

Immigration Detention: Erosion or Reinforcement of a Theory of Immigration Exceptionalism?

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Presentation Overview

Introduction

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ترحيب BEM-VINDO

Overview of
Immigration Detention

Limitations of Immigration Detention

Introduction

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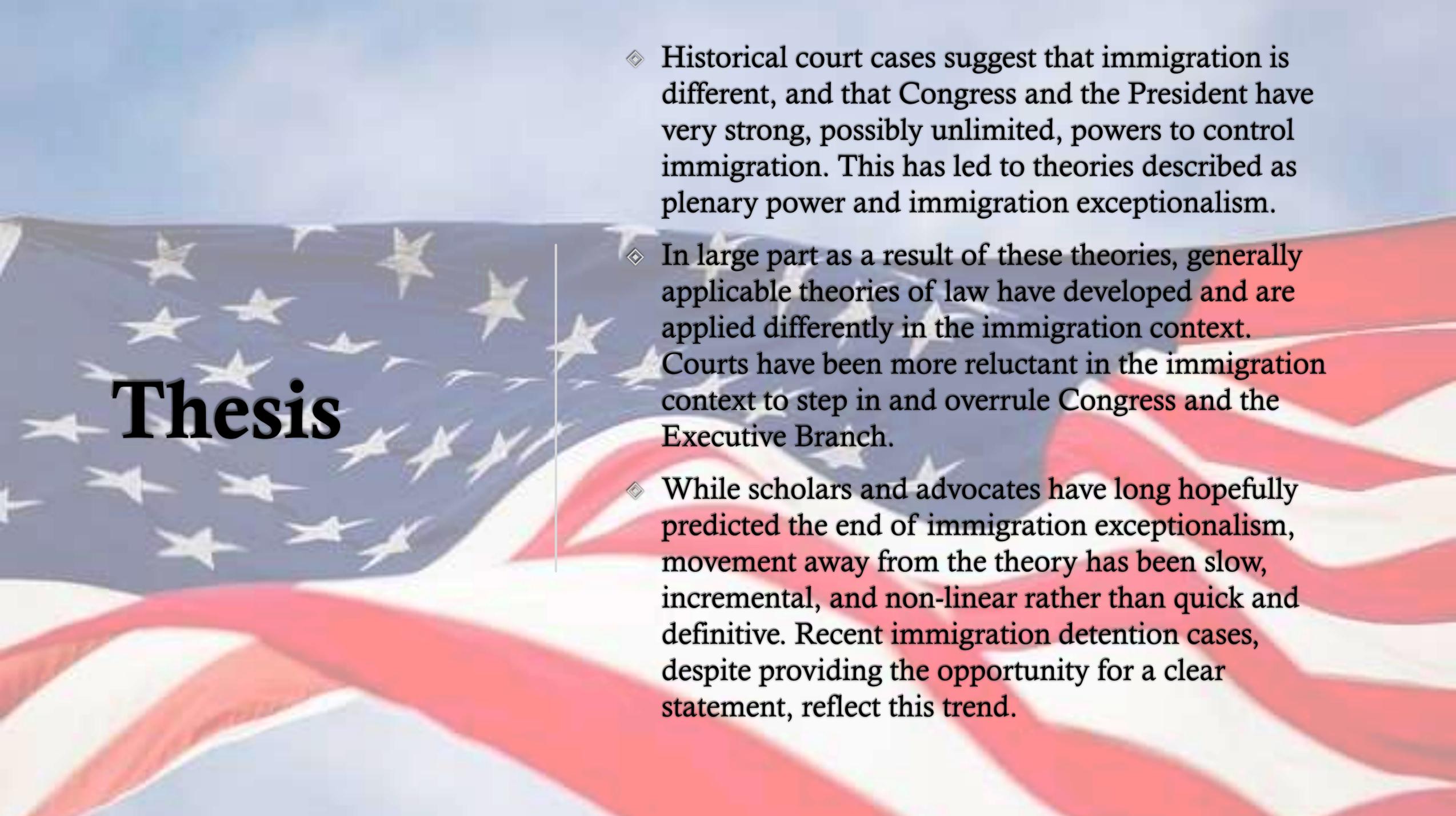
ترحيب

BEM-VINDO



Basic Principles of Immigration Law

- ◆ Immigration Law is civil, not criminal.
 - ◆ Deportation is not punishment.
- ◆ Immigration Law is federal law, not state law.
- ◆ Immigration Law is administrative law.

