PRACTICE ADVISORY
Constitutional Challenges to Mandatory Immigration Detention After *Nielsen v. Preap*
July 2019

In *Nielsen v. Preap*, 139 S. Ct. 954 (2019), the Supreme Court held that the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1226(c), imposes mandatory detention on a noncitizen subject to a criminal ground of removal—*regardless* of when U.S. Immigration and Customs Enforcement ("ICE") takes him or her into custody. Thus, the statute authorizes ICE to impose mandatory detention *any time after* an individual's predicate criminal offense—even if that person committed that offense years or decades in the past, and has long since returned to the community and rehabilitated themselves.

Critically, however, *Preap* reserved the question of whether *the Constitution* prohibits mandatory detention based on temporally distant offenses. *See Preap*, 139 S. Ct. at 972. Thus, an individual may still pursue as-applied due process challenges to mandatory detention based solely on past offenses through an individual habeas petition in federal district court. In many cases, there are strong arguments that such mandatory detention violates the Due Process Clause.

This practice advisory briefly discusses such due process challenges. To request technical assistance on these issues, please contact Michael Tan of the ACLU Immigrants' Rights Project at mtan@aclu.org.[1]

What did the Supreme Court hold in Preap*?*

In *Preap*, the Supreme Court addressed whether the "when released" language of the mandatory detention statute, 8 U.S.C. § 1226(c), limits the class of noncitizens subject to mandatory detention pending removal proceedings. As the Court explained, Section 1226(c)(1) directs the Secretary of Homeland Security to arrest an individual who is deportable based on a predicate crime "when the alien is released" from criminal custody. 8 U.S.C. § 1226(c)(1). Section 1226(c)(2) in turn forbids the Secretary from releasing any "alien described in paragraph (1)" until the conclusion of his or her removal proceedings, except for purposes of the federal witness protection program. 8 U.S.C. § 1226(c)(2). *See also Preap*, 139 S. Ct. at 959-60.

In the decision below, the Ninth Circuit had held that the "when released" language of Section 1226(c)(1) was part of the description of who is subject to the prohibition on release in Section

[1] This advisory is not a substitute for independent legal advice by a lawyer who is familiar with an individual's case.

1226(c)(2). *Preap v. Johnson*, 831 F.3d 1193, 1200-03 (9th Cir. 2016). Thus, the Ninth Circuit held that an individual whom the Secretary did not detain with a "reasonable degree of immediacy" after their release from criminal custody was not subject to the mandatory detention statute. *Id*. at 1207. Instead, that individual's detention was authorized by the default immigration detention statute, 8 U.S.C. § 1226(a), and he or she was entitled to a bond hearing. *Id*. at 1198-99, 1201, 1207.

In a 5-4 decision, the Supreme Court rejected this interpretation of the statute. The Court held that the plain language of Section 1226(c)(1) provides that only "the adjectival clauses that appear in subparagraphs [1](A)-(D)", which refer to criminal grounds of removability—and not the "when released" language—"describe" the individuals who are subject to the mandatory detention statute. *Preap*, 139 S. Ct. at 965. Thus, an individual who is "deportable" or "inadmissible" for a predicate criminal offense is subject to mandatory detention regardless of "when" the Secretary arrests him or her after release from criminal custody. *See id*. Critically, the Court reserved the question of whether mandatory detention might violate the Constitution when based on temporally distant offenses. *Id*. at 972.

Four Justices dissented. In his dissent, Justice Breyer noted that the majority's construction of the statute raised serious constitutional problems because it "[gave] Secretary authority to arrest and detain aliens years after they have committed a minor crime and then hold them without a bail hearing for months or years." *Id.* at 982 (Breyer, J., dissenting); *see also id*. (explaining that "[i]t is especially anomalous to take [a bond hearing] away from an alien who committed a crime many years before and has since reformed, living productively in a community.").

What is the impact of **Preap***?*

Prior to *Preap*, the Board of Immigration Appeals[2] and the Second, Third, Fourth, and Tenth Circuits[3] had held that the mandatory detention statute applied to individuals regardless of "when" the government took them into custody. Thus, *Preap* preserved the status quo in those jurisdictions.

However, *Preap* eliminated the statutory right to a bond hearing for individuals in jurisdictions that had construed the statute to impose mandatory detention only on those individuals whom the government detains at the time of their release from relevant criminal custody: i.e., the Ninth Circuit and the District of Massachusetts.[4] *Preap* also forecloses this line of argument in circuits that had not yet reached the issue.

