



“Give me your tired, your poor, your huddled masses yearning to breathe free, the wretched refuse of your teeming shore. Send these, the homeless, tempest-tossed to me, I lift my lamp beside the golden door!”¹

LAND OF THE FREE? IMMIGRATION DETENTION IN THE UNITED STATES

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Many see the “golden door” to the United States as a beacon of freedom, opportunity, and a better life than what they left behind. But for some noncitizens—“aliens” as they are defined by current immigration law—that “golden door” leads to an immigration detention center, where they must await: (1) agency determinations on their removability and any applications for relief and protection from removal or (2) execution of a final order of removal from the United States.² Indeed, the United States uses immigration detention as “a tool of immigration enforcement—to effectuate the deportation of those who are removable under the law and to prevent danger to the community during this process.”³ Particularly important to understanding immigration detention is that such detention is considered civil or administrative, not criminal. Thus, not all rights and protections afforded those in criminal proceedings (e.g., counsel at government expense) attach in this context.⁴

As President Donald J. Trump’s administration took office, many questions remained as to how it would ultimately craft and implement its immigration-detention policies. While President Trump’s campaign platform provided indications, after taking office, he issued two immigration enforcement and border security related executive orders—implemented through agency memoranda and discussed herein—that answered some questions, left others open, and prompted new ones. But immigration-detention policies do not exist in a vacuum, nor are they the product of a single person’s ideology. History has shown that such policies generally reflect the social and political forces of the time. The world currently is grappling with: rising numbers of migrant children and families; increasing recognition of lesbian, gay, bisexual, and transgender (LGBT) people; apparent resurging nationalist ideology and xenophobia, domestically and abroad; and continuing concerns about terrorism, crime, and national security. This combination of forces creates a complicated backdrop. A review of relevant historical policies and cases may help contextualize contemporary issues in immigration detention and hopefully guide the formulation of—or at least advocacy for—better policies and practices.

Historical Evolution⁵

Constitutional Underpinnings and Plenary Power

The Constitution does not explicitly address the federal government’s authority over immigration—let alone detention of aliens. Indeed, the Constitution does not use the word “alien” at all; rather,

it variously guarantees rights and privileges to “people,” “persons,” “citizens,” and “subjects.” And, as “persons,” aliens who enter the United States are entitled to due process protection regarding the deprivation of liberty.⁶ But jurisprudence shows that the extent of such protection typically depends on a particular alien’s ties to the United States and national security considerations. Aliens who believe their immigration detention is unlawful typically seek judicial redress through filing a petition for a writ of *habeas corpus*.

The Supreme Court held that “the government of the United States has broad, undoubted power over the subject of immigration and the status of aliens.”⁷ As most recently recognized by the Court, that authority rests, in part, on the government’s constitutional power to “establish an [sic] uniform Rule of Naturalization” and its inherent power as sovereign to control and conduct relations with foreign nations.⁸ The Supreme Court has routinely declared that immigration falls within Congress’ and the executive branch’s “plenary power.”⁹ And without exception, the Supreme Court has upheld Congress’ “plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.”¹⁰

Under this authority, over the last 200-plus years, Congress has enacted numerous pieces of legislation addressing which aliens should be allowed into the United States, who should be deported, and who should be detained pending resolution of those questions.¹¹ In turn, the executive branch has implemented policies and procedures to effectuate these legislative mandates.

Alien and Sedition Acts

The fledgling United States wasted no time in confronting the issue of alien detention. In 1798—the same year the U.S. Constitution officially came into effect—Congress passed, and President John Adams signed into law, four bills known as the Alien and Sedition Acts. These included the Alien Enemy Act of 1798, allowing the president to detain and deport any male citizen of a hostile nation above the age of 14 during times of war.¹²

The Federalist-controlled Congress ostensibly passed the Alien and Sedition Acts to protect national security during an undeclared war with France. But modern historians now largely agree that the primary motive was actually to decrease the number of voters who disagreed with the Federalist Party. At the time, most immigrants living in the United States supported Thomas Jefferson and the Democratic-Republicans, the Federalists' political rivals.¹³ Although political authorities reportedly created deportation lists, many immigrants voluntarily left the United States during debate over the Alien and Sedition Acts, and President Adams ultimately never signed a deportation order.¹⁴

