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VI. Separation of Powers

In This Section:

NEW CASE: <i>Gundy v. United States</i>	373
“SEX OFFENDER CASE MAY DEAL BLOW TO 'ADMINISTRATIVE STATE'”	
Jimmy Hoover	376
“THE SUPREME COURT MAY REVIVE A LEGAL THEORY LAST USED TO STRIKE DOWN NEW DEAL LAWS”	
Mark Joseph Stern	379
“WILL SUPREME COURT PUSH CONGRESS TO GET BACK TO ITS JOB OF MAKING LAW?”	
Mark Miller	381
“UNITED STATES V. GUNDY”	
Justia Inc.	383
NEW CASE: <i>Nielsen v. Preap</i>	385
“SUPREME COURT TO DECIDE WHETHER IMMIGRANTS JAILED FOR PAST CRIMES CAN BE DETAINED PENDING DEPORTATION”	
David G. Savage	399
“SUPREME COURT TO CONSIDER HOW FAST GOVERNMENT MUST ACT IN DETAINING IMMIGRANTS FOR DEPORTATION”	
Robert Barnes	401
“MORE DETAINED IMMIGRANTS ARE OWED BOND HEARINGS: 9 TH CIRC.”	
Allissa Wickham	403
Topic: <i>Chevron Deference</i>	
“A POWER GRAB OF SORTS, BURIED IN A SUPREME COURT DECISION”	
Noah Feldman	406
“THE FEDERALIST SOCIETY’S <i>CHEVRON</i> DEFERENCE DILEMMA”	

Christopher J. Walker.....	409
“UNDUE DEFERENCE”	
Jonathan Wood.....	413
Topic: <i>Deferred Action for Childhood Arrivals (DACA)</i>	
“THE END OF DACA IS THE NEXT BIG IMMIGRATION FIGHT”	
Noah Feldman	416
“JUDGE UPHOLDS ORDER FOR TRUMP ADMINISTRATION TO RESTORE DACA”	
Miriam Jordan	419
“KAVANAUGH COULD STYMIE TRUMP’S IMMIGRATION POLICIES”	
Laura D. Francis	421
“JUDGE’S RULING ISN’T GOING TO SAVE THE DREAMERS”	
Noah Feldman	424
“A JUDGE SUPPORTS DREAMERS AND THE RULE OF LAW”	
Cass R. Sunstein.....	427
Topic: <i>Sanctuary Cities</i>	
“FULL APPEALS COURT TO HEAR CASE ON INJUNCTION AGAINST TRUMP SANCTUARY POLICIES”	
Josh Gerstein	431
“SANCTUARY CITIES AS THE NEXT NATIONWIDE INJUNCTION TEST CASE”	
Steve Vladeck.....	433
“JUDGE: TRUMP OVERSTEPPED IN SANCTUARY CITY ORDER”	
Kimberly Atkins	435
Topic: <i>Affordable Care Act</i>	
“TRUMP ADMINISTRATION WON’T DEFEND ACA IN CASE BROUGHT BY GOP STATES”	
Amy Goldstein	438

“TRUMP’S SABOTAGE OF OBAMACARE IS ILLEGAL”

Nicholas Bagley and Abbe R. Gluck 441

Gundy v. United States

Ruling Below: *United States v. Gundy*, 695 Fed.Appx. 639 (2nd Cir. 2017)

Overview: Herman Gundy was convicted of a sex offense. When Gundy was transferred to federal custody in Pennsylvania, he received permission to travel by bus from Pennsylvania to New York unsupervised. As a result, Gundy was convicted and sentenced to time served plus five years supervised release for staying in New York without registering as a sex offender.

Issue: Whether the federal Sex Offender Registration and Notification Act’s delegation of authority to the attorney general to issue regulations under 42 U.S.C. § 16913 violates the nondelegation doctrine.

United States of America, Appellee

v.

Herman Avery GUNDY, AKA Herman Grundy, Defendant- Appellant

United States Court of Appeals, Second Circuit

Decided on June 22, 2017

[Excerpt; some citations and footnotes omitted]

OETKEN, District Judge:

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the June 16, 2016 judgment of the District Court is **AFFIRMED**.

Defendant-appellant Herman Gundy appeals his conviction and sentence, following a bench trial on stipulated facts, for one count of failing to register as a sex offender after traveling in interstate commerce, in violation of the Sex Offender Registration and Notification Act (“SORNA”), 18 U.S.C. § 2250(a). We assume the parties’ familiarity with the underlying facts and the procedural history of

the case, to which we refer only as necessary to explain our decision to affirm.

While serving a federal sentence for violating Maryland Criminal Law § 3-306, Sexual Offense in the Second Degree, during his supervised release for a prior federal offense, Gundy was transferred from Maryland to a federal prison in Pennsylvania. *See United States v. Gundy*, 804 F.3d 140, 143 (2d Cir. 2015). As he approached the end of his federal sentence, Gundy authorized the Department of Justice to make arrangements for his move to community-based custody. He was ordered to be transferred to the Bronx Residential Re-Entry Center, a halfway house in New York, and he was granted a

furlough to travel unescorted on a commercial bus on July 17, 2012, from Pennsylvania to the Bronx. Gundy arrived at the Re-Entry Center as planned, and, on August 27, 2012, was released from federal custody there to a private residence in the Bronx. Gundy did not register as a sex offender in either Maryland or New York, as state law required, and was arrested and charged under 18 U.S.C. § 2250. *Id.* at 144. After the District Court granted Gundy's motion to dismiss the prosecution for the absence of a trigger for SORNA's registration requirement, this Court reversed the dismissal and reinstated the indictment, holding that the requirement was triggered because Gundy was "required to register" under SORNA no later than August 1, 2008. *See id.* at 145.

Upon the indictment's reinstatement, Gundy renewed his motion to dismiss on the basis that the interstate travel requirement of the statute was not satisfied because he was still in custody when he traveled from Pennsylvania to the Bronx. The District Court denied the motion, holding that the statute did not include an exception to the interstate travel element based on a defendant's custodial status. The District Court also held that, even if the statute did include a voluntariness or *mens rea* requirement, the allegations of the indictment were sufficient for that issue to be resolved at trial.

A bench trial followed on stipulated facts. The District Court found that each element of the offense had been proven beyond a reasonable doubt, including the interstate travel element and any

voluntariness or *mens rea* requirement that may apply, and thus found Gundy guilty of violating § 2250. Following a sentencing hearing, the District Court entered judgment imposing a sentence of time served and a five-year term of supervised release. Gundy now appeals from that judgment.

Section 2250(a) imposes criminal liability on anyone who (1) is required to register under SORNA; (2) travels in interstate or foreign commerce; and (3) knowingly fails to register or update a required registration. 18 U.S.C. § 2250(a). We held in our consideration of Gundy's earlier appeal that Gundy satisfies the first requirement. There is no dispute that he knowingly failed to register, thus satisfying the third requirement. On appeal, Gundy asks us to read in an exception to the second requirement, travel in interstate commerce, for a defendant who crosses state lines while in federal custody. He contends that holding otherwise would violate the usual requirement of criminal law that criminal acts be committed voluntarily. The parties also dispute whether, on the stipulated facts and conclusions of the District Court following the bench trial, Gundy's travel from Pennsylvania to New York was voluntary.

We decline to reach Gundy's argument regarding the interpretation of § 2250(a). Assuming *arguendo* that Gundy is correct and that the travel element contains an implicit voluntariness requirement, that requirement is easily met on the facts of this case. Although Gundy remained technically in federal custody when traveling to the halfway house in New York, the stipulated

facts at trial are sufficient to support the District Court's finding that Gundy's travel was voluntary. On the basis of those facts, the District Court was free to conclude that Gundy made the trip in question willingly, as he authorized the initial transfer process and then traveled by bus to New York on his own recognizance. *See United States v. Pierce*, 224 F.3d 158, 164 (2d Cir. 2000) (noting that standard of review for sufficiency of the evidence is the same in a bench trial as a jury trial). We need not and do not reach the question of statutory interpretation because, even assuming Gundy is correct that interstate travel in § 2250(a) is limited to voluntary travel, the District Court reasonably found that the travel here was voluntary.

* * *

We have considered Gundy's remaining arguments and find them to be without merit.

Accordingly, we **AFFIRM** the judgment of the District Court.

“Sex Offender Case May Deal Blow To 'Administrative State’”

Law360

Jimmy Hoover

March 7, 2018

The U.S. Supreme Court took up a case this week involving a convicted sex offender who failed to register as such in New York, and the legal question at the center of the proceeding could lead to a ruling that reins in the "administrative state" and hands conservatives a major win.

In *Gundy v. U.S.*, the high court has agreed to decide whether the Sex Offender Registration and Notification Act is unconstitutional because, rather than saying whether it applies to people convicted before its passage, the statute simply passes that determination off to the attorney general. Petitioner Herman Gundy, whose underlying sex conviction occurred a year before the law was enacted, has said that SORNA violates the separation of powers.

At first glance, it might seem strange that conservatives are looking askance at a law passed to get tough on sex offenders. But the case centers on the non-delegation doctrine, a thorny judicial rule forbidding Congress from passing laws that delegate legislative functions to members of the executive branch, in this case the attorney general. For conservatives, the tendency of Congress to hand over its constitutional duties to unelected federal officials is one they dearly

want to reverse. The doctrine has not been used by the Supreme Court to strike down a law passed by Congress since 1935, but lawyers and scholars on the political right have clamored for its revival in recent years as federal regulators have grown in size and power. Court watchers were atwitter Monday after the court decided to take the case.

“What’s interesting about this challenge is that the possibility that a statute anywhere right now might violate the non-delegation principle suggests a revisiting of the whole issue of whether the court should be in the business of determining how much discretion is too much discretion” for Congress to hand the executive branch, said Evan Bernick, a visiting lecturer at Georgetown University Law Center.

Decades in the Wilderness

Believers in the non-delegation doctrine — there are many skeptics — say it is based on Article I of the Constitution, which states, “All legislative powers herein granted shall be vested in a Congress of the United States.”

Despite those early origins, the doctrine didn’t enjoy its heyday until 1935, when in a pair of now-famous cases the Supreme Court

struck down portions of the 1933 National Industrial Recovery Act — a key New Deal law — because they gave the president legislative powers over the poultry and petroleum industries.

The court in the poultry case said Congress can't allow the president to "exercise an unfettered discretion to make whatever laws he thinks may be needed" without first laying down policies and standards itself, or what's since been referred to as an "intelligible principle."

But the Supreme Court quickly retreated from its seemingly broad rulings in those cases, and hasn't wielded the scythe of the non-delegation doctrine to fell congressional statutes since.

While the court has never explicitly renounced the doctrine, it has struggled over the years to establish a rule for when a law delegating power to the executive branch lacks an "intelligible principle" to serve as a guidepost for policymaking.

Because it is still technically on the books, the doctrine has been called a "shotgun behind the door" tempering Congress' inclination to pass laws with broad delegations of power. But Bernick said "the shotgun isn't apparently loaded, and hasn't been loaded for decades. It's not really a threat."

'Second Coming of the Constitution'?

Conservatives have sought to put teeth back into the doctrine for years; then-Justice William Rehnquist called for its return in a famous 1980 concurrence, while D.C. Circuit

Judge Douglas Ginsburg, in a 1993 article, said it was part of the "Constitution-in-exile ... kept alive by a few scholars who labor on in the hope of a restoration, a second coming of the Constitution of liberty."

Recently, however, it has become part of a broader conservative attack on the administrative state that developed in response to heavy regulatory activity under the Obama administration.

Among its chief proponents is the newest member of the Supreme Court, Justice Neil Gorsuch, who in a 2016 opinion while he was still on the Tenth Circuit suggested using non-delegation as a basis for overturning *Chevron* *USA v. Natural Resources Defense Council Inc.*, a 1984 Supreme Court decision that has armed federal agencies with a powerful tool for defeating rulemaking challenges.

Gorsuch, whose opinion in that case was **one of the reasons** behind his Supreme Court nomination, has reiterated his desire to rein in administrative power through the doctrine since taking the nation's top bench. "Our founders did not approve lawmaking made easy by bureaucratic fiat," he said in a November speech.

The case granted by the justices Monday will give him his first shot to do just that.

An Unlikely Vehicle

Herman Gundy was sentenced to time served and five years of supervised release because he failed to register as a sex offender after he was transferred from a federal prison in

Pennsylvania to a halfway house in New York.

Gundy filed a petition with the Supreme Court in September, making various challenges to the conviction. Among them was his argument that SORNA violated the non-delegation doctrine because it gave the attorney general the decision of whether the registration requirements should apply to people whose sex offense convictions occurred prior to the law's enactment in 2006; Gundy was convicted of giving cocaine to an 11-year-old girl and raping her in October 2004, according to the government.

“The authority to legislate is entrusted solely to Congress,” Gundy, who is being represented by the New York federal defenders office, said in his petition. “Because SORNA grants the attorney general unfettered discretion to determine who is subject to criminal legislation without an ‘intelligible principle’ to guide this discretion, it violates the non-delegation doctrine.”

Bernick said the court’s decision to take on the case is reflective of its “sense of unease” about the growth of the administrative state. “This sense of unease is going to inform a

bunch of different areas of law, and I think it could manifest itself in a case like this,” he said.

“What could happen in this context, you could see an effort on the part of the court, a number of members of which have expressed skepticism about the administrative state and its constitutional standing, to draw a ‘thus far and no further’ principle,” he said.

Still, despite Justice Gorsuch’s passion on the subject, Bernick believes the court will try to narrow the scope of its ruling so as not to unleash a Pandora’s box of non-delegation challenges to various modern legislation, much of which he said confers unto agencies power “as great or greater than any power that was conferred by the National Industrial Recovery Act.”

“I think that Gorsuch and [Justice Clarence] Thomas are both votes, if the opportunity arose to articulate a very robust non-delegation principle that applies to everything,” he said. “My skepticism is whether there are more than two votes for that principle.”

The case is *Gundy v. U.S.*, case number 17-6086, in the U.S. Supreme Court.

“The Supreme Court May Revive a Legal Theory Last Used to Strike Down New Deal Laws”

Slate

Mark Joseph Stern

March 5, 2018

On Monday, the Supreme Court agreed to hear *Gundy v. United States*, a constitutional challenge to federal sex offender regulations. If, like me, you believe that America’s current sex offender regime is draconian, unjust, and counterproductive, that might sound like good news! And perhaps it is. But there’s one aspect of the court’s grant that may be *very* bad news from progressive viewpoint: It will only consider whether the policy in question violates the nondelegation doctrine—a hazy legal principle last used to strike down New Deal legislation in 1935.

The law in question, the Sex Offender Registration and Notification Act (SORNA), required states to expand their sex offender registries or lose millions in federal funding. It also increased punishments for sex offenders, keeping them in the registry for decades, strictly limiting their freedom of movement, and allowing them to be detained for years in “civil commitment” after they finish serving their prison sentences. Oddly, Congress did not clarify whether SORNA must apply to sex offenders convicted *before* the law’s passage. Instead, it gave the attorney general authority to apply the law retroactively, which he did.

