Nielsen v. Preap, the Futility of Strict Textualism, and the Case for Universalism in Judging

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On April 12, 2019, Scribes — The American Society of Legal Writers presented Justice Stephen Breyer its Lifetime-Achievement Award. As part of that event, Justice Breyer sat down for an interview, during which he outlined his philosophy of judging. I would call Justice Breyer a universalist. He believes that judges should take all considerations into account when deciding cases.

> I don't doubt that the language is important . . . . We all have text. We have history . . . . We have precedent . . . . We have purpose: somebody wrote these words for a reason . . . . In the case of the Constitution, I like to think of values . . . and consequences. . . . His [Justice Scalia's] view [during their joint public appearances] was that I will be too subjective. . . . So I say well, that [using purpose, values, and consequences] depends on how carefully and honestly you do it, the same as anything else. . . . If you have too rigid a view — of looking at the words of that document or the time at which they were written — you *will* create a Constitution or statute that no one will want.[1]

For a case that starkly illustrates the difference between a textualist approach to judging and a universalist approach, look no

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[1] Scribes — The American Society of Legal Writers, *Darby Dickerson Interviewed Justice Stephen Breyer*, Facebook (Apr. 13, 2019), https://www.facebook.com (search under the title for part 2, lasting 5:47).

further than the Supreme Court's decision in *Nielsen v. Preap*.[2] Deep textual analysis did not yield a clear outcome, although the majority said it did. The majority did venture into some limited nontextual arguments, but only the minority opinion brought to bear a full range of legitimate considerations.

The Facts and Issue in *Nielsen*

Mony Preap was released from criminal custody in 2006 and detained by immigration officials seven years later. Other respondents in these consolidated cases were also detained years after their release from custody. The broad issue was whether the long lapse of time precluded the government from denying them a bail hearing.

The relevant statute was 8 U.S.C. § 1226. It is reproduced in the appendix. Subsection (a), in its first sentence, gives the Secretary of Homeland Security (formerly the Attorney General) the general authority to arrest and detain an "alien" pending a decision on deportation. The second sentence allows the Secretary to keep detaining the alien or to release him or her on bond or conditional parole. For aliens who are detained under (a), federal regulations grant them the right to a bail hearing.[3] But (a) adds an exception to this right to seek release — "except as provided in subsection (c)." In other words, if (c) applies, an alien can be denied a bail hearing.

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[2] 139 S. Ct. 954 (2019).

[3] 8 C.F.R. §§ 236.1(d)(1), 1236.1(d)(1) (2018).

Here is (c), with emphasis added:

> **(c) Detention of criminal aliens**
>
> **(1) Custody**
>
> The Attorney General *shall take into custody* any alien who —
>
> (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,
>
> (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,
>
> (C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence[d] to a term of imprisonment of at least 1 year, or
>
> (D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,
>
> *when the alien is released . . . .*
>
> **(2) Release**
>
> The Attorney General may release *an alien described in paragraph (1)* only if the Attorney General decides that [certain conditions exist, none of which existed in these cases].

The narrow issue was whether (c)(2)'s reference to *an alien described in paragraph (1)* includes all the (c)(1)(A)–(D) category aliens, regardless of when the Secretary took them into custody. Or does *an alien described in paragraph (1)* include only those aliens who were taken into custody "when the alien [was] released" from prison? The respondents argued for the second interpretation. Accordingly, because of the long delay in taking them into custody after their release, the exception in (c) did not apply — and they were entitled to a bail hearing under (a).

A majority of the Court held otherwise: the *when . . . released* clause does not affect which aliens are "described" in (c)(1), so those who are listed in (1)(A)–(D) must not be released while they await a decision on deportation.

Below I have tried to fairly set out the rather complex arguments. Four points in that regard.

First, the majority opinion, written by Justice Alito, did not get five votes on each of its parts: on some parts, the opinion was joined only by a plurality. For convenience, though, I have not distinguished between majority arguments and plurality arguments.