In 1800, after an electoral campaign dominated by denouncement of the Alien and Sedition Acts, Thomas Jefferson was elected president, and Democratic-Republicans gained control of Congress. They allowed the Sedition Act and Alien Friends Act to expire in 1800 and 1801, respectively, and repealed the Naturalization Act in 1802. The Alien Enemies Act, however, remained—and became the first (and oldest) statute authorizing alien detention.¹⁵

Westward Expansion, Immigration Act of 1882, and Chinese Exclusion

The 19th century saw the westward expansion of the United States—all the way to California, where gold was discovered in 1848. The demand for cheap labor to work in the mines and building projects to develop the frontier—along with unrest in China—led to a significant increase in Chinese migration to the American West.¹⁶ The Chinese migrants were largely tolerated until the economy weakened after the Civil War, and California labor leaders and politicians blamed them for depressing workers' wages.¹⁷ Animosity toward Chinese migrants grew to the point where the 1878 California Constitutional Convention appealed to Congress to take measures to prevent their further immigration.¹⁸

In 1882, Congress passed two significant immigration laws: (1) the Immigration Act of 1882, which for the first time specified that the federal government—rather than the states—had responsibility for regulating immigration and prohibited entry convicts, paupers, “mental defectives,” and other aliens likely to become public charges;¹⁹ and (2) the Chinese Exclusion Act, which specifically prohibited Chinese laborers from entering the United States—the first in what would become a series of immigration laws that barred entry to people of specific ethnicities and nationalities.²⁰

Litigation about the Chinese Exclusion Act and its subsequent amendments helped build the jurisprudential foundation of federal control over immigration, including the ability to detain those subject to removal. *Chae Chang Ping v. United States* arguably provided the initial basis for the plenary power doctrine, discussed *supra*, which was premised on national sovereignty.²¹ In *Wong Wing v. United States*, the Supreme Court struck down a provision that imposed “hard labor” for Chinese Exclusion Act violators, but held that deportation proceedings “would be vain if those accused could not be held in custody pending the inquiry into their true character.”²²

Lawful immigration detention was therefore determined not to be punishment, but an administrative function of border control.²³

Industrial Revolution, Mass Migration, and Alien Inspection Stations

On the East Coast, the late 19th century situation was not much better for European migrants. American nativists routinely invoked the “increasingly resonant logic of heredity and race.”²⁴ Drawn in part by the industrializing cities and the need for cheap labor, “new” Europeans often found themselves viewed as “increasingly drawn from the nations of southern and eastern Europe—peoples which have got not great good for themselves out of the race wars of centuries, [and have] . . . remained hopelessly upon the lowest plane of industrial life.”²⁵ The large number of people seeking entry to the country resulted in the need to better process those arrivals—particularly for an America that had become communicable-disease conscious.²⁶

Against this backdrop, Congress enacted the Immigration Act of 1891, and instituted immigration detention as an administrative tool to ensure that aliens were “properly housed, fed, and cared for,” pending a screening, which generally led to entry to the United States.²⁷ For the next 60 years, the United States had a policy of detaining all aliens seeking entry—at least for the period of time that it took to complete medical checks.²⁸ Two years later, the Immigration Act of 1893 made it “the duty every inspector of arriving alien immigrants to detain for a special inquiry . . . every person who may not appear to him to be clearly and beyond doubt entitled to admission.”²⁹

The best known—and busiest—of the admission stations was Ellis Island in New York Harbor, where 12 million people passed between 1892 and 1954.³⁰ Most arrival inspections occurred before 1924, after which Ellis Island was largely used as a detention and deportation station.³¹ A sister facility, Angel Island, was opened in San Francisco Bay in 1910.³² Arriving aliens generally were only detained for a few hours to complete the inspection process—with longer periods of detention for those with health problems; and a small percentage of aliens whose status needed to be determined, or who were among the 2 percent of arrivals who were denied entry to the United States and needed to be deported.³³

Wartime Immigration Detention

In 1917, the United States entered World War I. That same year, over President Woodrow Wilson's veto, Congress enacted its most comprehensive immigration legislation to date, the Immigration Act of 1917, which reflected a rise in nativism.³⁴ Rather than regulating immigration as prior acts had, this act restricted immigration from most Asian countries and imposed a literacy requirement on admission. The act also increased the executive's discretion to decide the fate of deportable aliens, but it did not indicate for how long aliens could be detained.³⁵ To fill gaps, courts imposed a so-called “reasonable time limit” of four months in immigration detention.³⁶