Typically, the Constitution’s Ex Post Facto Clause prohibits the government from applying a new criminal law retroactively to punish an offender who committed his crime before the law’s passage. But in 2003, the Supreme Court rejected an Ex Post Facto challenge to Alaska’s retroactive sex offender registration act, holding that Alaska’s measure was not sufficiently “punitive” to violate the clause.

Thus, Herman Gundy—the defendant in this case, who was convicted of a sex offense before SORNA’s passage—decided to challenge the federal law’s retroactivity under the nondelegation doctrine. Under this theory, Congress infringes upon the constitutional separation of powers when it delegates too much legislative authority to another branch of government. Here, Gundy asserts that Congress delegated an unconstitutional amount of power to the attorney general by allowing him to determine how to apply SORNA retroactively.

I am simultaneously sympathetic to and terrified by this argument. On the one hand, SORNA is a truly terrible law, and I’d like to see it reined in. On the other hand, *Gundy* may open up a nasty can of

worms. The Supreme Court has deployed the non-delegation doctrine to strike down legislation precisely twice—in 1935. Both laws were New Deal regulations: one governing industrial labor laws, the other setting quotas on oil sales. But shortly thereafter, the court changed its attitude toward the New Deal, giving up efforts to police economic reforms. Since then, the court has largely abandoned the nondelegation theory, allowing Congress to delegate power to another branch so long as that power is limited by some “intelligible principle.” Justice Anthony Kennedy described the doctrine as “somewhat moribund” during oral arguments in 2014.

In recent years, however, several conservative justices have expressed an interest in reviving nondelegation principles. Justice Clarence Thomas wants to bring it back; so does Justice Neil Gorsuch, who praised the doctrine as a safeguard of personal freedom while on the 10th U.S. Circuit Court of Appeals. (He also endorsed it in a 2017 speech to the Federalist Society.) Many progressives fear that, once resuscitated, the theory could be used to strike down all manner of economic regulations.

It’s a reasonable concern. These days, Congress hands off most regulatory authority to a slew of federal agencies situated in the executive branch. A court concerned about nondelegation could strike down a vast range of liberal legislation under the doctrine. Labor laws and environmental protections would be especially vulnerable, since

Congress gives agencies a broad mandate to interpret and implement these measures. If the Supreme Court renders that mandate unconstitutional, federal rules that protect workers’ rights, collective bargaining, clean air, and endangered species would fall.

So: Should progressives panic about *Gundy*? Not quite yet. University of North Carolina criminal law professor Carissa Byrne Hessick points out that the Supreme Court could set different rules for the non-delegation in the criminal context. Gorsuch suggested as much in his 10th Circuit opinion—which, in fact, involved a similar challenge to SORNA’s retroactivity. In an impressive dissent, Gorsuch wrote that Congress must provide something more than an “intelligible principle” when delegating prosecutorial authority given the “individual liberty” at stake. “If the separation of powers means anything,” he asserted, “it must mean that the prosecutor isn’t allowed to define the crimes he gets to enforce.”

I think Gorsuch is probably right, but I worry about this court’s ability, or willingness, to limit the non-delegation doctrine’s revival to criminal cases. Gorsuch has a knack for reintroducing conservative principles in cases where they lead to a liberal outcome, even though the underlying rationale tilts the law rightward. Would this conservative Supreme Court cabin non-delegation to criminal law? Or might it succumb to the temptation to use this principle as a sword to slay economic and environmental regulations, too? *Gundy* will give us a glimpse of the answer.

“Will Supreme Court push Congress to get back to its job of making law?”

The Hill

Mark Miller

June 4, 2018

In the Constitution, the opening phrase “We the People” vests all legislative powers in Congress. The power to write the federal laws that govern the American people belongs to Congress. The most important protection of our liberty embedded in the Constitution — the separation of powers among the three branches of our federal government — prohibits any branch from re delegating its unique powers to another branch. The courts call this the nondelegation doctrine.

However, Congress, with the Supreme Court’s permission, has ignored that prohibition by delegating its lawmaking powers to executive agencies for more than 80 years. These agencies are staffed with bureaucrats who can’t be voted out of office, and many blame that lack of accountability for the growth of the regulatory state in the decades since the New Deal.

But the Supreme Court has signaled it may revoke its longstanding approval of the administrative status quo. It recently granted review of a criminal case, *Gundy v. United States*, which will allow the court to limit legislative powers to Congress, where they belong.

The facts of the criminal case are not the central legal issue, but a brief explanation

helps illustrate the constitutional problem. While on federal supervised release related to a drug charge, Herman Gundy was convicted in state court of a sex offense. When he completed his state prison sentence, the government transferred him to a prison in Pennsylvania on a different charge. While in Pennsylvania he received permission to travel to New York to serve time for that crime in a halfway house. He did not, however, register with the federal government as a sex offender, as required under the federal Sex Offender Registration and Notification Act (SORNA) when a sex offender crosses state lines.

Although Gundy’s underlying crime occurred prior to SORNA’s passage, Congress included a provision allowing the U.S. attorney general to decide if the law would apply retroactively to offenders who committed SORNA crimes before the law’s passage. The attorney general decided it would, issued a regulation that said as much, and then charged Gundy for violating SORNA when he crossed state lines without registration.

Gundy challenged this conviction on a number of grounds, but the Supreme Court agreed to review the case for one reason: to determine whether Congress’s use of

SORNA to delegate its lawmaking power to the attorney general — regarding whether the law should apply to criminals who committed crimes before it was enacted — violates the nondelegation doctrine.

The court last struck down a statute for violating the nondelegation doctrine in 1935. The court's acceptance of the *Gundy* case, solely on this issue, signals a willingness to revisit this doctrine and perhaps resurrect it. In the case, the Supreme Court will decide whether Congress overstepped its constitutional bounds by empowering the attorney general to unilaterally make law.

Although the nondelegation doctrine does not prevent Congress from “obtaining the assistance of its coordinate branches,” as the court has said, it does require Congress to minimally explain — by way of what the court has called “an intelligible principle” — what it wants the federal agency to do. But unsurprisingly, Congress often fails to muster any principle, intelligible or otherwise, to explain what it expects the agency to do.

Such is the case here. The attorney general's regulation applying SORNA's registration requirement retroactively to *Gundy*'s crimes before the act's passage may be a legitimate decision, but it is a decision for Congress to make, according to the Constitution.

Like *Gundy*, American businesses face retroactive applications of new regulatory standards all the time. For example, regulatory agencies reinterpret a broad statutory term, such as what constitutes a

wetland, and then conclude that a landowner violated the Clean Water Act in years past. Or, they narrow the definition of “normal farming practices” by regulation and then deny the statutory exemption to American farmers for normal farming practices based on practices conducted before the regulation was finalized.

And the voter cannot punish the writer of these commands because Congress cleverly has passed the lawmaking buck to bureaucrats who cannot be voted out of office. That is the rub — our Founding Fathers delegated the lawmaking authority to Congress, and then made legislators responsible to the people by allowing the people to vote them in or out of office every two years, according to how Congress abused or properly used its lawmaking power.

Congress insulates itself from this accountability by shirking its lawmaking responsibility and handing it off to bureaucrats. The Supreme Court should use the *Gundy* case to put a stop to this purposeful avoidance of accountability.

To be clear: if *Gundy* wins his case, his conviction for not registering under SORNA would be reversed, but Congress would then most likely amend the law to require registration for old crimes. That puts the lawmaking onus back on Congress where it belongs. In reality, this case is less about *Gundy* than it is about the Supreme Court reining in the regulatory state run amok, and requiring Congress to get back to doing its job.

“United States v. Gundy”

Justia

Justia Inc.

September 15, 2015

The Government appealed the district court's dismissal of an indictment against defendant and denial of its motion for reconsideration. Defendant was indicted for violation of the Sex Offender Registration and Notification Act (SORNA), 18 U.S.C. 2250(a). The district court held that defendant did not violate section 2250(a) because defendant was not “required to register” until shortly before his release from custody and thus after the interstate travel charged in the Indictment. The court reversed and

remanded, concluding that defendant was a person “required to register” under SORNA beginning at the latest on August 1, 2008, the effective date of the Attorney General’s final guidelines. This date arrived well before his alleged travel from Pennsylvania to New York. The district court thus erred in concluding that defendant became a person “required to register” under SORNA only after traveling interstate.

Nielsen v. Preap

Ruling Below: *Preap v. Johnson*, 831 F.3d 1193 (9th Cir. 2016)

Overview: Three lawful residents were taken into custody by immigration authorities and were detained without bond hearings years after they completed serving their sentence for an offense that could have led to their removal. As a result, a class action for habeas relief was filed. *Preap* focuses on a federal law that allows the Department of Homeland Security to detain non-citizens convicted of specified crimes until proceedings take place to deport them.

Issue: Whether a criminal alien becomes exempt from mandatory detention under 8 U.S.C. § 1226(c) if, after the alien is released from criminal custody, the Department of Homeland Security does not take him into immigration custody immediately.

Mony PREAP; Eduardo Vega Padilla; Juan Lozano Magdaleno, Plaintiffs-Appellees,

v.

Jeh Johnson, Secretary, Department Of Homeland Security; Loretta E. Lynch, Attorney General; Timothy S. Aitken; Gregory Archambeault; David Marin, Defendants-Appellants

United States District Court of Appeals, Ninth Circuit

Decided on August 4, 2016

[Excerpt; some citations and footnotes omitted]

NGUYEN, Circuit Judge:

Every day in the United States, the government holds over 30,000 aliens in prison-like conditions while determining whether they should be removed from the country. Some are held because they were found, in a bond hearing, to pose a risk of flight or dangerousness. 8 U.S.C. § 1226(a); 8 C.F.R. § 1236.1(d). Others, however, are held without bond because they have committed an offense enumerated in a provision of the Immigration and Naturalization Act (“INA”). 8 U.S.C. § 1226(c). Aliens in this latter group are subject to the INA’s mandatory detention provision,

which requires immigration authorities to detain them “when [they are] released” from criminal custody, 8 U.S.C. § 1226(c)(1), and to hold them without bond, 8 U.S.C. § 1226(c)(2). A broad range of crimes is covered under the mandatory detention provision, from serious felonies to misdemeanor offenses involving moral turpitude and simple possession of a controlled substance. 8 U.S.C. §§ 1226(c)(1)(A)–(D).

This mandatory detention provision has been challenged on various grounds. *See, e.g., Demore v. Kim*, 538 U.S. 510, 513 (2003) (upholding the constitutionality of the

provision against a due process challenge); *Rodriguez v. Robbins*, 804 F.3d 1060, 1078–81 (9th Cir. 2015) (*Rodriguez III*), cert. granted sub nom., *Jennings v. Rodriguez*, No. 15-1204, 2016 WL 1182403 (June 20, 2016) (holding that detainees are entitled to a bond hearing after spending six months in custody). Here, we are faced with another such challenge; this time, regarding the meaning of the phrase “when [they are] released” in § 1226(c)(1), and whether it limits the category of aliens subject to detention without bond under § 1226(c)(2). Specifically, we must decide whether an alien must be detained without bond even if he has resettled into the community after release from criminal custody. If the answer is no, then the alien *may* still be detained, but he may seek release in a bond hearing under § 1226(a) by showing that he poses neither a risk of flight nor a danger to the community. Addressing this issue requires us to consider the interaction of the two paragraphs of the mandatory detention provision, 8 U.S.C. § 1226(c). Paragraph (1) requires the Attorney General (“AG”) to “take into custody any alien who [commits an offense enumerated in subparagraphs (A)– (D)] when the alien is released [from criminal custody].” 8 U.S.C. § 1226(c)(1). Paragraph (2) prohibits the release of “an alien described in paragraph (1)” except in limited circumstances concerning witness protection. 8 U.S.C. § 1226(c)(2). Plaintiffs argue that the phrase “when . . . released” in paragraph (1) applies to paragraph (2) as well, so that an alien must be held without bond only if taken into immigration custody promptly upon release from criminal custody for an enumerated offense. The government, by contrast, argues

that “an alien described in paragraph (1)” is any alien who commits a crime listed in §§ 1226(c)(1)(A)– (D) regardless of how much time elapses between criminal custody and immigration custody. According to the government, individuals not detained “when . . . released” from criminal custody as required by paragraph (1) are still considered “alien[s] described in paragraph (1)” for purposes of the bar to bonded release in paragraph (2).

To date, five of our sister circuits have considered this issue, and four have sided with the government. Significantly, however, there is no consensus in the reasoning of these courts. The Second and Tenth Circuits found that the phrase “an alien described in paragraph (1)” was ambiguous, and thus deferred to the BIA’s interpretation of the phrase to mean “an alien described in subparagraphs (A)–(D) of paragraph (1).” See *Lora v. Shanahan*, 804 F.3d 601, 612 (2d Cir. 2015) (“Consistent with *Chevron*, we are not convinced that the interpretation is ‘arbitrary, capricious, or manifestly contrary to the statute.’” (quoting *Adams v. Holder*, 692 F.3d 91, 95 (2d Cir. 2012))); *Olmos v. Holder*, 780 F.3d 1313, 1322 (10th Cir. 2015) (“The text, the statutory clues, and canons of interpretation do not definitively clarify the meaning of § 1226(c).”). The Fourth Circuit has held that “when . . . released” means any time after release, but it did so under a misconception that the BIA had so interpreted the phrase. *Hosh v. Lucero*, 680 F.3d 375, 380–81 (4th Cir. 2012). Finally, the Second, Third, and Tenth Circuits applied the loss-of-authority rule, finding that the AG’s duty to detain criminal aliens under §

1226(c)(1) continues even if the government fails to comply with the “when . . . released” condition. *See, e.g., Sylvain v. Atty Gen. of United States*, 714 F.3d 150, 157 (3d Cir. 2013) (holding that “[e]ven if the statute calls for detention ‘when the alien is released,’ and even if ‘when’ implies something less than four years, nothing in the statute suggests that immigration officials lose authority if they delay”); *see also Lora*, 804 F.3d at 612; *Olmos*, 780 F.3d at 1325–26.

On the other hand, the government’s position has been rejected by most district courts to consider the question and, most recently, by three of six judges sitting en banc in the First Circuit. *See Castañeda v. Souza*, 810 F.3d 15, 18–43 (1st Cir. 2015) (en banc) (Barron, J.). In an opinion written by Judge Barron, these three judges concluded that the statutory context and legislative history make clear that aliens can be held without bond under § 1226(c)(2) only if taken into immigration custody pursuant to § 1226(c)(1) “when . . . released” from criminal custody, not if there is a lengthy gap after their release. *See id.* at 36, 38.

We agree with Judge Barron and his two colleagues. The statute unambiguously imposes mandatory detention without bond only on those aliens taken by the AG into immigration custody “when [they are] released” from criminal custody. And because Congress’s use of the word “when” conveys immediacy, we conclude that the immigration detention must occur promptly upon the aliens’ release from criminal custody.

I.

The named Plaintiffs in this case are lawful permanent residents who have committed a crime that could lead to removal from the United States. Plaintiffs served their criminal sentences and, upon release, returned to their families and communities. Years later, immigration authorities took them into custody and detained them without bond hearings under § 1226(c). Plaintiffs argue that because they were not detained “when . . . released” from criminal custody, they were not subject to mandatory detention under § 1226(c).

