DEFINITELY INDEFINITE: POLICY IMPLICATIONS OF THE SUPREME COURT'S RULING ON IMMIGRATION ARRESTS UNDER 8 U.S.C. § 1226(C)

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INTRODUCTION

Mony Preap was born in a refugee camp after his family fled Cambodia.[1] In 1981, he entered the United States as an infant and became a lawful permanent resident.[2] In 2006, Preap was convicted of

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[1] *See* Preap v. Johnson, 831 F.3d 1193, 1197 (9th Cir. 2016).

[2] *See id.*

two misdemeanor counts of marijuana possession, served his sentence, and was released.[3] In 2013, seven years after being released from criminal custody for the misdemeanor convictions, U.S. Immigration and Customs Enforcement (ICE) officers arrested Preap and charged him with being removable[4] due to his misdemeanor convictions.[5] Preap was initially held in immigration detention without bond and was found removable as charged, though an immigration judge granted him a Cancellation of Removal.[6]

Eduardo Vega Padilla entered the United States from Mexico as an infant in 1966 and became a lawful permanent resident.[7] In 1997, Padilla was convicted of misdemeanor possession of methamphetamine and sentenced to thirty days in prison.[8] In 2000, Padilla was convicted of felony possession of methamphetamine and sentenced to 180 days.[9] During his criminal confinement, police officers discovered a firearm in a shed behind his home, and he was additionally charged and convicted of felony possession of a firearm and sentenced to another 180 days.[10] In 2002, Padilla was released from criminal custody.[11] Eleven years later, in 2013, ICE charged Padilla with being removable based on his controlled substance and

[3] *See* Nielsen v. Preap, 139 S. Ct. 954, 961 (2019); Preap v. Johnson, 303 F.R.D. 566, 572 (N.D. Cal. 2014).

[4] "Being removable," or "being deportable," is legal terminology referring to a removability charge under Title 8 of the U.S. Code. *See, e.g.,* Arizona v. United States, 567 U.S. 387, 407 (2012) ("When an alien is suspected of being removable, a federal official issues an administrative document called a 'Notice to Appear.'"); Tijani v. Willis, 430 F.3d 1241, 1250 (9th Cir. 2005) ("He was specifically charged with being removable under 8 U.S.C. § 1227(a)(2)(A)(ii), based on his status as an alien convicted of two crimes involving moral turpitude, and under 8 U.S.C. § 1227(a)(2)(A)(iii), based on his status as an alien convicted of an aggravated felony."); *Preap*, 303 F.R.D. at 572 ("On September 11, 2013, upon his release from the Sonoma County Detention Facility, ICE officers arrested and charged Preap with being removable as a result of his 2006 misdemeanor convictions for possession of marijuana.").

[5] *See Preap*, 303 F.R.D. at 572.

[6] *See id.*

[7] *See id.*

[8] *See id.*

[9] *See id.*

[10] *See id.*

[11] *See Preap*, 303 F.R.D. at 572.

firearm convictions. He surrendered to immigration detention without the opportunity for a bond hearing.[12] An immigration judge ordered Padilla removed. He appealed and was released on bond after six months.[13]

Juan Lozano Magdaleno entered the United States from Mexico as a teenager in 1974 and became a lawful, permanent resident.[14] He purchased storage units and sold the contents at his thrift store for a living.[15] In 2000, he was arrested for possession of a firearm (a rifle that officers found in a storage unit he had purchased). Police officers noticed the rifle when they visited his thrift store on an unrelated matter.[16] Magdaleno was convicted of felony possession of a firearm and sentenced to 147 days of criminal confinement.[17] In 2007, Magdaleno was convicted of driving with a suspended license (originally suspended for driving under the influence, a misdemeanor) and possession of a controlled substance (methamphetamine), a felony.[18] He was sentenced to six months of criminal confinement and was released in 2008.[19] Five years later, in 2013, ICE officers arrested Magdaleno and charged him with being removable due to his 2000 and 2007 convictions.[20] An immigration judge ordered Magdaleno removed, and he appealed.[21] He was denied bond because he was considered a flight risk.[22]

These three defendants, who together filed a class action suit for habeas relief in the Northern District of California, have two common attributes: (1) their prior convictions qualified them for deportation under 8 U.S.C. § 1226(c), and (2) they were detained by

[12] *See id.*
[13] *See id.*
[14] *See id.* at 573.
[15] *See id.*
[16] *See id.*
[17] *See Preap,* 303 F.R.D. at 573.
[18] *See id.*
[19] *See id.*
[20] *See id.*
[21] *See id.*
[22] *See id.*

immigration enforcement years after they were released from criminal confinement.

Under 8 U.S.C. § 1226(c) (hereinafter referred to as "§ 1226(c)"), the U.S. government "shall take into custody any alien[23] [with certain criminal convictions] . . . *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."[24] The issue the defendants came across was what "when" means. Does "when" mean immediately upon release from criminal custody, or can the U.S. government detain aliens at any point thereafter? The Supreme Court addressed this statutory interpretation issue in the 2019 case, *Nielsen v. Preap*.[25] This Note explores the legal and policy implications of interpreting § 1226(c) to allow detention of aliens with certain qualifying criminal convictions at *any* time after such convictions.