Second, for the sake of accuracy, I have naturally adopted much of the language in both opinions. It would have been quite distracting to quote and cite every word and phrase that I repeated. Instead, I reserved quotations for arguments that seemed especially important or well expressed. These are mostly in block quotations.

Third, I broke out the various arguments on both sides and put them next to each other, in point–counterpoint fashion. Although this necessarily disrupts the flow of analysis in each opinion, I hope there's a dramatic gain in our ability to compare and weigh the competing views.

Finally, because this article is about textualism, I have grouped the arguments into those that are purely textual, partly textual, and nontextual. This too disrupts the opinions' analytical flow, but for a reason. As the title to this article makes clear, I have a view about strict textualism. That view is reflected at various places in the arguments below, as well as in the concluding section.

Purely Textual Arguments

- ***Syntax and the Meaning of* Describe**

Majority: Grammatically, the adverbial *when . . . released* clause has to modify the verb *shall take*; it cannot modify the noun *alien*. The noun *alien* is modified by the adjectival clauses in subparagraphs (A)–(D). In other words, an adverbial clause that appears after subparagraph (D) modifies a verb phrase in the lead-in language that appears before subparagraph (A).

Author: Neither opinion says so, but it's seriously bad drafting to place the *when . . . released* clause so far from what it supposedly modifies. Why not *The* [*Secretary*] *shall take an alien into custody upon release from detention if the alien —*

(A) *is inadmissible . . . .*

Easy. And then it would have been clear that "upon release" does not modify (or have any bearing on) the list of aliens in (A)–(D).

(Side point: If you look at (c)(1) in the appendix, you'll see text after the *when . . . released* clause. The first words are *without regard to*. If you moved the "release" language to before the (A)–(D) list, you'd have to start a new sentence after (D): "The Secretary must do so without regard to . . . ." Also easy.)

Minority: The statute, in (c)(2), uses the word *described*, not *modify*. *Describe* is broader than *modify* (citing dictionaries). A noun like *alien* can be described by more than the adjectives that modify it. Example: "The well-behaved child was taken by the generous couple to see *Hamilton*." The child is described not only as well-behaved but as someone who was taken to see *Hamilton*. A person subjected to an action can be described by the action (citing grammar guides).

Take another example, similar to the statute at issue:

> Imagine the following cookbook recipe. Instruction (1) says: "(1) Remove the Angus steak from the grill when the steak is

> cooked to 120 degrees Fahrenheit." Instruction (4) says: "(4) Let the steak described in Instruction (1) rest for ten minutes and then serve it." What would we say of a chef who grilled an Angus steak to 185 degrees Fahrenheit, served it, and then appealed to these instructions — particularly the word "described" in Instruction (4) — as a justification? . . . The chef would have no good textual defense: The steak "described in Instruction (1)" is not just an "Angus" steak, but an "Angus" steak that must be "remove[d] . . . when the steak is cooked to 120 degrees Fahrenheit." By the same logic, the alien in paragraph (1) is "described" not only by the four clauses — A, B, C, and D — that directly modify the word "alien," but *also* by the verb ("shall take") and that verb's modifier ("when the alien is released").[4]

Majority: To *describe* is to identify salient features (citing a dictionary).

> And here is the crucial point: The "when . . . released" clause could not possibly describe aliens in that sense; it plays no role in identifying for the Secretary *which* aliens she must immediately arrest. If it did, the directive in § 1226(c)(1) would be nonsense. It would be ridiculous to read paragraph (1) as saying: "The Secretary must arrest, upon their release from jail, a particular subset of criminal aliens. Which ones? Only those who are arrested upon their release from jail." Since it is the Secretary's action that *determines* who is arrested upon release, "being arrested upon release" cannot be one of her criteria in figuring out whom to arrest.[5]

That reading is confirmed by the use of *the* in *when the alien is released*. *The* is a function word indicating that a following noun has been previously specified by context (citing a dictionary and a case). The scope of alien must have been settled by the time the *when . . . released* clause appears.