Mony Preap, born in a refugee camp after his family fled Cambodia’s Khmer Rouge, has been a lawful permanent resident of the United States since 1981, when he immigrated here as an infant. He has two 2006 misdemeanor convictions for possession of marijuana. Years after being released at the end of his sentences for these convictions, Preap was transferred to immigration detention upon serving a short sentence for simple battery (an offense not covered by the mandatory detention statute) and held without a bond hearing. Since the instant litigation began, Preap has been granted cancellation of removal and released from immigration custody.

Eduardo Vega Padilla has been a lawful permanent resident since 1966, shortly after he came to the United States as an infant. Padilla also has two drug possession convictions—one from 1997 and one from 1999—and a 2002 conviction for owning a firearm with a prior felony conviction. Eleven years after finishing his sentence on

that last conviction, he was placed in removal proceedings and held in mandatory detention. Padilla eventually obtained release after receiving a bond hearing under our decision in *Rodriguez v. Robbins* (*Rodriguez II*), 715 F.3d 1127, 1144 (9th Cir. 2013), in which we held that the government’s detention authority shifts from § 1226(c) to § 1226(a) after a detainee has spent six months in custody; *Rodriguez v. Robbins*, 804 F.3d 1060, 1078–81 (9th Cir. 2015) (*Rodriguez III*), cert. granted sub nom., *Jennings v. Rodriguez*, No. 15- 1204, 2016 WL 1182403 (June 20, 2016).

Juan Lozano Magdaleno has been a lawful permanent resident since he immigrated to the United States as a teenager in 1974. Magdaleno has a 2000 conviction for owning a firearm with a prior felony conviction, and a 2007 conviction for simple possession of a controlled substance. He was sentenced to six months on the possession charge and released from jail in January 2008. Over five years later, Magdaleno was taken into immigration custody and held without bond pursuant to § 1226(c). He also was later released from detention following a *Rodriguez* hearing.

These three Plaintiffs filed a class action petition for habeas relief in the Northern District of California. The district court granted their motion for class certification, certifying a class of all “[i]ndividuals in the state of 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 Section 1226(c)(1) offense.” The district court also issued a preliminary injunction requiring the government to provide all class members with bond hearings under § 1226(a). *Preap v. Johnson*, 303 F.R.D. 566, 571, 584 (N.D. Cal. 2014). This appeal followed.

II.

We have jurisdiction to review this class action habeas petition under 28 U.S.C. § 1291. The jurisdiction-stripping provision of 8 U.S.C. § 1226(e), which bars judicial review of discretionary agency decisions regarding immigrant detention, does not bar us from hearing “challenges [to] the statutory framework that permits [petitioners’] detention without bail.” *Demore v. Kim*, 538 U.S. 510, 517 (2003). We review questions of statutory construction de novo. *United States v. Bert*, 292 F.3d 649, 651 (9th Cir. 2002).

III.

The government’s authority to detain immigrants in removal proceedings arises from two primary statutory sources.⁸ The first, 8 U.S.C. § 1226(a), grants the AG discretion to arrest and detain any alien upon the initiation of removal proceedings.⁹ Under this provision, the AG may then choose to keep the alien in detention, or allow release on conditional parole or bond. 8 U.S.C. § 1226(a)(1)–(2).

If the AG opts for detention, the alien may seek review of that decision at a hearing before an immigration judge (“IJ”), 8 C.F.R. § 236.1(d)(1), who may overrule the AG and grant release on bond, *id.* § 1003.19. The alien bears the burden of proving his suitability for release, and the IJ should consider whether he “is a threat to national security, a danger to the community at large, likely to abscond, or otherwise a poor bail risk.” *Matter of Guerra*, 24 I. & N. Dec. 37, 40 (BIA 2006); see also 8 § C.F.R. 1236.1(c)(8).

The second provision is 8 U.S.C. § 1226(c), the mandatory detention provision at issue in this case. Importantly, this provision operates as a limited exception to § 1226(a). *See* 8 U.S.C. § 1226(a). (“Except as provided in subsection (c) of this section . . .”). Section 1226(c) reads as follows:

(a) Arrest, detention, and release

On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) of this section and pending such decision, the Attorney General—

- (1) may continue to detain the arrested alien; and
- (2) may release the alien on—
 - (A) bond of at least \$1,500 with security approved by, and

containing conditions prescribed by, the Attorney General; or

- (B) conditional parole[.]

8 U.S.C. § 1226(a)

(c) Detention of criminal aliens

(1) Custody

The Attorney General shall take into custody any alien who —

- (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,
- (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,
- (C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence [sic] to a term of imprisonment of at least 1 year, or
- (D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(2) Release

The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to [the Federal Witness Protection Program] that release of the alien from custody is necessary . . . [and] the alien will not pose a danger to . . . safety . . . and is likely to appear for any scheduled proceeding.

8 U.S.C. § 1226(c) (emphases added) (footnote omitted). We must decide the proper scope of this mandatory detention exception, and specifically whether it applies to aliens who are not promptly placed in removal proceedings upon their release from criminal custody for an offense listed in § 1226(c)(1)(A)–(D).

The government advances three arguments to support its view that Plaintiffs are subject to mandatory detention under § 1226(c). First, it argues that we should give *Chevron* deference, as have the Second and Tenth Circuits, to the BIA’s interpretation that the phrase “an alien described in Paragraph (1)” means “an alien described in subparagraphs (A)–(D) of paragraph (1),”

thus subjecting all criminal aliens who have committed one of the listed crimes to mandatory detention regardless of when they were taken into immigration custody. *See In re Rojas*, 23 I. & N. Dec. 117, 121 (BIA 2001). Second, the government argues that we should follow the Fourth Circuit in holding that “when . . . released” is a duty-triggering clause, not a time-limiting clause, and that, as such, it merely informs the AG when the duty to detain arises, not when the duty must be performed. *Hosh v. Lucero*, 680 F.3d 375, 381 (4th Cir. 2012). Third, the government argues that we should follow the Second, Third, and Tenth Circuits in holding that, even if Congress intended that immigration authorities promptly detain criminal aliens when they are released from criminal custody, Congress did not clearly intend that they would lose the authority to do so in the event of delay.

We find all three arguments unpersuasive. We agree with Judge Barron and his colleagues on the First Circuit in *Castañeda*, 810 F.3d at 19, that the government’s positions contradict the intent of Congress expressed through the language and structure of the statute.

A.

We first address the government’s argument that we should defer to the BIA’s interpretation of § 1226(c)(2)’s phrase “an alien described in paragraph (1)” to mean “an alien described in subparagraphs (A)–(D) of paragraph (1).” *See Rojas*, 23 I. & N. Dec. at 125 (“We construe the phrasing ‘an alien described in paragraph (1),’ as including only

those aliens described in subparagraphs (A) through (D) of section [(c)(1)], and as not including the ‘when released’ clause.”). Under this interpretation, § 1226(c)(2)’s detention-without-bond requirement applies to any alien who has committed an offense enumerated in § 1226(c)(1), regardless of how long after release from criminal custody he or she was taken into immigration custody. This interpretation is at odds with the statute, which unambiguously links the “when . . . released” custody instruction in § 1226(c)(1) to the without-bond instruction in § 1226(c)(2), such that the latter applies only after the former is satisfied.

When faced with a question of statutory interpretation, our analysis begins “with the text of the statute.” *Yokeno v. Sekiguchi*, 754 F.3d 649, 653 (9th Cir. 2014). The words of a statute should be accorded their plain meaning, as considered in light of “the particular statutory language at issue, as well as the language and design of the statute as a whole.” *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). We cannot look to the statute’s language in isolation because “[t]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). “If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

Starting with the text, we find that § 1226(c)(2) is straightforward. It refers simply to “an alien described in paragraph (1),” not to “an alien described in subparagraphs (1)(A)–(D).” We must presume that Congress selected its language deliberately, thus intending that “an alien described in paragraph (1)” is just that—*i.e.* an alien who committed a covered offense and who was taken into immigration custody “when . . . released.” See *Int’l Ass’n of Machinists & Aerospace Workers, Local Lodge 964 v. BF Goodrich Aerospace Aerostructures Grp.*, 387 F.3d 1046, 1051 (9th Cir. 2004) (“[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.” (quoting *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992))). Certainly, had Congress wanted to refer only to “an alien described in subparagraphs (A)–(D),” it could have done so. And while we recognize that “Congress has not always been consistent in how it refers to other subsections in the same statute,” *Olmos*, 780 F.3d at 1320 (describing a separate provision where Congress referred to “subparagraph (a)” but the context made it obvious that Congress was referring to only subparts (i) and (ii)), we observe that, unlike the example cited by the Third Circuit in *Olmos*, this section’s context supports, rather than contradicts, the plain meaning.

As mentioned, there are two relevant sources of authority for the government’s detention of aliens in removal proceedings—§ 1226(a) and § 1226(c). Section 1226(a) provides for discretionary detention of any alien in removal proceedings, while § 1226(c) provides a limited exception of

mandatory detention for a specified group of aliens. Thus, if the government is not authorized to detain an alien under the narrow exception of § 1226(c), it may only do so under the general rule of § 1226(a). Critically, however, each of these sections includes its own corresponding instructions for releasing detained aliens—§ 1226(a) provides for possible release on bond, while § 1226(c) forbids any release except under special circumstances concerning witness protection. There is one important consequence of this structure: under both the general detention provision in § 1226(a) and the mandatory detention provision in § 1226(c), the authority to detain and the authority to release go hand in hand. That is, an alien detained under § 1226(a) is clearly subject to the release provisions of § 1226(a), whereas one detained under § 1226(c) is subject to the release provisions in § 1226(c). Accordingly, if an alien is not detained in immigration custody “when . . . released” from criminal custody, as required under § 1226(c)(2), then the government derives its sole authority to detain that alien from § 1226(a)(1), and, as a consequence, it must provide the alien with a bond hearing as required under § 1226(a)(2).

The BIA’s interpretation in *In re Rojas* flouts this structure. The BIA held that the “when . . . released” clause was “address[ed] . . . to the statutory command that the ‘Attorney General shall take into custody’ certain categories of aliens,” but that it did not define the categories of aliens subject to the prohibition on bonded release in § 1226(c)(2). *In re Rojas*, 23 I. & N. Dec. at 121. The BIA thereby held, in essence, that

the AG can fail to comply with the “when . . . released” requirement of § 1226(c)(1)—thereby necessarily relying on § 1226(a) for its authority to take custody of an alien—but still apply the release conditions of § 1226(c)(2). In other words, even if § 1226(c)(1) authorizes the custody of only those aliens who are detained “when [they are] released” from criminal custody, not those who are detained at a later time, the BIA would still apply § 1226(c)(2)’s proscription on bonded release from immigration custody. This reading simply fails to do justice to the statute’s structure. *See Castañeda*, 810 F.3d at 26 (noting that under the BIA’s reading, the statute is “oddly misaligned” because it necessarily “de-link[s] the ‘Custody’ directive in § 1226(c)(1) from the bar to ‘Release’ in (c)(2)”).

The headings in § 1226(c) further illustrate this point. Section 1226(c) as a whole is entitled “Detention of criminal aliens.” This heading conveys to the reader that the section provides an exception to the general detention rule of § 1226(a), and that this exception concerns the detention of certain criminal aliens. The two paragraphs within the section are entitled “Custody” and “Release.” These headings inform the reader that the section governs the full life cycle of the criminal aliens’ detention, with the first paragraph specifying the requirements for taking them into custody, and the second specifying the restrictions on their release. This structure suggests only one logical conclusion: the release provisions of § 1226(c)(2) come into effect only after the government takes a criminal alien into

custody according to § 1226(c)(1). And, correspondingly, if the government fails to take an alien into custody according to § 1226(c)(1), then it necessarily may do so only under the general detention provision of § 1226(a), and we never reach the release restrictions in § 1226(c)(2).

Rojas's contrary reading, as Judge Barron explained, would mean that Congress directed the AG to hold without bond aliens “who had never been in criminal custody”—because with the “when . . . released” clause rendered inoperative for purposes of § 1226(c)(2), there would be nothing to impose a requirement of the aliens ever having been in custody. *Castañeda*, 810 F.3d at 27. At the same time, *Rojas's* reading would leave the AG “complete discretion to decide not to take [such aliens] into immigration custody at all.” *Id.* These incongruous consequences further persuade us to reject the BIA’s reading.

Notably, neither the BIA nor those circuits that deferred to the BIA adequately addressed the structure of the relationship between § 1226(a) and § 1226(c). Indeed, the BIA and the Second Circuit failed to address it at all. *See Lora v. Shanahan*, 804 F.3d 601, 611 (2d Cir. 2015) (deeming it ambiguous whether the “when . . . released” clause “is part of the definition of aliens subject to mandatory detention” without considering statutory context); *In re Rojas*, 23 I. & N. Dec. at 121–22 (considering statutory context but failing to acknowledge the relationship between § 1226(a) and § 1226(c)). The Tenth Circuit did address it, and even seemed to agree with our conclusion that custody must be authorized under paragraph (1) of §

1226(c) in order for paragraph (2) to take effect. *Olmos*, 780 F.3d at 1321 (recognizing that the authority to detain “arises in Paragraph ‘1’” and that “the [AG] must exercise this responsibility ‘when the alien is released’”). But, applying the loss-of-authority doctrine, that court concluded that the government maintains its authority to take custody of an alien under § 1226(c)(1) even when it fails to comply with the “when . . . released” requirement. *Olmos*, 780 F.3d at 1321–22 (“With the alien in the [AG’s] custody under his delayed enforcement of § 1226(c)(1), there would be nothing odd about § 1226(c)(2)’s restrictions on when the alien can be released.”). Finding that the “when . . . released” requirement imposed no actual limitations on the government, the Tenth Circuit thus concluded that the BIA’s interpretation—reading out the “when . . . released” requirement—was reasonable. *Id.* We disagree. As we later explain, the loss-of-authority doctrine does not apply to § 1226(c). And absent this doctrine, we are left with the conclusion that the AG must comply with § 1226(c)(1), including the “when . . . released” requirement, before it can apply § 1226(c)(2).

In sum, we conclude that paragraph (2)’s limitations on release unambiguously depend upon paragraph (1)’s mandate to take custody. “An alien described in paragraph (1)” is therefore one who is detained according to the requirements of paragraph (1). These requirements include the mandate that the government take the alien into custody “when . . . released.” The BIA’s interpretation to the contrary is impermissible.

B.

We must next decide whether the AG is in compliance with § 1226(c)(1)'s custody mandate—and thus § 1226(c)(2)'s limitations on release apply—even if the AG takes an alien into custody after substantial time has passed since the alien's release from criminal custody. Plaintiffs argue that § 1226(c)(1)'s mandate requiring the AG to detain criminal aliens “when [they are] released” from criminal custody means that they must be taken into custody *promptly* after release, not years later, as were the named Plaintiffs here. The government, on the other hand, argues that the phrase “when . . . released” is ambiguous, supporting either Plaintiffs' reading or a broader reading requiring mandatory detention of any criminal alien arrested by the AG at any point after release from criminal custody. The government's argument wrongly assumes that the BIA had so construed “when . . . released.” On the contrary, the BIA explicitly stated that “[t]he statute does direct the [AG] to take custody of aliens *immediately* upon their release from criminal confinement.” *Rojas*, 23 I. & N. Dec. at 122 (emphasis added). And even if the BIA had construed the phrase not to require immediate confinement, the statute would foreclose that construction because “when . . . released” unambiguously requires promptness.

