



# *Nielsen v. Preap*: High Court Clarifies Application of Immigration Detention Statute to Criminal Aliens

**Hillel R. Smith**

Legislative Attorney

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Recently, the Supreme Court in *Nielsen v. Preap* interpreted provisions of the Immigration and Nationality Act (INA) as mandating the detention pending removal proceedings of non-U.S. nationals (aliens) who have committed certain specified crimes, even if those aliens are not detained by immigration authorities immediately upon release from criminal incarceration. The Court reversed a decision by the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit), which had construed the INA provisions as affording such aliens the opportunity to seek release on bond if they were not promptly detained by immigration authorities after release from criminal custody. The Supreme Court determined that the INA's plain text and structure demonstrated that Congress intended that aliens who have committed certain crimes not be released on bond, no matter how much time has passed between their release from criminal custody and subsequent immigration arrest. The Court's reading of the mandatory detention statute reinforces the government's broad authority to detain aliens pending their removal proceedings.

## **Legal Background**

Under [INA § 236\(a\)](#), the Department of Homeland Security's Immigration and Customs Enforcement (ICE) generally may arrest and detain an alien found in the United States pending his removal proceedings. Detention under this statute is discretionary, and an alien may be released on bond or conditional parole pending the removal proceedings. In addition, if the alien remains detained, he may seek review of ICE's custody determination at a bond hearing before an immigration judge.

Special rules, however, apply for a subset of aliens involved in criminal or terrorist activity. [INA § 236\(c\)](#) generally *requires* the detention of aliens subject to removal due to specified criminal or terrorist-related

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grounds. Specifically, INA § 236(c)(1) provides that ICE “shall take into custody any alien” who falls within one of the enumerated grounds “*when the alien is released*” from criminal custody (emphasis added). And under INA § 236(c)(2), ICE may release “an alien described in paragraph (1) only if” the alien’s release is warranted for witness protection purposes. Thus, an alien detained under INA § 236(c) generally may not be released on bond or conditional parole, or request a custody redetermination at a bond hearing. The *Preap* litigation centers on who, precisely, is “an alien described in paragraph (1)” for purposes of INA § 236(c)’s mandatory detention scheme.

## Procedural History

The [plaintiffs](#) in *Nielsen v. Preap* were lawful permanent residents convicted of various crimes. Many years after they completed their sentences, they were taken into ICE custody pending removal proceedings and held without bond under INA § 236(c). In their [class action](#) lawsuit both on their own behalf and that of similarly situated aliens in ICE custody, the plaintiffs [argued](#) that they were not subject to INA § 236(c) because they were not detained *immediately* upon their release from criminal custody. In 2014, a federal district court granted plaintiffs’ motion for class certification, and [ordered](#) ICE to allow aliens in the State of California who were not immediately detained upon their release from criminal custody an opportunity to seek release on bond (the plaintiffs themselves had already been released from custody when the district court’s decision was rendered).

In 2016, the Ninth Circuit [upheld](#) the district court’s decision, ruling that INA § 236(c)’s mandatory detention scheme applied to aliens detained “promptly after their release from criminal custody, not to those detained long after.” The court reasoned that INA § 236(c)(2) prohibits the release of “an alien described in paragraph (1),” and that INA § 236(c)(1) describes an alien who committed a specified criminal offense *and* who was taken into immigration custody “when . . . released” from criminal custody. The court determined that “the phrase ‘when . . . released’ connotes some degree of immediacy.” Thus, the Ninth Circuit concluded, if an alien is not detained promptly upon release from criminal custody, the alien is subject to detention only under INA § 236(a), and thus has the right to a bond hearing.

The Ninth Circuit’s decision in *Preap* contributed to the circuit split over how to construe INA § 236(c). Apart from the Ninth Circuit, the [First Circuit](#) had similarly held that aliens are subject to mandatory detention under INA § 236(c) only if they are taken into immigration custody “within a reasonable time” after release from criminal custody. Dissimilarly, the [Second](#), [Fourth](#), and [Tenth](#) Circuits had ruled that any alien who has committed an offense listed in INA § 236(c) is subject to mandatory detention, no matter how long after release from criminal custody. The [Third Circuit](#), meanwhile, held that, even if INA § 236(c) calls for detention to occur promptly upon an alien’s release from criminal custody, ICE would not lose its mandatory detention authority over the alien in the event of delay.