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[4] *Nielsen*, 139 S. Ct. at 979 (Breyer, J., dissenting).

[5] *Id*. at 965.

Minority: In the Angus-steak example, the words "[r]emove . . . from the grill when the steak is cooked to 120 degrees Fahrenheit" don't tell the chef what kind of steak to cook in instruction (1), but they still describe the steak that must be served in instruction (4). By the time the chef gets to instruction (4), the action in instruction (1) has been completed. Likewise in the statute. Paragraph (c)(2) refers back to all of paragraph (c)(1). And (c)(2) — the provision that limits release — contemplates that the detention in (c)(1) has already occurred. Thus, the phrase *an alien described in paragraph (1)* describes not who must be detained but who is not eligible for release on bail.

Author: Would you say that one side has the better of the textual debate so far? I'd be surprised.

- ***A Comparable Statutory Provision***

Minority: In a different detention provision enacted alongside the one here, Congress made a precise cross-reference — to "an alien described in subparagraph (A)(ii) or (A)(iii)."[6] But the statute at issue, rather than referring to subparagraphs (A)–(D), refers to the entirety of paragraph (1).

Author: This is the first thing that struck me. It seems like a strong textual point.

Majority: It doesn't matter. The scope of *the alien* in *when the alien is released* is fixed by (A)–(D), before the *when*-clause appears.

Author: How responsive is this to the minority's point?

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[6] Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) § 303(b)(3)(B), 110 Stat. 3009-587 (not codified, but included in the historical notes to 8 U.S.C. § 1226).

- ***A Comparison of (c) with (a)***

Minority: Structurally, subsection (c) parallels subsection (a), which applies to all aliens (not just "criminal aliens"). In both, the first sentence sets out a detention rule and the second sentence a release rule. [The two long sentences in (c) are paragraphs (1) and (2).] And just as the second sentence of (a) applies only to aliens who are detained in accordance with the first sentence, so does the second sentence in (c) — (c)(2) — apply only to those detained in accordance with all of (c)(1). In short, the limited-release rule in (c)(2) depends on the Secretary's complying with the detention rule in (c)(1), which requires that the alien be detained *when . . . released*.

Majority: Subsections (a) and (c) do not establish separate sources of arrest and release authority. Paragraph (c)(1) limits the Secretary's discretion to arrest under (a)'s first sentence: the Secretary *shall* (must) arrest aliens guilty of certain offenses. And (c)(2) limits the Secretary's discretion over the decision to release under (a)'s second sentence. So (c)(2)'s prohibition on release does not apply only to those arrested under (c)(1); those arrested under subsection (a) may also face mandatory detention under (c)(2). If (c)(2)'s prohibition on release applied only to those arrested under (c)(1), there would have been no need in (a) for *except as provided in subsection (c)*. This inference is supported by the use of the term *described in paragraph (1)*, rather than those arrested *pursuant to paragraph (1)* or *under authority created by paragraph (1)*.

Author: Do you suppose that, given the general state of legislative drafting, the drafters in this instance really thought about these fine differences and confidently concluded that *an alien described in paragraph (1)* would lend itself to one interpretation and *an alien arrested pursuant to paragraph (1)* to another interpretation?

Minority: Even if (c) merely "limits" the authority granted by (a), the parallel structure of those two subsections still suggests that the Secretary must comply with the limit on detention in the first sentence of (c) to invoke the rule on detention in the second sentence.

Author: This round of debate seemed to me somewhat abstruse, but there you have it.

- ***Constitutional Avoidance***

Minority: Under the canon of constitutional avoidance, a statute must, if fairly possible, be construed to avoid grave doubts about its constitutionality (citing and quoting cases). The government's reading — that the Secretary can arrest aliens years after committing a crime (even a minor one) and hold them for years without a bail hearing — raises a serious constitutional question. Such a practice likely deprives a person of liberty without due process.

