many years the alien has been residing in the United States without lawful status. See INA § 235(b)(1), (2), 8 U.S.C. § 1225(b)(1), (2).”

In a previous blog, we discussed [Buenrostro-Mendez v. Bondi](#) (5th Cir. 2026) the Fifth Circuit agreed with *Yajure Hurtado*, holding that noncitizens who entered without inspection are ineligible for bond. The court addressed the statutory discrepancy by stating that “Section 1226(a) undeniably does work independent from § 1225(b)(2)(A) because only § 1226(a) applies to admitted aliens who overstay their visas, become deportable on many different grounds, or were admitted erroneously due to fraud or some other error... Not only does § 1226(c) sweep in deportable aliens in addition to the inadmissible aliens covered by § 1225(b)(2)(A)...it also eliminates the option of parole for those to whom it applies.” In a dissenting opinion, Justice Douglas found that “Combining the ordinary meaning of ‘seeking’ with the statutory definition of ‘admission,’ there is no need to resort to strained analogies with the college admissions process to determine the meaning of key statutory terms governing detention.”

Nonetheless, most district courts outside the Fifth Circuit have not been persuaded and continue to rule in favor of releasing the citizen using their own independent interpretation of the INA under *Loper Bright*. District court cases that have cited *Buenrostro* to date have primarily done so to point out that the Fifth Circuit’s holding is an outlier and nonbinding. See, for example, [Aroca v. Mason](#), [Pascual Jose-de-Jose v. Noem](#), [Carlos Roldan Chang v. Noem](#). In a New Jersey district court [case](#), Judge Padin wrote in her opinion that the court was “unpersuaded” by the Fifth Circuit’s decision in *Buenrostro*, reasoning that “the majority’s interpretation risks rendering substantial portions of the statutory scheme superfluous and internally inconsistent”. The Seventh Circuit

preliminarily concluded that the U.S. Department of Homeland Security was not likely to prevail on its argument that “§ 1225(b)(2)(A) covers any noncitizen who is unlawfully already in the United States as well as those who present themselves at its borders,” [*Castanon-Nava v. U.S. Dep’t of Homeland Sec.*](#), 161 F.4th 1048, 1062 (7th Cir. 2025). The Second Circuit has now reached the same conclusion in *Cunha v. Freden*, holding that § 1226(a), not § 1225(b)(2)(A), governs the detention of a noncitizen who entered without inspection years earlier and was later arrested in the interior. The Eleventh Circuit likewise rejected the government’s broad reading of § 1225(b)(2)(A) in *Alvarez v. Warden, Federal Detention Center Miami*, concluding that interior EWI respondents are generally eligible for bond under § 1226(a). These circuit decisions confirm that *Buenrostro-Mendez* is not the consensus view, but part of a widening circuit split over whether long-resident noncitizens arrested inside the United States can be subjected to mandatory no-bond detention merely because they entered without inspection. Only a handful of district courts have adopted the reasoning laid out by the Fifth Circuit in *Buenrostro*. See e.g. [*D.M.R.D. v. Andrews*](#) and [*Zhuang v. Bondi*](#). Even the Fifth Circuit’s decision in *Buenrostro-Mendez* also does not preclude release based on [constitutional grounds](#). In *Buenrostro-Mendez*, the Fifth Circuit did not consider whether a noncitizen detained under 8 U.S.C. § 1225 may be constitutionally entitled to a bond hearing at the outset of proceedings, or even to release on constitutional grounds. It also leaves intact habeas corpus as a key mechanism for challenging unlawful prolonged detention.

