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Prisoners of the INS

By Charles Weisselberg

As part of its efforts to control immigration, the Immigration and Naturalization Service (INS) detains thousands of noncitizens. Many are held while the INS determines whether they are visitors, immigrants, or refugees; others are held because the INS would like to return them to their countries of origin but their countries will not take them back. Aliens in these situations run the risk of long-term detention—possibly years of incarceration—with no end in sight. They are prisoners of the INS.

The number of noncitizens held by the INS has dramatically increased since Congress passed legislation in 1996 that requires the INS to detain certain categories of noncitizens, principally people who have committed a crime in our country. As many more people have found themselves in long-term custody, they have turned to the federal courts for help. The courts have split on whether the INS has legal authority to detain people who, as a practical matter, cannot be repatriated. The Supreme Court recently granted certiorari in Zadvydas v. Underwood and Ma v. Reno to resolve the issue.

Roots of the Power to Control Immigration

Most people probably think of immigration control as a central function of our federal government. Yet the U.S. Constitution does not clearly place this function with the federal government. In the first part of the nineteenth century, there was a real question whether the authority to control immigration would rest with the states or with the federal government. (See, e.g., Passenger Cases, 48 U.S. 283 (1849).) The Supreme Court eventually decided that the power ought to be exercised by federal officials.

Part of the reason the Supreme Court found the federal government to control immigration is that decisions to admit or exclude aliens may be linked to foreign affairs. The federal government, not state, has the power to make treaties and conduct foreign affairs. The link between immigration and foreign affairs is perhaps strongest when the government excludes those who come to our borders for the first time, rather than when it seeks to deport noncitizens who have already established legal residence.

The Power to Detain "Excludable" Aliens

The authority to exclude people who seek to enter the U.S. historically has included the power to detain them. Without the ability to hold noncitizens in custody while deciding whether to admit them, the U.S. could not control its borders. The extent of this power was tested in a case that reached the Supreme Court in 1953, Shaughnessy v. United States ex rel. Mezei (345 U.S. 206 (1953)).

Ignatz Mezei was a noncitizen who had lived in the U.S. under an uncertain status, but left this country for what the Supreme Court called "a protracted absence." When he sought to return to the U.S. as a new immigrant, he was detained on Ellis Island and eventually ordered excluded on grounds of national security. But Mezei's citizenship was uncertain, and no other country would accept him. He stayed on Ellis Island for several years. The Supreme Court held that the power to exclude Mezei from the country included the power to enforce the order of exclusion, even by long-term detention. A year after the Supreme Court decision, the U.S. Attorney General decided that Ignatz Mezei was no longer a threat and relented; Mezei was released into the U.S. for humanitarian reasons. Yet the Supreme Court decision stands as a strong statement of the government's power with respect to aliens who come to the border seeking permission to enter.

The Mariel Boatlift

In the spring and summer of 1980, 125,000 Cuban citizens came to Key West, Florida, on a flotilla of small boats. The Mariel Boatlift, so-called because the Cubans left from Mariel harbor, was one of the most remarkable migration events in U.S. history. Most of the boatlift participants were admitted to the U.S., and most became permanent residents or citizens. At the time they arrived, however, virtually all were legally "excludable" because they had come to this country without first obtaining permission to enter. Several thousand were immediately ordered excluded from the U.S. and were detained pending repatriation. Several thousand others were temporarily admitted to the U.S. pending completion of their applications for permission to enter but were later arrested for crimes committed in the U.S., and then ordered excluded due to these crimes. They were released to INS custody after they served their sentences. In 1984, Cuba agreed to the repatriation of 2,746 Mariel Cubans but refused to accept any more. As a result, over the last twenty years, the INS has confined several thousand Mariel Cubans, many in jails or federal prisons long past the end of their criminal sentences, some for more than a decade.