Majority: Constitutional avoidance comes into play only when the text is susceptible of more than one construction (citing and quoting cases). Here, the text "cuts clearly against respondents' position."[7]

Author: Perfect — there's no ambiguity because we say so. The dissent's construction is apparently not plausible. Do you agree with that assertion?

At any rate, this is how it usually goes — either side can argue text. You can parse and parse and parse to the point of dizziness. Why are judges seemingly so reluctant to admit that the text is inconclusive? In a great many appellate cases — let alone those in the United States Supreme Court — the text itself will not yield anything like a clear answer. Other considerations must be brought to bear.

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[7] *Nielsen*, 139 S. Ct. at 972.

Mixed Textual and Nontextual Arguments

- ***Precedent and the Purpose of Deadlines***

Majority: Even if (c)(1) requires immediate arrest, that would not prevent the Secretary from acting later. Defendants should not receive such a windfall. If a statute does not specify a penalty for noncompliance with a timing provision, courts will ordinarily not impose their own coercive action (citing and quoting precedent).

Minority: Our cases make clear that a statutory deadline against the government must be enforced if (1) other parts of the statute so indicate, (2) the statute specifies a consequence for noncompliance, or (3) the harms caused by noncompliance are likely to be serious (citing and quoting precedent).

Regarding (1):

Minority: When Congress enacted (c) in 1996, it authorized the government to delay implementation for a year, explicitly recognizing that there might be "insufficient detention space and Immigration and Naturalization Service personnel."[8] What was the need for that transition statute if the government, to avoid overcrowding, could have delayed arresting aliens for a year — or 10 years — and then denied them a bail hearing?

Majority: The transition statute served to delay the onset of the Secretary's obligation to begin making arrests.

Minority: Again, why was that necessary if Congress thought the Secretary could detain aliens without a bail hearing after a yearlong delay?

Majority: Congress does not expect the Executive to blow through deadlines. That's why Congress specifies any deadlines at all. They are a spur to action.

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[8] IIRIRA § 303(b)(2), 110 Stat. 3009-586.

Author: Apart from the validity of this argument, it goes beyond text alone — to what I'd call commonsense purpose.

Regarding (2) above about enforcing deadlines:

Minority: The statute does specify a consequence for not satisfying (c): the Secretary must fall back on (a) — which, critically, does *not* guarantee release. By regulation, aliens will simply receive a hearing on whether they pose a risk of flight or threat to the community.[9]

Majority: Congress enacted mandatory detention for safety reasons: individualized hearings might not reveal which deportable aliens would continue to engage in crime or skip their removal hearing (citing and quoting precedent).

Regarding (3) above about serious harms from noncompliance:

Minority and Majority: See pages 63–64.

- ***Congress's General Purpose***

Majority: The Ninth Circuit observed that under the government's reading, some aliens whom the government need not arrest at all must be detained if they are arrested. The Ninth Circuit thought it bizarre to conclude that Congress would forbid their release if they didn't have to be arrested in the first place.

But (c)(1)(D), through its cross-references, covers close relatives of terrorists and those believed likely to commit a terrorist attack. Those are the very aliens for whom Congress would most likely have wanted to require mandatory detention without a bail hearing. And other (c)(1) predicates reach aliens whom the police would not be expected to arrest, such as the spouse or child of an alien who recently engaged in terrorist activity. Why would Congress have covered them in (c)(1)(A)–(D) if (c) applied only to those emerging from jail?

[9] 8 C.F.R. §§ 236.1(d)(1), 1236.1(d)(1).

In short, the *when . . . released* clause does not limit the class of aliens — those in (c)(1)(A)–(D) — subject to mandatory detention; it specifies the timing of their arrest. Subsection (c)(1) simply does not speak to the timeline for arresting those few who spent no time in jail. They are to be detained as they come across the government's radar.