Nielsen v. Preap is not an "easy case." It was a 5-4 split on the bench, with the plurality opinion written by Justice Alito and joined by Justices Roberts and Kavanaugh.[26] Justice Kavanaugh delivered one concurrence, joined in part by Justice Thomas; Justice Thomas delivered another concurrence, joined by Justice Gorsuch; and Justice Breyer delivered the dissent, joined by Justices Ginsburg, Sotomayor, and Kagan.[27] The Court's opinion, however, is consistent with immigration law and policy as addressed by the courts and Congress. This Note will explore some of the policy grounds raised in the various opinions and explain how the *Nielsen* holding translates into immigration law and policy moving forward.

First, this Note addresses the legal implications of the Court's interpretation of § 1226(c). Precedent reveals that the Court has not been lenient with defendants' release (or, in this case, continued presence) in the community, consistent with the legislative rationale

[23] "Alien" is the legal term of art found in statutory language and will be used for purposes of consistency in this article.
[24] 8 U.S.C. § 1226(c) (emphasis added).
[25] *See Nielsen*, 139 S. Ct. at 961.
[26] *See id.* at 958.
[27] *See id.* at 972-73, 976.

that such leniency would penalize the government and citizens by exposing them to potentially dangerous defendants.[28] Additionally, the Court "do[es] not readily infer congressional intent to limit an agency's power to [execute legally-mandated tasks] merely from [legislative] specification to act by a certain time."[29] Finally, this Note evaluates the friction between a temporal restriction on immigrant detention under § 1226(c) and the general practice of mandatory detention without bond for qualifying dangerous defendants who pose risks of committing more crime or failing to appear for hearings.[30]

Second, this Note addresses *Nielsen's* place in immigration procedure. The Court in *Nielsen* defers to Congress, which has plenary power to regulate immigration procedure in the United States.[31] One practical consideration is the federal-state-local disconnect in immigration and criminal procedure. For example, state and local officials do not always comply with federal requests for notification when officials release aliens from criminal detention.[32] Another consideration in immigration procedure is length of detention. While excessive or unnecessary detention is a valid concern post-*Nielsen*, the government maintains safeguards to prevent this issue.[33] Ultimately, the Court's holding in *Nielsen* is consistent with effective immigration procedure.

This Note also addresses the clear policy justifications in the Court's holding. The Court's interpretation of § 1226(c) favors the national security objective of restricting dangerous criminals and potential terrorists. Also, mandatory detention under § 1226(c) without a time restriction diminishes the chance of flight pending

[28] *See id.* at 967.
[29] Barnhart v. Peabody Coal Co., 537 U.S 149, 160 (2003).
[30] *Nielsen*, 139 S. Ct. at 968.
[31] Jon Feere, *Plenary Power: Should Judges Control U.S. Immigration Policy?*, CTR. FOR IMMIGRATION STUDIES (Feb. 25, 2009), https://cis.org/sites/cis.org/files/articles/2009/back209.pdf ("Historically, the U.S. Supreme Court has taken a hands-off approach when asked to review the political branches' immigration decisions and policymaking.").
[32] *Nielsen*, 139 S. Ct. at 968.
[33] *Id.* at 978.

removal hearings. Altogether, the Court's decision in *Nielsen* is consistent with parallel legal and policy implications.

I. BACKGROUND

A. Mandatory Detention and 8 U.S.C. § 1226(c)

Congress enacted the first mandatory detention statute in the Anti-Drug Abuse Act of 1988 (ADAA), which established the commission of an "aggravated felony" as grounds for deportation.[34] The ADAA employed language similar to that later enacted in § 1226(c),[35] stating, "the Attorney General shall take into custody any alien convicted of an aggravated felony upon completion of the alien's sentence for such conviction."[36]

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).[37] By doing so, Congress replaced a provision in the Immigration and Nationality Act (INA) requiring automatic mandatory detention without bond for aliens convicted of "aggravated felony,"[38] with § 1226(c).[39] The IIRIRA provisions, including § 1226(c), were "designed to put certain targeted criminal aliens on a fast track for removal."[40] Under § 1226(c), the government is required to detain, without bond, deportable criminal aliens following release from criminal confinement, even if they were released on parole, supervised release, or probation.[41] Additionally, the government has the discretion to release an alien if he or she "satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for

[34] Jorge A. Solis, *Detained Without Relief*, 10 ALA. C.R. & C.L. L. REV. 357, 371 (2019).
[35] 8 U.S.C. § 1226(c)(1) ("The Attorney General shall take into custody any alien who . . .").
[36] Solis, *supra* note 34.
[37] Deborah F. Buckman, Annotation, *Validity, Construction, and Application of Mandatory Predeportation Detention Provision of Immigration and Nationality Act (8 U.S.C.A. § 1226(c)) As Amended*, 187 A.L.R. FED. 325 (2003).
[38] 8 U.S.C.A. § 1101(a)(43) (West) (defining "aggravated felony").
[39] Buckman, *supra* note 37.
[40] Kwon v. Comfort, 174 F. Supp. 2d 1141, 1143 (D. Colo. 2001).
[41] 8 U.S.C. § 1226(c).

any scheduled proceeding."[42] Essentially, § 1226(c) introduced the policy of requiring that criminal aliens with certain convictions be detained by immigration officials following release from prison. As a general matter, if the requirements in § 1226(c) were not met – i.e. if, under the Ninth Circuit's interpretation,[43] ICE failed to detain criminal aliens immediately upon release from criminal conviction – then § 1226(a), which allows the opportunity for bond, applies.[44]