What constitutional challenges remain available after **Preap***?*

In many cases, there will be strong as-applied due process challenges to the mandatory detention statute as construed by *Preap*. This will be especially true where ICE has subjected a person to

[2] *Matter of Rojas*, 23 I. & N. Dec. 117 (BIA 2001).
[3] *See Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015); *Sylvain v. Attorney General*, 714 F.3d 150 (3d Cir. 2013); *Hosh v. Lucero*, 680 F.3d 375 (4th Cir. 2012); *Olmos v. Holder*, 780 F.3d 1313 (10th Cir. 2015).
[4] *See Preap v. Johnson*, 831 F.3d 1193 (9th Cir. 2016); *Castaneda v. Souza*, 810 F.3d 15 (1st Cir. 2015) (Barron, J., writing for an evenly divided en banc court).

mandatory detention based on a criminal offense they committed in the distant past—years or even decades ago—and the person has long since rehabilitated themselves.

The Supreme Court has explained that "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Due process requires that immigration detention "'bear[] a reasonable relation to the purpose for which the individual was committed.'" *Demore v. Kim*, 538 U.S. 510, 527 (2003) (quoting *Zadvydas*, 533 U.S. at 690). Specifically, immigration detention must be reasonably related to the government's goals of preventing flight and protecting the community from harm, and be accompanied by adequate procedural protections to ensure that those goals are being served. *See Zadvydas*, 533 U.S. at 690-91.

Section 1226(c) is an exception to the general due process principle that civil detention requires an individualized showing of flight risk or danger at a fair hearing. The Supreme Court's cases establish that civil detention must not be punitive or arbitrary, and generally must rest on an individualized determination of the necessity for detention accompanied by fair procedural safeguards.[5]

In the key instance where the Supreme Court has approved detention without an individualized hearing, *Demore v. Kim*, 538 U.S. 510 (2003), the Court upheld Section 1226(c) in a facial challenge to the statute, in a case where the noncitizen was detained within a day of his release. *See id*. at 513-14; *see also* Brief for Petitioner at 4, *Demore v. Kim*, 538 U.S. 510 (2003) (No. 01-1491), 2002 WL 31016560. As such, the Court did not address the constitutionality of mandatory detention based solely on convictions in the distant past. *See Preap*, 139 S. Ct. at 972 (permitting as-applied due process challenges in these circumstances).[6]

Where an individual has lived peaceably in the community for years, and may well have strong family ties and a high likelihood of prevailing in her removal hearing, mandatory detention is no longer adequately linked to the government's interest in preventing flight risk and danger. Indeed,

> it is counter-intuitive to say that aliens with potentially longstanding community ties are, as a class, poor bail risks . . . . By any logic, it stands to reason that the

[5] For example, in the criminal pretrial setting, the Court has upheld the denial of bail only where Congress provided stringent procedural safeguards, including a requirement that the government demonstrate probable cause to believe the detainee has committed the charged crime and "a full-blown adversary hearing" on dangerousness, at which the government bears the burden of proof by clear and convincing evidence. *United States v. Salerno*, 481 U.S. 739, 750 (1987). The Court has similarly upheld preventive detention pending a juvenile delinquency determination only where the government proves a risk of future dangerousness in a fair adversarial hearing with notice and counsel. *Schall v. Martin*, 467 U.S. 253, 277, 280-81 (1984). Civil commitment is constitutional only when there are "proper procedures and evidentiary standards," including individualized findings of dangerousness. *Kansas v. Hendricks*, 521 U.S. 346, 357-58 (1997); *see also Foucha v. Louisiana*, 504 U.S. 71, 79 (1992) (noting individual's entitlement to "constitutionally adequate procedures to establish the grounds for his confinement").

[6] The Court in *Demore* also emphasized that the mandatory detention regime is "narrow" and closely linked to the purpose of effectuating removal and protecting public safety, pointing to the expected brevity of the detention and the individual's concession of deportability for an enumerated crime. *See Demore*, 538 U.S. at 513-14, 526, 528, 529 n.12.

> 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.

Saysana v. Gillen, 590 F.3d 7, 17-18 (1st Cir. 2009). *See also Castañeda v. Souza*, 769 F.3d 32, 43 (1st Cir. 2014), *reh'g en banc granted, opinion withdrawn* (Jan 23, 2015) (concluding that any "presumption of dangerousness and flight risk is eroded by the years in which [an] alien lived peaceably in the community.").