Again, we start with the plain language: “The Attorney General shall take into custody any alien who [commits an enumerated offense] when the alien is released [from criminal custody].” 8 U.S.C. § 1226(c). As Judge Barron observed, the first

thing that leaps out is that “Congress chose a word, ‘when,’ that naturally conveys some degree of immediacy as opposed to a purely conditional word, such as ‘if.’” *Castañeda*, 810 F.3d at 37 (citation omitted). Of course, the word “when” has multiple dictionary definitions. But looking to context, which of these meanings is the intended one is clear. The word “when” used in a command such as this one requires prompt action. Consider a teacher's common instruction to stop writing when the exam ends. There is no doubt that such an instruction requires the student to immediately stop writing at the end of the exam period. Or as one district court noted, “if a wife tells her husband to pick up the kids *when* they finish school, implicit in this command . . . is the expectation that the husband is waiting at the moment” school ends. *Sanchez-Penunuri v. Longshore*, 7 F. Supp. 3d 1136, 1155 (D. Colo. 2013); see also *Khoury v. Asher*, 3 F. Supp. 3d 877, 887 (W.D. Wash. 2014) (“A mandate is meaningless if those subject to it can carry it out whenever they please.”). Similarly, the use of the phrase “when . . . released,” when paired with the directive to detain, unambiguously requires detention with “some degree of immediacy.” *Hosh v. Lucero*, 680 F.3d 375, 381 (4th Cir. 2012).

Indeed, “[i]f Congress really meant for the duty in (c)(1) to take effect ‘in the event of’ or ‘any time after’ an alien's release from criminal custody, we would expect Congress to have said so, given that it spoke with just such directness elsewhere in the IIRIRA.” *Castañeda*, 810 F.3d at 38 (citing 8 U.S.C. § 1231(a)(5) (“[T]he alien shall be removed under the prior order at any time

after the reentry.” (emphasis added)); *see also* *Quezada-Bucio v. Ridge*, 317 F. Supp. 2d 1221, 1230 (W.D. Wash. 2004) (noting that Congress “easily could have used the language ‘after the alien is released,’ ‘regardless of when the alien is released,’ or other words to that effect”). But instead Congress chose words that signal an expectation of immediate action. *See Jones v. United States*, 527 U.S. 373, 389 (1999) (“Statutory language must be read in context [as] a phrase ‘gathers meaning from the words around it.’” (quoting *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961))). This word choice must be given its due weight.

Moreover, unlike the government’s interpretation, our reading is consistent with Congress’s purposes in enacting the mandatory detention provision—to address heightened risks of flight and dangerousness associated with aliens who commit certain crimes, which are serious enough to give rise to criminal custody. *See Demore*, 538 U.S. at 518–19 (describing evidence before Congress). These purposes are ill-served when the critical link between criminal detention and immigration detention is broken and the alien is set free for long stretches of time. Congress’s concerns over flight and dangerousness are most pronounced at the point when the criminal alien is released. Consequently, we can be certain that Congress did not intend to authorize delays in the detention of these criminal aliens. And correspondingly, without considering the aliens’ conduct in any intervening period of freedom, it is impossible to conclude that the risks that

once justified mandatory detention are still present. These considerations are prudently reflected in Congress’s decision that these individuals must be detained “when . . . released,” and that if they aren’t, the AG may detain them only if warranted under the general detention provision of 8 U.S.C. § 1226(a), upon a bond hearing during which an individualized assessment of risks is conducted. We therefore conclude that the phrase “when . . . released” connotes some degree of immediacy.

C.

Finally, we turn to the government’s argument that even if § 1226(c)(1) unambiguously requires prompt detention, we should nonetheless uphold the AG’s authority to detain without bond an alien who committed a covered offense even when the AG has violated the mandate of § 1226(c)(1). The government points to a line of cases holding that: “[i]f 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 v. Peabody Coal Co.*, 537 U.S. 149, 159 (2003) (quoting *United States v. James Daniel Good Real Property*, 510 U.S. 43, 63 (1993)); *see also id.* at 158 (“Nor, since *Brock [v. Pierce County]*, 476 U.S. 253 (1986)], have we ever construed a provision that the government ‘shall’ act within a specified time, without more, as a jurisdictional limit precluding action later.”); *United States v. Nashville, C & St. L. Ry.*, 118 U.S. 120, 125 (1886); *United States v. Dolan*, 571 F.3d 1022, 1027 (10th Cir. 2009). Under this “loss-of-

authority” line of cases, the government’s argument goes, the AG’s failure to timely take into custody a criminal alien in no way affects her ability to act pursuant to the mandatory detention provision of § 1226(c)(2). Several circuits have agreed. See *Sylvain*, 714 F.3d at 157; *Lora*, 804 F.3d at 612–13; *Olmos*, 780 F.3d at 1324–26.

The courts adopting this reasoning rely on *United States v. Montalvo-Murillo*, 495 U.S. 711 (1990), in which the Supreme Court interpreted a provision of the Bail Reform Act that required judicial officers to hold a bond hearing “immediately upon the [defendant]’s first appearance before the judicial officer.” 18 U.S.C. § 3142(f)(2). *Montalvo-Murillo* didn’t receive a timely hearing under this provision, and the district court released him from custody. The Supreme Court reversed, holding that “a failure to comply with the first appearance requirement does not defeat the government’s authority to seek detention of the person charged.” 495 U.S. at 717. The Court noted that nowhere did the statute provide for the release of pretrial detainees as a remedy for the failure by judicial officers to provide prompt hearings. *Id.* And it concluded that “[a]utomatic release contravened the object of the statute, to provide fair bail procedures while protecting the safety of the public and assuring the appearance . . . of defendants . . .” *Id.* at 719. To hold otherwise, the Court reasoned, would “bestow upon the defendant a windfall” and impose on the public “a severe penalty” by “mandating release of possibly dangerous defendants every time some deviation” from the statute occurred. *Id.* at 720. Looking to

this decision, our sister circuits have treated *Montalvo-Murillo* as a “close[] analog” to the dispute over § 1226(c)’s limitations. *Sylvain*, 714 F.3d at 158. We find, however, that *Montalvo-Murillo* is readily distinguishable.

Critically, unlike in *Montalvo-Murillo*, the government here invokes the loss-of-authority doctrine to justify extending a statutory provision that in fact curtails, rather than expands, the government’s discretionary authority. See Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 Hastings L. J. 363, 367 (2014) (“The [mandatory detention provision] strips the immigration judge of her power to conduct a bond hearing and decide whether the individual poses any danger or flight risk, and likewise precludes DHS from making discretionary judgments about whether detention is appropriate.”). Indeed, the sole practical effect of the district court’s decision in this case is to *reinstate* the government’s general authority, under § 1226(a), to decline to detain, or to release on bond, those criminal aliens who are not timely detained under § 1226(c). In short, we decline to apply the loss-of-authority doctrine where, as here, there is no loss of authority.

Moreover, unlike the district court’s ruling in *Montalvo-Murillo*, our holding does not craft a new remedy inconsistent with the statutory scheme. Whereas in *Montalvo-Murillo* the statute at issue did not identify a remedy for a delayed hearing, see *United States v. Montalvo-Murillo*, 876 F.2d 826, 831 (10th Cir. 1989) (per curiam) (noting that “Congress did not provide . . . the remedy”

for a violation of § 3142(f)), *overruled by Montalvo-Murillo*, 495 U.S. at 722), here the statutory structure makes clear precisely what occurs in the absence of prompt detention under 8 U.S.C. § 1226(c): the general detention provision, 8 U.S.C. § 1226(a), applies. Far from imposing a judiciallycreated remedy for untimely detention, we are merely holding that under the statute, the conditions for the mandatory detention exception are not met when detention is too long delayed. *See Castañeda*, 810 F.3d at 40–41 (distinguishing several cases where courts improperly fashioned their own sanctions).

We do not share the Third Circuit’s concern that failing to apply the loss-of-authority doctrine “would lead to an outcome contrary to the statute’s design: a dangerous alien would be eligible for a hearing—which could lead to his release—merely because an official missed the deadline.” *Sylvain*, 714 F.3d at 160. Congress’s design of protecting the public by detaining criminal aliens is undoubtedly premised on the notion that *recently* released criminal aliens may be presumed a risk. Such a presumption carries considerably less force when these aliens live free and productive lives after serving their criminal sentences. *See Saysana v. Gillen*, 590 F.3d 7, 17–18 (1st Cir. 2009) (“By any logic, it stands to reason that the more remote in time a conviction becomes and the more time after a conviction an individual spends in a community, the lower his bail risk is likely to be.”). Indeed, the imposition of robotic detention procedures in such cases not only smacks of injustice, but also drains scarce detention resources that should be

reserved for those aliens who pose the greatest risks.

We therefore hold that the mandatory detention provision of 8 U.S.C. § 1226(c) applies only to those criminal aliens who are detained promptly after their release from criminal custody, not to those detained long after.

IV.

In so holding, we are not suggesting that the mandate to detain “when . . . released” necessarily requires detention to occur at the exact moment an alien leaves criminal custody. The plain meaning of “when . . . released” in this context suggests that apprehension must occur with a reasonable degree of immediacy. *Accord Hosh*, 680 F.3d at 381 (“[W]e agree that Congress’s command . . . connotes some degree of immediacy”); *Rojas*, 23 I. & N. Dec. at 122 (“The statute does direct the [AG] to take custody of aliens immediately upon their release from criminal confinement.”). Thus, depending on the circumstances of an individual case, an alien may be detained “when . . . released” even if immigration authorities take a very short period of time to bring the alien into custody.

This appeal, however, does not present the question exactly how quickly detention must occur to satisfy the “when . . . released” requirement. The class was defined as those who were not “immediately detained” but were still taken into mandatory custody, and the government did not challenge the class definition on the ground

that it required further clarification as to the meaning of “immediately.” Nor did the government appeal class certification on the ground that the named class members were not typical of the class as a whole—even though the named Plaintiffs spent years in their home communities after completing their criminal sentences, whereas some class members presumably were released for shorter times. We thus need not decide for purposes of the instant appeal exactly how promptly an alien must be brought into immigration custody after being released from criminal custody for the transition to be immediate enough to satisfy the “when . . . released” requirement. The district court granted preliminary injunctive relief to a

class of aliens who were not “immediately detained” when released from criminal custody, and that grant of relief accords with our interpretation of the statutory requirements.

* * *

Under the plain language of 8 U.S.C. § 1226(c), the government may detain without a bond hearing only those criminal aliens it takes into immigration custody promptly upon their release from triggering criminal custody.

AFFIRMED.

“Supreme Court to Decide Whether Immigrants Jailed For Past Crimes Can Be Detained Pending Deportation”

The Los Angeles Times

David G. Savage

March 19, 2018

The Supreme Court agreed Monday to decide another case testing the Trump administration's power to arrest and jail immigrants facing deportation, including longtime lawful residents who committed minor offenses years ago.

The justices will review a class-action ruling from California that held that immigrants who were released after serving time in local and state jails may not be detained later by federal immigration agents for possible deportation and held indefinitely without a hearing, if they pose no danger to the public and are not likely to flee.

Administration lawyers appealed the ruling of the U.S. 9th Circuit Court of Appeals, arguing that federal law calls for "mandatory detention" for all noncitizens who face possible deportation because of a criminal record.

They said the 9th Circuit's approach would lead to a "gap in custody" and "frustrate the [government's] ability to remove deportable criminal aliens from the United States." And they placed part of the blame on "state and local jurisdictions [that] do not always cooperate" with federal efforts to arrest immigrants who are leaving jails.

The case, to be heard in the fall, sets up another clash between "sanctuary" cities and counties and federal immigration agents who seek to detain and deport immigrants who have criminal records.

In deciding the case, the 9th Circuit said that more 30,000 non-citizens are held every day in the United States in "prison-like conditions" while they challenge the government's efforts to deport them. The judges said the mandatory-detention rule covers those with a "broad range of crimes" on their records, from violent felonies to simple drug possession. And it applies to longtime, lawful residents who have lived and worked in the United States for decades, they said.

The lead plaintiff in the challenge to this provision, Mony Preap, was born in a Cambodian refugee camp and has been a lawful permanent resident since 1981. He was convicted on two counts of marijuana possession in 2006, a misdemeanor offense. Agents of the Department of Homeland Security took him into custody in 2013 under the disputed part of the immigration law, which says the DHS "shall take into custody

any alien" who was convicted of a "deportable" offense "when the alien is released."

Preap joined a class-action suit brought by the American Civil Liberties Union to challenge the government's view that he was subject to mandatory detention seven years after his release. A federal judge in San Francisco and the 9th Circuit agreed with the challengers and said the phrase "when the alien is released" referred only to the time of their release. Because Preap had been released years earlier, he was not subject to mandatory detention in 2013 for the past offenses, the appeals court said.

"We therefore hold that the mandatory detention provision ... applies only to those criminal aliens who are detained promptly after their release from criminal custody, not to those detained long after," wrote Judge Jacqueline Nguyen.

The Supreme Court kept the government's appeal on hold while it decided a related case. In *Jennings vs. Rodriguez*, the court ruled last month that federal law did not give jailed immigrants a right to a bail hearing after six months in custody. However, the justices sent that case back to the 9th Circuit to rule on whether indefinite detention without a hearing violated the Constitution.

The new case, *Nielsen vs. Preap*, concerns a part of the same immigration law but focuses

on a different group of lawful immigrants who had served jail time for a criminal offense.

Lawyers for Preap and the other plaintiffs in the case had urged the court to turn down the administration's appeal. "Instead of focusing mandatory detention on high-risk individuals who are coming out of criminal custody, the government's expansive interpretation would sweep up individuals who have been living peaceably in the community for more than a decade and pose neither a danger nor a flight risk," they said.

They cited a second plaintiff, Eduardo Vega Padilla, who came to the United States as a toddler and has been a lawful permanent resident since 1966. He was convicted of drug possession in 1997 and for keeping an unloaded pistol in a shed behind his house. He served six months in jail, but was arrested 11 years later under the mandatory-detention provision of the federal law. Padilla was later released on bond because he posed no flight risk.

Preap was released after winning his fight against deportation.

But the Supreme Court said it would hear the case of *Nielsen vs. Preap* in the fall to decide whether federal law requires mandatory detention for all non-citizens who have past crimes that could trigger their deportation.

“Supreme Court to Consider How Fast Government Must Act in Detaining Immigrants For Deportation”

The Washington Post

Robert Barnes

March 19, 2018

There is a split in the lower courts on whether federal officials must act immediately after the person is released from criminal custody to detain them indefinitely as they await deportation proceedings. The case will be heard in the term that begins in October.

The U.S. Court of Appeals for the 9th Circuit said that unless the arrest is prompt, the detainee should receive a hearing to determine whether they may be freed awaiting the outcome of the deportation proceedings. Immigrants would have to convince an immigration judge that they posed no danger to others and were not a flight risk.

Other lower courts have agreed with the government’s reading that detention is mandatory no matter when the noncitizen is picked up.