Notably, Congress passed § 1226(c) amidst concern over excessive immigration litigation. In its 1995 report, "Criminal Aliens in the United States," by the Committee on Governmental Affairs, the Senate expressed the need for additional resources for detaining criminal aliens.[45] With an increased rate of incarceration since the passage of § 1226(c),[46] the policy of mandatory detention following release from prison remains a key component of the immigration law framework.[47]

B. Nielsen v. Preap

Nielsen v. Preap joins two Ninth Circuit cases: *Preap v. Johnson* and *Khoury v. Asher*. *Preap v. Johnson* originated as an immigration habeas corpus class action in the U.S. District Court for

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[42] *Id.*
[43] *Preap*, 831 F.3d at 1197.
[44] 8 U.S.C. § 1226(a).
[45] S. REP. NO. 104-48, at 32 (1995) ("Limited detention space is a fundamental problem confronting the INS and therefore it needs to increase capacity to keep pace with the increasing numbers of criminal aliens.").
[46] In 1995, before passage of § 1226(c), the DOJ estimated that there were about 53,000 criminal aliens in federal and state prisons. *Id.* at 1. In its second quarter report for fiscal year 2018, the DOJ estimated 59,945 criminal aliens in DOJ custody. U.S. DEP'T OF HOMELAND SEC., U.S. DEP'T OF JUSTICE, ALIEN INCARCERATION REPORT FISCAL YEAR 2018, QUARTER 2 (2019). The DOJ noted, however, that this topic lacks comprehensive data because state and local facilities account for about 90 percent of the total U.S. incarcerated populations. *See id.*
[47] *See, e.g.,* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (broadening range of aggravated felonies and applying statute retroactively where anyone convicted of a crime not considered an aggravated felony at the time of conviction could then be subject to mandatory detention); Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (excluding lawful permanent residents from mandatory detention).

the Northern District of California.[48] There, the court held that § 1226(c) unambiguously required individuals to be detained *immediately* upon release from criminal custody for the § 1226(c) mandatory detention provision to apply.[49] In holding as such, the court granted the plaintiffs' motion for class certification, including all individuals in California subjected to mandatory detention under § 1226(c) and not taken into custody immediately upon release from criminal custody.[50] The Ninth Circuit affirmed.[51]

Khoury v. Asher originated in the U.S. District Court for the Western District of Washington.[52] Similarly, the court held that the government could not subject aliens to mandatory detention under § 1226(c) unless taken into immigration custody immediately upon release from criminal custody.[53] The court granted the plaintiffs' motion for class certification.[54] The Ninth Circuit affirmed on the same day as its *Preap v. Johnson* decision.[55]

The Ninth Circuit in *Preap v. Johnson* contended that as a textual matter, "when . . . released" unambiguously conveys immediacy (immigrants released following criminal convictions may only be detained by ICE immediately following their release).[56] The Ninth Circuit additionally argued this "immediacy" assessment reflected Congress's ostensible policy purpose: addressing the flight risk of dangerous criminal aliens. [57] In other words, Congress purportedly could not have intended to authorize indefinite detention of criminal aliens. The court concluded the plain meaning of "when . . . released" suggests that the government must detain criminal aliens with a "reasonable degree of immediacy."[58] Therefore, according to the Ninth Circuit's interpretation, if criminal aliens are not

[48] *Preap*, 303 F.3d.
[49] *See id.* at 571.
[50] *Id.* at 587.
[51] *Preap*, 831 F.3d at 1207.
[52] Khoury v. Asher, 3 F. Supp. 3d 877, 892 (W.D. Wash. 2014).
[53] *Id.* at 883.
[54] *Id.* at 892.
[55] *See* Khoury v. Asher, 667 Fed. Appx. 966, 967 (9th Cir. 2016).
[56] *Preap*, 831 F.3d at 1197.
[57] *Id.* at 1204-05.
[58] *Id.* at 1207.

immediately detained "when . . . released," the government may detain them only if warranted under the more process-encumbered general detention provision of § 1226(a).[59] In affirming *Khoury v. Asher*, the Ninth Circuit summarized and reiterated its *Preap v. Johnson* argument.[60]

The Supreme Court granted certiorari to review the Ninth Circuit's ruling because it split from four other Courts of Appeals.[61] After addressing jurisdictional questions and conducting a statutory analysis, the plurality argued that the government does not lose its authority to arrest under § 1226(c), even given the failure to detain criminal aliens immediately upon release from criminal custody.[62] The plurality relied on *United States v. Montalvo-Murillo,* in which the Court similarly permitted agency deviation from statutory time strictures.[63] The *Nielsen* plurality specifically declined to "readily infer congressional intent to limit an agency's power to get a mandatory job done merely from a specification to act by a certain time."[64] By clarifying when the duty to arrest in immigration matters arises, the Court rejected the idea that its reading of § 1226(c) was too expansive. [65] It specified that immigration arrests under § 1226(c) must be conducted *upon* release from criminal custody rather than *before* release or *after* noncustodial portions of a criminal sentence such as parole, supervised release, or probation.[66] The Court also rejected the Ninth Circuit's interpretation of leniency toward the most extreme class of potentially dangerous aliens: representatives of terrorist groups and those whom the government has reasonable grounds to believe are likely to engage in terrorist activities.[67] Finally, the Court