The background of the slide is a blurred image of the United States flag, showing the stars and stripes. The word "Thesis" is written in a large, bold, black serif font on the left side of the slide.

Thesis

- ◇ Historical court cases suggest that immigration is different, and that Congress and the President have very strong, possibly unlimited, powers to control immigration. This has led to theories described as plenary power and immigration exceptionalism.
- ◇ In large part as a result of these theories, generally applicable theories of law have developed and are applied differently in the immigration context. Courts have been more reluctant in the immigration context to step in and overrule Congress and the Executive Branch.
- ◇ While scholars and advocates have long hopefully predicted the end of immigration exceptionalism, movement away from the theory has been slow, incremental, and non-linear rather than quick and definitive. Recent immigration detention cases, despite providing the opportunity for a clear statement, reflect this trend.

A close-up, slightly blurred background of a silver chain-link fence. The diamond-shaped mesh pattern is prominent, creating a sense of restriction and barrier. The background behind the fence is out of focus, showing hints of a landscape with blue and white tones.

Overview of Immigration Detention

Current Number of Immigration Detainees

The screenshot shows the ICE website's 'ICE Detainee Statistics' page. The page features a blue header with the ICE logo and navigation menu. A red 'NOTICE' banner is present. The main content area includes a 'SHARE' sidebar, a disclaimer, and three data cards. A 'Related Information' section is on the right.

U.S. Department of Homeland Security
U.S. Immigration and Customs Enforcement

Report Crimes: Email or Call 1-866-DHS-2-ICE | Search ICE.gov

Home | Who We Are | What We Do | Newsroom | Information Library | Contact ICE | Careers | En Español

NOTICE Click here for the latest ICE guidance on COVID-19

ICE Guidance on COVID-19

Overview & FAQs | **ICE Detainee Statistics** | Judicial Releases | Previous Statements

