

CHARLES E. GRASSLEY, IOWA, CHAIRMAN

ORRIN G. HATCH, UTAH  
JEFF SESSIONS, ALABAMA  
LINDSEY O. GRAHAM, SOUTH CAROLINA  
JOHN CORNYN, TEXAS  
MICHAEL S. LEE, UTAH  
TED CRUZ, TEXAS  
JEFF FLAKE, ARIZONA  
DAVID VITTER, LOUISIANA  
DAVID A. PERDUE, GEORGIA  
THOM TILLIS, NORTH CAROLINA

PATRICK J. LEAHY, VERMONT  
DIANNE FEINSTEIN, CALIFORNIA  
CHARLES E. SCHUMER, NEW YORK  
RICHARD J. DURBIN, ILLINOIS  
SHELDON WHITEHOUSE, RHODE ISLAND  
AMY KLOBUCHAR, MINNESOTA  
AL FRANKEN, MINNESOTA  
CHRISTOPHER A. COONS, DELAWARE  
RICHARD BLUMENTHAL, CONNECTICUT

## United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, *Chief Counsel and Staff Director*  
KRISTINE J. LUCIUS, *Democratic Chief Counsel and Staff Director*

August 19, 2016

The Honorable Loretta E. Lynch  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

Dear Attorney General Lynch:

As you know, criminal aliens pose a substantial risk to the safety and security of communities all across this country. Available statistics paint an incomplete picture of the adverse impact their actions have on the lives of innocent Americans all across this country, but one needs to look no further than the tragic deaths of Kate Steinle and Sarah Root to understand the importance of detaining and deporting criminal aliens as quickly as possible. This issue is of great concern to us and many of our colleagues in the Senate; so much so that we have held three hearings over roughly the last year on the impact of these criminal aliens on the safety and security of the American people.

Despite the clear danger posed by criminal aliens, the U.S. Court of Appeals for the Ninth Circuit recently held in *Preap v. Johnson*<sup>1</sup> that “[u]nder the plain language of 8 U.S.C. § 1226(c), the government may detain without a bond hearing only those criminal aliens it takes into immigration custody *promptly* upon their release from triggering criminal custody.”<sup>2</sup> Under this holding, it appears that the most dangerous categories of criminal aliens, those whom Congress directed the Department of Homeland Security (DHS) to detain without the possibility of bond pending their removal from the United States, can only be held without a bond by DHS if they are *immediately* taken into custody after completing a criminal sentence.

This decision is clearly wrong as a matter of law and as a matter of policy.

As a matter of law, *Preap* parted ways with four of the five circuits that have interpreted this statutory provision. The one court that the Ninth Circuit cites in

---

<sup>1</sup> 2016 WL 4136983 (9th Cir., Aug. 4, 2016).

<sup>2</sup> *Id.* at \*11 (emphasis added).

support of its decision—the U.S. Court of Appeals for the First Circuit—decided its case by a split 3-3 *en banc* vote,<sup>3</sup> causing the district court to be affirmed as a matter of court protocol, not on the merits. In short, the Ninth Circuit's conclusion lacked support from a majority of judges on any of the five persuasive Courts of Appeals decisions that preceded it.

The Ninth Circuit's decision is also problematic because it erodes the constitutional power of Congress to determine when criminal aliens are subject to the authority of United States immigration authorities. As the Third Circuit stated succinctly: "nothing in the statute suggests that immigration officials lose authority if they delay." *Sylvain v. Attorney General*, 714 F.3d 150, 157 (3d Cir. 2013). Or, as the Fourth Circuit put it: "the Government's supposed failure to comply with a statutory immediacy requirement—when the statute does not specify a consequence for such noncompliance—does not bestow a windfall upon criminal aliens." *Hosh v. Lucero*, 680 F.3d 375, 383 (4th Cir. 2012).

As a matter of policy, this decision endangers the communities that members of the court were appointed to serve. Now, DHS will not be able to guarantee the detention of countless dangerous criminal aliens in Alaska, Arizona, California, Idaho, Montana, Nevada, Oregon, Washington, Hawaii, and several territories pending their removal from the United States. The impact of this decision will be especially acute on immigration enforcement within the Ninth Circuit, which covers more sanctuary jurisdictions than any other circuit in the nation, including San Francisco, Los Angeles, Berkeley, Seattle, Portland, and dozens of others.<sup>4</sup> These sanctuary jurisdictions refuse to hand over criminal aliens to DHS at all, much less immediately, meaning that the Ninth Circuit's decision will prevent DHS from guaranteeing the detention of the most dangerous criminal aliens in those jurisdictions.

It is a clear and unavoidable duty of the Department of Justice to defend vigorously the lawful statutes passed by Congress, and to have them interpreted as intended. We appreciate your work to defend DHS's clear statutory authority to detain criminal aliens without the possibility of bond,<sup>5</sup> and we ask that you continue to do so by seeking rehearing *en banc*, or by seeking Supreme Court review. Accordingly, please advise in detail, no later than September 9, 2016, as to how the Department intends to proceed with this case.

---

<sup>3</sup> *Castañeda v. Souza*, 810 F.3d 15 (1st Cir. 2015) (*en banc*).

<sup>4</sup> Griffith, Vaughan, & Telford, *Map: Sanctuary Cities, Counties, and States*, <http://cis.org/Sanctuary-Cities-Map> (last accessed, August 17, 2016).

<sup>5</sup> *Jennings v. Rodriguez*, 804 F.3d 1060 (9th Cir. 2015), *cert. granted*, 136 S.Ct. 2489 (2016).

Thank you for your attention to this matter. We look forward to your response.

Very truly yours,



Jeff Sessions  
Chairman  
Subcommittee on Immigration and  
the National Interest



Charles E. Grassley  
Chairman  
Committee on the Judiciary