[59] *Id.* at 1204 (requiring a bond hearing with an individualized assessment of risks).
[60] *Khoury*, 667 Fed. Appx. at 967.
[61] *See Nielsen*, 139 S. Ct. at 961 (2019).
[62] *See id.* at 967.
[63] *See* United States v. Montalvo-Murillo, 495 U.S. 711, 720 (1990) ("In these situations, there is no reason to bestow upon the defendant a windfall and to visit upon the Government and the citizens a severe penalty by mandating the release of possibly dangerous defendants every time some deviation from the strictures of § 314(f) occurs.").
[64] *Nielsen*, 139 S. Ct. at 967.
[65] *See id.* at 969.
[66] *See id.*
[67] *See id.* at 970.

struck down the respondents' constitutional avoidance argument, finding the statute textually unambiguous.[68]

In his dissent in *Nielsen,* Justice Breyer argued the "when . . . released" language in § 1226(c) acts as a statutory deadline against the government, especially given Congress's ostensible recognition of a lack of sufficient detention space and immigration personnel.[69] Justice Breyer supported the "within a reasonable time" limit for detention authority following a criminal alien's release from criminal custody – presumptively no more than six months.[70] Beyond this, Justice Breyer focused mainly on potential policy consequences of unnecessary or excessive detention and related constitutional concerns, such as deprivation of liberty without due process.[71]

C. Reactions to Nielsen

The *Nielsen* decision received nationwide attention toward the course of immigration policy. After arguing the case, American Civil Liberties Union (ACLU) Deputy Legal Director Cecillia Wang criticized the Supreme Court for endorsing "the most extreme interpretation of immigration detention statutes allowing mass incarceration of people without any hearing, simply because they are defending themselves against a deportation charge."[72] The ACLU characterized the government's interpretation and the Court's holding, as resulting in

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[68] *See id.* at 972.

[69] ICE must selectively prioritize the use of personnel, detention space, and removal resources because of its capacity to only remove "approximately 400,000 aliens per year, less than 4 percent of the estimated legal alien population in the United States. Memorandum from John Morton, Dir., U.S. Immigration and Customs Enforcement, to all ICE Employees, Policy No. 10072.1, FEA No. 601-14 (Mar. 2, 2011), http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf.

[70] *See Nielsen*, 139 S. Ct. at 984 (Breyer, J. dissenting).

[71] *See id.* at 982.

[72] Richard Wolf, *Divided Supreme Court Makes It Easier to Detain Noncitizens With Criminal Records*, USA TODAY (Mar. 19, 2019, 10:29 AM), https://www.usatoday.com/story/news/politics/2019/03/19/supreme-court-illegal-immigrants-criminal-records-deport-trump/2505543002/.

> people who have never reoffended, rebuilt their lives with their families, and become productive members of their communities [being] subject to mandatory imprisonment as their deportation case winds its way through the immigration court system, with no hearing to determine if they need to be locked up in the first place.[73]

On the other hand, Department of Justice spokeswoman, Kerri Kupec, said the administration was "pleased with the decision."[74]

The implications of the Court's holding in *Nielsen* are vast: aliens detained under § 1226(c) do not have the opportunity for bond, and the government has considerable discretion in making arrests under § 1226(c). Additionally, by failing to immediately detain deportable criminal aliens, the government does not afford windfall to potentially dangerous criminal aliens. This Note will address these implications under the scopes of law and policy.

II. *NIELSEN'S* PLACE IN THE LAW

A. Supreme Court Precedent on Immigration Detention

Nielsen follows Supreme Court precedent concerning government agency discretion, the timeframe for detaining criminal aliens, and mandatory detention. Reviewing a timeline of Supreme Court precedent on these topics illustrates how the Court reached its decision in *Nielsen.*

The Court has held that the failure of an agency to execute its duties in a timely manner does not foreclose the agency's power to exercise those duties. In *United States v. Montalvo-Murillo,* the Court held that the defendant, Montalvo-Murillo, was not entitled to release from pretrial custody just because his detention hearing was not held at the time directed under the Bail Reform Act of 1984.[75] The rationale is that dangerous defendants would be allowed back into society based

[73] *Nielsen v. Preap*, ACLU (Mar. 19, 2019), https://www.aclu.org/cases/nielsen-v-preap.
[74] Jessica Gresko, *Supreme Court Rules Against Immigrants In Detention Case*, ABC NEWS (Mar. 19, 2019, 1:21 PM), https://abcnews.go.com/Politics/wireStory/supreme-court-rules-immigrants-detention-case-61782366.
[75] *See Montalvo-Murillo*, 495 U.S. at 713.

centrally on the speed and efficiency (or lack thereof) of government action. As explained above, the *Nielsen* dissent argued for an immediacy requirement for mandatory detention.[76] If the government does not act immediately, the alien in question – released from criminal confinement – is no longer subject to mandatory detention under § 1226(c), but is instead eligible for bond under § 1226(a).[77] The dissent characterized this as a consequence of the government's failure to detain an alien immediately upon release,[78] though the community may incur the consequences.[79] In other words, the government should be held accountable for its administrative failures. The Court addressed this in *Montalvo-Murillo* and held that mere timeliness is no justification for preventing an agency from carrying out its responsibilities, especially where the inability to do so can adversely affect the community.[80] As Justice Alito explained in his opinion, "an official's crucial duties are better carried out later than never. Or more precisely, a statutory rule that officials 'shall' act within a specified time does not by itself preclude action later."[81]

The Court addressed a similar timeliness issue in *Zadvydas v. Davis*. *Zadvydas* involved 8 U.S.C. § 1231(a), which requires that "when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the 'removal period')."[82] Additionally, under § 1231(a)(1)(A), "[d]uring the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under [certain sections]."[83] Finally, § 1231(a)(6) states,