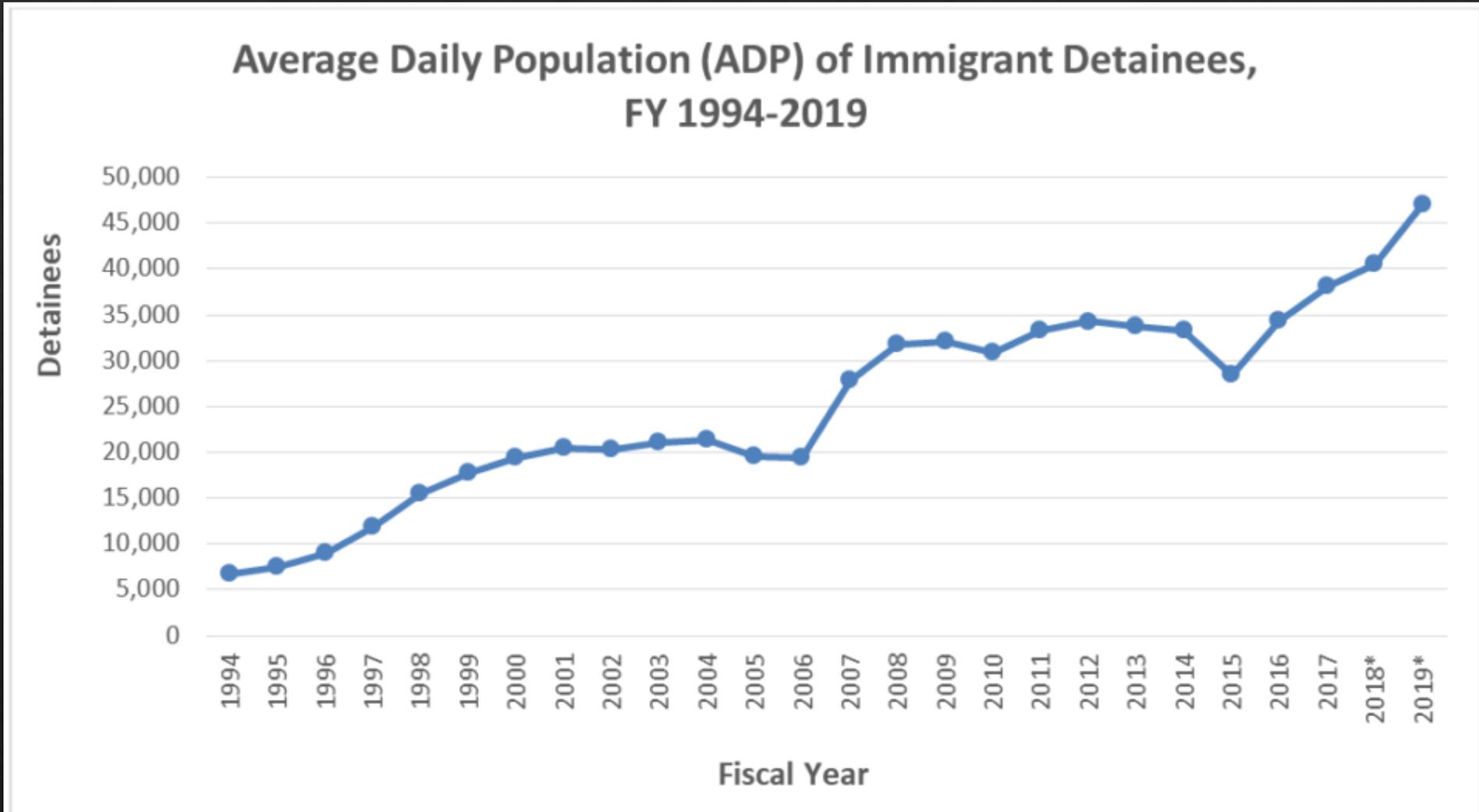
SHARE: Email, Facebook, Twitter, Print

Page information is recorded from a live database; data may change as the agency receives updated case information.

DETAINED POPULATION ¹ AS OF 01/04/2021 16,037	COVID-19 POSITIVE CASES CURRENTLY IN CUSTODY ² UNDER ISOLATION OR MONITORING AS OF 01/04/2021 558	DETAINEES TESTED AS OF 01/04/2021 80,200
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Related Information
Operation Stolen Promise: An Initiative Targeting COVID-19 Fraud
ICE's Enforcement and Removal Operations