On April 6, 1917, President Wilson delivered Proclamation 1364 and invoked the Alien Enemies Act of 1789, which as discussed above, had remained good law after the Alien and Sedition Crisis.³⁷ Enemy aliens who failed to comply with U.S. laws and refrain from actual hostility or giving information, aid, and comfort to the enemy were “liable to restraint, or to give security, or to remove and depart from the United States.”³⁸ Ultimately, over 2,000 enemy aliens—male German nationals over 14 years old—were interned in camps until the end of the war.³⁹

In 1933, the United States unified two bureaus into a single agency, the Immigration and Naturalization Service (INS) and in the Department of Labor.⁴⁰ In 1940, INS transferred to the Department of Justice, where it remained for the rest of its existence.⁴¹

Detention under the auspices of the Alien Enemies act of 1789 was again used during World War II. On Feb. 19, 1942—shortly after the Japanese attack on Pearl Harbor—President Franklin D. Roosevelt issued Executive Order 9066, which forcibly relocated all people of Japanese ancestry—including aliens and citizens—on the United States' West Coast to internment camps.⁴² Of the nearly 120,000 people forcibly relocated and interned, nearly two-thirds were U.S. citizens.⁴³ Decades later, the United States provided compensation to former internees.

Immigration and Naturalization Act of 1952 and the Cold War

Following World War II, the world faced an unprecedented migratory and displacement crisis and the rise of communism—both influencing U.S. immigration law and detention policies. Over President Harry S. Truman's veto, Congress passed the Immigration and Nationality Act of 1952 (INA), which—although significantly amended over the years—remains the primary basis for immigration law today.⁴⁴

In 1952, the Supreme Court also issued its decision in *Carlson v. Landon*.⁴⁵ *Carlson* involved a challenge brought by aliens detained by INS under what Justice Felix Frankfurter viewed as the mistaken “conception that Congress had made [alien Communists] in effect un-bailable”—despite the fact that the attorney general ostensibly had discretion to release these aliens on bond.⁴⁶ The aliens acknowledged that they were Communist Party members and therefore removable, but challenged their immigration detention because there had been no finding that they were unlikely to appear for deportation proceedings when ordered.⁴⁷ The Supreme Court rejected claims that they were entitled to release if they did not pose a flight risk because “detention is necessarily a part of this deportation procedure.”⁴⁸

A year later, in 1953, the Supreme Court decided *Shaughnessy v. United States ex rel. Mezei*, in which it upheld the constitutionality of Mezei's 21-month immigration detention.⁴⁹ Mezei, who had lived in the United States for more than 25 years, left and spent 19 months in Hungary; when he returned, he was permanently excluded from the United States on national security grounds under 8 C.F.R. § 175.57. Because no other country would grant him entry, he became stranded on Ellis Island for 21 months without a hearing and petitioned the courts for a writ of *habeas corpus*. The Supreme Court held that Mezei was an entrant under the regulation and thus had no rights and no protections under the Constitution.⁵⁰

Immigration detention remained a relatively low profile until 1979 and 1980, when an influx of people from Cuba and Haiti began arriving on American shores. When Cuban President Fidel Castro refused to take back many of the Cuban migrants, many Americans grew concerned that they were criminals or public safety threats. In sorting out which of these migrants should be allowed to stay, the government detained them at numerous centers in Florida, Arkansas, Pennsylvania, and Georgia. Ultimately, the government paroled most of the Cubans into the United States in 1981 after finding that they were not dangers to the community.⁵¹

The Rise of ‘Crimmigration’ and Mandatory Detention

In the 1980s, Congress amended the INA several times “to deal more effectively and expeditiously with the involvement of aliens in seri-

ous criminal activities, particularly narcotics trafficking.”⁵² In 1986, Congress classified all controlled substances as drugs for purposes of establishing exclusions and deportation under immigration laws.⁵³ The Anti-Drug Abuse Act of 1988 (ADAA) introduced the term “aggravated felony” to the INA, resulting in a new category of deportable aliens. ADAA also mandated that an alien convicted of an aggravated felony be detained during deportation proceedings.⁵⁴ Immigration aggravated felonies originally only included murder, drug trafficking crimes, illicit trafficking in firearms or destructive devices, or any attempt or conspiracy to commit such act in the United States. But over the years, Congress greatly expanded the “aggravated felony” definition—which today consists of at least 18 subparts.⁵⁵

Within a matter of months in 1996, Congress passed two major immigration bills: (1) Antiterrorism and Effective Death Penalty Act,⁵⁶ which in relevant part expanded deportability grounds and provided broader mandates for detaining criminal aliens; and (2) the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),⁵⁷ which also expanded the scope of criminal removability.