[76] See discussion *supra* Section I.B.
[77] *See Nielsen*, 139 S. Ct. at 983-84 (Breyer, J. dissenting).
[78] *See id.* at 983.
[79] *See* Sylvain v. Att'y Gen. of the U.S., 714 F.3d 150, 159 (3d Cir. 2013) ("[T]he mandatory-detention statute is intended to protect only the public – detention is mandatory, no matter the perceived flight risk, or danger.").
[80] *See Nielsen*, 139 S. Ct. at 967 (citing Barnhart v. Peabody Coal Co., 537 U.S. 149, 160 (2003)).
[81] *See id.* (first citing *Sylvain*, 714 F. 3d at 158; and then *Barnhart*, 537 U.S. at 158).
[82] 8 U.S.C. § 1231(a)(1)(A).
[83] 8 U.S.C. § 1231(a)(2).

> [a]n alien ordered removed [1] who is inadmissible . . . [2] [or] removable [as a result of violations of status requirements or entry conditions, violations of criminal law, or reasons of security or foreign policy] or [3] who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to [certain] terms of supervision . . . .[84]

The Court in *Zadvydas* read § 1231(a)(6) as containing an implicit "reasonable time" limitation, subject to federal court review.[85] Ultimately, according to the Court, "reasonable time" presumes a time period no longer than six months.[86] At first glance, one might expect the Court to place such a time limit on § 1226(c) as it did to § 1231(a)(6) in *Zadvydas*. The Court distinguishes these provisions, however, by plain language. After quoting *Zadvydas*'s rationale,[87] Justice Alito concluded in *Nielsen* that "the text of § 1226 cuts clearly against respondents' position." Section 1226(c), therefore, is indefinite in its time limit.

The Court continued its inquiry of detained immigrants' periodic rights in *Jennings v. Rodriguez*, decided one year before *Nielsen*. The Court refused to interpret § 1226(c) as giving detained aliens the right to periodic bond hearings during detention.[88] Justice Kavanaugh, in his *Nielsen* concurrence, noted that cases like *Jennings* and *Zadvydas* differ from *Nielsen* in that they address how long a non-citizen may be detained during or before removal proceedings, where *Nielsen* addresses the time limit imposed on the government in enforcing the mandatory detention provision.[89] However, like

[84] Zadvydas v. Davis, 533 U.S. 678, 682 (2001) (quoting 8 U.S.C. § 1231(a)(6) (1994 ed., Supp. V)).
[85] *See id.* at 701.
[86] *See id.*
[87] *See id.* at 696 (". . . if Congress has made its intent in the statute clear, we must give effect to that intent.").
[88] *See* Jennings v. Rodriguez, 138 S. Ct. 830, 847 (2018).
[89] *See Nielsen*, 139 S. Ct. at 972 (Kavanaugh, J. concurring) ("This case is also not about *how long* a noncitizen may be detained during removal proceedings or before removal. We have addressed that question in cases such as *Zadvydas v. Davis*, *Clark v. Martinez*, and *Jennings v. Rodriguez*.") (citations omitted).

Zadvydas, *Jennings* contributed to the Court's interpretations of time limits implicit in § 1226(c).

The Court has also addressed policy justifications for mandatory detention leading up to *Nielsen.* In *Demore v. Kim*, the Court considered the evidence before Congress – in enacting § 1226(c) – suggesting that many criminal aliens not detained pending removal proceedings continued engaging in crime.[90] Congress, consequently, required that permanent legal residents convicted of certain dangerous or violent crimes be detained.[91] The *Nielsen* holding considers the concerns weighed in *Demore*. The Court even confirmed that § 1226(c) specifically follows *Demore*,[92] and recognized that "Congress mandated that aliens who were thought to pose a heightened risk be arrested and detained without a chance to apply for release on bond or parole."[93] Therefore, mandatory detention without release on bond or parole under § 1226(c) conforms to the *Demore* framework in terms of both statutory interpretation and ratification of congressional intent.

The *Nielsen* holding reflects the Court's previous cases by noting that an agency's work is better carried out later than never. Additionally, in a series of cases, the Court has extrapolated time limits from § 1226(c). Finally, the Court has raised Congress's intent of addressing national security and flight risk implications (also to be addressed in *Nielsen*). These topics addressed in Supreme Court precedent collectively pave the way to the Court's opinions in *Nielsen*.

B. Immigration Procedure

The Court's holding in *Nielsen* is consistent with Congress's role in dictating immigration procedure, as illustrated in § 1226(c).

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[90] *See* Demore v. Kim, 538 U.S. 510, 513 (2003).
[91] *See id.*
[92] *See Nielsen*, 139 S. Ct. at 960 ("Section 1226(c) was enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, and it sprang from a 'concer[n] that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers.'") (quoting *Demore*, 538 U.S. at 513).
[93] *Id.*

First, given the distinction between immigration and civil detention, the Court's reading of § 1226(c) properly focuses on the statute's *immigration* function. Second, the Court's reading adequately addresses discrepancies among different levels of government in enforcing immigration detention procedures. Finally, concerns of over-detention are best resolved by further legislation from Congress, including preventative safeguards – not by judicial interference.