Given the circuit split over the issue, the Supreme Court [granted certiorari](#) to the government’s appeal of the Ninth Circuit’s decision in *Preap* (the Court also consolidated for review an unpublished Ninth Circuit [decision](#) affirming a separate federal district court order requiring the government to provide bond hearings to aliens who were not detained immediately upon their release from criminal custody).

## The Supreme Court’s Decision

In a 5-4 [decision](#), the Supreme Court reversed the Ninth Circuit’s decision, with Justice Alito writing for the majority (joined in full by Chief Justice Roberts and Justice Kavanaugh, and joined in part by Justices Thomas and Gorsuch).

On the [merits](#) of the case, the Court rejected the plaintiffs’ argument that they are not aliens “described in” INA § 236(c)(1)—and thus not subject to mandatory detention—because ICE did not immediately arrest them after their release from criminal custody. Starting with the plain text, the Court [observed](#) that INA §

236(c)(2)'s mandate against release applies to “an alien described in paragraph (1)” of that statute, and that INA § 236(c)(1), in turn, describes aliens who have committed one of the crimes enumerated in four subparagraphs. And even though INA § 236(c)(1) instructs that such aliens be taken into custody “when the alien is released,” the phrase “when . . . released” does not *describe* the alien and plays “no role,” in Justice Alito’s words, “in identifying for the [DHS] Secretary *which* aliens she must immediately arrest” (emphasis in original). Accordingly, the Court [held](#) that the scope of aliens subject to mandatory detention under INA § 236(c) “is fixed by the predicate offenses identified” in INA § 236(c)(1), regardless of when the alien was released from criminal custody.

In addition, the Court [determined](#) that the Ninth Circuit wrongly concluded that INA § 236 subsections (a) and (c) “establish[] separate sources of arrest and release authority,” such that “criminal aliens must have been arrested under subsection (c)” to be subject to mandatory detention, and “since subsection (c) authorizes only immediate arrest . . . those arrested later fall under subsection (a), not (c).” Instead, the Court [opined](#) that all of ICE’s arrest authority “springs from” subsection (a), and that subsection (c) simply “cut[s] back” ICE’s discretion under subsection (a) to release criminal aliens from its custody.

Justice Alito (joined for this portion of the opinion by Chief Justice Roberts and Justice Kavanaugh) also [opined](#) that, even if INA § 236(c) requires an alien to be detained immediately upon release from criminal custody, ICE’s failure to act promptly would not bar the agency from detaining the alien without bond. The Court relied, in part, on its ruling in *United States v. Montalvo-Murillo*, which held that the failure to provide a criminal defendant a prompt bond hearing as required by federal statute did not mandate the defendant’s release from custody. The *Preap* Court [recognized](#) the principle that if a statute fails to specify a penalty for the government’s noncompliance with a statutory deadline, the courts generally will not “impose their own coercive sanction.” In short, the Court [declared](#), “it is hard to believe that Congress made [ICE’s] mandatory detention authority vanish at the stroke of midnight after an alien’s release” from criminal custody.

Accordingly, the Court [reversed](#) the Ninth Circuit’s decision, but [noted](#) that its ruling on the proper interpretation of INA § 236(c) “does not foreclose as-applied challenges—that is, constitutional challenges to applications of the statute as we have now read it.”

Justice Kavanaugh authored a [concurring opinion](#) in which he joined the majority’s opinion in full, but emphasized the narrow scope of the Court’s holding. He elaborated that the case did not raise questions, for instance, about whether an alien may be detained—potentially indefinitely—during removal proceedings or whether such detention may be mandatory rather than discretionary.