Perhaps IIRIRA's most significant addition, however, was an explicit mandatory detention provision for most criminal aliens during the pendency of their removal proceedings. Under 8 U.S.C. § 1226(c) (known to immigration practitioners as “INA § 236(c)”), the Department of Homeland Security (DHS) ostensibly lacks all discretion to release certain categories of aliens on bond. For other aliens, they could be released on bond on a case-by-case basis, depending on their risk of flight and danger to the community. Under 8 U.S.C. § 1231(a)(6), those with an administratively final removal order are to be held in custody for a 90-day removal period.

In the following years, courts grappled with the mandatory detention system; ultimately, resulting in two landmark Supreme Court immigration detention decisions. First, the Supreme Court in *Zadvydas v. Davis*,⁵⁸ which arose when some countries refused to take back deportees. *Zadvydas* held that “indefinite detention” of aliens with administratively final removal orders raised constitutional concerns under the Fifth Amendment due process clause. Accordingly, the Supreme Court adopted a presumptively reasonable six-month period of detention, after which judicial review was appropriate to review the likelihood that the government could remove the alien in the “reasonably foreseeable future.” To be sure, however, simply keeping such an alien in detention more than six months does not mean that such detention has presumptively become unreasonable—and certain actions, including the alien's noncompliance with obtaining travel documents or otherwise obstructing the removal order, can toll the removal period and impact the reasonableness of continued post-order detention beyond the six-month mark.

Two years later, in *Demore v. Kim*, the Supreme Court upheld the constitutionality of 8 U.S.C. § 1226(c)'s mandatory detention provision for most criminal aliens “for the brief period necessary for their removal proceedings.”⁵⁹ In its decision, the Supreme Court cited statistics showing that detention in the majority of cases lasted less than 90 days, while most cases were completed in a few months.⁶⁰

Current Issues in Immigration Detention

From INS to DHS

The Homeland Security Act of 2002 created the modern immigration enforcement structure.⁶¹ The INS's functions were divided between three agencies within the newly created DHS: Customs and Border Patrol (CBP), Immigration and Customs Enforcement (ICE), and

U.S. Citizenship and Immigration Services (USCIS). ICE has primary responsibility for detention and removal operations. In executing these responsibilities, ICE currently focuses on two core missions: (1) identifying and apprehending criminal aliens and other priority aliens in the United States; and (2) detention and removal of those individuals apprehended in the United States' interior and those CBP apprehends patrolling the nation's borders.⁶² The current immigration detention statutes that DHS administers are found at 8 U.S.C. § 1226 (apprehension and detention of aliens), which govern immigration detention before an alien has an administratively final removal order, and 8 U.S.C. § 1231 (detention and removal of aliens ordered removed), which governs post-order immigration detention.

The United States currently operates the largest immigration detention system in the world, utilizing approximately 250 detention facilities. During Fiscal Year (FY) 2015, ICE housed a total of 307,310 detainees, although only a fraction of that population at any single time; ICE's average daily population (ADP) for FY 2015 was 28,168.⁶³ In FY 2015, approximately 84 percent of ICE's ADP was male and 16 percent were women.⁶⁴ These numbers are actually down from the FY 2012 high of 477,523 detainees during the year—a time when Congress mandated that ICE “maintain” 34,000 detention beds at all times. Notably, “maintaining” a detention bed does not necessarily mean that a person must “fill” or “occupy” that bed. Congress lowered the bed quota based on decreased illegal border crossings.⁶⁵ For FY 2017, ICE requested \$1.748 billion to fund maintenance of 30,913 beds.⁶⁶