Center for Migration Studies Virtual Brief: Immigration Detention



ICE Detention Facilities in Florida

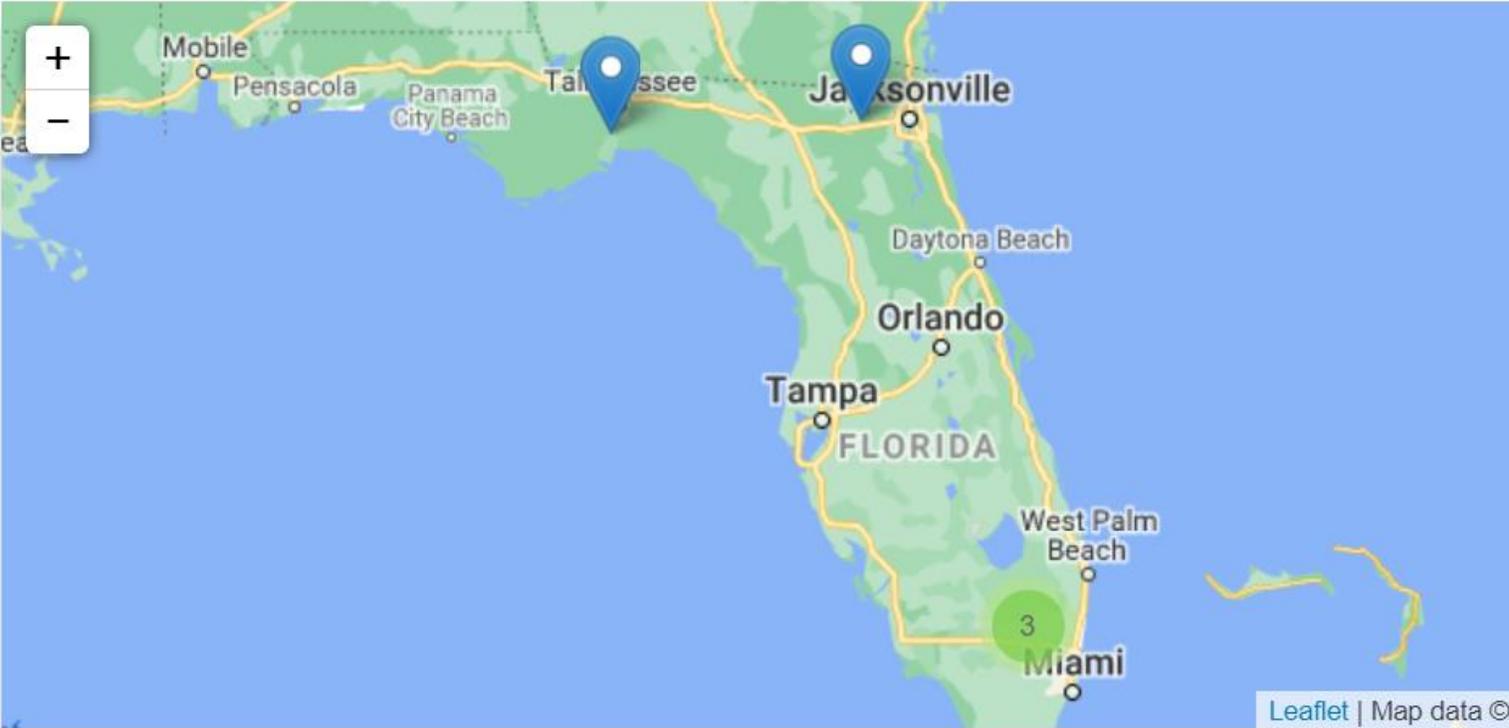
- ◇ Wakulla County Jail
- ◇ Baker County Jail
- ◇ Glades County Jail
- ◇ Broward Transitional Center (GEO Group)
- ◇ Krome North Service Processing Center (Akal Security)

ice.gov/detention-facilities

NOTICE Click here for the latest ICE guidance on COVID-19

Immigration Enforcement

Detention Facility Locator



Leaflet | Map data ©

Detention Facilities

Categories of Immigration Detention

- ◆ Pre-Removal Order Detention
 - ◆ Arriving Aliens: INA § 235
 - ◆ Non-Mandatory: INA § 236(a)
 - ◆ Mandatory Detention: INA § 236(c)
- ◆ Post-Removal Order Detention:
INA § 241

Pre-Removal Order Detention: Arriving Aliens INA § 235 (8 U.S.C. § 1225)

- ◇ An “arriving alien” is someone who attempted an entry at a port of entry but was not admitted OR someone who is interdicted at sea. 8 C.F.R. 1001.1(q).
- ◇ INA § 235(b)(1): Arriving aliens initially determined to be inadmissible due to fraud, misrepresentation, or lack of valid documentation.
 - ◇ INA § 235(b)(1)(B)(iii)(IV): Arriving aliens in pending credible fear proceedings are subject to mandatory detention.
 - ◇ INA § 235(b)(1)(B)(ii): Arriving aliens found to have a credible fear “shall be detained” for further proceedings.
- ◇ INA § 235(b)(2): Other arriving aliens
 - ◇ If not “clearly and beyond a doubt” entitled to be admitted, “shall be detained” for removal proceedings.
- ◇ May be released on parole only.