Moreover, the passage of time after the individual is released from criminal custody also affects her chances of prevailing on the merits of her removal case. Individuals who have been living in the community may have increased their eligibility for relief from deportation, such as cancellation of removal, by strengthening their ties to the community, and so have less incentive to flee. *See* 8 U.S.C. § 1229b(a)-(b). With the passage of time, the justification for applying an irrebuttable categorical presumption of mandatory detention thus erodes in two respects: the presumption that the individual will flee does not hold, and the likelihood that removal will actually occur diminishes.

Accordingly, prior to *Preap*, district courts held mandatory detention unconstitutional where an individual has long since rehabilitated himself and reintegrated into the community after release from criminal custody. *See, e.g.*, *Araujo-Cortes v. Shanahan*, 35 F. Supp. 3d 533, 549-50 (S.D.N.Y 2014) (holding mandatory detention unconstitutional where nearly 5 years passed between criminal and immigration custody); *Martinez-Done v. McConnell*, 56 F. Supp. 3d 535, 547-48 (S.D.N.Y. 2014) (same, where the individual had been released from criminal custody nearly 10 years ago). *See also Rodriguez v. Shanahan*, 84 F. Supp. 3d 251, 264-66 (S.D.N.Y. 2015) (finding that mandatory detention of a petitioner released from criminal custody 7 years ago raised serious due process concerns); *Monestime v. Reilly*, 704 F. Supp. 2d 453, 458 (S.D.N.Y. 2010) (same, for person detained 8 years after his offense); *Figueroa v. Aviles*, No. 14 Civ. 9360, 2015 U.S. Dist. LEXIS 13424, at *10-11 (S.D.N.Y. Jan. 29, 2015) (same, for person detained 5 years after his offense); *Espinoza v. Aitken*, No. 5:13-cv-00512 EJD, 2013 U.S. Dist. LEXIS 34919, at * (N.D. Cal. Mar. 13, 2013) (same, for person detained 11 years after his criminal arrest and 6 months after criminal conviction); *Nabi v. Terry*, 934 F. Supp. 2d 1245, 1248 (D.N.M. 2012) (mandatory detention despite no immediate detention raises serious constitutional problems).

What if my client was released on a bond issued pursuant to a court decision that has been abrogated by* Preap*?

The government has stipulated as follows with respect individuals released as a result of a *Preap* bond hearing:

> Defendants will not re-detain those who were released as a result of *Preap* bond hearings during the pendency of their removal proceedings absent individualized circumstances, such as a violation of terms of release, commission of another crime, or if the individual is collaterally encountered by Immigration and Customs Enforcement in its enforcement operations.

Preap v. McAleenan, No. 13-CV-05754-YGR (N.D. Cal. June 4, 2019) (order of dismissal) (ECF No. 102) (attached).

In addition, there are arguments that individuals cannot be re-detained under *Preap* absent a hearing in district court on whether their imprisonment would be lawful. If you or your client is re-detained under these circumstances, please contact Michael Tan of the ACLU Immigrants' Rights Project at mtan@aclu.org.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MONY PREAP, et al., Plaintiffs-Petitioners, v. KEVIN K. MCALEENAN, Acting Secretary, Department of Homeland Security; et al., Defendants-Respondents.	**CASE NO. 13-CV-05754-YGR** **~~[Proposed]~~ ORDER OF DISMISSAL**

PURSUANT TO STIPULATION (ECF No. 101), the Court orders as follows:

1. The June 7, 2019, compliance hearing (ECF No. 100) is VACATED.
2. In accordance with Federal Rule of Civil Procedure 41(a)(1)(ii), this case is DISMISSED. Plaintiffs' First Cause of Action is dismissed with prejudice, and Plaintiffs' Second Cause of Action is dismissed without prejudice.
3. Defendants will not re-detain those who were released as a result of *Preap* bond hearings during the pendency of their removal proceedings absent individualized circumstances, such as a violation of terms of release, commission of another crime, or if the individual is collaterally encountered by Immigration and Customs Enforcement in its enforcement operations.

4. Each party shall bear its own costs, fees, and expenses.

IT IS SO ORDERED.

Dated: June 4, 2019

YVONNE GONZALEZ ROGERS
United States District Judge