Author: This seems to me a fairly strong argument, especially the argument that Congress would have wanted suspected terrorists detained without bail even if they had not been previously arrested. And it is a text-based inference about congressional purpose. But it is selectively text-based. The unconvicted aliens covered by (c)(1)(A)–(D) also include persons who the Secretary has reason to believe are illicit traffickers in a controlled substance,[10] certain relatives of a trafficker,[11] and drug abusers or addicts.[12] Obviously, these are not terrorists — not all are even criminals — and there's no apparent reason why Congress would have singled them out as deserving detention without bail.

Minority: The transition statute states that "the provisions [of (c)] shall apply to *individuals released* after" the transition period ends.[13] Thus, Congress itself saw the no-bail-hearing requirement in (c)(2) as applying only to aliens who had been "released."

Nontextual Arguments

- ***Practical Consequences***

Majority: The respondents' insistence that *when . . . released* means "immediately upon release" imposes a highly unrealistic and impractical deadline. For one thing, state and local officials

[10] 8 U.S.C. § 1182(a)(2)(C)(i).

[11] 8 U.S.C. § 1182(a)(2)(C)(ii).

[12] 8 U.S.C. § 1227(a)(2)(B)(ii).

[13] IIRIRA § 303(b)(2), 110 Stat. 3009-586 (emphasis added in the dissenting opinion).

often rebuff the government's request to give notice when a criminal alien is released. This happened over 20,000 times between January 2014 and September 2016.

Author: This argument is nontextual in having to do with (im)practical results, so I placed it in this section even though the minority's response is textual.

Minority: The Ninth Circuit was wrong to conclude that *when . . . released* means "immediately." The word *when* does not always mean "at the time that" (citing dictionaries). If you tell a child to "mow the lawn when you get home from school," she doesn't have to do it the very second that she gets home. We should interpret the *when*-clause as we interpreted other parts of the statute in one case — to mean within a reasonable time, and presumptively no more than six months after release.

Author: The minority need not have reached for a dictionary. The example is telling — and quite within our common understanding of what *when* can mean.

- ***Common Sense***

Minority: As a matter of common sense, why would the law grant a bail hearing to an accused murderer and deny it to someone who many years earlier may have committed a minor crime and now leads a productive life?

Majority: (Nothing in response.)

- ***American Legal Values***

Majority:

> [W]e cannot interpret the words of this specific statute without also considering basic promises that America's legal system has long made to all persons. In deciphering the intent of the Congress that wrote this statute, we must decide — in the face of what is, at worst, linguistic ambiguity — whether Congress intended that persons who have long since paid their debt to society would be deprived of their

> liberty for months or years without the possibility of bail. We cannot decide that question without bearing in mind basic American legal values: the Government's duty not to deprive any "person" of "liberty" without "due process of law," U.S. Const., Amdt. 5; the Nation's original commitment to protect the "unalienable" right to "Liberty"; and, less abstractly and more directly, the longstanding right of virtually all persons to receive a bail hearing . . . . I fear that the Court's contrary interpretation will work serious harm to the principles for which American law has long stood.[14]

Minority: (Nothing in response.)

Observations

I have three.

First, *Nielsen* is yet another case in which minutely examining the text proved futile.[15] Surely, the textual debate was a draw. Or if one side had the better of it, the margin was slim. Yet the majority declared that there was no ambiguity: the text "cuts clearly" against the detained aliens.[16] This instead of acknowledging the uncertainty, arguing that one reading seemed the more likely one, and then candidly looking to nontextual reasons for a decision. But no — the text was clear. Little wonder that one commentator says, "The greatest failing of textualism . . . is its hubris."[17]

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[14] *Nielsen*, 139 S. Ct. at 985 (Breyer, J., dissenting).