On July 2, 2026, in [*Sosnava Rodriguez v. Ortega*](#), No. 26-50183 (5th Cir. 2026), a Fifth Circuit panel held that the government may not detain noncitizens under § 1225(b)(2)(A) for more than ninety days without providing them a bond hearing. The case involved three long-term U.S. residents who were detained under 8 U.S.C. § 1225(b)(2)(A) while their removal proceedings remained pending. Although the court accepted, consistent with *Buenrostro-Mendez*, that § 1225(b)(2)(A) mandates detention for noncitizens who entered without inspection and confers no statutory right to a bond hearing, *Rodriguez* did not concern *Loper Bright* or the degree of deference owed to an agency’s statutory interpretation. Rather, the decision turned on a distinct constitutional question: whether continued detention authorized by statute becomes unconstitutional when it deprives a person of liberty without adequate process. The Fifth Circuit framed the issue under the Due Process Clause of the Fifth Amendment, which

protects “persons” physically present in the United States, including noncitizens who have lived here for many years. Relying on the Supreme Court’s due process decisions in [Zadvydas v. Davis](#), 533 U.S. 678 (2001), [Demore v. Kim](#), 538 U.S. 510 (2003), and [Carlson v. Landon](#), 342 U.S. 524 (1952), the court reasoned that Congress may authorize categorical detention of certain noncitizens, but only within constitutional limits. Those limits become especially important when detention is prolonged, individualized review is unavailable, and the government has not shown that the person is dangerous or likely to flee. The Fifth Circuit therefore concluded that the Constitution does not permit indefinite or extended detention based on unlawful-entry status alone and that these petitioners could not be detained for more than ninety days without a bond hearing.

This is why *Rodriguez* should not be understood as another post-*Loper Bright* statutory-interpretation case. *Loper Bright* requires courts to exercise independent judgment in construing statutes, but *Rodriguez* shows that constitutional due process imposes an independent limit even where the government prevails on the statutory question. Indeed, because the holding rested on the Fifth Amendment rather than on statutory ambiguity or agency deference, *Rodriguez* did not even need to cite *Loper Bright*. The government cannot avoid the Fifth Amendment merely by arguing that § 1225(b)(2)(A) mandates detention. If detention becomes prolonged and the detainee has no meaningful opportunity to contest dangerousness or flight risk, due process may require an individualized bond hearing. *Rodriguez* is therefore significant for habeas challenges because it allows petitioners to argue that, even if *Buenrostro-Mendez* controls the statutory issue within the Fifth Circuit, continued detention without a bond hearing may still violate the Fifth Amendment.

However, on July 10, a majority of the Fifth Circuit voted to rehear *Rodriguez* en banc, which had the effect of vacating the panel decision. That development should not be overstated. The panel opinion was vacated not because the Fifth Circuit rejected its reasoning, but because the full court agreed to reconsider the case. The en banc court could still affirm the panel’s due process holding, which would make *Rodriguez* even more powerful as binding Fifth Circuit precedent. Even in its vacated posture, however, the panel decision remains useful. Fifth Circuit precedent confirms that a vacated panel decision may still be cited for its persuasive reasoning. See *Cheejati v. Blinken*, 106 F.4th 388, 395

(5th Cir. 2024) (explaining that although a prior panel decision had been vacated, the court still found its reasoning persuasive); *Munn v. City of Ocean Springs*, 763 F.3d 437, 441 (5th Cir. 2014) (treating a vacated decision as persuasive). Thus, while *Rodriguez* is no longer binding panel precedent pending en banc review, it can still be cited as persuasive authority in challenges to detention beyond ninety days, and it may yet become more authoritative if the full Fifth Circuit affirms the panel's constitutional analysis.

The en banc court may ultimately adopt Judge Wilson's dissent in *Rodriguez v. Ortega*, which concluded that due process does not require a bond hearing for noncitizens detained under § 1225(b)(2)(A). In our view, however, the panel majority's opinion is better reasoned. It more faithfully reconciles the government's authority to detain with the Fifth Amendment's protection against prolonged detention without individualized review, and it is more consistent with the Supreme Court's guidance in *Zadvydas*, *Demore*, and *Carlson*. The en banc court should therefore reaffirm the panel's approach rather than adopt the dissent's narrower view of due process.

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