**OVERVIEW OF IMMIGRATION HABEAS**

*This section is a “nuts and bolts” overview of habeas corpus in the immigration context. The first two videos will provide a primer on immigration detention. The AILA webinars, CLINIC Practitioner’s Guide, and AIC Practice Advisory are tailored to immigration practitioners looking to understand habeas practice. Note that the CLINIC and AIC materials are somewhat dated—immigration habeas caselaw develops rapidly. Finally in this section is Justice Breyer’s dissent in* Jennings v. Rodriguez*, a Supreme Court decision from February; while the decision itself addresses specific legal arguments (the canon of constitutional avoidance and statutory construction), Justice Breyer provides a helpful overview of the Court’s treatment of immigration detention and liberty interests. As you read his dissent, pay attention to his discussion of* Mezei*,* Salerno*,* Zadvydas*, and* Demore, landmark cases on immigration detention and civil detention that form the bedrock of the cases that follow.

**Watch:** Innovation Law Lab Videos, Detention Authority (17 mins) - <https://vimeo.com/84047260>

**Watch:** Detention History (8 mins) - <https://vimeo.com/88083771>

**Watch:** AILA Webinars

1: Habeas Nuts and Bolts - <http://eventcenter.commpartners.com/se/Meetings/Playback_new.aspx?meeting.id=823630>

2: Typical Legal and Procedural Issues in Habeas Litigation - <http://eventcenter.commpartners.com/se/Meetings/Playback_new.aspx?meeting.id=840977>

3: Prolonged Detention I - <http://eventcenter.commpartners.com/se/Meetings/Playback_new.aspx?meeting.id=712114>

4: Prolonged Detention II - <http://eventcenter.commpartners.com/se/Meetings/Playback_new.aspx?meeting.id=471169>

5: Challenging Conditions of Release and Creative Uses of Habeas - <http://eventcenter.commpartners.com/se/Meetings/Playback_new.aspx?meeting.id=807880>

CLINIC Practitioner’s Guide: Obtaining Release From Immigration Detention, pp. 1 – 30

<https://cliniclegal.org/sites/default/files/A-Guide-to-Obtaining-Release-from-Immigration-Detention.pdf>

AIC Legal Action Center practice advisory “Introduction to Habeas Corpus”, <https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/lac_pa_0406.pdf>

Justice Breyer's dissent in *Jennings v. Rodriguez*, 138 S. Ct. 830, 859 (pp. 49-61 of the pdf), <https://www.supremecourt.gov/opinions/17pdf/15-1204_f29g.pdf>

**PROLONGED MANDATORY DETENTION**

*One of the main active areas of habeas litigation currently is around prolonged detention under the “mandatory detention” statutes, INA § 235(b) [8 U.S.C. § 1225(b)] and INA § 236(c) [8 U.S.C. § 1226(c)]. While* Demore *found pre-order mandatory detention of 6 months to be constitutional, the open question has been: what happens after 6 months? Of note, government counsel told the Court in* Demore *that detention averaged 1 month without an appeal, and 5 months with an appeal, for detainees under § 236(c); but during briefing of* Jennings*, the government revealed that it provided incorrect information, and detention, even at the time of* Demore*, regularly exceeded one year. Now, it is increasingly common for mandatory detainees to have their case go up to the BIA twice or three times, and detention often approaches two years or longer. The “Prolonged Detention Stories” site describes what this long detention means for noncitizens and their families—in other words, what we’re fighting for. The ACLU Practice Advisory gives an update on what the* Jennings *decision means—though, as you’ll keep hearing—a lot has changed in the last 9 months since it was released.* Rodriguez v. Marin *is* Jennings *on remand to the Ninth, which remanded to the District Court, and provides some hints as to where the Circuit Court and District Court will go from here.* Muse *is a recent local case finding prolonged § 236(c) detention unconstitutional, as is* Mohamed*. Both provide more background on how noncitizens end up in detention so long, and discuss issues related to the constitutionality of detention when the noncitizen wins in immigration court and ICE appeals. Litigation in* Muse *is still continuing, as he was denied bond by the immigration judge following the District Court’s Order, and through attorney fee litigation.*