The government argues that the 9th Circuit’s approach will lead to a “gap in custody” and hamper the federal government’s ability to remove deportable immigrants. The Trump administration said the efforts of “sanctuary cities” reluctant to cooperate with federal authorities escalate the difficulties.

The Obama administration took the same reading of the law, but the stakes are higher

with President Trump’s vow to remove more noncitizens who have committed crimes that make them deportable.

The 9th Circuit case involved two people in unrelated cases.

Mony Preap was born in a refugee camp after his parents fled Cambodia, and he has lived legally in the United States since 1981. He was convicted in 2006 of marijuana possession, but was not picked up by federal authorities after he was sentenced to time served.

He served another criminal sentence for battery in 2013, a charge that is not a deportable offense. He was detained for months, but was released and no longer faces deportation.

Bassam Yusuf Khoury has been a lawful permanent resident of the United States since 1976. In 2011, he was released after serving a 30-day sentence for a drug charge. Nearly two years later, federal authorities picked him up for deportation and he was detained for more than six months before a judge said he could be released

The issue concerns language in the federal law that authorizes the Department of

Homeland Security to seize someone for deportation “when the alien is released” from criminal custody.

The federal government says it could mean any time after the release, not just immediately after the release.

Lawyers for the detainees say that under the government’s reading, that would impose mandatory deportation “on individuals who have been released months, years, or even

more than a decade earlier, and who therefore have an actual record of living at liberty in the community without posing any flight risk or danger to others.”

The court decided a related case last month. On a 5-to-3 vote, the court said federal law did not require a bond hearing even after months or years of detention of those facing deportation.

The case to be heard is *Nielsen v. Preap*.

“More Detained Immigrants Are Owed Bond Hearings: 9th Circ.”

Law360

Allissa Wickham

August 5, 2016

Only criminally convicted immigrants who enter immigration custody soon after being released from criminal custody can be detained without bond hearings, the Ninth Circuit decided Thursday in a ruling that also upheld a lower court’s class certification in the case.

A three-judge appellate panel ruled that a mandatory detention section of the Immigration and Naturalization Act applies exclusively to immigrants who were detained “promptly” after being let out of criminal custody, not to people who were detained much later.

“The statute unambiguously imposes mandatory detention without bond only on those aliens taken by the [Attorney General] into immigration custody ‘when [they are] released’ from criminal custody,” wrote Circuit Judge Jacqueline Nguyen. “And because Congress’s use of the word ‘when’ conveys immediacy, we conclude that the immigration detention must occur promptly upon the aliens’ release from criminal custody.”

The class action was filed by three immigrants in late 2013, and although the complaint isn’t publicly available, a later order from the court stated that the plaintiffs

were challenging their detention without bond. The lower court granted the petitioners’ motion for class certification and issued an injunction forcing the government to hold bond hearings for all the class members, according to the Ninth Circuit’s ruling.

The Ninth Circuit panel upheld the lower court’s class certification ruling and the preliminary injunction. According to Kecker & Van Nest LLP, which served as co-counsel for the plaintiffs, the Ninth Circuit’s ruling means that “thousands” of immigrants in California can now make a case against being detained.

“The Court specifically struck down the government’s practice of subjecting immigrants to mandatory detention based on crimes they may have committed years ago, even if those individuals had long since rehabilitated themselves,” the firm said in a statement.

Michael Tan, a staff attorney at the ACLU Immigrants’ Rights Project, added in the statement, “Today’s decision is a victory for fairness and due process of law.” The ACLU also served as counsel for plaintiffs in the case.

On the same day, the Ninth Circuit also affirmed a lower court's order certifying a class of immigrant detainees and finding the class could have bond hearings in a case called *Khoury v. Asher*. Matt Adams, legal director for the Northwest Immigrant Rights Project, which represented plaintiffs in that case, said in a statement that his team is "very happy that the Court has rejected the government's efforts to overstep their authority in denying thousands of individuals their basic right to a custody hearing."

A representative for the U.S. Department of Justice did not respond to a request for comment.

Bond hearings are an active topic in the immigration legal world. In June, the U.S. Supreme Court decided to hear a case about whether certain immigrants are entitled to an automatic bond hearing after six months of detention, adding another layer to the national debate over immigrant detention.

The plaintiffs in the first case, *Preap v. Johnson*, are represented by Julia Harumi Mass at the ACLU Foundation of Northern California, by Alison Edith Pennington,

Jingni Zhao and Anoop Prasad at the Asian Law Caucus, by Ashok Ramani of Keker & Van Nest LLP and by Michael K.T. Tan of the American Civil Liberties Union Foundation.

The government is represented by Hans Harris Chen, Leon Fresco and Troy David Liggett.

The plaintiffs in the *Khoury* case are represented by Matt Adams and Christopher Strawn at the Northwest Immigrant Rights Project, by Robert Pauw at Gibbs Houston Pauw, by Judy Rabinovitz at the ACLU Immigrants' Rights Project, by Michael K.T. Tan at the ACLU and by Devin T. Theriot-Orr of Sunbird Law PLLC.

The government in that case is represented by Timothy Michael Belsan, Hans Harris Chen, Leon Fresco and Lori Warlick.

The cases are *Mony Preap, et al v. Jeh Johnson, et al*, case number 14-16326, and *Bassam Khoury, et al v. Nathalie Asher, et al*, case number 14-35482, at the U.S. Court of Appeals for the Ninth Circuit.

Chevron Deference

“A Power Grab of Sorts, Buried in a Supreme Court Decision”

Bloomberg

Noah Feldman

June 24, 2018

As the U.S. Supreme Court’s swing justice, Anthony Kennedy is used to making big headlines in June. On Thursday, he did something just as important as issuing a major decision — but considerably harder to capture in a few words.

In a brief, solo concurrence in *Pereira v. Sessions*, Kennedy called for reconsidering and maybe overruling one of the cornerstones of modern administrative law, known as “Chevron deference.” If the Chevron precedent is overturned, judges would have more direct power to overrule policy decisions made by agencies like the Environmental Protection Agency, the Federal Communications Commission and the Securities and Exchange Commission.

Depending on how you count, Kennedy is the fifth sitting justice to call Chevron into doubt. His opinion is an opportunity to take a hard look at whether the end of the doctrine would be a bad thing or a good one.

The Chevron doctrine, created by the Supreme Court in 1984 in a case involving the Chevron oil company, says that, when Congress has passed a law that is both ambiguous and directed to an administrative agency, the courts will defer to the agency’s

interpretation of the law, so long as it is reasonable.

For years, judges on both ends of the political spectrum embraced the doctrine. Liberals like Justice Stephen Breyer, a former academic scholar of administrative law, appreciated the way the doctrine empowered technocratic experts at the agencies and discouraged judges from second-guessing them.

Conservatives like the late Justice Antonin Scalia (who was also an administrative law scholar before becoming a judge) found the doctrine appealing because it reflected the value of judicial restraint, making it harder for courts to reverse agency action from the Ronald Reagan era.

In Scalia’s influential interpretation of Chevron deference, the doctrine made jurisprudential sense because Congress was in effect telling judges to listen to the agencies. Scalia thought judges should listen to Congress and do as little as possible on their own.

But today’s judicial conservatism is not your father’s judicial conservatism. Scalia’s theoretical commitment to judicial restraint (never mind whether he consistently

practiced it) has been replaced by conservative judicial activism.

Justice Neil Gorsuch, while still an appellate judge, openly criticized the Chevron doctrine for taking the power to interpret the law away from judges and giving it to agencies. That resonates with a core value held by Kennedy, that the judiciary (in practice: Kennedy) must always have definitive say over the meaning of the law.

Gorsuch clerked for Kennedy, and Kennedy's new opinion reflects a circular path of influence: Kennedy taught Gorsuch about judicial supremacy; Gorsuch used that to attack Chevron; now Gorsuch is influencing Kennedy to apply his own values to Chevron, too.

Kennedy and Gorsuch make two. Justice Clarence Thomas, the court's only true, all-in originalist, has his doubts about whether administrative agencies, undreamed-of by the founders, are even constitutional in the first place. You can be sure he doesn't like a doctrine that empowers the agencies. Chief Justice John Roberts hasn't called for the doctrine to go, but he has criticized the overuse of Chevron before. That makes four.

Justice Samuel Alito may be a wildcard. On the one hand, he has criticized agency overreach in reliance on supposedly "ambiguous" statutes. In a speech to the conservative Federalist Society in 2016, Alito went so far as to claim (with some plausibility) that "before his death, [Scalia] was also rethinking the whole question of

Chevron deference." That suggests that Alito could join his conservative colleagues.

On the other hand, in last week's case, Alito wrote a separate dissent of his own saying that Chevron deference should have been applied because the statute in question was ambiguous. In his punchline, he wrote that "unless the court has overruled Chevron in a secret decision that has somehow escaped my attention, it remains good law."

This may conceivably imply that Alito is not ready to jettison Chevron. It's noteworthy, too, that while Kennedy's concurrence cited opinions by Roberts, Thomas and Gorsuch, it didn't cite any Alito opinion calling Chevron into question.

If Alito is on board with the other conservatives, what then? Liberals are already worrying that the end of Chevron would invite activist conservatives to overturn agency action. That's a logical fear. If the conservatives want to end Chevron, it's at least partly because they want to be able to constrain future Democratic-controlled agencies. No matter what happens after Donald Trump's presidency, we are going to have a more conservative judiciary because of his appointees.

Yet the truth is that liberals can't really mourn the end of Chevron too hard, because liberals like judicial activism. Most liberals since World War II aren't really committed to judicial restraint — except when liberals don't have five votes on the Supreme Court.

Deep in liberals' hearts, they know that courts exist to interpret the law and must often do so in the light of values. Scalia's fantasy that judges could be mere objective rubber stamps is one that liberals must recognize as unrealistic in many situations.

Seen from this perspective, the end of Chevron could be bad for the environment, bad for the internet, bad for securities regulation, as conservative judges overturn agency regulation.

But the end of judicial deference to agencies won't be bad for the rule of law itself. That rule is strengthened when judges — however fallible, however motivated — use reason to say what the law is, and take responsibility for their judgments.

“The Federalist Society’s *Chevron* Deference Dilemma”

Law and Liberty

Christopher J. Walker

April 3, 2018

In 2016 here at *Law and Liberty*, I asked whether administrative law’s judicial deference doctrines matter. Leveraging my study with Kent Barnett on *Chevron* deference in the federal courts of appeals, I argued that these doctrines do matter. In this essay, I explore the related question of whether *Chevron* deference advances its stated objectives. In particular, does *Chevron* deference constrain partisanship in judicial decisionmaking? The answer to this question has important implications for the current debate on whether to narrow, or even eliminate, *Chevron* deference.

For the uninitiated, *Chevron* deference is the judicial doctrine that federal agencies—and not courts—are the primary interpreters of statutes that Congress has charged the agencies to administer. “If a statute is ambiguous, and if the implementing agency’s construction is reasonable,” Justice Thomas has explained, “*Chevron* requires a federal court to accept the agency’s construction of the statute, even if the agency’s reading differs from what the court believes is the best statutory interpretation.”

In recent years, there has been a growing call to eliminate *Chevron* deference. This call has

come from the Hill, the federal bench, and the legal academy. Last year it was front and center during the Senate Judiciary Committee’s hearing on Neil Gorsuch’s nomination to the Supreme Court, as then-Judge Gorsuch had authored a concurring opinion critical of *Chevron* deference and its progeny. That Gorsuch concurrence was quite reminiscent of Justice Thomas’s earlier attack on *Chevron* deference in his concurring opinion in *Michigan v. EPA*. Indeed, last week, the *New York Times* reported there’s a new “litmus test” for judicial nominees, which was applied in the selection of Gorsuch for the Supreme Court: “reining in what conservatives call ‘the administrative state.’”

The call to eliminate *Chevron* deference has largely come from those right of center. But it would be a mistake to conclude that everyone center-right is, or should be, in favor of eliminating administrative law’s deference doctrines. There is deep divide on the right with respect to the role of federal courts in our constitutional republic. Some view courts as a critical safeguard of liberty, and thus encourage courts to actively engage in checking the actions of the political branches. Think Randy Barnett and Philip Hamburger. Others, by contrast, argue that

because federal courts are not democratically accountable, they should exercise judicial restraint, embrace the “passive virtues” when possible, and otherwise adopt a minimalist and deferential approach to judicial review of actions by the political branches. Think Michael Stokes Paulsen and Adrian Vermeule.

For years, if not decades, the proper role of federal courts has thus been subject to an ongoing and vigorous debate within the Federalist Society and related circles.

Indeed, the *Chevron* Court itself grounded this deference doctrine in part on the need to reserve political (or policy) judgments for the more politically accountable agencies:

“Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges’ personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the

agency charged with the administration of the statute in light of everyday realities.”

In other words, *Chevron* deference strives to remove politics from judicial decisionmaking. Such deference to the political branches has long been a bedrock principle for at least some judicial conservatives.

Does *Chevron* deference achieve this goal of removing politics from judicial decisionmaking?

In an article forthcoming in the *Vanderbilt Law Review*, Kent Barnett, Christina Boyd, and I attempt to answer this question empirically. To do so, we leverage our *Chevron* dataset that includes every published circuit-court decision that involved *Chevron* or *Skidmore* deference from 2003 through 2013. Over this eleven-year period, the federal courts of appeals reviewed 1,613 agency statutory interpretations in 1,382 published opinions where they considered applying either deference doctrine.

Contrary to prior, more limited studies, we find that *Chevron* deference has a powerful constraining effect on partisanship in judicial decision-making. To be sure, we still find some statistically significant results as to partisan influence. But the overall picture provides compelling evidence that the *Chevron* Court’s objective to reduce partisan judicial decision-making has been quite effective.

First, like earlier studies, we find that politics does play some role in how circuit courts

review agency statutory interpretations. Liberal three-judge panels, for instance, are more likely to agree with liberal agency interpretations and less likely to agree with conservative interpretations. Vice versa for conservative panels. When we separate how conservative and liberal panels act in cases in which they apply *Chevron* deference, however, we find that *Chevron* deference significantly constrains judicial discretion. For instance, the most liberal-judge panels agree with conservative agency statutory interpretations 51% of the time when they apply the *Chevron* deference framework, compared to just 18% when they don't. The most conservative-judge panels similarly agree with liberal agency interpretations 66% of the time with *Chevron* deference, and only 18% without.

That does not mean that *Chevron* eliminates political behavior entirely. When it comes to conservative agency interpretations, there's a 23% difference in the likelihood of panels across the ideological spectrum agreeing with the agency under *Chevron* deference (and a higher 36% difference when panels applied a lesser form of deference). We found a similar 25% difference for review of liberal agency interpretations under *Chevron*. When the circuit courts do not apply *Chevron*, that difference rises to a staggering 63% difference.

When the circuit courts decide to apply the *Chevron* framework, they largely apply it in a similar fashion, with only modest ideological behavior. Conservative panels, for example, were as much as 21% more likely than liberal panels to find no ambiguity when reviewing a liberal agency

interpretation, whereas liberal panels were as much as 14% more likely than conservative panels to find no ambiguity when reviewing conservative agency interpretations. Nonetheless, in contrast to Justice Scalia's view (rearticulated recently by Judge Kethledge), we do not find that conservative judges are more likely to find statutes unambiguous regardless of the valence of the agency interpretation.