Pre-Removal Order
Detention:
Non-Arriving
INA § 236
(8 U.S.C. § 1226)

- ◇ General: INA § 236(a) A noncitizen may be arrested and detained pending removal proceedings.
 - ◇ May be released on bond of at least \$1500 or conditional parole.
- ◇ Mandatory: INA 236(c) A noncitizen removable for certain criminal convictions shall be taken into immigration custody when released from criminal custody.
 - ◇ Release authorized only under very narrow circumstances.

Post-Removal
Order
Detention:
INA § 241
(8 U.S.C. § 1231)

- ◆ INA § 241(a)(2) Noncitizens shall be detained during 90 day removal period.
- ◆ INA § 241(a)(6) Noncitizens who are inadmissible or deportable for status violation, certain criminal convictions, or national security grounds or noncitizens who are a risk to the community or unlikely to comply with an order of removal may be detained beyond the 90 day removal period.
- ◆ INA § 241(a)(3) Noncitizens with a final order when released are released on an order of supervision.

The image shows the front facade of the United States Supreme Court building. It features a grand portico with eight tall, fluted Corinthian columns supporting a heavy entablature. Above the columns is a large triangular pediment filled with intricate relief sculptures. The sky is bright blue with scattered white clouds. The text 'Limitations on Immigration Detention' is overlaid in a bold, black, serif font across the middle of the image.

Limitations on Immigration Detention

Limitations on Post-Removal Order Detention



Zadvydas v. Davis, 533 U.S. 678
(2001)

- ◆ Indefinite post-removal order detention of deportable non-citizens would raise substantial due process concerns.
- ◆ To avoid this constitutional problem, the Court interpreted the statute to include a reasonable time limitation of six months.
- ◆ After six months, a noncitizen may no longer be detained if there is no significant likelihood of removal in the reasonably foreseeable future.



Clark v. Martinez,
543 U.S. 371 (2005)

- ◆ The same principles announced in *Zadvydas* also apply to post-removal order detention of inadmissible noncitizens.

Limitations on Pre-Removal Order Detention



Demore v. Kim,
538 U.S. 510 (2003)

- ◇ The principles in *Zadvydas* do not apply to pre-removal order detention.
- ◇ Indefinite pre-removal order detention does not violate due process. Such periods of detention are typically relatively short.