In understanding *Nielsen's* place in immigration procedure, it is important to distinguish between immigration detention and civil detention to prevent domestic criminal activity. Notably, the judiciary has historically allowed immigration detention because it serves the purpose of enforcing compliance with the immigration selection function of proceedings,[94] while "civil detention to prevent potential domestic criminal activity by itself has never been deemed a purpose that deserves judicial deference."[95] Immigration detention, then, is more broadly permissible than civil detention to prevent potential domestic criminal activity because it is "detention designed to prevent flight or protect the national security."[96]

Section 1226(c) is an immigration detention provision designed to prevent flight and protect national security. As Justice Alito noted in his *Nielsen* plurality opinion, "Congress enacted mandatory detention precisely out of concern that such individualized hearings could not be trusted to reveal which 'deportable criminal aliens who are not detained' might 'continue to engage in crime [or] fail to appear for their removal hearings.'"[97] Specifically, § 1226(c) covers "the very sort of aliens for which Congress was most likely to have wanted to require mandatory detention, including those who are representatives of a terrorist group and those whom the Government has reasonable grounds to believe are likely to engage in terrorist

[94] Immigration selection refers to Congress's plenary power over regulating who can enter or remain in the country. Frances M. Kreimer, *Dangerousness on the Loose: Constitutional Limits to Immigration Detention as Domestic Crime Control*, 87 N.Y. U. L. REV. 1485, 1501 (2012).
[95] *Id.* at 1505.
[96] *Id.*
[97] *Nielsen*, 139 S. Ct. at 968 (quoting *Demore*, 538 U.S. at 513).

activities."[98] Therefore, § 1226(c), as the Court reads it, serves the purpose of enforcing compliance with the immigration selection function of proceedings.

Another procedural justification for the Court's ruling is that a time limit on enforcing § 1226(c) would be impractical considering federal interactions with states and locales in detaining qualifying criminal aliens.[99] One notable problem with limiting the scope of § 1226(c) to only *immediate* detention upon an alien's release from criminal custody is local and state governments' failure to heed federal notification requests when a criminal alien is released from criminal detention.[100] This could not be solved by systematic reform: state and local governments are not required by law to notify federal authorities.[101] Additionally, federal databases of immigration violators are often inaccurate.[102] The Court's reading, however, avoids the scenario where the government does not find out about an alien's

[98] *Id.* at 970.

[99] Peter Margulies, *Deconstructing "Sanctuary Cities": The Legality of Federal Grant Conditions That Require State and Local Cooperation on Immigration Enforcement*, 75 WASH. & LEE L. REV. 1508, 1511 (2018) ("The realities of federal-sub-federal coordination with respect to immigration enforcement contrast sharply with the rhetoric from both sides. Certain sub-federal officials and entities have taken to trumpeting their separation from federal immigration enforcement, while federal officials including President Trump and Attorney General Sessions have deplored what they view as sub-federal resistance. In fact, virtually all sub-federal entities regularly cooperate with the federal government on immigration enforcement concerning serious crime, although the current polarized political climate hinders acknowledgement of this ground truth by either side.").

[100] *Nielsen*, 139 S. Ct. at 968 ("To give just one example, state and local officials sometimes rebuff the Government's request that they give notice when a criminal alien will be released. Indeed, over a span of less than three years (from January 2014 to September 2016), the Government recorded 'a total of 21,205 declined [requests] in 567 counties in 48 states including the District of Columbia.' ICE, Fiscal Year 2016 ICE Enf. And Removal Operations Rep. 9.").

[101] Margulies, *supra* note 99, at 1519 ("[A]ll sub-federal law enforcement entities provide substantial assistance to federal immigration officials. Resistant sub-federal entities provide this assistance, merely by virtue of the operation of ordinary law enforcement procedures. Other policies pursued by resistant entities may limit the impact of this assistance, but do not decrease the baseline cooperation built into law enforcement at all levels of government of the United States.").

[102] *See id.*

release from criminal detention until it is too late to enforce immigration detention.

One criticism the dissent offered for the plurality's reading is its tendency to allow excessive or unnecessary detention when certain aliens are detained after criminal confinement.[103] As Justice Breyer saw it, Congress did not give the government such broad discretion to hold, without bond, an alien who has established a responsible life even years after that individual was released from criminal confinement.[104] The plurality and concurrence had another take on what Congress likely could not have intended: for dangerous criminals and terrorists to enjoy windfall when the government does not act immediately.[105] Both views offer conflicting procedural justifications. However, the Court ultimately favored Congress's role in ensuring effective immigration procedure.

The Court's holding in *Nielsen* encompasses efficiency in the immigration procedure. This kind of immigration enforcement policy comports with Congress's purpose of employing practicable immigration procedures. Additionally, it addresses procedural problems such as federal-state-local harmony.

III. POLICY JUSTIFICATIONS FOR *NIELSEN*

A. National Security Objectives of Immigration Detention Policy

The courts have long recognized national security interests as a justification for immigration legislation. The early Supreme Court case *Chae Chan Ping v. United States*[106] traces the Court's historic

[103] *See Nielsen*, 139 S. Ct. at 978 (Breyer, J. dissenting).
[104] *See id.*
[105] *See id.* at 973 (Kavanaugh, J. concurring).
[106] Though good law, *Chae Chan Ping v. United States* has been compared to other unpopular Supreme Court cases. *See* Shawn E. Fields, *The Unreviewable Executive? National Security and the Limits of Plenary Power*, 84 TENN. L. REV. 731, 739 (2017) ("While the facts, circumstances surrounding, and ultimate holding of [*Chae Chan Ping*] are so noxious to the twenty-first century observer as to be commonly analogized to other 'anti-canon' cases like *Plessy v. Ferguson*, the Chinese Exclusion Case remains among the most important precedents for defining the foundations

deference to Congress's restrictive immigration legislation supporting national security interests. In that case, the Court upheld the Chinese Exclusion Act, which prohibited the immigration of Chinese laborers, to deny a Chinese laborer entry into the United States.[107] Regarding national security interests, the Court stated, "[t]o preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated."[108]

