IMMIGRATION POLICY CENTER

…providing factual information about immigration and immigrants in America

POLICY BRIEF

Legal Fiction Denies Due Process to Immigrants

by Beth Werlin*
AILF Legal Action Center

Over a thousand noncitizens face indefinite detention in the United States on the basis of a meaningless legal technicality.

On October 13, 2004, the Supreme Court heard arguments in two cases that may determine whether the U.S. government has the authority to jail noncitizens indefinitely – and perhaps permanently – based on civil immigration charges. The cases are *Benitez v. Mata* and *Clark v. Suarez-Martinez*,[1] and involve two noncitizens who are excludable from the United States, but whom the government is unable to deport because their home countries will not accept them. The government's solution to this dilemma has been to lock these men up, along with hundreds of other people in similar situations, despite the fact that their deportation from the United States is not foreseeable. The government says that this solution is "the only means of exercising the United States' sovereign prerogative to exclude [these noncitizens]…."[2] But this solution, which some courts have found unlawful, denies fundamental rights on the basis of a legal technicality, is profoundly unjust, and comes at a significant expense to the U.S. taxpayer. Further, the practice of indefinite detention undermines the moral authority of the United States throughout the world at a time when the nation can ill afford to do so.

A Life Sentence

The cases of Mr. Benitez and Mr. Suarez-Martinez are representative of hundreds of other noncitizens who languish in U.S. jails. Many are Cubans who were among the 125,000 people who fled that country in 1980 during the Freedom Flotilla from Mariel Harbor. Although most of the Mariel Cubans became permanent residents and, later, U.S. citizens, a small number violated U.S. laws and were ordered deported. With only a limited exception,[3] Cuba has refused to take them back. In 2003, the U.S. government reported that approximately 750 Mariel Cubans who were found to be excludable from the United States were imprisoned because they could not be deported. In addition, the U.S. government estimates that there are approximately 300 excludable detainees from countries other than Cuba.[4] Significantly, not all of the people jailed indefinitely in immigration custody have criminal records. Some are asylum seekers from over 70 countries around the world who arrived at U.S. borders without proper documentation.[5]

However, even among immigration inmates with criminal histories, many were convicted of nonviolent crimes and all served their criminal sentences (if they had any) before entering immigration custody. Most of the detained Mariel Cubans with criminal convictions end up being jailed in immigration custody far longer than their original criminal sentences. One study found that 60.9 percent had served criminal sentences of five years or less, but had served at least six years in immigration custody after the original sentence.[6] In one case, a person who served only two years and four months for his criminal conviction was detained for over twenty years following the completion of his criminal sentence. Over 160 Mariel Cubans have been jailed in immigration custody for ten years or more.[7]

These detentions continue despite the fact that three years ago, in the case of *Zadvydas v. Davis*, the Supreme Court held that the immigration detention statute precludes the government from indefinitely detaining former permanent residents – even those who have committed crimes – in cases where it is not foreseeable that they will be returned to their home countries. The Supreme Court said, "We read an implicit limitation into the statute before us. … [T]he statute, when read in light of the Constitution's demands, limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States. It does not permit indefinite detention."[8] Six months, the Court held, was a reasonable amount of time in which to accomplish foreseeable removals; detention beyond six months was presumptively unreasonable and may be unlawful.

Meaningless Technicalities

After the Supreme Court's decision, the government established rules for releasing from indefinite detention former permanent residents and other noncitizens, including those who entered the United States without documentation. The government maintains, however, that the Supreme Court's decision in Zadvydas doesn't apply to people like Mr. Benitez and Mr. Suarez-Martinez, and that it can interpret the immigration detention statute differently for excludable Mariel Cubans and other noncitizens who were "paroled" into the United States. The government makes a distinction between those who have "entered" the United States, whether legally or illegally, and those who are physically present in the United States, but who were stopped at the border and "paroled" into country without being "admitted." The crux of the government's argument in the two current cases before the Court is that this technical difference in how Mr. Benitez and Mr. Suarez-Martinez entered the country is reason enough to make their indefinite detention permissible.

