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The Ever-Expanding Mandatory Detention: Limitless Detention without a Right to Bond

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Summary

Thousands of individuals are detained each year pursuant to a series of immigration statutes requiring mandatory detention for certain categories of noncitizens. These include, among others, asylum seekers; noncitizens who have committed certain criminal offenses; and others already in the country, pending the outcome of their removal proceedings.

In 2018, Immigration and Customs Enforcement (“ICE”) had a total average daily detention population of over 42,000 people. Unlike individuals awaiting criminal trial in jail, seventy-one percent of immigration detainees are required by statute to be detained without any access to a bond hearing. The number of immigration detainees continues to rise due to increased enforcement efforts. As a result, there are huge backlogs in the immigration court system, resulting in prolonged detention periods while cases are pending for months or even years. The backlog of cases in immigration court has increased by almost fifty percent since January 2017. As of November 30, 2018, the number of pending cases exceeded 800,000. Detainees who contest their removability do so at a greatly increased risk of prolonged detention.

Noncitizens with certain criminal records are subject to mandatory immigration detention under Immigration and Nationality Act (“INA”) § 236(c), 8 USC § 1226(c). Individuals that are subject to mandatory detention do not have a right to a bond hearing. They may remain detained for weeks, months, or years during the pendency of their entire immigration case. The recent U.S. Supreme Court decisions in *Jennings v. Rodriguez* and *Preap v. Johnson* have significantly increased the number of individuals subject to mandatory detention.

Previously *Rodriguez v. Robbins*, 804 F.3d 1060, 1074-77 (9th Cir. 2015) provided that everyone in the Ninth Circuit, including those individuals subject to mandatory detention, were entitled to a bond hearing after sixth months in ICE custody. On February 27, 2018, the U.S. Supreme Court reversed *Rodriguez* and held that the mandatory detention statute does not provide the right to periodic bond hearings. *Jennings v. Rodriguez*, 138 S.Ct. 830 (2018).

Until recently in the Ninth Circuit, individuals were only subject to mandatory detention if ICE took them into custody directly from criminal custody that was imposed based on an offense that triggered mandatory detention. If there was a gap of time between release from jail and ICE arrest, mandatory detention did not apply, no matter what the conviction was. *Preap v Johnson*, 831 F.3d 1193 (9th Cir. 2016). On March 19, 2019, the U.S. Supreme Court held that the mandatory detention provision of the INA still applies to defendants even if they are not detained immediately after being released from criminal custody. *Nielsen v. Preap*, 586 U.S. __ (2019).

Jennings v. Rodriguez
138 S.Ct. 830 (2018)

Alejandro Rodriguez is a Mexican citizen who came to the United States as an infant. He had been a lawful permanent resident of the United States for almost twenty years when he was detained by ICE in 2004 after being convicted for possession of a controlled substance in 2003 and “joyriding” in a stolen vehicle in 1998. An immigration judge issued a final order of removal in July 2004. Rodriguez remained in detention for the next three years without a bond hearing, as he appealed the order, first to the Board of Immigration Appeals (BIA), and then to the Ninth Circuit.

While litigating his removability in the Ninth Circuit, Rodriguez filed a habeas petition in the Central District of California seeking a bond hearing on whether his continued detention was justified. The case was consolidated and certified as a class of noncitizens who had been detained for longer than six months pending removal proceedings without a bond hearing (not being held under a national security statute). The District Court granted summary judgment in favor of the detained class members and entered a permanent injunction requiring bond hearings for noncitizens after six months of detention. With respect to three out of four classes, the Ninth Circuit affirmed, reasoning that indefinite civil detention without individualized hearings raised due process concerns outside of a few extreme circumstances. The Supreme Court granted certiorari and reversed and remanded. The Supreme Court held that §§ 1225(b), 1226(a), and 1226(c) do not confer an automatic statutory right to periodic bond hearings, and that the Ninth Circuit misapplied the constitutional avoidance canon in finding otherwise.

For the time being, this means that individuals in ICE custody who are subject to mandatory detention will not have access to bond hearings except for limited exceptions such as removal cases on appeal at the Ninth Circuit (*Casas-Castrillon v. Dep’t of Homeland Security*, 535 F.3d 942 (9th Cir. 2008)) and individuals in “withholding-only” proceedings (*Diouf v. Napolitano (Diouf II)*, 634 F.3d 1081 (9th Cir. 2011)).