[15] For others, see Joseph Kimble, *Deep in the Weeds of Textualism*, 21 Green Bag 2d 297 (Summer 2018) (analyzing *O'Connor v. Oakhurst Dairy*, 851 F.3d 69 (1st Cir. 2017)); *How* Lockhart *Should Have Been Decided (Canons Are Not the Key)*, Judicature, Winter 2018 (analyzing, in the form of an opinion, *Lockhart v. United States*, 136 S. Ct. 958 (2016)); *cf. Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1763 (2020) (Alito, J., dissenting) (characterizing as having "no justification" and "indefensible" the majority's conclusion that the meaning of *sex* in Title VII is unambiguous).

[16] *Nielsen*, 139 S. Ct. at 972.

[17] Richard L. Hasen, *The Justice of Contradiction: Antonin Scalia and the Politics of Disruption* 26 (2018).

Adherents greatly overestimate their ability to sift through all the various and often conflicting textual clues to uncover *the* intended meaning.

Second, even while pronouncing that the text was clear — "[t]he 'when . . . released' clause could not possibly describe . . . *which* aliens [the Secretary] must immediately arrest"[18] — the majority opinion did venture into purpose and consequences. Textualists profess to consider purpose only "in its concrete manifestations as deduced from close reading of the text."[19] But no close reading of text would produce the majority's argument (page 60) that Congress sets deadlines as a spur to action. That's purely a matter of sensible judgment. Nor does close reading have anything to do with the majority's argument (pages 62–63) about the consequences — the impracticability — of asking the Secretary to arrest all criminal aliens immediately upon their release.

Recent scholarship confirms that the textualists on the Supreme Court are not nearly as circumscribed by text as they claim to be. From an extensive study of Court opinions, Anita Krishnakumar concluded that those justices "have been using pragmatic reasoning, as well as traditional textual canons . . . , to impute a specific intent or policy goal to Congress"; that they invoked practical consequences "entirely external to the statutory text" in over 30% of the opinions they wrote; that they sometimes relied on "their own personal views about a statute's sensibility or their own judgment calls about what a statutory provision is designed to achieve"; and that even their use of textual tools "entails at least as much judicial discretion and room for normative decision-making

[18] *Nielsen*, 139 S. Ct. at 965.

[19] Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 20 (2012).

as the more straightforward, traditional purposive mode of analysis that textualism decries."[20]

Worth mentioning, too, is a survey of 42 federal circuit judges by Abbe Gluck and Richard Posner. The results again show that purely textual judging exists only in theory:

> The study . . . helps to substantiate the irrelevance of the enduring, but now-boring, textualism-versus-purposivism debate. None of the judges we interviewed was willing to associate himself or herself with "textualism" without qualification. All consult legislative history. Most eschew dictionaries. . . . The approach that emerged most clearly from our interviews might be described as intentional eclecticism.[21]

Or maybe describe it as universalism? At any rate, how this picture might or will be affected by the host of recent presidential appointees remains to be seen.

Third observation: the majority opinion had no response to the minority's argument about "the principles for which America has long stood"[22] — that is, the values that are part of America's legal system. They include the right to a bail hearing. Would a textualist judge deny that? Would they deny even that values have value in judging? A universalist judge certainly would not. *Nielsen*, I'd say, is a shining example of the narrow-mindedness of textualism.

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[20] Anita S. Krishnakumar, *Backdoor Purposivism*, 69 Duke L.J. 1275, 1276, 1320, 1329, 1352 (2020).

[21] Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Court of Appeals*, 131 Harv. L. Rev. 1298, 1300 (2018).

[22] *Nielsen*, 139 S. Ct. at 985 (Breyer, J., dissenting).

Appendix: 8 U.S.C. § 1226

(a) Arrest, detention, and release

On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General —

(1) may continue to detain the arrested alien; and

(2) may release the alien on —

(A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

(B) conditional parole; but

(3) may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

. . .

(c) Detention of criminal aliens

(1) Custody

The Attorney General shall take into custody any alien who —

(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,

(C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien

has been sentence[d] to a term of imprisonment of at least 1 year, or

(D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,

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.

(2) Release

The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien 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 any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

. . .