We also find no "whistleblower effects." Whistleblower effects, as Cass Sunstein and others have explained, involve the phenomenon of group polarization, in that "[d]eliberating groups of like-minded people tend to go to extremes." The presence of a panelist with opposing political preferences can serve as a whistleblower of sorts, which helps rein in the majority's preference of politics over legal doctrine in a given case.

Contrary to the famous Cross and Tiller study, we find no whistleblowing effects in the *Chevron* deference context: Whether a panel is ideologically uniform or diverse does not affect whether circuit courts apply the *Chevron* framework, nor does it affect agency-win rates on judicial review. Indeed, we find only minor differences at even the ideological extremes, and those differences are strangely in the opposite direction than expected. This finding might seem surprising in light of the earlier, most-limited empirical studies that found such panel effects. But it's not too surprising in light of our other findings. Because *Chevron* deference itself largely constrains partisanship in judicial decision-making, the ideological composition of the

panel may have little, if any, additional constraining role to play.

We also had a bit of fun looking at individual judges who had at least 20 observations in our dataset. Some liberal judges, including Judge Stephen Reinhardt and then-Judge Sonia Sotomayor, affirmed 100% of liberal agency interpretations. But a few liberal judges, including Judges Marjorie Rendell and Robert Sack, indicate conservative behavior. Likewise, a number of conservative judges did not engage in ideological decision-making, though some did, including Judges Jane Roth and Michael Fisher. A number of conservative judges more favorably reviewed liberal interpretations than conservative ones. Judge Peter Hall voted to adopt 100% of liberal interpretations. Other prominent

conservative judges, such as Judges Frank Easterbrook, Thomas Griffith, David Sentelle, and Jeffrey Sutton, similarly demonstrated counter-ideological voting patterns.

In sum, the findings from our study underscore one significant and largely overlooked cost of eliminating or narrowing *Chevron* deference: Such reform could result in partisanship playing a larger role in judicial review of agency statutory interpretations. It may turn out that, even with this cost taken into account, some on the right would conclude that such reform efforts produce a net benefit. For many, however, the cost of increased partisan judicial decision-making should be a cause for concern.

“Undue Deference”

National Review

Jonathan Wood

July 29, 2018

For the second time in two years, President Trump has nominated a justice to the Supreme Court of the United States. His selection of Brett Kavanaugh, like the selection of Justice Neil Gorsuch before him, shows the White House’s commitment to selecting judges “devoted to a legal doctrine that challenges the broad power federal agencies have to interpret laws and enforce regulations,” as the *New York Times* has put it.

If confirmed, that devotion may be quickly tested. Led by Texas, 17 states have urged the Supreme Court to take up *California Sea Urchin Commission v. Combs* and end *Chevron* deference — the Court’s controversial and unconstitutional practice of deferring to agencies on the meaning of statutes, rather than having independent judges interpret the law.

For too long, the states argue, the convenience of bureaucrats has been weighted more heavily than fairness to the American people.

“It is doubtless convenient for federal agencies to have little restraint on their interpretation of federal law; to be able to

change their minds at any time, for any reason; and to receive deference even for interpretations expressed retroactively,” the states acknowledge. But “there is a price to be paid for these conveniences, and it is paid by those who are subject to the agency’s regulatory authority.”

California Sea Urchin Commission demonstrates just how far we’ve strayed from the Constitution’s design of courts subjecting government actions to fair, independent scrutiny. In 1986, Congress struck a compromise that would encourage the recovery of California’s sea-otter population while minimizing unnecessary impacts on fishermen. That compromise held for decades, during which the otter population increased dramatically.

But in 2012, a federal agency decided it no longer liked the deal Congress had struck. So it reinterpreted the compromise, concluding — conveniently — that the law allowed the agency to keep its benefits from the bargain while depriving the fishermen of theirs. Represented by Pacific Legal Foundation, the fishermen sued, arguing that nothing in the law passed by Congress gave the agency such power to rewrite the law.

Unfortunately, the Ninth U.S. Circuit Court of Appeals — which embraces blind deference to federal agencies with more zeal than most courts — concluded that this didn't matter. The court ruled that a federal agency can do whatever it pleases, so long as there's no law that explicitly forbids the precise action. The court gave no answer as to just how Congress was supposed to anticipate every novel idea an agency might dream up over decades.

With Kavanaugh on the bench, the Supreme Court may finally be ready to revisit *Chevron* and restore meaningful, independent scrutiny to the administrative state.

When courts reassert themselves and enforce the law as written by Congress, it “helps preserve the separation of powers and operates as a vital check on expansive and aggressive assertions of executive authority,” Kavanaugh wrote in a recent D.C. Circuit ruling. His concern makes him a fitting successor to Justice Anthony Kennedy, who, in one of his final opinions, urged the Supreme Court to “reconsider” the premises underlying *Chevron*'s “reflexive deference” to unelected bureaucrats.

Justice Neil Gorsuch, Trump's first nominee, has argued that excessive deference to agencies replaces “an independent decisionmaker seeking to declare the law's

meaning as fairly as possible” (i.e., a judge) with “an avowedly politicized administrative agent seeking to pursue whatever policy whim may rule the day.”

Chief Justice John Roberts has similarly raised an alarm about the concentration of power in administrative agencies and the lack of meaningful checks and balances. “The danger posed by the growing power of the administrative state,” the chief justice has cautioned, “cannot be dismissed.”

“We seem to be straying further and further from the Constitution without so much as pausing to ask why,” Justice Clarence Thomas has separately observed.

The fundamental principles underlying our Constitution are that government power must be divided up, rather than concentrated, and those who exercise it must be accountable to the people. It's difficult to imagine a greater departure from these principles than the concentration of near-limitless power in the hands of unelected bureaucrats, combined with a lack of oversight from Congress and the courts.

With three sitting justices raising questions about *Chevron* deference and another on deck, it's time for the Supreme Court to address the issue head-on.

Deferred Action for Childhood Arrivals (DACA)

“The End of DACA Is the Next Big Immigration Fight”

Bloomberg

Noah Feldman

August 9, 2018

The struggle over the Deferred Action for Childhood Arrivals program and the fate of the immigrants known as “Dreamers” is heating up again. There’s a strong probability that it will go all the way to the U.S. Supreme Court, and fast — conceivably even before Judge Brett Kavanaugh gets a Senate vote on his confirmation.

The path to the Supreme Court passes through the possibility of dueling nationwide lower-court injunctions. There are already orders mandating that President Donald Trump’s administration keep in place DACA, which shields from deportation certain undocumented immigrants who came to the U.S. as children. A federal district court in Texas could soon issue a contradictory order shutting it down.

That seems likely, because it’s the same judge who in 2015 blocked Barack Obama’s administration from implementing the Deferred Action for Parents of Americans and Lawful Permanent Residents policy, or DAPA, which would have extended the DACA protections to Dreamers’ parents.

To understand the looming crisis, you have to start with the rather remarkable fact that DACA is still legally in place, even though the Trump administration ordered it shut down in September 2017. The reason that’s so remarkable is that DACA isn’t a law passed by Congress. It’s a unilateral presidential enactment adopted by Obama.

Ordinarily, what one president can do by fiat, another can undo by fiat. But in January, a federal judge in California ruled that the Trump administration had acted arbitrarily when it shut down the program. He ordered that DACA remain in place. Since then, a couple of other federal district courts agreed.

My own view is that these courts got it wrong. But Cass Sunstein, my colleague at Bloomberg Opinion and Harvard Law School and (among many other things) the leading administrative law scholar in the country, thinks the decision keeping DACA alive was “eminently reasonable.” I won’t bore you with the disagreement, which centers on whether the Trump administration

gave a good enough reason for shutting the program down when it asserted that DACA was illegal.

What matters practically is that the courts' orders kept DACA going despite Trump's wishes.

That led directly to a new federal lawsuit, filed by Texas and seven other states, arguing that DACA is in fact unlawful, because it exceeded Obama's presidential authority. A hearing the case took place Wednesday.

It's pure luck, but the judge who drew the case, Andrew Hanen, is the same judge who struck down DAPA. The U.S. Court of Appeals for the 5th Circuit upheld his opinion in that case. And the U.S. Supreme Court then split 4-4 after Justice Antonin Scalia died, leaving the appeals court ruling in effect. There can be little doubt that Scalia would have voted to strike down DAPA.

As a matter of constitutional logic, if the program for parents was beyond Obama's presidential authority, so was the program for their children. And Hanen has already demonstrated his willingness to issue a nationwide injunction enforcing his ruling. So it's a pretty safe bet that Hanen will at some point rule DACA unconstitutional.

That leaves the question of timing — which could be all important here.

DACA supporters are arguing to Hanen that unlike DAPA, which had not yet been implemented when Hanen blocked it, DACA has been in place for several years. Therefore,

they maintain, there is no immediate need for a preliminary injunction because the states are suffering no irreparable harm from continuing the program.

I'm skeptical that Hanen will embrace that distinction. He previously ruled that state resources expended on DAPA were harmful enough to issue his injunction. States are also spending resources on DACA.

If and when Hanen strikes down DACA and orders a nationwide injunction against it, the Trump administration will be whipsawed between competing court orders. Some courts are ordering it to keep DACA going, and Hanen would be ordering the opposite.

In the face of contradictory orders, the administration would seek expedited review by courts of appeals. If those didn't create uniformity immediately — and that is the most likely outcome — then it would turn to the Supreme Court. After all, the high court's job is to ensure some modicum of legal uniformity across the country.

All that could happen within days or even hours of a ruling and injunction by Hanen. And Hanen could perfectly well rule at any time. He's already thought through the constitutional issues in issuing his DAPA opinion.

Nevertheless, Hanen can use his discretion to choose when he wants to issue a decision and an injunction. And he has a pragmatic reason to take his time.

That's because the Supreme Court is evenly split again, as it was when it voted on the 5th

Circuit decision upholding Hanen's DAPA ruling.

If the current Supreme Court had to consider dueling nationwide injunctions, it could face a serious crisis if it again divided 4-4. A split court can only uphold the decision on appeal before it. If a 5th Circuit decision upholding a Hanen opinion remained in place, it would put the Trump administration into a legally untenable situation.

Of course, moderates like Chief Justice John Roberts and Justices Stephen Breyer and Elena Kagan could hammer out a temporary

compromise. But such a compromise would almost certainly have to include keeping DACA in place.

So it makes sense for Hanen to wait until Kavanaugh is confirmed, and then issue his ruling.

If that's what happens, Kavanaugh may have to swing into action pretty darn fast. He would face his first controversial, emergency vote in a high-profile case where his vote would be decisive.

It won't be his last.

“Judge Upholds Order for Trump Administration to Restore DACA”

New York Times

Miriam Jordan

August 3, 2018

A federal judge on Friday upheld his previous order to revive an Obama-era program that shields some 700,000 young immigrants from deportation, saying that the Trump administration had failed to justify eliminating it.

Judge John D. Bates of the Federal District Court for the District of Columbia gave the government 20 days to appeal his decision. But his ruling could conflict with another decision on the program that a federal judge in Texas is expected to issue as early as next week.

The Trump administration announced late last year that it would phase out the program known as Deferred Action for Childhood Arrivals, or DACA, which protects undocumented young adults from deportation and grants them two-year renewable work permits. The administration argued that President Barack Obama had overstepped his authority and circumvented Congress when he created the program in 2012.

The decision to end the program has faced numerous legal challenges. Currently, the government must continue accepting applications to renew DACA status, if not

new applications from those who meet the criteria to qualify. DACA recipients — often called “Dreamers” — typically were brought to the United States illegally as children through no choice of their own.

Judge Bates ruled in late April that the administration must restore the DACA program and accept new applications. He had stayed his decision for 90 days to give the Department of Homeland Security, which runs the program, the opportunity to lay out its reasons for ending it.

Kirstjen Nielsen, the homeland security secretary, responded last month, arguing that DACA would likely be found unconstitutional in the Texas case and therefore must end. She relied heavily on the memorandum that her predecessor, Elaine C. Duke, had issued to rescind the program and said that the department had the discretion to end the program, just as the department under Mr. Obama had exercised discretion to create it.

Judge Bates, who was appointed by President George W. Bush, did not agree. He called the shutdown of the program “arbitrary and capricious” and said that Secretary Nielsen’s response “fails to elaborate meaningfully on

the agency's primary rationale for its decision."

Two federal judges, in Brooklyn and in San Francisco, issued injunctions this year ordering the government to keep the program. But neither of those rulings required that the government accept new applications, as the ruling by Judge Bates does. The earlier decisions are pending before appeals courts.

Meanwhile, the State of Texas and several other plaintiffs have sued the government to rescind the program, contending that it is illegal.

The District of Columbia lawsuit was brought by the N.A.A.C.P., Microsoft and Princeton University. The DACA program has broad bipartisan support in the business and academic worlds.

Christopher L. Eisgruber, the president of Princeton, hailed the court's decision.

"Princeton University's continued success as a world-class institution of learning and research depends on our ability to attract talent from all backgrounds, including Dreamers," he said. Brad Smith, the president of Microsoft, said that finding a solution for DACA "has become an economic imperative and a humanitarian necessity."

Since the 2016 presidential campaign, the young people who benefited from DACA have seen their hopes alternately elevated and dashed, sometimes in the space of a week. Neither a flurry of court decisions nor horse-trading in Congress has settled the issue.

In a statement on Friday, United We Dream, an organization that represents Dreamers, offered a sobering assessment: "The situation for DACA beneficiaries remains dangerous and unstable, as we do not know how the administration will respond, and there are other court cases in progress."

“Kavanaugh Could Stymie Trump’s Immigration Policies”

Bloomberg Law

Laura D. Francis

July 10, 2018

President Donald Trump’s nomination of Judge Brett Kavanaugh to replace Justice Anthony Kennedy on the U.S. Supreme Court isn’t necessarily a guaranteed win for the president’s immigration policies.

The Trump administration already is facing a host of lawsuits on a variety of immigration issues: ending the Deferred Action for Childhood Arrivals program and temporary protected status, state and local “sanctuary” policies on whether to cooperate with federal immigration enforcement, and some challenges to limits on business visas.

Kavanaugh hasn’t addressed many immigration cases while on the U.S. Court of Appeals for the District of Columbia Circuit. But he’s likely to face at least some if confirmed to replace Kennedy.

“We’re going to see a lot more business immigration litigation because of the unreasonably restrictive decisions” from U.S. Citizenship and Immigration Services, David Leopold of Ulmer & Berne in Cleveland, Ohio, told Bloomberg Law July 10.

Some of those cases may make their way up to the Supreme Court.

‘Question Mark’ on Immigration

But “the conservative tilt to the court becomes a big question mark when it comes to immigration” because many of the cases involve a “strict” interpretation of the Immigration and Nationality Act, he said. That means conservative justices could go against the Trump administration’s interpretations of the INA, he said.

The Supreme Court “has given Congress plenary authority to write the immigration law,” said Leopold, a past president and past general counsel of the American Immigration Lawyers Association. So it’s possible that Kavanaugh and the other justices will “hold the Trump administration to the letter of the law” when it comes to the INA’s provisions on employment visas, he said.