In November 2016, DHS Secretary Jeh Johnson announced a surge in apprehensions along the Southwest border: 46,195 in October, compared to 39,501 in September and 37,048 in August. As a result of this surge, approximately 41,000 aliens were in immigration detention as of November 2016.⁶⁷ Secretary Johnson authorized ICE to acquire additional detention space for single adults so that those apprehended at the border can be removed as soon as possible.⁶⁸

But following President Trump's inauguration, the number of apprehensions at the border fell. For example, according to CBP data, February 2017 numbers (18,762) were down 40 percent from January 2017 (31,578); March 2017 numbers (roughly 12,000) were down 35 percent from February 2017 and 63 percent from March 2016.⁶⁹ Some experts attribute this, at least in part, to President Trump's issuance of certain executive orders, including: (1) *Enhancing Public Safety in the Interior of the United States*, and (2) *Border Security and Immigration Enforcement Improvements*. Among other things, these orders:

- specified immigration-enforcement priorities;
- called for increased hiring of immigration officers (10,000) and border patrol agents (5,000);
- reinstated a program (Secured Communities) to facilitate cooperation between immigration authorities and other law enforcement agencies;
- directed relevant Cabinet officials to “allocate all legally available resources to immediately construct, operate, control, or establish contracts to construct, operate, or control facilities to detain aliens at or near the land border with Mexico”, and to assign asylum officers and immigration judges to conduct appropriate interviews and proceedings in those facilities;
- and specifically directed the DHS secretary, to the extent permitted by law, to ensure the detention of aliens apprehended for immigration-law violations pending the outcome of their removal

proceedings or removal from the United States and to end the so-called “catch and release” practice of routinely releasing aliens into the United States after apprehension for immigration-law violations.⁷⁰

Modern Crimmigration

Removal Priorities. As of April 2017, ICE focuses its resources on removing aliens identified by President Trump's executive order. In a Feb. 20 memorandum, to “maximize the benefit to public safety, to stem unlawful migration and to prevent fraud and misrepresentation,” DHS Secretary John Kelly directed DHS personnel to prioritize for removal those aliens Congress described in:

- INA § 212(a)(2), 8 U.S.C. § 1182(a)(2) (inadmissible on criminal grounds);
- INA § 212(a)(3), 8 U.S.C. § 1182(a)(3) (inadmissible on national security and terrorism related grounds);
- INA § 212(a)(6)(C), 8 U.S.C. § 1182(a)(6)(C) (inadmissible on misrepresentation and fraud grounds);
- INA §§ 235(b) and (c), 8 U.S.C. §§ 1225(b) and (c) (subject to expedited removal proceedings for inadmissible arriving aliens or removal without further hearing on national security or other grounds); and
- INA §§ 237(a)(2) and (4), 8 U.S.C. §§ 1227(a)(2) and (4) (deportable on criminal or national security and related grounds).⁷¹

Secretary Kelly further directed that, regardless of the basis for an alien's removability, DHS personnel should prioritize removable aliens who:

- have been convicted of any criminal offense;
- have been charged with any criminal offense that has not been resolved;
- have committed acts that constitute a chargeable criminal offense;
- have engaged in fraud or willful misrepresentation in connection with any official matter before a government agency;
- have abused any program related to receipt of public benefits;
- are subject to a final order of removal but have not complied with their legal obligation to depart the United States; or
- in the judgment of an immigration officer, otherwise pose a risk to public safety or national security.

Secretary Kelly authorized the ICE director, CBP commissioner, and USCIS director to issue further guidance to allocate appropriate resources to prioritize enforcement activities within the above categories. He gave the specific example of prioritizing enforcement activities against removable aliens convicted of felonies or who are involved in gang activity or drug trafficking.⁷² To the extent they conflicted with those in the Feb. 20 memorandum and with certain enumerated exceptions (notably prior guidance for applying to prosecutorial discretion for individuals who came to the United States as children), Secretary Kelly's Feb. 20, 2017 memorandum explicitly rescinded “all existing conflicting directives, memoranda, or field guidance regarding the enforcement of our immigration laws and priorities for removal.” In many ways, current enforcement priorities are a continuation and extension of previous prioritizations—focusing on national security threats and criminals, many of whom were

subject to mandatory detention during removal proceedings.

