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GULAG ARCHIPIÉLAGO: THE OMINOUS FUTURE FOR IMMIGRANTS IN THE JAILHOUSE

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Gulag Archipiélago: The Ominous Future for Immigrants in the Jailhouse

It is not often when a Justice of the Supreme Court of the United States feels compelled to write, and announce, in their dissenting opinion “We need only recall the words of the Declaration of Independence, in particular its insistence that *all* men and women have ‘certain unalienable Rights,’ and that among them is the right to ‘Liberty’”¹. Justice Stephen Breyer spoke for the minority in *Jennings et al. v. Rodriguez et al.*, the latest case regarding the rights of detained immigrants. Alejandro Rodriguez was an infant when he and his parents immigrated to the United States in 1987 and has

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TUMCA Law & Policy Review is a platform for current undergraduate moot court participants and TUMCA (Texas Undergraduate Moot Court Association) Alumni to engage in legal scholarship. Each issue centers on a topic that article submissions must discuss in some form. The topic of this issue concerned any legal issues that arise due to prison conditions.

¹ *Jennings v. Rodriguez* 538 U.S. ____ (2018) *Unreported*

since been a lawful permanent resident.² After being arrested for joyriding and a misdemeanor drug possession, immigration officials moved to deport Rodriguez back to his home country of Mexico in July of 2004.³ For three years Rodriguez sat in an immigration detention center and for three years was denied a bond hearing.⁴ Rodriguez ultimately won his immigration case and was released from detainment with assistance from the American Civil Liberties Union. His legal challenge to the constitutionality of indefinite detainment with no guarantee of a bond hearing, however, persisted.

Rodriguez, representing a class of detainees that the Central District of California under remand by the Ninth Circuit Court of Appeals are defined as non-citizens who have been detained for longer than six months without a hearing and who are not detained by way of a national security statute.⁵ It was before the Supreme Court to decide whether the Immigration and Nationality Act prevents detainees from being granted bail indefinitely.⁶ The majority avoided the apparent due process quandary, but their satisfaction with the ramifications of the purely textual interpretation of the statutes speaks for itself.⁷ Justice Samuel Alito, writing for the majority, outlined where the Ninth Circuit erred: the statutes Rodriguez and similarly situated detainees were subject to plainly did not include, as the Ninth Circuit construed, an implied maximum amount of time that a detainee could be held in custody or without a bond hearing.⁸

The debate of indefinite detainment ought not be conflated with the question indefinite detainment without a bond hearing in regard to this class and those similar to it. Most clearly, the population that could most reasonably be detained indefinitely such as flight risks is worlds apart from those who would otherwise be finding themselves bonding out of their stint in the county jail prior to *Rodriguez*, or in this case, a federal immigrant detention center. While Alejandro Rodriguez's statutorily unprotected status, relative to a citizen, as an alien was capitalized on by federal law enforcement, his misdemeanors did not change color. Yet, by this holding, the federal government can now indefinitely detain non-citizens who have been charged with a crime without the due process promised to citizens.

Advocates label this ruling as another blow to the rights of immigrants. In piecemeal fashion, the civil liberties of non-citizens have been chipped away while the

² See *id.*

³ See *id.* at 2

⁴ See *id.*

⁵ See *id.*

⁶ See *id.*

⁷ See *id.*

⁸ See *id.*

detainment apparatus grows. In 1994, U.S. Immigration and Customs Enforcement (ICE) held, on a typical day, around 5,000 non-citizen detainees.⁹ Today's average rests at 40,726, and it's been budgeted for 2019 at 51,379.¹⁰ This staggering flood of detainees has provoked many to identify this new era of imprisonment as a *Gulag Archipelago*¹¹, an allusion to writer Aleksandr Solzhenitsyn's work by the same name which details the derelict, gruesome and bloody treatment of prisoners of soviet prison camps.¹² Labeling a prison system a Gulag Archipelago is to describe a secretive network of prisons and labor camps with little oversight.¹³ However accurate this term is to describe ICE detention centers may be, this decision does little to dispel the notion. As the immigrant-only prison apparatus grows and protections shrink, the conditions of these prisons become ever more salient. Currently, there are eleven immigrant-only detention centers in the United States, all of which are managed by one of three corporations contracted out by the Federal Bureau of Prisons: Geo Group, Core Civic (formerly Corrections Corporation of America), and Management & Training Corporation.¹⁴ Even for children brought by their parents, the harshness of detention in the United States is permeating. The T. Don Hutto Family Detention Center, built in order to keep immigrant families together during their transition, was criticized for its prison-like conditions.¹⁵ One female inmate, an asylum seeker, was quoted saying "They treat us like dogs," in response to her having spent six months at Hutto, spurring her to join twenty-six other women in a hunger strike in protest of the center's cruel conditions.¹⁶ Due to the work of steadfast investigative journalists like Seth Freed Wessler and Caitlin Dickerson the conditions of immigrant-only detention centers have been repeatedly reported for insufficient accommodations that amount to incompatibility with contemporaneous policies, jurisprudence, and the national consensus on the treatment for citizens.