Kavanaugh is “very much a careful jurist who looks at the statute and looks at the regulation and tries to determine whether the executive branch’s regulation is consistent with the statute,” said Kevin R. Johnson, dean of the University of California, Davis, School of Law.

“He’s going to call it as he sees it,” Johnson told Bloomberg Law July 10. “I don’t think he’s going to allow the executive branch to go beyond what he views as the requirements of the statute,” he said.

The Immigration and Nationality Act “is clear on what constitutes a specialty occupation,” the type of job covered by the H-1B guestworker visa, Leopold said. Instead of following that law, the administration is “making it up as they go along,” he said.

“Brett Kavanaugh is a superb choice to fill the current vacancy in the U.S. Supreme Court,” Federation for American Immigration Reform President Dan Stein said in a July 10 statement. “President Trump should be commended for choosing a candidate who clearly understands the nation’s patchwork of immigration laws and how they are intended to protect both American workers and the overarching national interest,” he said.

FAIR advocates for lower immigration levels.

Pro-DACA?

“With important immigration-related decisions heading to the Supreme Court—including the challenge to the Obama-era Deferred Action for Childhood Arrivals (DACA)—Judge Kavanaugh will provide expert insight into the legality of the program and the ability of future administrations to circumvent Congress and create tailored amnesty programs for large groups of illegal aliens,” Stein said.

But Kavanaugh’s views of the executive’s authority may in fact result in a ruling in favor of DACA.

In a 2013 decision involving nuclear waste storage, Kavanaugh took an expansive view

of the president’s power not to enforce the law.

The president “possesses a significant degree of prosecutorial discretion not to take enforcement actions against violators of a federal law,” he wrote. In fact, because of separation of powers concerns, “Congress may not mandate that the President prosecute a certain kind of offense or offender,” Kavanaugh said.

Johnson said it’s “very hard to tell” how Kavanaugh would rule on the DACA issues. Considering that the Supreme Court tied 4-4 when it considered the challenge to the Deferred Action for Parents of Americans and Lawful Permanent Residents program, Kavanaugh could very well be the swing vote one way or another, he said.

“The first question that comes to mind is where is he going to be on prosecutorial discretion,” Leopold said. Kavanaugh’s viewpoint in this area doesn’t just affect DACA, it “affects business immigration as well,” he said.

‘Tremendous Discretion’

The Immigration and Nationality Act gives “tremendous discretion to the executive,” Leopold said.

That was the view of the sitting justices in the recent case involving the president’s travel ban, which turned on the president’s authority under the INA to block the entry of certain immigrants.

“The court has a long history of deferring to the executive” when “it comes to national

security,” Leopold said. It’s possible that the justices may rule differently on immigration law questions involving employment, he said.

Johnson agreed, especially when it comes to Kavanaugh. “He might be more deferential to the executive” in a case involving national security than in a “run-of-the-mill” immigration case, Johnson said.

Leopold said he thinks “the real challenge for the justices” is “to set aside their political opinions and not to permit politics into the courtroom.”

“The hope is we have intellectual honesty,” he said.

“Judge’s Ruling Isn’t Going to Save the Dreamers”

Bloomberg

Noah Feldman

January 10, 2018

A federal judge in California on Tuesday blocked President Donald Trump from rescinding the Deferred Action for Childhood Arrivals program, which he had planned to phase out in March. The impulse to protect the so-called Dreamers is admirable. But legally speaking, the opinion can’t be correct. If President Barack Obama had the legal authority to use his discretion to create DACA in the first place -- itself a close legal question -- Trump must have the legal authority to reverse DACA on the ground that he considers it to have exceeded Obama’s powers.

District Judge William H. Alsup’s ruling was based on a provision of the Administrative Procedure Act that says executive agency actions must not be arbitrary and capricious. The court held that it was arbitrary for Trump’s Department of Homeland Security to rescind DACA. It reasoned that because DACA was legal, Homeland Security could not rescind it for being illegal.

This logic may sound plausible. But it runs into multiple legal problems.

The first has to do with applying the arbitrary and capricious standard to DACA in the first place. The Administrative Procedure Act functions so that the courts can supervise

executive agencies and be sure their actions are based on reasoned policy logic. But the law makes an exception for any decision that is “committed to agency discretion by law.”

The original DACA order was based on the president’s discretionary authority to decide how to enforce federal immigration law. Recall that Dreamers have no statutory right to be in the country -- they are the children of undocumented immigrants. DACA was, formally speaking, an announced discretionary decision by the executive branch not to deport Dreamers.

In court, the Trump administration argued that if DACA was itself an exercise of discretion, the decision to revoke DACA must similarly be an exercise of discretion and not subject to review under the Administrative Procedure Act. In other words, the courts have no business telling the president that he cannot reverse a discretionary decision by a previous president.

The federal judge rejected this argument by saying that while the decision not to deport was indeed discretionary and not subject to review, the decision to deport was not discretionary in the same way. It added that

there was further reason to review Homeland Security's move because DACA had invited Dreamers "out of the shadows" and reversing the program would subject them to consequences that would infringe on the liberty and property interests created by the original order.

There's something appealing about this argument. Certainly prosecuting or deporting someone is active in the way that deciding not to do so is not. Yet it's difficult to accept that once the government decides not to prosecute or deport someone, it must then justify the decision to change its mind. The asymmetry isn't especially consistent with general principles of administrative law.

The second significant legal problem with the California court's decision is its assertion that it was arbitrary and capricious for Homeland Security to rescind DACA.

The main basis the government gave for ending DACA was that it was illegal when Obama enacted in the first place -- it exceeded his constitutional authority. This was essentially the view taken by the federal district court in Texas that froze the Deferred Action for Parents of Americans plan that was DACA's twin sibling, allowing the undocumented parents of citizen children to stay in the country. The U.S. Court of Appeals for the 5th Circuit agreed. The U.S. Supreme Court split 4-4 on the issue after Justice Antonin Scalia's death and before Trump named Justice Neil Gorsuch to the court.

The federal district court in California disagreed. It said that DACA was legal in the first place, and that the Supreme Court never said otherwise. It concluded that ending DACA "was based on the flawed legal premise that the agency lacked authority to implement DACA." And it rejected the notion that it was up to the executive branch to decide whether to defend DACA in court, especially in the 5th Circuit where it is arguably illegal under the precedent of the DAPA program.

This analysis cannot be correct. One presidential administration is entitled to disagree with the legal analysis of another.

What's more, the president has the right to interpret the Constitution when it comes to the legality of his own actions. He doesn't have to wait for a court to tell him something is illegal. He can judge for himself.

And the legal judgment that DACA exceeds presidential authority certainly isn't arbitrary or capricious. A federal court of appeals and four Supreme Court justices have already said DAPA was. If it weren't for Scalia's death, it's highly probable that the majority of the justices would have taken that view. And it seems even more likely that Gorsuch would now provide the deciding fifth vote to say DACA is unconstitutional.

Trump's Department of Homeland Security can't have been acting arbitrarily because its judgment aligns with these authorities.

The California judge cited Trump's pro-DACA tweets as evidence that continuing the

program serves the public interest. That's cute, but misleading. Trump is calling for congressional legislation to continue DACA, not for executive action.

I deeply hope some version of DACA is signed into law. But this judicial decision isn't going to save the Dreamers, no matter how well-intentioned it might be.

“A Judge Supports Dreamers and the Rule of Law”

Bloomberg

Cass R. Sunstein

January 16, 2018

The White House was quick to condemn a federal judge’s decision last week striking down the Trump administration’s efforts to terminate the Deferred Action for Childhood Arrivals program. It called the ruling “outrageous,” and President Donald Trump tweeted that it shows “how broken and unfair our court system is.”

But the judge’s decision to invalidate the program’s termination, and thus to protect young immigrants who were brought to the U.S. illegally as children, was not outrageous. Strictly as a matter of law, it was eminently reasonable — whatever Congress does or does not do in the coming days and weeks.

To begin to understand why, imagine that in 2021, a Democratic president — say, Bernie Sanders — starts repealing dozens of regulations issued during the Trump administration, on the ground that the new attorney general believes those regulations are “illegal.”

Though Democrats might celebrate, that’s a horrible idea. The executive branch can’t simply assert that the decisions of its predecessor were “illegal.” It has to justify that conclusion. If it isn’t able to do that, it must come up with better grounds for changing course.

In a nutshell, that’s what Judge William Alsup told the Trump administration last week in his DACA decision.

As the judge explained, “DACA grew out of a long agency history of discretionary relief programs,” going back to the Dwight Eisenhower administration and including major initiatives under Presidents Ronald Reagan and George H.W. Bush. Such “programs had become a well-accepted feature of the executive’s enforcement of our immigration laws, recognized as such by Congress and the Supreme Court,” Alsup wrote.

When it adopted the current DACA program in 2012, the Barack Obama administration said that the young people seeking to qualify

for its protections had to meet certain criteria. They had to have come to the U.S. before the age of 16, and they had to have resided continuously in the country for at least five years. They also had to have been enrolled in school, and graduated from high school or obtained a GED, or been honorably discharged from the U.S. military or Coast Guard. And they could not pose a threat to national security or public safety. More than 650,000 young people residing in the U.S. meet these standards.

Those who qualify under the DACA program are not to be detained or removed for two years from the time that they successfully apply for its protections (unless they do something wrong). They can also obtain Social Security numbers and receive authorization to work.

In September 2017, Attorney General Jeff Sessions wrote a short letter to the acting secretary of Homeland Security, stating that the program was an “unconstitutional exercise of authority by the Executive Branch.” Because it offered no serious analysis of why that was the case, the letter was a shoddy document from a legal point of view. But the next day, Acting Secretary Elaine Duke, referring to the letter, rescinded DACA.

In invalidating this rescission, Judge Alsup applied a well-established principle, widely ignored even by expert commentators: An agency’s action must be upheld or invalidated only on the basis of the specific reasons the agency itself has given. So the only question was whether the attorney

general was right to conclude that DACA was illegal.

The judge thought not. He said that “each feature of the DACA program is anchored in authority granted or recognized by Congress or the Supreme Court.” In his view, the executive branch is perfectly entitled to conclude that DACA enrollees are low-priority cases for removal and to direct its enforcement priorities elsewhere.

The Trump administration’s strongest response pointed to a 2014 appeals court ruling, striking down a related Obama administration program that protected the parents of lawful permanent residents from deportation. If that program is invalid, it could be argued that DACA is invalid, too.

That’s not a crazy argument. But as Judge Alsup emphasized, the DACA program is quite different. Focusing specifically on children, it is more limited than the program covering immigrant parents, and it builds more incrementally on longstanding practices; it stands on firmer legal ground.

Importantly, the judge did not rule out the possibility that in the future the Trump administration might be able to defend a decision to rescind the program. Agencies are perfectly entitled to change course, so long as they offer a reasoned explanation for doing so.

Perhaps the government could explain that the program does not fit with the Trump administration’s overall immigration strategy, because the protection it affords is

too broad and categorical. The problem is that it never made that argument.

A broader principle is at stake. A central distinction between authoritarian and non-authoritarian systems is that in the latter, executive officials have an obligation to obey the law. An equally central distinction is that

officials must give reasons for their decisions.

They cannot simply assert their power or their will. In insisting on reason-giving, Judge Alsup's ruling keeps faith with the best traditions of our legal system — and the rule of law.

Sanctuary Cities

“Full appeals court to hear case on injunction against Trump sanctuary policies”

Politico

Josh Gerstein

June 4, 2018

The full bench of the federal appeals court based in Chicago has agreed to consider whether a District Court judge went too far in imposing a nationwide ban against enforcement of Trump administration policies seeking to block so-called sanctuary cities from receiving Justice Department grants.

In April, a three-judge panel of the 7th U.S. Circuit Court of Appeals upheld the nationwide injunction that the city of Chicago obtained against the policy. However, one judge, Daniel Manion, said he would have narrowed the injunction to protect only Chicago.

Attorney General Jeff Sessions, who has railed against nationwide injunctions as a power grab by the judiciary, asked the entire bench of the 7th Circuit to rein in the injunction. On Monday, the court said in an order that a majority of its active judges had voted to consider doing just that.

The en banc court could consist of as many as 13 judges: the court’s 11 active judges plus the two senior judges on the original ruling. The overall set of judges leans heavily in the Republican direction, with 11 GOP appointees and two Democratic appointees.

There is no reason to expect the judges will vote along party lines, however. All three judges who voted earlier this year to uphold the ruling in Chicago’s favor, including the one who said he would narrow it, are Republican appointees.

The April ruling rejected efforts by the Justice Department to impose new grant conditions requiring that cities, counties and states cooperate with immigration enforcement efforts in order to get so-called Byrne Justice Assistance Grants.

In a strongly worded opinion, Judge Ilana Rovner said that allowing federal agencies to add conditions to grant funds without explicit congressional authority could lead toward “tyranny.”

“The Attorney General in this case used the sword of federal funding to conscript state and local authorities to aid in federal civil immigration enforcement,” Rovner wrote, in an opinion joined by Judge William Bauer. “But the power of the purse rests with Congress, which authorized the federal funds at issue and did not impose any immigration enforcement conditions on the receipt of such funds. It falls to us, the judiciary, as the

remaining branch of the government, to act as a check on such usurpation of power.”

The narrower dispute going before the full bench of the 7th Circuit will solely involve whether U.S. District Court Judge Harry Leinenweber, based in Chicago, was right to apply his ruling nationwide, even though the city was the only plaintiff in the suit before him.

In a speech last year, Sessions slammed what he called the “activist” practice of judges issuing nationwide injunctions purporting to bind federal officials across the country and sometimes around the globe.

“Forgive me for feeling strongly about this,” the attorney general said at the time. “Today, more and more judges are issuing nationwide injunctions and in effect single judges ... are making themselves superlegislators for the entire United States. ... A single judge’s decision can enjoin the entire federal government from acting. It’s an extreme step. Too often, district court judges are doing it without following the law.”

Sessions has repeatedly complained that the Trump administration has been swamped with such injunctions, but he has acknowledged that they began to pick up under President Barack Obama. At least one such order, a Texas federal judge’s 2015 injunction blocking Obama’s expansion of protection for certain illegal immigrants, won praise from Sessions while he was a senator. However, it’s unclear whether he ever

explicitly endorsed the nationwide element of the ruling.

Judges and activists on the right and left have defended the nationwide injunction practice as appropriate in at least some cases, in order to prevent disparate treatment in different parts of the country, particularly in immigration-related cases.

The Supreme Court has never issued a detailed opinion on the validity of nationwide injunctions, but one expert said there was some chance the grant-related dispute could wind up getting the justices to square up to the issue.

“If the Supreme Court does not reach the scope of the injunction in the travel ban case, this is the most likely vehicle for the question to reach the Court,” UCLA law professor Sam Bray said in an email, referring to the president’s disputed executive order banning entry into the United States by nationals of several countries, most of them majority-Muslim. “The Seventh Circuit’s decision to rehear en banc suggests growing judicial concern about national injunctions.”

Even if the 7th Circuit lifts the nationwide injunction in the case about grants to cities with sanctuary policies, the Trump administration policies may still not take effect. That’s because another federal judge, based in San Francisco, also blocked the policies nationwide. His order is on appeal to the 9th Circuit.