In a [separate concurrence](#), Justice Thomas (joined by Justice Gorsuch) disagreed with the threshold jurisdictional conclusions rendered in Justice Alito’s controlling opinion. Justice Thomas argued instead that the INA barred judicial review of claims challenging the detention of aliens during removal proceedings, and that plaintiffs’ detention challenge became moot upon their receiving bond hearings or relief from removal. On the merits, Justice Thomas agreed that INA § 236(c) does not require detention immediately upon an alien’s release from criminal custody. Justice Thomas, however, did not join Justice Alito’s determination that, even if the statute requires immediate detention, ICE would not lose its mandatory detention authority in the event of delay.

In a [dissenting opinion](#), Justice Breyer (joined by Justices Ginsburg, Sotomayor, and Kagan) addressed the merits of the plaintiffs’ detention challenge without considering any threshold jurisdictional issues. Justice Breyer argued that INA § 236(c)’s text and structure revealed that the statute’s mandatory detention scheme applied only to aliens who are detained by ICE “when . . . released” from criminal custody. Contrary to the majority, Justice Breyer [argued](#) that the words “take into custody . . . when the alien is released” found in INA § 236(c)(1) also “describe” an alien subject to mandatory detention. Further, Justice Breyer [argued](#), construing INA § 236(c) to require the detention of aliens without bond, even if they “have long since paid their debt to society,” would “create serious constitutional problems.”

(The majority opinion had [declined](#) to construe INA § 236(c) to avoid these constitutional concerns because, in the majority’s view, the statute unambiguously required detention regardless of when the alien was released from criminal custody.) Unlike the Ninth Circuit, however, Justice Breyer would have [interpreted](#) “when the alien is released” as requiring an alien’s detention to occur no more than six months after release from criminal custody.

## Impact of the Court’s Decision

The Supreme Court’s decision in *Preap* is the latest to examine the scope of the federal government’s authority to detain aliens without bond pending their removal proceedings. In its 2003 decision in *Demore v. Kim*, the Court [held](#) that mandatory detention under INA § 236(c) is “constitutionally permissible” because it “serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings.” And in 2018, the Court [ruled in](#) *Jennings v. Rodriguez* that the government is authorized under INA § 236(c) to detain such aliens potentially indefinitely pending their removal proceedings. (The *Jennings* Court did not decide whether such prolonged detention is constitutional). In *Preap*, the Court has now read INA § 236(c) as mandating the detention of covered aliens regardless of whether they are taken into ICE custody immediately or long after their release from criminal incarceration.

The Supreme Court’s decision has significant implications for aliens who may be subject to removal on the basis of one of the criminal grounds enumerated within INA § 236(c). Under the Court’s ruling, any alien who commits a specified criminal offense (which may range from murder to a comparatively [minor drug](#) offense) may be detained without bond pending removal proceedings, even if the alien had been released from criminal custody years or decades earlier, and, further, has since established family or community ties. In his dissenting opinion in *Preap*, Justice Breyer contends that Congress never intended to give the government such broad detention authority, “especially when doing so would run contrary to basic American and common-law traditions[.]” The government, however, [had argued](#) that broadly interpreting INA § 236(c) “[a]dvances Congress’s purpose of preventing flight and recidivism by criminal aliens.”

Despite the Court’s *statutory* construction of INA § 236(c), its ruling [does not foreclose](#) aliens from raising constitutional challenges to the statute’s application in individual cases. Moreover, aliens detained under INA § 236(c) have the same [rights and protections](#) generally available to aliens in formal removal proceedings, including the right to apply for relief from removal (though some crimes giving rise to mandatory detention [may foreclose](#) many types of relief). As Justice Breyer [noted](#), for example, many long-term residents taken into immigration authorities’ custody may be eligible for [cancellation of removal](#). Finally, to the extent there are concerns that the Court’s decision “would [significantly expand](#) [DHS’s] authority to deny bail hearings,” Congress has the power to amend INA § 236(c) and clarify whether the agency’s mandatory detention authority should be limited to aliens detained immediately—or within a reasonable period—after their release from criminal custody.