



## DOJ Says It Gave High Court Faulty Data In Detention Case

Share us on: By **Melissa Daniels**

Law360, Los Angeles (August 30, 2016, 9:36 PM ET) -- The Office of the U.S. Solicitor General admitted to the [U.S. Supreme Court](#) on Friday that it submitted incorrect information about the length of detentions in arguing a 2003 case where the justices eventually ruled that mandatory detention for immigrants appealing deportation orders is constitutional.

The letter, first reported on Tuesday by The Wall Street Journal and obtained by Law360, was written by Acting Solicitor General Ian Gershengorn regarding *Demore v. Kim*, which upheld federal policy that immigrants facing deportation may be held during the “limited” period before their deportation proceedings commence.

Gershengorn says that a review by the [Executive Office for Immigration Review](#), which provided the original figures, found that the office had miscalculated the statistics because it omitted the data from more than 15,000 cases.

“EOIR recently reviewed the statistics it provided to this Office in *Demore*, and that the government provided to the Court and the respondent,” the letter says. “The General Counsel of EOIR has informed me that EOIR made several significant errors in calculating those figures.”

The letter includes communication from the EOIR dated Aug. 25 about the errors as well as charts that show the new analysis of processing time.

The Journal said the new figures indicate the average length of detention was more than a year, far longer than the four-month estimate the government had supplied when *Demore* was before the Supreme Court.

The office's new calculations also show that average and median completion times for dispositions of an appeal to the immigration board are longer than what was originally reported. The letter says that average time is 141 days and the median time is 119 days, not “approximately four months” and 114 days, respectively.

When the case was being argued in 2002, Demore drew intense interest from outside parties in the legal and human rights realms, including the Washington Legal Foundation, the [American Bar Association](#), the National Asian Pacific American Legal Consortium, Citizens and Immigrants for Equal Justice and the International Human Rights Organizations.

The Demore case reversed a Ninth Circuit decision that found immigrants facing deportation were entitled to bail hearings. The high court ruled that detention without bail during removal proceedings is constitutionally permissible. The opinion was written by then-Chief Justice William Rehnquist and joined in full by Justice Anthony Kennedy. Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg and Stephen Breyer joined for Part One of the opinion, and Justices Sandra Day O’Connor, Antonin Scalia and Clarence Thomas joined for all but Part One.

Nancy Morawetz, the co-director of the Immigrant Rights Clinic at the [New York University School of Law](#), worked on an amicus filing from Citizens and Immigrants for Equal Justice. Back then, she said, the legal team was frustrated with the government’s data about the length of detentions as it didn’t supply the underlying methods of calculations, and Kim’s team had evidence of people being held for months or years at a time.

“It was a very unfair situation back then, and it turns out to have been even more unfair than we might have realized,” Morawetz said.

She said that the court’s ruling in Demore “went out of its way” to note the length of the detentions, which suggests they felt that the amount of time mattered.

The solicitor general’s letter says that Demore is relevant to *Jennings v. Rodriguez*, which the court [in June](#) agreed to hear. That case centers on whether certain immigrants are entitled to automatic bond hearings following six months of detention.

Morawetz said that she hopes the court will re-examine the constitutionality of mandatory detention, especially given that it was misled by the data in Demore, and that it takes seriously the prolonged detention issue presented in *Jennings*.

“It’s hard to overestimate the human cost of this,” she said, noting the mental and physical toll of being held. “Mandatory detention is an incredibly cruel system.”

The Demore v. Kim ruling has been used to guide immigration detention decisions in other courts. [In April](#), a First Circuit panel noted that the Third and Sixth circuits relied on Demore.

The [American Civil Liberties Union](#), which represented Kim, declined to comment. The [U.S. Department of Justice](#) declined to comment.

--Additional reporting by Kevin Penton and Alissa Wickham. Editing by Jill Coffey.