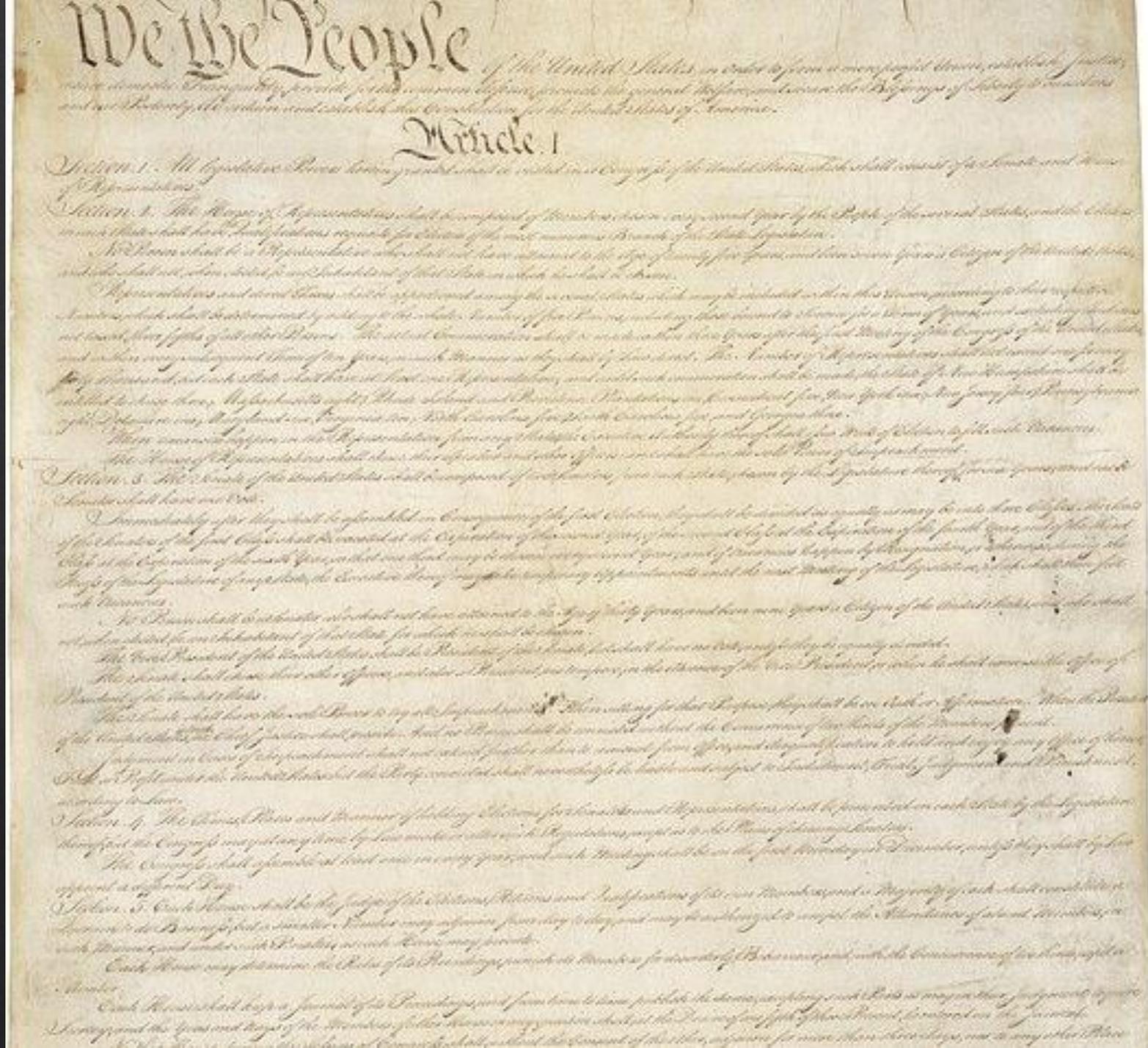
Jennings v. Rodriguez,
138 S.Ct. 830 (2018)