Despite lacking technical "admission" or "entry" to the United States, parolees have legal (if not permanent) status in the United States. Mariel Cubans like Mr. Benitez and Mr. Suarez-Martinez were treated as refugees when they arrived here and were eligible to benefit from legislation granting them permanent residence. Many Mariel Cubans now ordered excluded from the United States have U.S. families and strong ties to their communities in this country. Nonetheless, the U.S. government says they have no protected interest in freedom from detention. As a result of this reasoning, Mr. Benitez and Mr. Saurez-Martinez, and others like them, have been denied fundamental rights on the basis of little more than a legal technicality. Ironically, the government routinely admonishes other nations for similarly questionable legal practices.[9]

Wasted Resources

Regardless of whether or not the government's interpretation of the immigration detention statute is legally sustainable, indefinite detentions are a significant expense to U.S. taxpayers. The federal government spends $89,930 every day detaining excludable noncitizens whose countries will not take them back, at a cost of $85 per person per day.[10] Over the course of a year, the price tag is $32.8

million. Although this is only a small percentage of the $600 million the government spends detaining all noncitizens in the course of the deportation process,[11] it nonetheless represents a particularly irrational use of resources.

A Matter of Rights

The U.S. government claims that it conducts "meaningful" annual reviews of these indefinite detentions. Although regulations do establish custody reviews,[12] such reviews are neither annual nor meaningful. The review process lacks even the most basic of procedural protections, such as judicial review, a neutral decision maker, the right to counsel, and the right to confront adverse evidence. To the extent the regulations do set forth procedures and standards, these are implemented arbitrarily and often ignored.[13] The result is that over a thousand people are jailed without due process at an extremely high price to the detainees themselves, their families, and the U.S. taxpayer. Attempts to rationalize the inherently unjust treatment of these detainees on the basis of a legal technicality are a disservice to the fundamental principles of fairness and due process that lie at the heart of our judicial system. Moreover, they undermine the credibility of the United States in criticizing other nations that fail to respect fundamental rights to due process and freedom from arbitrary imprisonment.

October 2004

* Beth Werlin is a Staff Attorney with the American Immigration Law Foundation's Legal Action Center.

Copyright 2004 by the American Immigration Law Foundation.

Endnotes

[1] *Crawford v. Suarez-Martinez*, No. 03-35053 (9th Cir. Aug. 18, 2003) (unreported decision) *cert. granted*, 124 S. Ct. 1507, 158 L. Ed. 2d 152 (U.S. Mar. 1, 2004) (No. 03-878); *Mata v. Benitez*, 337 F.3d 1289 (11th Cir. 2003) *cert. granted*, 124 S. Ct. 1143, 157 L. Ed. 2d 966 (U.S. Jan. 16, 2004) (No. 03-7434).
[2] See Brief for the Petitioners, *Crawford v. Suarez-Martinez*, No. 03-878, *34 (U.S. filed May 7, 2004).
[3] In 1985, 201 excluded Mariel Cubans were returned to Cuba pursuant to an agreement between the United States in Cuba. Although Cuba was supposed to receive a total of 2,746 Cuban nationals in exchange for the United States accepting 20,000 Cubans, Castro suspended the agreement.
[4] Government's brief in *Crawford v. Suarez-Martinez.*
[5] Julian Aguilar & Dan Malone, "Rotting in Jail," *Fort Worth Weekly*, September 29, 2004.
[6] See Letter from Post Conviction Justice Project at the University of Southern California Law School to Director of INS Policy Directives and Instructions Branch, July 27, 2000.
[7] Mark Dow, *American Gulag: Inside U.S. Immigration Prisons*. Berkeley, CA: University of California Press, June 2004.
[8] See *Zadvydas v. Davis*, 533 U.S. 678 (2001).
[9] See the U.S. State Department's annual *Country Reports on Human Rights Practices*.
[10] U.S. Department of Justice, Office of the Federal Detention Trustee.
[11] Human Rights First, *In Liberty's Shadow: U.S. Detention of Asylum Seekers in the Era of Homeland Security*, New York, 2004.
[12] 8 C.F.R. § 212.12 (2004).
[13] See *Ferrer-Mozorra v. United States*, Inter-American Commission on Human Rights, Report No. 51/01, Case 9903, April 4, 2001; *American Gulag*. For comparison with the U.S. government's failure to comply with *Zadvydas* procedures, see U.S. General Accounting Office, *Better Data and Controls Are Needed to Assure Consistency with the Supreme Court Decision on Long-Term Alien Detention*, GAO-04-434, May 2004.