Many detained Mariel Cubans brought court challenges to protest their long-term confinement. The lower federal courts generally rejected their claims, and the Supreme Court never granted certiorari to review these cases. Under Mezei, courts held, people who come to the U.S. seeking admission have no "right" to enter, and the INS's power to detain is a necessary part of the power to exclude because of the link to authority over foreign affairs. People who have lawfully entered the U.S. and now live here are fully protected by the Constitution. People who come to the border seeking admission have not yet entered this country and therefore are not entitled to the Constitution's complete protections, even if they are held in detention centers, jails, and prisons in the U.S. (See, e.g., Barreto-Echevarria v. Rison, 44 F.3d 1441 (9th Cir. 1995) (en banc) (Alexis Barrera-Echevarria, who unsuccessfully challenged his detention in the Ninth Circuit, is now in his sixteenth year of INS incarceration); Cisbert v. U.S. Attorney General, 988 F.2d 1437 (5th Cir. 1993)).
The New Prisoners

Following passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), immigration detention substantially increased and expanded beyond the "exclusion" process. IIRIRA erases some of the historical distinctions between proceedings to exclude noncitizens who seek entry and proceedings to deport permanent residents or others already admitted to the U.S. Both are now called "removal" proceedings. IIRIRA requires the INS to take certain groups of aliens into custody pending removal proceedings and to deport them within ninety days of the ordered removal date. However, the statute also says that some noncitizens, notably people who have committed certain serious crimes, "may be detained beyond the [90-day] removal period." (8 U.S.C. § 1231(a)(6).)

As a practical matter, the INS is not able to "remove" all people ordered returned to their countries of origin. The U.S. does not have repatriation agreements with a number of countries, such as Vietnam, Laos, and Cambodia; nor is it always easy to determine a person's citizenship or where he or she should be sent. The INS currently detains hundreds of noncitizens who cannot be sent back to their countries of origin. Many of these are former permanent residents—people who entered the U.S. lawfully and may even have lived here for many years. Most committed criminal offenses in the U.S. and completed those sentences but are now being held in jail, prisons, or detention centers without a further trial or any judicial process.

The problem is illustrated by the trials of the two people whose cases are now before the Supreme Court. Kostutis Zadvydas (Zadvydas v. Underdown, 185 F.3d 279 (5th Circuit 1999)), finished his sentence for a drug offense and was placed in INS custody in 1994. He came to the U.S. in 1956, when he was just eight years old. Zadvydas cannot be returned to a country of origin because his true nationality is undetermined. He was born in a displaced persons camp in Germany. His parents were Lithuanian, but their birth records are incomplete and neither Germany nor Lithuania will accept him. Kim Ho Ma (Ma v. Reno, 208 F.3d 815 (9th Cir. 2000)) fled Cambodia when he was just two years old, and came to the U.S. in 1985, when he was six. He became a lawful permanent resident. He was convicted of manslaughter in 1996, and completed his state sentence before being released to INS custody. The U.S. has no repatriation agreement with Cambodia, and Cambodia will not issue travel documents authorizing Ma's return. The prospects of his return to Cambodia are highly uncertain.

The Courts Disagree

Expanded detention has brought a new round of legal challenges to the government's power, and thus far the courts have split. Although no one contests the government's power to detain if "removal" can in fact take place, there is a real dispute about what happens if confinement is indefinite or seemingly permanent.

Two federal appellate courts ruled the INS has the authority to detain even for the 1996 laws, but a broader holding is also possible.

Questions for the Supreme Court, and for Us All

As the Supreme Court takes up these cases, the stakes are tremendously high for the detainees. For the many people who face open-ended detention by the INS, the question is whether they are free to return to their families in this country—at least while various governments sort out their future—or whether they must remain long-term prisoners of the INS.

For the INS the question is whether it may continue to hold people who cannot be removed, or whether the agency must find some other way to effect repatriation. The conflict in the courts has caused real difficulties for the agency. It cannot exe-

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