



Written by [R. Cort Kirkwood](#) on March 21, 2019

## Supremes: Feds Must Arrest, Detain Criminal Aliens, Even Years After They're Released From Jail

The U.S. Supreme Court ruled this week that the law means what it says.

The nut of its [5-4 ruling in \*Nielsen v. Preap\*](#) is this: Pursuant to federal law, immigration authorities must detain, without the possibility of release on bond, a deportable criminal immigrant until his immigration status is settled. And no matter long how he was free from custody for the criminal offense, the government can lock him up again.



Those who don't want to read the whole decision can skip down to Justice Brett Kavanaugh's laconic concurring opinion.

### The Case

[Writing for](#) the majority, Associate Justice Samuel J. Alito explained that the case involved plaintiffs who challenged the federal law, passed in 1996, that says criminal immigrants must be arrested “‘when [they are] released’ from custody on criminal charges and ... must be detained without a bond hearing until the question of their removal is resolved.”

The Ninth Circuit Court of Appeals ruled that the law requires immigration authorities to arrest those criminal foreigners nearly the minute they are released, say, from jail. In other words, immigration cops can't arrest a criminal immigrant a year after his release.

Alito wrote that “four other Circuits have rejected this interpretation of the statute, and we agree that the Ninth Circuit's interpretation is wrong.”

The question the court had to settle, [Alito wrote](#), was whether or not “the executive branch's mandatory duty to detain a particular noncitizen when the noncitizen is released from criminal custody remains mandatory if the executive branch fails to immediately detain the noncitizen when the noncitizen is released from criminal custody.”

That, he wrote, can't be, because Congress cannot have intended that immigration authorities lose their legal power to detain a criminal alien “if the executive branch fails to immediately detain the noncitizen because of resource constraints or because the executive branch cannot immediately locate and apprehend the individual in question.”

“Especially hard to swallow,” [Alito continued](#), is the notion that “for an alien to be subject to mandatory detention ... the alien must be arrested on the day he walks out of jail (though respondents allow that it need not be at the jailhouse door — the ‘parking lot’ or ‘bus stop’ would do).”

Why is that hard to swallow?

Assessing the situation in realistic and practical terms, it is inevitable that respondents' unsparing deadline will often be missed for reasons beyond the Federal Government's control.... To give just



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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...."

Under these circumstances, it is hard to believe that Congress made the Secretary's mandatory-detention authority vanish at the stroke of midnight after an alien's release.

Thus, Alito wrote, "an official's crucial duties are better carried out late than never."

### **Kavanaugh's Opinion**

In less than 600 words, Kavanaugh explained the "narrowness of the issue before us" and, in particular, to emphasize "what this case is not about."

The case was not about the authority of the government to deport criminal immigrants, or "whether Congress may mandate that the Executive Branch detain noncitizens during removal proceedings or before removal, as opposed to merely giving the Executive Branch discretion to detain."

Rather, [Kavanaugh wrote](#), "the sole question" is whether immigration authorities' "duty to detain a particular noncitizen when the noncitizen is released from criminal custody remains mandatory if the Executive Branch fails to immediately detain the noncitizen when the noncitizen is released from criminal custody."

Noting that the question before the court was strictly statutory, not constitutional, with regard to the 1996 immigration law, Kavanaugh explained that "it would be odd [if the law] mandated detention of particular noncitizens because the noncitizens posed such a serious risk of danger or flight that they must be detained during their removal proceedings," yet "allowed the noncitizens to remain free during their removal proceedings if the Executive Branch failed to immediately detain them upon their release from criminal custody."

But the law "does not require such an odd result," he continued. "On the contrary, the relevant text ... is relatively straightforward, as the Court explains. Interpreting that text, the Court correctly holds that the Executive Branch's detention of the particular noncitizens here remained mandatory even though the Executive Branch did not immediately detain them."





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