Secure Communities and the Priority Enforcement Program. In July 2015, based on the priority of removing convicted criminals and in an attempt to gain the support of many state and local jurisdictions that had been uncooperative with ICE, DHS ended the Secure Communities program and replaced it with the Priority Enforcement Program (PEP).⁷³ Secure Communities was a 2008 Bush administration initiative—expanded by the Obama administration—originally designed to fully integrate immigration and law enforcement databases. Under Secure Communities, local law enforcement officials shared information concerning aliens with federal immigration authorities—including lawfully present and undocumented aliens—who had been arrested.⁷⁴

In particular, Secure Communities raised questions about ICE's use of "immigration detainers"—documents ICE uses to notify other law enforcement agencies of its interest in taking custody of specific aliens in those agencies' detention.⁷⁵ ICE, and before it INS, had used immigration detainers as a means of obtaining custody of and detaining aliens for removal purposes since at least 1950.⁷⁶ Notably, under Secure Communities, ICE sometimes asked other agencies to continue detaining the alien not more than 48 hours "beyond the time when the subject would have otherwise been released from ... custody to allow DHS to take custody of the subject."⁷⁷ But, while ICE emphasized that under Secure Communities it prioritized criminal aliens—particularly "aggravated felons," other felons, and those convicted of three or more misdemeanors—reports surfaced of detainers issued for aliens without criminal convictions or single misdemeanor offenses.⁷⁸ As a result, several state and local law enforcement jurisdictions adopted policies of declining ICE immigration detainer requests for at least some aliens, and numerous lawsuits were filed challenging detainer practices.⁷⁹

Ultimately, Secure Communities came under criticism for targeting a number of aliens who committed seemingly minor, nonviolent offenses.⁸⁰

In July 2015, PEP became fully operational and replaced Secure Communities.⁸¹ Like Secure Communities, PEP "continue[d] to rely on fingerprint-based biometric data submitted during bookings by state and local law enforcement agencies to the Federal Bureau of Investigation for criminal background checks."⁸² However, detainers under PEP were to be used only for aliens with convictions—rather than just arrests—for crimes that are described in ICE's priorities memo.⁸³ However, as discussed, President Trump called for the reinstatement of the Secure Communities Program, which DHS Secretary Kelly specifically implemented in his Feb. 20, 2017, Enforcement of the Immigration Laws to Serve the National Interest memo, which terminated the PEP program and restored Secure Communities.⁸⁴

Mandatory and Prolonged Detention Revisited

With the official prioritization of criminal aliens, and increased enforcement generally, more aliens in removal proceedings find themselves subject to 8 U.S.C. § 1226(c)'s "mandatory detention," which the Supreme Court previously upheld as constitutional in *Demore v. Kim*. But immigration court backlogs have resulted in removal proceedings taking much longer than they did in years past—some aliens being detained for years, waiting for their cases to be completed before the immigration court and Board of Immigration Appeals. Thus, courts have struggled to apply the *Zadvydas* and *Demore* holdings in the modern context. This has resulted in a circuit split in

approaches to mandatory and prolonged detention: (1) a "reasonable period" administered on a case-by-case basis and (2) a bright-line six-month/180-day approach.

The First, Third, Sixth, and Eleventh Circuits have adopted a "reasonableness" interpretation to prolonged detention, holding that an alien can only be held in immigration detention for a "reasonable" period without being provided a bond hearing.⁸⁵ In contrast, the Ninth and Second Circuits adopted a bright-line six-month/180-day period interpretation.⁸⁶ Under this approach, an alien who is otherwise subject to mandatory detention must be given a bond hearing after six months in detention. The Ninth Circuit's most recent case, *Rodriguez v. Robbins*, brought the issue of mandatory and prolonged detention back before the Supreme Court.⁸⁷

The Supreme Court heard the *Rodriguez* oral argument on Nov. 30, 2016. But on Dec. 15, 2016, the Supreme Court issued a supplemental briefing order, directing the parties and any amici to address whether the Constitution—rather than a proper interpretation of the immigration statutes—requires the result the Ninth Circuit reached. As University of Texas School of Law professor Steve Vladeck—who also joined in a *Rodriguez* amicus brief—observed, "if the justices tackle the extent to which the Constitution does or does not compel the Ninth Circuit's bottom line, [*Rodriguez*] now may force the Court to answer" a number of significant unanswered questions, including:

- whether circumstances exist in which the government may constitutionally detain aliens pending removal for more than six months without violating due process;
- the meaning and continuing vitality of *Mezei*, which has often been read to hold that aliens physically "stopped at the border"—such as some *Rodriguez* plaintiffs—do not have due process rights;
- whether and when IIRIRA's mandatory detention requirements raise procedural and/or substantive due process problems; and
- the standard of review the Constitution requires in cases in which it requires judicial review of ongoing detention.⁸⁸

If the Supreme Court addresses any of these questions, the ramifications for immigration-detention litigation could be profound.