The Court should apply a highly deferential standard of review when it comes to national security policy implicit in immigration procedure.[109] Today, the Supreme Court typically defers to Congress and upholds immigration detention where it serves a specific policy purpose, such as protecting the community from violence or addressing national security interests like detaining potential terrorists.[110] Such judicial deference stems from explicit and implicit references to congressional power to regulate immigration.[111]

By refusing to read time limits into § 1226(c), the *Nielsen* court acted consistently with its historic deference to congressional regulation of national security interests implicit in immigration detention. The Senate Report from the Committee on Governmental Affairs expressed concern with certain criminal aliens being a "growing threat to the public safety."[112] To except aliens "who are able to evade ICE flies in the face of Congress's clear intent to take bond decisions out of the hands of [immigration judges]."[113] Accordingly, the Court noted that Congress did not want, for example, suspected

and scope of immigration plenary power. Perhaps more importantly, it has never been overturned.").

[107] The Chinese Exclusion Case, 130 U.S. 580, 597 (1889).

[108] *Id.* at 606.

[109] Fields, *supra* note 106, at 771.

[110] Kreimer, *supra* note 94, at 1499.

[111] *See id.*

[112] S. REP. NO. 104-48, at 8 (1995).

[113] Brief for Amicus Curiae Immigration Reform Law Institute in Support of Petitioners at 8, Nielsen v. Preap, 139 S. Ct. 954 (2019) (No. 16-1363).

terrorists to enjoy a windfall.[114] By refusing to set a time limit, the Court ratified Congress's intent.

Congressional action, of course, remains subject to constitutional strictures. Mandatory detention is constrained by the Constitution, even as an exercise of Congress's legislative power.[115] Government officials are not free to disregard the Constitution, even if their decisions are not subject to judicial review.[116]

> Congress's plenary power over immigration does not extend to all actions regulating noncitizen lives. Although the Court has recognized both enforcing compliance with immigration proceedings and protecting national security as exercises of Congress's immigration power, that deference cannot extend to detention that only serves the purpose of domestic crime control.[117]

Zadvydas established the parameters for detention based on purported dangerousness, noting that detention is "limited to specially dangerous individuals and subject to strong procedural protections."[118] Courts should continue to consider the national

[114] *Nielsen*, 139 S. Ct. at 970 ("[B]y the Court of Appeals' logic, Congress chose to spare terrorist aliens from the rigors of mandatory detention–a mercy withheld from almost all drug offenders and tax cheats. *That* result would be incongruous.") (citations omitted).

[115] Kreimer, *supra* note 94, n. 65 (citing *Zadvydas,* 533 U.S. at 695) (noting that Congress's "'plenary power' to create immigration law . . . is subject to important constitutional limitations"); Monestime v. Reilly, 704 F. Supp. 2d 453, 459 (S.D.N.Y. 2010) ("It is of no import that Monestime is detained under a 'mandatory' detention statute – what a statute requires of a federal official and what the Constitution demands are not always in harmony.")).

[116] Trump v. Hawaii, 138 S. Ct. 2392, 2424 (2018) (Kennedy, J., concurring) ("There are numerous instances in which the statements and actions of Government officials are not subject to judicial scrutiny or intervention. That does not mean those officials are free to disregard the Constitution and the rights it proclaims and protects. The oath that all officials take to adhere to the Constitution is not confined to those spheres in which the Judiciary can correct or even comment upon what those officials say or do. Indeed, the very fact that an official may have broad discretion, discretion free from judicial scrutiny, makes it all the more imperative for him or her to adhere to the Constitution and to its meaning and promise.").

[117] Kreimer, *supra* note 94, at 1499.

[118] *See id.* at 1517 (quoting *Zadvydas*, 533 U.S. at 691).

security implications of immigration statutory law as the legislature intends to regulate.

B. Flight Risk

Congress expressed concern with certain criminal aliens failing to appear for hearings before passing § 1226(c). The 1995 Report for the Committee on Governmental Affairs noted that, through 1992, 11,000 criminal aliens with aggravated felony convictions failed to appear for deportation hearings.[119] The Committee recommended that such felons be detained pending deportation hearings – a necessary step due to the "high rate of no-shows for those criminal aliens released on bond."[120] Additionally, recent data reveal the scope of the problem posed by flight risk. During fiscal year 2017,[121] forty-three percent of aliens free, pending trial, never came to court.[122] Additionally, since 1996, thirty-seven percent of aliens free, pending trial, disappeared.[123] American immigration courts have higher rates of failures to appear compared to other state and federal courts.[124]

Demore addressed and weighed flight risk (establishing a justification for § 1226(c)), noting that "Congress had before it evidence suggesting that permitting discretionary release of aliens pending their removal hearings would lead to large numbers of deportable criminal aliens skipping their hearings and remaining at large in the United States unlawfully."[125] In other words, if potentially

