



IMMIGRATION LITIGATION UPDATE: CONSTITUTIONALITY OF INDEFINITE DETENTION

by **Francesco Isgro***

The 1996 immigration reforms, namely the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), have been a boon for immigration litigation. Indeed, the efforts of Congress to limit judicial review of certain administrative decisions involving the removal of aliens convicted of serious crimes have had the opposite effects. Most federal district courts and certain courts of appeals which have confronted these issues have ruled in favor of the aliens,

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thus providing additional levels of judicial review that had not been contemplated by Congress. However, the litigation over these issues is far from over, at least until the Supreme Court or Congress steps into the fray.

Much of the litigation has been caused by Congress's efforts to capture, literally, for special treatment, aliens who had committed a serious crime, namely an aggravated felony, prior to the passage of the 1996 reforms. To do so, Congress created an elaborate scheme to ensure that this particular class of criminal aliens would be cut off from all immigration reliefs, unable to have access to the courts, and subject to mandatory detention pending removal by the INS. When the INS began implementing the new law, it became clear that many aliens caught within the web of the 1996 reforms were permanent resident aliens who had lived in this country most, if not all of their lives. Some of them who had committed "minor offenses" were now left without any remedies. Moreover, many of these permanent residents who now find themselves in INS custody are from countries that have refused to issue travel documents. The INS is thus left in a Catch-22 situation: release the alien with the risk that he or she could commit another crime in the community, or continue to detain them until the country of nationality issues a travel document, the latter decision inevitably to be challenged in court.

These "draconian measures," as characterized by some of the critics of the 1996 reform, have led the courts to confront, as never before, the constitutional issues raised by the power of Congress to legislate over immigration

matters. Indeed, some of these issues were aired more than a century ago when Congress sought to exclude and deport Chinese laborers who had helped to build the railroads. The Supreme Court, ruling at a time when public sentiment was against the presence of foreigners and especially the Chinese, gave Congress broad powers to regulate immigration, a power which was later characterized as "plenary." The plenary power of Congress was reaffirmed by the Supreme Court during the World War II era, when Congress exercised it to enact legislation to expel resident aliens who were members or had been members of the Communist Party.

The latest manifestation of the plenary power exhibited in Congress' renewed efforts to remove criminal aliens, is forcing lower federal courts to examine century-old precedents or avoid them altogether — depending upon which road the courts take. The following is a summary of how some of the courts have addressed the constitutionality of indefinite detention.

CASE FINDING THAT INDEFINITE DETENTION VIOLATES FIFTH AMENDMENT

The first significant ruling involving a challenge to the constitutionality of the indefinite detention of aliens subject of a final order of deportation or removal, was made by a panel of five federal district court judges in *Phan v Reno*, 56 F. Supp.2d 1149 (W.D. Wash. 1999). The panel had been convened to consider the common legal issues raised in more than 100 lawsuits filed by detained aliens in Seattle, Washington. These aliens had been ordered deported to countries that to date have refused them admission. The five judges held that the aliens' status as long-time permanent

residents of the United States entitled them to constitutional protections under the Fifth Amendment Due Process Clause. The court found that the detained aliens had a fundamental liberty interest in being free from incarceration. Consequently, it applied a strict scrutiny review to determine whether the deprivation of due process was tailored to serve a compelling government interest. This standard, said the court, requires a balancing of the likelihood that the government will be able to effectuate deportation against the dangerousness of each petitioner and the likelihood that he will abscond if released.

The court rejected the government's argument that under the plenary power doctrine it should apply a more deferential standard of review. The court explained that while such doctrine supports judicial deference to the "legislative and executive branches on substantive immigration matters, such deference does not extend to post-deportation order detention" because "indefinite detention of aliens ordered deported is not a matter of immigration policy." The court also explained that the doctrine had "far less force here" because the detention or release of the aliens "does not raise foreign relations questions."

The court then examined whether the procedures governing the aliens' detention passed constitutional muster. The court, after applying the *Mathews v. Eldridge* analysis, concluded that the procedures governing post-removal order detention do not comport with procedural due process because of the lack of any individualized consideration of petitioners' circumstances and the lack of a hearing on the issue of eligibility for release from detention. In support of its conclusion, the court raised concerns about the "quality of review afforded by the INS to the petitioners," noting

that "the INS does not meaningfully and impartially review the petitioners' custody status." Accordingly, the court held that "[a]t a minimum, each petitioner is entitled to a fair and impartial hearing before an immigration judge at which he or she can present evidence to support release pending deportation." Moreover, petitioners also "must be able to appeal any adverse denial of release to the BIA."