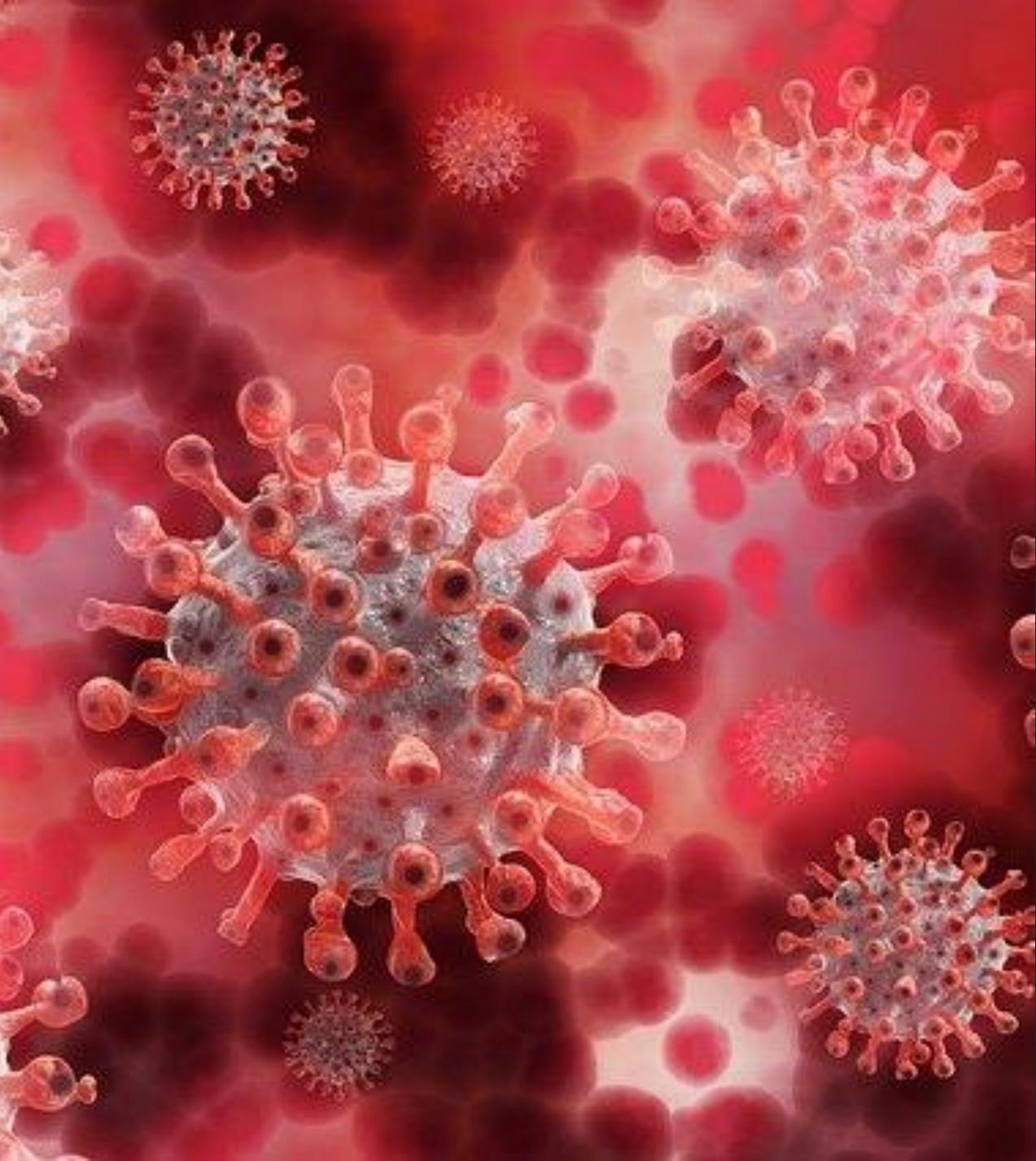
- ◆ The Ninth Circuit improperly applied the principle of constitutional avoidance to construe the pre-removal order detention statutes to include a reasonable time limitation.
- ◆ The Supreme Court declined to consider the constitutional arguments directly and remanded for further proceedings.



Lukaj v. McAleenan,
420 F. Supp. 3d 1265 (M.D. Fla. 2019)

◆ Indefinite pre-removal
order detention
violates due process.





Fraihat v. U.S. Immigration and Customs Enforcement

- ◆ Preliminary Injunction Issued April 20, 2020 (445 F. Supp. 3d 709 (C.D. Cal. 2020))
- ◆ Motion to Enforce Preliminary Injunction Granted Oct. 7, 2020 (2020 U.S. Dist. LEXIS 210929 (C.D. Cal. 2020))
- ◆ The court held that plaintiffs were likely to succeed on or more of the claims they raised: several claims under the Due Process clause of the Fifth Amendment, including medical indifference and punitive conditions of confinement during the COVID-19 pandemic, and one claim that individuals with disabilities were denied the benefits of executive agency programs in violation of the Rehabilitation Act.



Conclusion

- ◇ Courts are unlikely to make quick and definitive statements protecting the rights of immigrant detainees or denouncing the theory of immigration exceptionalism.
- ◇ Recent Supreme Court and lower federal court decisions reflect the same slow, incremental and non-linear progress that we have seen historically.
- ◇ The Executive Branch has the ability to move more quickly to end immigration detention or provide greater protection for the rights of immigrant detainees.
- ◇ I'm happy to answer questions or talk further! You may contact me at kaschenbrenner@barry.edu.