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

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Presentation Overview

- Introduction
- Overview of Immigration Detention
- Limitations of Immigration Detention
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.
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.
Overview of Immigration Detention
Current Number of Immigration Detainees

ICE Guidance on COVID-19

Detained Population
- As of 01/04/2021: 16,037

COVID-19 Positive Cases Currently in Custody
- Under isolation or monitoring as of 01/04/2021: 558

Detainees Tested
- As of 01/04/2021: 80,200

Related Information:
- Operation Stolen Promise: An Initiative Targeting COVID-19 Fraud
- ICE's Enforcement and Removal Operations

Page information is recorded from a live database; data may change as the agency receives updated case information.
Center for Migration Studies Virtual Brief: Immigration Detention

Average Daily Population (ADP) of Immigrant Detainees,
FY 1994-2019

Fiscal Year

Detainees

0 5,000 10,000 15,000 20,000 25,000 30,000 35,000 40,000 45,000 50,000

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)
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.
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.

- 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,

- 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.

- 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))
- 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.