“Sanctuary cities as the next nationwide injunction test case”

SCOTUS Blog

Steve Vladeck

June 19, 2018

However the Supreme Court decides the travel ban case in the next 10 days, it may well avoid taking a position on one of the numerous issues raised in that litigation — whether the district court in *Trump v. Hawaii* lacked the authority to issue a nationwide injunction. But the justices may not be able to duck the broader debate over the propriety of nationwide injunctions for much longer, thanks to an unusual application for a “partial” stay filed by Solicitor General Noel Francisco on Monday in *Sessions v. City of Chicago*.

The *City of Chicago* case is one of several pending challenges to actions taken by Attorney General Jeff Sessions under Executive Order 13,768, which provides that certain “sanctuary jurisdictions” that refused to comply with some immigration enforcement measures would not be “eligible to receive Federal grants, except as deemed necessary for law enforcement purposes” by the attorney general or secretary of Homeland Security. As relevant here, the city of Chicago sued challenging conditions that the attorney general subsequently imposed under the executive order on receipt of funds under the Edward Byrne Memorial Justice Assistance Grant Program, claiming that they were both unlawful and unconstitutional.

The U.S. District Court for the Northern District of Illinois agreed with the city with respect to two of the three challenged conditions — the “notice” condition, which requires advance notice to federal authorities of the release date of persons in state or local custody who are believed to be noncitizens, and the “access” condition, which requires local correctional facilities to provide access to federal agents to meet with those persons. Both of those conditions, the district court ruled, could not be traced to any statutory authority, and therefore exceeded the attorney general’s authority to impose unilaterally. And because of considerations the district court deemed unique to immigration law, not only did Judge Harry Leinenweber enjoin the attorney general from continued enforcement of the conditions against the city of Chicago, but he issued the injunction on a nationwide basis.

After refusing to stay the injunction pending appeal, a three-judge panel of the U.S. Court of Appeals for the 7th Circuit affirmed in April 2018, unanimously concluding that no statute granted the attorney general the authority to impose the “notice” and “access” conditions. As for the nationwide scope of the district court’s injunction, a majority of the 7th Circuit panel stressed that

“nationwide injunctions should be utilized only in rare circumstances,” but concluded that the city’s suit was one such circumstance, because “[t]he case presents essentially a facial challenge to a policy applied nationwide, the balance of equities favors nationwide relief, and the format of the Byrne JAG grant itself renders individual relief ineffective to provide full relief.” Judge Daniel Manion dissented only with respect to the nationwide nature of the injunction. As he wrote, “Other jurisdictions that do not want to comply with the Notice and Access conditions were not parties to this suit, and there is no need to protect them in order to protect Chicago.”

The government sought en banc rehearing of the panel decision only with respect to the nationwide scope of the injunction, and a stay of that aspect of the injunction (but not the injunction itself) pending disposition of its petition. On June 4, the 7th Circuit granted rehearing en banc “only as to the geographic scope of the preliminary injunction entered by the district court,” but deferred the government’s request for a ruling on its application for a stay until the Supreme Court decided the travel ban case, which “may facilitate our disposition of the pending motions.”

Given the full 7th Circuit’s refusal to rule immediately on the stay application, the solicitor general on Monday filed an application for a partial stay directly with Justice Elena Kagan, in her capacity as Circuit Justice for the 7th Circuit. The application asks Kagan to stay the nationwide scope of the district court’s injunction pending the en banc 7th Circuit’s disposition of the government’s petition for rehearing — which looks like it will be argued later this summer — and, “if necessary, pending the filing and disposition of a petition for a writ of certiorari and further proceedings in this Court.” Later on Monday, Kagan ordered a response to the application — by 5:00 p.m. on Wednesday, June 27 (by which point the Supreme Court may well have decided the travel-ban case).

Thus, although the government is not challenging the substance of the district court’s injunction, it appears willing to use that injunction as a vehicle to challenge the propriety of nationwide injunctions more generally — perhaps more so than in the travel ban or DACA litigation. Whether the justices are interested in such a challenge (especially in a case in which the government may be all-but conceding the weakness of its position on the merits) remains to be seen.

“Judge: Trump overstepped in sanctuary city order”

Boston Herald

Kimberly Atkins

August 2, 2018

The battle between the Trump administration and so-called “sanctuary cities” appears bound for the U.S. Supreme Court after a federal appeals court declared unconstitutional the president’s executive order stripping funding from localities that don’t cooperate with federal immigration authorities.

The ruling was a mixed bag for the Trump administration, striking down the order while also lifting the nationwide ban against its implementation.

But 9th Circuit Court of Appeals Judge Sidney R. Thomas held in the 2-1 ruling that Trump overstepped his constitutional authority, reasoning that only Congress has the power to grant or deny funding — a power the president cannot circumvent.

“Here, the Administration has not even attempted to show that Congress authorized it to withdraw federal grant moneys from jurisdictions that do not agree with the current Administration’s immigration strategies,” Thomas wrote. “Nor could it. In fact, Congress has frequently considered and thus far rejected legislation accomplishing the goals of the Executive Order.”

Other cases out of Philadelphia and Chicago are also making their way through the courts and are likely bound for the U.S. Supreme Court — particularly if any appellate court rules in the administration’s favor, creating a circuit split.

Opponents of the order declared victory, as supporters said it still leaves the door open for Congress and the White House to take other steps to press states and local governments to cooperate with federal immigration authorities.

“Put simply, the president cannot use the threat of defunding as a weapon to force local governments to abandon politics that make their communities safer,” said Santa Clara County, Calif., Counsel James R. Williams.

Jessica M. Vaughan of the Center for Immigration Studies, which supports Trump’s order, said that it was good policy regardless of the court’s constitutional reasoning — and said other courts, including the Supreme Court, could see it differently.

“What would be better is for Congress to clarify,” Vaughan said. “But Congress can’t get out of its own way on anything, especially immigration-related matters.”

The vacancy on the high court, left by Justice Anthony Kennedy's retirement this week, could delay a move by the justices to take up the case to avoid a potential 4-4 deadlock.

Trump's nominee to replace Kennedy, Judge Brett Kavanaugh, likely won't go before the

Senate Judiciary Committee for a hearing until September, committee chairman Chuck Grassley (R-Iowa) said yesterday. That would put a vote on his confirmation some time in October — after the court's new term has already commenced.

Affordable Care Act

“Trump administration won’t defend ACA in case brought by GOP states”

The Washington Post

Amy Goldstein

June 7, 2018

The Trump administration said Thursday night that it will not defend the Affordable Care Act against the latest legal challenge to its constitutionality — a dramatic break from the executive branch’s tradition of arguing to uphold existing statutes and a land mine for health insurance changes the ACA brought about.

In a brief filed in a Texas federal court and an accompanying letter to the House and Senate leaders of both parties, the Justice Department agrees in large part with the 20 Republican-led states that brought the suit. They contend that the ACA provision requiring most Americans to carry health insurance soon will no longer be constitutional and that, as a result, consumer insurance protections under the law will not be valid, either.

The three-page letter from Attorney General Jeff Sessions begins by saying that Justice adopted its position “with the approval of the President of the United States.” The letter acknowledges that the decision not to defend an existing law deviates from history but contends that it is not unprecedented.

The bold swipe at the ACA, a Republican whipping post since its 2010 passage, does not immediately affect any of its provisions. But it puts the law on far more wobbly legal footing in the case, which is being heard by a GOP-appointed judge who has in other recent cases ruled against more minor aspects.

The administration does not go as far as the Texas attorney general and his counterparts. In their suit, lodged in February in the U.S. District Court for the Northern District of Texas, they argue that the entire law is now invalid.

By contrast, the Justice brief and letter say many other aspects of the law can survive because they can be considered legally distinct from the insurance mandate and such consumer protections as a ban on charging more or refusing coverage to people with preexisting medical conditions.

A group of 17 Democratic-led states that have won standing in the case also filed a brief on Thursday night arguing for the ACA’s preservation.

While the case has to play out from here, the administration’s striking position raises the

possibility that major parts of the law could be struck down — a year after the Republican Congress failed at attempts to repeal core provisions.

In an unusual filing just before 6 p.m. Thursday, when the brief was due, the three career Justice attorneys involved in the case — Joel McElvain, Eric Beckenhauer and Rebecca Kopplin — withdrew.

The department's argument, if adopted by U.S. District Judge Reed O'Connor, "would be breathtaking in its effect," said Timothy Jost, a retired Washington and Lee law professor who follows such litigation closely. "Of all of the actions the Trump administration has taken to undermine individual insurance markets, this may be the most destabilizing. . . . [If] I'm an insurer, I don't know what I am supposed to do or not."

Jost, an ACA supporter, noted that the administration's decision not to defend the law comes during the season when participating insurers must file their rates for next year with state regulators. It raises new questions about whether insurers still will be required to charge the same prices to all customers, healthy or sick.

And Topher Spiro, vice president of health policy at the liberal Center for American Progress, said the administration's legal argument contradicts promises by Trump that he would not tamper with the ACA's protections for people with preexisting medical conditions.

University of Michigan law professor Nicholas Bagley, another ACA defender, went even further in a blog post. "If the Justice Department can just throw in the towel whenever a law is challenged in court, it can effectively pick and choose which laws should remain on the books," he wrote. "That's not a rule of law I recognize. That's a rule by whim. And it scares me."

Crusading against the ACA has been a priority of Trump's since his campaign for the White House. On his first night in office, Trump issued an executive order, directing federal agencies to lighten the regulatory burden placed by the law. Last October, the president unilaterally ended a significant part of the law that cushions insurers financially from an obligation to give discounts to decrease out-of-pocket costs to lower-income customers with ACA coverage.

More recently, the White House and Department of Health and Human Services have been working to make it easier for consumers to buy relatively inexpensive health plans that exclude some of the benefits the ACA requires.

The new challenge comes six years after the Supreme Court's divided ruling that the ACA is constitutional. That ruling hinged on the reasoning that, while the government "does not have the power to order people to buy health insurance," as Chief Justice John G. Roberts Jr. wrote for the majority, it "does have the power to impose a tax on those without health insurance."

The case in Texas, which has attracted relatively little notice until now, emerges from the massive tax bill Congress passed late last year. In that, lawmakers decided to eliminate the tax penalty the ACA requires people to pay if they flout the insurance mandate. The enforcement of that requirement will end in January.

As a result, the Texas lawsuit contends, “the country is left with an individual mandate to buy health insurance that lacks any constitutional basis. . . . Once the heart of the ACA — the individual mandate — is declared unconstitutional, the remainder of the ACA must also fall.”

Texas and the accompanying states have asked for a preliminary injunction that could suspend the entire law while the case plays out in court.

But the administration disagrees with that position. Instead, Justice officials argue in their brief that the ACA’s insurance requirement will not become unconstitutional until January, so that “the injury imposed by the individual mandate is not sufficiently imminent” and that the judge could issue a final ruling in the case before then.

O’Connor, who is hearing the suit, was appointed by President George W. Bush and has ruled against the ACA in other cases the past few years.

Until Thursday’s filing, the Trump administration had not indicated its position on either this latest lawsuit or the Republican states’ effort to block the law while the case moved along.

“Trump’s Sabotage of Obamacare Is Illegal”

New York Times

Nicholas Bagley and Abbe R. Gluck

August 14, 2018

From the moment he took office, President Trump has used all aspects of his executive power to sabotage the Affordable Care Act. He has issued executive orders, directed agencies to come up with new rules and used the public platform of the presidency in a blatant attempt to undermine the law. Indeed, he has repeatedly bragged about doing so, making statements like, “Essentially, we are getting rid of Obamacare.”

But Mr. Trump isn’t a king; he doesn’t have the power to dispense with laws he dislikes. He swore to preserve, protect and defend the Constitution of the United States. That includes the requirement, set forth in Article II, that the president “take care that the laws be faithfully executed.”

Faithfully executing the laws requires the president to act reasonably and in good faith. It does not countenance the deliberate sabotage of an act of Congress. Put bluntly: Mr. Trump’s assault on Obamacare is illegal.

Among Mr. Trump’s first acts in office was to issue an executive order instructing his agencies “to waive, defer, grant exemptions from, or delay the implementation of” any

part of the Affordable Care Act that they could. That order has prompted a series of administrative actions aimed at undermining the law.

To make it harder for people to enroll in Obamacare plans, for example, the administration shortened the open enrollment period on the health care exchanges from three months to six weeks; cut 90 percent of the funding that the exchanges had used to advertise open enrollment; and slashed the funding available to groups that help people navigate the complex enrollment process.

To sow chaos in the insurance markets, Mr. Trump toyed for nine months with the idea of eliminating a crucial funding stream for Obamacare known as cost-sharing payments. After he cut off those funds, he boasted that Obamacare was “being dismantled.”

When Congress declined to repeal the Affordable Care Act, as Mr. Trump had requested, he said that he was taking on that job himself: “So we’re going a little different route.”

This month, the Trump administration dealt what may be its biggest blow yet to the insurance markets. In a new rule, it announced that insurers will have more latitude to sell “short-term” health plans that are exempt from the Affordable Care Act’s rules. These plans were designed to provide people insurance for small gaps in coverage, like those created when switching jobs. They had previously been limited to three months.

Under Mr. Trump’s new rule, however, such plans can last for 364 days and can be renewed for up to three years. That rule joins an earlier one that allowed businesses to join together to create “association health plans” that also evade the Affordable Care Act’s strictures. In effect, these rules are creating a cheap form of “junk” coverage that does not have to meet the higher standards of Obamacare. This sort of splintering of the insurance markets is not allowed under the Affordable Care Act as Congress drafted it.

The Trump administration’s goal is not only to weaken the Affordable Care Act but also to trick the public into thinking, as opponents of the law like to say, that Obamacare is “collapsing under its own weight.” Let’s be clear: If the Affordable Care Act collapses, it is because the president demolished it.

Never in modern American history has a president so transparently aimed to destroy a piece of major legislation. What makes Mr. Trump’s sabotage especially undemocratic is that Congress has repeatedly considered repealing the law — and repeatedly declined to do so. In addition, the Supreme Court has twice sustained the Affordable Care Act in the face of major legal challenges. Mr.

Trump’s attempt to destroy the law any way he can is an unconstitutional usurpation of power.

That is also the message of a lawsuit — the first of its kind — filed this month in federal court in Maryland. Brought by several plaintiffs including the cities of Chicago, Cincinnati and Columbus, the lawsuit recounts the “relentless and unlawful campaign to sabotage and, ultimately, to nullify” the Affordable Care Act. Taken individually, some of the Trump administration’s actions may be defensible. Taken together, they amount to a derogation of his constitutional duties.

The lawsuit asks the court to strike down the administration’s new rules and to enjoin the president from further sabotage. To prevail, the plaintiffs may have to overcome some procedural hurdles, including questions about whether the courts have the authority or the institutional competence to prevent violations of Article II’s requirement that the president “take care that the laws be faithfully executed” — especially given the wide discretion that presidents traditionally have to implement the laws.

But if there is ever going to be a viable claim along these lines, this is it. After all, no court has ever held that the president has the power to consciously aim, in bad faith, to destroy Congress’ handiwork. Yet with his attacks on this law, that is precisely what Mr. Trump has been doing. No matter how you feel about Obamacare, we should all care about that.