CASES FINDING THAT THE INDEFINITE DETENTION OF ALIENS SUBJECT TO FINAL ORDERS DOES NOT VIOLATE THE CONSTITUTION

The most recent decision to address the constitutionality of indefinite detention was handed down by the Tenth Circuit in a split decision in *Ho v. Green*, ___F.3d___, 2000 WL 228755 (10th Cir., Feb. 29, 2000). The case involved two aliens from Vietnam who had legally entered the United States as refugees more than fifteen years ago. One of them, Ho, never became a permanent resident, while the other, Nguyen, became a permanent resident in 1984.

Ho was convicted of several crimes and following his release from prison, he was paroled into the custody of the INS. After an exclusion hearing, Ho was ordered excluded and ordered deported to Vietnam. However, the Vietnamese government has not issued the requested travel document. Ho then sought immigration parole, but the INS denied the request, finding that he had not demonstrated that he would be a public danger to the community or that he would not flee. Nguyen, too, was convicted of crimes which under the INA were classified as an aggravated felonies. After he served his sentence, he was paroled to the INS for deportation to Vietnam.

In this case, too, the government of Vietnam has not issued the travel document.

In addressing the constitutionality of indefinite detention, the court made no distinction between the immigration status of Ho, a refugee, and Nguyen, a permanent resident alien. The court wrote that, "any right either Petitioner had to remain in this country was extinguished when their removal orders became final." Whatever liberty interest they may possess, noted the court, it must be viewed from the perspective of an alien who has sought but been denied initial entry into this country and who is subject to indeterminate detention because his country of origin will not accept his return. Thus, following this line of reasoning, the court found that the Supreme Court "has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." Consequently, the majority found no constitutional impediments to the continued detention of Ho and Nguyen.

The majority's constitutional analysis drew a sharp dissent. The dissenter argued that the court's treatment of the detained aliens constitutional claims was supported "only by a tenuous foundation of legal fiction stacked upon legal fiction." This fictional foundation, wrote the dissenter, "collapses under the ground floor constitutional principle" that an "alien is surely a 'person' in any ordinary sense of that term," and thus protected by the Due Process Clause of the Fifth Amendment.

In another decision by a court of appeals, the Fifth Circuit also held in *Zadvydas v. Underdown*, 185 F.3d 279 (5th Cir. 1999), that the continued detention of a stateless person

LEGAL REPORT

subject to a final order of deportation did not violate the Constitution. Zadyvas was born in a displaced persons camp in Germany in 1948. In 1956, he immigrated with his family to the United States and became a resident alien. Unfortunately, in the subsequent years he accumulated a list of crimes, culminating in a drug conviction that brought him a sixteen-years' imprisonment. However, after serving only two years, he was released on parole and the INS promptly took him into custody. He was ordered deported as an alien convicted of an aggravated felony, but German officials refused to accept Zadyvas, taking the position that his birth on German soil did not automatically entitle him to German citizenship. The Lithuanian government also refused to accept Zadyvas because he was neither a citizen nor a permanent resident of Lithuania. Thus, Zadyvas, practically a stateless person, challenged his continued detention by the INS as, among other claims, a violation of the Eighth Amendment, the due process clause, and international law. The district court found that, because Zadyvas was stateless and thus could never be deported, he could not be permanently incarcerated without violating his substantive due process rights. The INS appealed that decision.

On appeal, the Fifth circuit reversed the decision below, and rejected Zadyvas' contention that his detention was punishment without trial and thus violated his substantive due process liberty interest. In particular, the court disagreed with his contention that as a former permanent resident alien, he had greater rights under the Constitution. The court acknowledged that resident aliens are entitled to procedural due process before they may be removed from the United

States. However, said the court, "the fact that resident alien status entitles one to due process respecting the decision to deport does not mean that the plenary power concept is extinguished. The national interest in effectuating deportation is identical regardless of whether the alien was once resident or excludable," noted the court. Citing a century-old case, the court found that "the need to expel such an alien is identical, from a national sovereignty perspective, to the need to remove an excludable alien who has been finally and properly ordered returned to his country of origin." Accordingly, the court concluded that the government may detain a resident alien based on either danger to the community or risk of flight while good faith efforts to effectuate the alien's deportation continue and reasonable parole and periodic review procedures are in place."

CONCLUSION

The constitutional issues being raised by the indeterminate detention of aliens subject to final orders of deportation or removal will continue to preoccupy the courts, the critics, and the government for a long time. Interestingly enough, it appears that the government has made extensive efforts to ensure that aliens subject to long term detention get periodic review of their status and in appropriate cases be paroled in the community. Indeed, it is clearly not in the best interest of the government or the taxpayers to continue to detain a person who has already served a prison sentence for the crime he or she committed. As the government has indicated before courts who have addressed these detention cases, extensive diplomatic efforts are being made to ensure that countries accept the return of their nationals. But then, there is always the case of Zadyvas. ■