Due to a permanent injunction in California’s Central District, individuals in that district are, for the time being, continuing to receive hearings after six months of detention.

Nielsen v. Preap
586 U.S. __ (2019)

Mony Preap was born in a refugee camp after his family escaped Khmer Rouge in Cambodia and has lived lawfully in the U.S. since 1981. In 2006, he was convicted of two misdemeanor counts of possession of marijuana. These convictions would have subjected him to mandatory detention; however, immigration authorities did not arrest him then. Instead, he returned to his community. Preap was later convicted of battery, which does not trigger the mandatory-detention statute. He was released from custody for his battery charge in 2013 and was transferred to immigration custody by ICE and held without a bond hearing.

Preap and his fellow non-citizen detainees filed a class action petition asking for habeas relief in the Northern District of California. The Government and Preap disputed how 8 U.S.C. § 1226(c), the mandatory detention statute, should be read. The statute states that the Attorney General “shall take into custody” any alien who meets the criteria in subsections (1)(A)–(D)—including criminal aliens—“when the alien is released.”

Preap argued that for criminal non-citizens to fall within the purview of 8 U.S.C. § 1226(c)(1), subjecting them to mandatory detention, they would need to be detained by the Government at the moment they were released from criminal custody because of the language “when the alien is released.” He argued that Congress could not have intended to permit authorities to wait years after a conviction, and then detain immigrants long after they have successfully returned to their lives, without any possibility of bond. Because Preap was not detained until years after he was released from criminal custody for the deportable offense, he contended that he should not be subject to mandatory detention.

The Government countered that § 1226(c)(1) applies to all criminal non-citizens who committed offenses enumerated within that paragraph of the statute, whether or not they are detained immediately following their release from criminal custody. The Government argued that Congress, concerned about crimes committed by undocumented aliens, meant to require bondless detention of all “criminal aliens” who have committed certain offenses, regardless of the timing of detention. Under this interpretation, even if the Government failed to immediately detain an immigrant referred to in § 1226(c)(1) upon his or her release, if the Government later managed to detain the immigrant, the immigrant could be held without bond.

In March 2019, the Supreme Court reversed the Ninth Circuit, in a fractured 5-4 decision. Writing for the majority, Justice Alito concluded that the plain language of the statute mandated detention for immigrants described in § 1226(c)(1), whether or not they were immediately detained upon release from criminal custody. Justice Alito found that the provision’s “when ... released” language did not require that the government either immediately detain any noncitizen released from criminal custody or else lose the power to subject that person to mandatory detention. Rather, Justice Alito concluded, the text of the provision and the policy driving its enactment meant that

detention was mandatory for a noncitizen arrested at any time after release from custody, including years later.

Based upon the Supreme Court's decision in *Nielsen v. Preap*, mandatory detention is now required in cases where the person committed an offense described in § 1226(c)(1) years or even decades prior. The result is that people who have never reoffended, rebuilt their lives with their families, and become productive members of their communities are subject to mandatory imprisonment as their deportation case winds its way through the immigration court system, with no hearing to determine eligibility for bond.

What Can Criminal Defenders Do?

A noncitizen who is not removable cannot be detained by ICE. The concern here is with undocumented individuals, permanent residents who may be removable, and people with other forms of lawful status that may have been compromised by a conviction or other factor.

Defenders can help in a few ways. First, they can make avoiding convictions that subject immigrants to mandatory detention one of the defense goals. Often this goal is in sync with a good immigration/criminal defense based on avoiding removability and inadmissibility. Second, defenders can attempt to lower the probability that defendants will be arrested by ICE directly from jail. This can be accomplished through bail for criminal defendants who do not have an ICE hold. Defenders should advise clients who have an ICE hold not to post bail. Lastly, defenders can review the criminal convictions of noncitizens in order to determine whether they have a conviction that subjects them to mandatory detention and seek post-conviction relief, if applicable, for those earlier convictions.

Conclusion

As ICE continues to increase its enforcement efforts, an unprecedented number of immigrants are being swept into the detention and deportation system. With the courts mandating mandatory detention for an increasing number of immigrants, even those with old criminal convictions, the number of immigrants in detention will continue to increase exponentially. This number will likely be impacted by other enforcement efforts, including the recent decision by the Attorney General to impose mandatory detention on asylum seekers apprehended between ports of entry who establish a credible fear of persecution or torture and ICE's attempt to deputize participating sheriffs and police departments to make immigration arrests within "sanctuary" jurisdictions.

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