Privatization of Immigration Detention

Not all aliens are detained in ICE owned-and-operated facilities. ICE contracts with state and local jails and for-profit prison corporations to house aliens—justifying such actions as a cost-cutting measure.⁸⁹ In 2014, the immigration-detention-bed breakdown was as follows: 11 percent ICE facility; 18 percent for-profit detention facilities under contract with ICE; 24 percent in state and local government detention facilities that exclusively house aliens for ICE; 28 percent in state and local detention facilities that also house criminal defendants and convicts; and 19 percent in U.S. Marshals Service facilities.⁹⁰ In 2014, of those aliens who were detained, 62 percent were housed in facilities run by private companies; that rose to 73 percent in 2016.⁹¹

As of 2015, for-profit prison corporations administered nine of the country's 10 largest immigration-detention centers.⁹² Critics argue that the growth in privatization to congressional bed quotas and contracts has led to administrative decisions to detain—rather than release—otherwise bond eligible aliens, including vulnerable detainees such as asylum-seekers and LGBT people.⁹³ Critics also highlight that

DHS is the largest federal client of the private-prison industry.⁹⁴ For example, according to February 2016 Security and Exchange Commission filings, ICE contracts account for 24 percent of Correction Corporation of America's 2015 \$1.79 billion revenue and 17.7 percent of The GEO Group Inc.'s 2015 \$1.8 billion revenue.⁹⁵

After the U.S. Department of Justice's Aug. 18, 2016, announcement that it would phase out the use of private prisons to house criminal inmates, critics called on ICE to follow suit for immigration detainees. Secretary Johnson directed the Homeland Security Advisory Council to evaluate the situation and submit a report by Nov. 30, 2016. After a two-month investigation by a six-member subcommittee made up of former law enforcement leaders, legal experts, and advocates, the report was submitted to the council. In part, the report called for greater oversight and monitoring of immigration detention facilities; on a vote, the council panel upheld these provisions.⁹⁶ However, 17 of the 24 members of the council panel voted to support a dissent that was included in the report, in which one of the authors criticized "the [majority's] conclusion that reliance on private prisons should, or inevitably must, continue."⁹⁷ The report and the council's vote nonetheless were advisory and nonbinding, with any final decisions to be made by the agency's director; Secretary Johnson apparently did not act and left the matter to his successor in the Trump administration, which has not officially addressed the report.⁹⁸

Detention Conditions and Medical Care

While immigration detention is not criminal detention, the conditions often resemble jails—with detainees wearing uniforms, traveling to immigration court appearances in handcuffs, and residing in detention cells. But, in August 2009, then ICE Assistant Secretary John Morton announced that ICE would reform its system to create a "truly civil detention system," and ICE created a new Office of Detention Policy and Planning to design and implement that system.⁹⁹ Nonetheless, advocates continued to express concerns over the detention conditions—and medical care in particular, which allegedly contributed to the deaths of some immigration detainees.

In February 2012, ICE released its 2011 Performance-Based National Detention Standards. Among other things, these new standards:

- expand some medical and privacy protections for vulnerable populations (e.g., women, elderly, LGBT detainees);
- during initial intake and assignment to various levels of security facility, give "special consideration" to factors that raise the risk of "vulnerability, victimization, or assault" of the detainee during detention (e.g., transgender identity, elderly, pregnant, or physically or mentally disabled);
- expand medical care offered to women in ICE detention; and
- strengthen oversight of the process through which detainees may file grievances.¹⁰⁰

Historically, critics have argued that a large obstacle to improving immigration detention conditions is that ICE's detention guidelines are not mandatory. But, as shown in a February 2016 U.S. Government Accountability Office Report and others, ICE continues working to improve its management and oversight of detention centers and the provision of medical care to immigration detainees.¹⁰¹

Changing Detention Demographics and Vulnerable Populations

In 2015, ICE reported a continuing decrease in illegal entries by Mexicans, while illegal entries by those from Central America—especially the Northern Triangle countries (Honduras, Guatemala, and El Salvador)—continued to increase.¹⁰² In 2014 and 2016, DHS reported that Central Americans outnumbered Mexicans intercepted at the border.¹⁰³ As discussed *supra*, after a period of decreased border apprehensions, they significantly increased along the Southwest border in the final months of 2016, including a number of unaccompanied children, families, and asylum-seekers—vulnerable populations that present special concerns in immigration detention.¹⁰⁴ But also as discussed *supra*, the number of 2017 apprehensions has significantly dropped.