Detainees are legally shielded under due process from inhumane conditions or excessive force by law enforcement while they are temporarily held. As articulated in these decisions by lower courts, the issues raised by detainees would be brought under

⁹ Garret Epps, *How the Supreme Court is Expanding the Immigrant Detention System*, The Atlantic, Mar. 19, 2018.

¹⁰ See id.

¹¹ Aleksandr Solzhenitsyn, *The Gulag Archipelago* (1973)

¹² See Epps, *How the Supreme Court is Expanding the Immigrant Detention System*

¹³ See Solzhenitsyn, *The Gulag Archipelago*

¹⁴ Seth Freed Wessler, *Family Sues Private-Prison Operator Over Deaths at Immigrant-Only Facilities*, The Nation, Mar. 15, 2016.

¹⁵ Evangeline Dech, *Nonprofit Organizations: Humanizing Immigration Detention*, 53 Cal. W. L. Rev. 219 (2017).

¹⁶ See id.

the due process clause. For example, in *Lynch v. Cannatella*¹⁷ out of the fifth circuit, sixteen Jamaican nationals came to the United States as stowaways aboard a grain barge in 1985. After being discovered and detained by the Immigration and Neutralization Service, they were shackled and labor was forced upon them¹⁸. If they refused, the detainees were threatened with hunger¹⁹. Their showers consisted of being pinned to the iron walls by water from a fire hose, to outline a few facets of their conditions²⁰. The fifth circuit found in favor of the non-citizens, affirming that all persons are protected under the “entitled under the due process clauses of the Fifth and Fourteenth Amendments to be free of gross physical abuse at the hands of state or federal officials.”

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The treatment of Mr. Rodriguez and his special class, that of lawful residents who are detained after having been accused of crimes forecasts a host of challenges to the protections afforded to immigrants. While of course immigrants, like citizens are protected under the constitution as supported longstanding cases of *Yick Wo v. Hopkins*²², *Wong Win v. United States*²³ and their progeny like the more recent *Zadvydas v. Davis*²⁴, the scope is limited to that of the First, Fourth, Fifth, Sixth, and Fourteenth Amendments. Most relevant for their status lays the latter three that protect immigrants’ due process as they navigate whatever statutorily imposed immigration system is of the moment. Yet, per *Jennings v. Rodriguez*, the protections once thought to be egalitarian now appear at the least confined, and at most, imperiled. Against the backdrop of the oftentimes horrendous conditions and *Rodriguez*, the judiciary is seemingly without guidance for a challenge by a detainee against the conditions of their confinement. Without the guarantee of a bond hearing, members of Rodriguez’s class of lawful residents are transformed from detainees, to prisoners. Therefore, the Eighth’s protection from cruel and unusual punishment is brought into the fold.

These protections under due process resemble that of the jurisprudence of the Eighth Amendment by design. Courts continuously held that the baseline parameters for protections of persons awaiting trial should be no less than that of those serving a sentence. However, when the Court held in *Jennings v. Rodriguez* that detainees could be held indefinitely without bond, the very application of the Fourth Amendment to non-citizens was called into question, and thereby implicates the protection from excessive

¹⁷ *Lynch v. Cannatella* 810 F.2d 1363 (5th Cir. 1987)

¹⁸ See *id.*

¹⁹ See *id.*

²⁰ See *id.*

²¹ See *id.*

²² *Yick Wo v. Hopkins* 118 U.S. 356 (1886)

²³ *Wong Win v. United States* 163 U.S. 228 (1896)

²⁴ *Zadvydas v. United States* 533 U.S. 678 (2001)

force or inadequate healthcare. Whereas the Fourth, Fifth and Sixth Amendments protect criminal defendants and the Eighth protects convicts, *Rodriguez* positions detainees held indefinitely more like prisoners than simply temporary detainees. In *Rodriguez*'s case alone, many tens of thousands of citizens could have served the entirety of their sentence during his three years of waiting for a bond hearing. This can be likened to the jurisprudence of detainees held indefinitely under a national security statute; the latest case being that of *Boumediene v. Bush*²⁵ wherein a divided Supreme Court held that detainees of Guantanamo Bay are entitled to Fifth Amendment protections, specifically habeas corpus.²⁶ The treatment of detainees has historically been only successfully adjudicated under the Fourth Amendment rather than the Eighth because of their non-convict status. However, because detainees can now be held indefinitely, the more appropriate identification for these persons is prisoner, not detainee. Therefore, this decision creates a jurisprudential gap for non-citizen inmates whose conditions do not comport with that of what is permissible for citizens. Albeit there has yet to be a direct challenge regarding the conditions of a detention center that would delineate between permissible conditions of citizen and non-citizen custody, the Court would have ample room to carve out a new line of jurisprudence under the Eighth amendment, to the benefit of detainees or otherwise.

The resultant landscape *Jennings v. Rodriguez* leaves behind is unclear, and ultimately will only be resolved by future cases. However, when reviewed considering the growing detention apparatus, arguably an emerging Gulag Archipelago, the decision forebodes a bleak forecast on detainees' odds of successfully challenging the conditions of their confinement.

²⁵ *Boumediene v. Bush* 553 U.S. 723 (2008)

²⁶ See *id.*