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[119] S. REP. NO. 104-48, at 2-3 (1995).
[120] S. REP. NO. 104-48, at 2-3 (1995) ("Undetained criminal aliens with deportation orders often abscond upon receiving a final notification from the INS that requires them to voluntarily report for removal . . . Too often, as one frustrated INS official told the Subcommittee staff, only the stupid and honest get deported.").
[121] This was the most up-to-date report available when this article was written.
[122] Mark H. Metcalf, *Skipping Court: U.S. Immigration Courts & Aliens Who Disappear Before Trial*, CENTER FOR IMMIGRATION STUDIES (Jan. 24, 2019), https://cis.org/Report/Immigration-Courts-Aliens-Disappear-Trial#2 (citing U.S. DEP'T OF JUSTICE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, STATISTICS YEARBOOK FISCAL YEAR 2017 (2018)).
[123] *Id.*
[124] *Id.*
[125] *Demore*, 538 U.S. at 528.

dangerous criminal aliens are not subject to mandatory detention before deportation proceedings, they are afforded more time and means to flee. This is particularly noteworthy considering the class of criminal aliens accounted for in § 1226(c). "[C]hances of relief in deportation proceedings may more greatly impact flight risk because an immigration respondent's stakes – permanent banishment – are arguably even higher."[126]

Flight risk works hand-in-hand with national security considerations because, should bond be extended to this class of criminal aliens, immigration judges risk permanently releasing dangerous people into communities. Congress accounted for this by mandating detention for classes of criminal aliens who may be more likely to flee, given the higher stakes in immigration proceedings.

IV. EFFECTS OF *NIELSEN*

Despite the law and policy justifications for *Nielsen*, there are foreseeable adverse consequences. One obvious observation is that with greater immigration detention flexibility, the United States will continue to struggle finding resources to house detained immigrants. According to the Executive Office for Immigration Review, Department of Justice, and Board of Immigration Appeals, immigration court statistics for fiscal year 2018[127] and fiscal year 2017 saw 652,006 pending immigration cases – consisting of removal, deportation, exclusion, asylum-only, and withholding-only cases – which is nearly three times more than the 186,079 pending cases in fiscal year 2008. [128] Allowing the government to impose mandatory detention on criminal aliens for an indefinite period after criminal detention, thus eliminating the possibility of bond for many, certainly will not help alleviate the population pressures of immigration detention centers. However, like the dissent's concern about over-

[126] Mark Noferi & Robert Koulish, *Immigration Detention Risk* Assessment, 29 GEO. IMMIGR. L. REV. 45, 79 (2015).
[127] This was the most up-to-date report available when this article was written.
[128] U.S. DEP'T OF JUSTICE OFFICE OF PUBLIC AFFAIRS, Q2 IMMIGRATION COURT STATISTICS FOR FISCAL YEAR 2018 (2019).

detention, the population pressures may better be alleviated with administrative rather than judicial attention.

Additionally, there remain concerns that allowing indefinite detention could hurt aliens with § 1226(c) convictions who have since rebuilt their lives and who have no chance of bond under the Court's holding. Preap himself, taken into custody seven years after conviction of a § 1226(c) offense, was a single father and a caretaker for his mother, who was in remission from cancer and suffered from seizures.[129] Padilla had five children, all U.S. citizens.[130] Prior to his detention, Magdeleno lived with his wife, two of his four children, his son-in-law, and one of his ten grandchildren, all U.S. citizens.[131] Without the opportunity for bond, people like the *Nielsen* defendants will inevitably struggle to make arrangements for those relying on them and settle aspects of the lives they have built since release following a criminal conviction. On the other hand, the notice function of the statute addresses this: by committing certain crimes, one subjects oneself to mandatory detention.

The *Nielsen* holding may impact policy and partisan political discourse surrounding immigration in the future. Ultimately, the decision affords the U.S. government more immigration enforcement flexibility. It accompanied government policies cracking down on immigration procedures at the time,[132] such as the Trump Administration's September 2017 travel ban.[133] Also, *Nielsen* transpired during the Democratic Party primaries for the 2020 presidential election. While *Nielsen* was not a hot topic among candidates, immigration law topics such as Deferred Action for Childhood Arrivals (DACA), decriminalization of illegal entry by immigrants, and the Trump Administration's promise to build a wall on the Southern border of the United States pervaded the agendas of

[129] *See Preap*, 303 F.R.D. at 571.
[130] *See id.* at 572.
[131] *See id.* at 573.
[132] *See* Rose Cuison Villazor & Kevin R. Johnson, *The Trump Administration and the War on Immigration Diversity*, 54 WAKE FOREST L. REV. 575, 585-94 (2019) (examining three Trump Administration policies "that seek to limit immigrants of color from coming to and/or remaining in the United States").
[133] Proclamation No. 9645, 82 Fed. Reg. 45161 (2017).

both political parties.[134] Topics like mandatory detention and strict criminal sanctions for aliens with § 1226(c) offenses can foreseeably surface in upcoming elections and future immigration reform plans.

CONCLUSION

The *Nielsen* decision aligns with Court precedent and general deference to immigration detention as legislated by Congress under its immigration regulation powers. The decision also comports with current immigration procedures for criminal aliens subject to § 1226(c) mandatory detention and other similar provisions. The Court's holding, although decided based on statutory interpretation, holds strong policy implications, including those related to national security and flight risk.

The politically charged topic of immigration detention and differing views on the government's role brings many different justifications to the table, as illustrated by the Court's response to the case. Nonetheless, the Court's decision in *Nielsen* fits with immigration law and policy as it stands.

[134] *Immigration*, POLITICO (Nov. 22, 2019), https://www.politico.com/2020-election/candidates-views-on-the-issues/immigration-reform/.