**Browse:** Interactive stories brief by amicus curiae in Jennings v. Rodriguez

<https://www.prolongeddetentionstories.org/>

ACLU Jennings Practice Advisory - <https://www.aclu.org/sites/default/files/field_document/2018_03_21_jennings_v_rodriguez_practice_advisory.pdf>

*Rodriguez v. Marin*, 909 F.3d 252 (9th Cir. 2018)

*Muse v. Sessions*, No. 18-cv-54, 2018 WL 4466052 (D. Minn. Sept. 18, 2018)

*Mohamed v. Sessions*, No. 17-cv-5055, 2018 WL 2392205 (D. Minn. Mar. 26, 2018)

**PREAP: WHO IS SUBJECT TO MANDATORY DETENTION?**

Preap *presents an interesting challenge to mandatory detention, which the Supreme Court may rule on any day. It essentially turns on the meaning of one single word in § 236(c): “when.” Advocates, the BIA, and the Ninth Circuit have fought over what “when” means—more specifically, the case involves how promptly ICE must take a noncitizen into custody after being released from criminal custody. The BIA has held that “when released” means “anytime after,” so that ICE can take someone into custody decades after completing a criminal sentence, while the Ninth held that “when” connotes immediacy. A favorable decision from the Supreme Court would mean a significant number of noncitizens would become eligible for bond and would rein in ICE’s detention authority. The ACLU provides a good overview of the case, and NIJC’s amicus brief outlines the issues. Finally, the oral argument is worth a listen—it was Kavanaugh’s first case as a Justice, and it is interesting to see how he, Gorsuch, and the other Justices staked out their positions through questions, and how ACLU counsel and the government respond.*

**Browse:** ACLU Preap Case Page: <https://www.aclu.org/cases/nielsen-v-preap>

*Preap v. Johnson*, 831 F.3d 1193 (9th Cir. 2016)

National Immigrant Justice Center’s amicus brief: <https://www.supremecourt.gov/DocketPDF/16/16-1363/59187/20180810170121240_16-1363bsacNationalImmigrantJusticeCenter.pdf%208-10-18.pdf>

Oral Argument: <https://www.oyez.org/cases/2018/16-1363>

**DANGEROUSNESS, RESOLVING CRIMINAL CHARGES, ABILITY TO PAY BOND**

*Finally, we have the catch-all for new terrain in habeas litigation. First up is a case that was argued by a FILC student director this spring,* Zacarias Matacua*, involving the allocation of burden of proof in bond hearings and how the court determines whether a noncitizen is a “danger to the community.” Second,* Pensamiento*, is a case challenging ICE’s practice of picking up noncitizens as they are released from criminal court on bond or on their own recognizance, while criminal proceedings are still pending. This often means that noncitizens cannot prove they are not a danger in immigration court because of the pending charge, even though they are frequently released from criminal court without bail; but ICE holds them in immigration custody and won’t allow them to attend criminal court dates, worsening their situation as they have warrants issued—and ICE doesn’t comply with state court writs ordering ICE to produce them in court. Last,* Hernandez*, is a case out of the Ninth Circuit finding that immigration judges must consider the noncitizen’s ability to pay in setting bond amounts—bond amounts should not be arbitrary and should be calculated to make sure the noncitizen returns to court without being unduly burdensome or excessive.*

*Zacarias Matacua v. Frank*, 308 F. Supp. 3d 1019 (D. Minn. 2018)

**Browse:** ACLU Pensamiento Case Page: <https://www.aclum.org/en/cases/pensamiento-v-mcdonald>

*Pensamiento v. McDonald*, No. 18-10475-PBS, 2018 US Dist LEXIS 84818, 2018 WL 2305667 (D. Mass. May 21, 2018)

**Browse:** ACLU Hernandez Case Page: <https://www.aclu.org/cases/hernandez-v-sessions>

*Hernandez v. Sessions*, 872 F.3d 976 (9th Cir. 2017)