Families and Children. In mid-2014, the United States experienced an influx of tens of thousands of children from Central America. Immigration law distinguishes between accompanied and unaccompanied alien children, and they are treated differently for immigration purposes. Unaccompanied alien children are those under the age of 18 years, who have no lawful immigration status and no parent or legal guardian in the United States available to provide care and custody.¹⁰⁵ With limited exceptional circumstances, any federal department or agency—including ICE—must transfer any unaccompanied alien children to the Department of Health & Human Services Office of Refugee Resettlement's custody within 72 hours of determining that they are unaccompanied alien children.¹⁰⁴

On the other hand, accompanied alien children are sometimes detained by ICE at family residential facilities with their mothers and siblings, a practice that has proved controversial. In June 2015, DHS Secretary Johnson announced a new approach to family detention, saying "once a family has established eligibility for asylum or other relief under our laws, long-term detention is an inefficient use of our resources and should be discontinued."¹⁰⁵ Nonetheless, litigation remains ongoing in the Ninth Circuit in *Flores v. Lynch*, regarding a 1997 settlement agreement that set minimum nationwide standards for the detention, release and treatment of minors in DHS custody. A Central District of California judge found that detaining mothers and children violated the 1997 settlement, and ordered DHS to release class members subject to specific provisions of the agreement during removal proceedings; DHS's appeal of that ruling remains pending.¹⁰⁶

Mentally Ill. Detained aliens with serious mental illnesses and disabilities also present unique challenges—particularly as it relates to the general premise that removal proceedings are civil, and aliens are not entitled to counsel at government expense. These individuals are the subject of a long-running class action in the Central District of California, *Franco-Gonzalez v. Holder*. In April 2013, the court entered a permanent injunction in which it ruled that alien class members (only aliens in certain Western states) who were determined to be incompetent to represent themselves before an immigration judge must be provided with legal representation under the Rehabilitation Act as a reasonable accommodation for their disabilities.¹⁰⁷

LGBT. LGBT immigration detainees also face unique challenges. Many critics allege that such individuals suffer harassment and physical and sexual abuse by detention facility staff and fellow detainees. Critics also assert that certain measures ostensibly designed to protect LGBT detainees—such as protective custody, in which the LGBT detainee is isolated from other detainees—are themselves abusive. A 2013 Center for America Program Freedom of

Information Act request revealed over 200 reports of abuse with ICE from 2008-2013 that mentioned the detainee's sexual orientation or gender identity, but ICE does not otherwise keep track of complaints in this way.¹⁰⁸ Since 2011, ICE contracted with the Santa Ana City Jail in California to maintain a number of beds specifically for LGBT individuals, but the Santa Ana City Jail recently decided to phase out that contract, forcing ICE to relocate these individuals. In 2017, ICE will open a new facility in Texas, which will have 36 beds designated for transgender detainees.¹⁰⁹

Future

Much remains unsettled in the area of immigration detention—including the interpretation of “mandatory” detention for criminal alien detainees. This unsettledness is amplified now that the country is in the midst of transitioning from one presidential administration with its set of policies, practices, and priorities to a new one. And as discussed, the incoming administration's post-election policies, practices, and priorities have yet to be explicitly defined and implemented. Donald Trump's immigration plans during his campaign included: detaining “anyone who illegally crosses the border” “until they are removed out of our country”; “mov[ing] criminal aliens out day one, in joint operations with local, state, and federal law enforcement”; and enforcing “all immigration laws” and tripling the number of ICE agents.¹¹⁰

These pre-election policies seem to have largely followed his inauguration and continue—if not further—the prior prioritization of criminal offenders in removal proceedings and expand use of immigration detention. As history has shown, the implementation of immigration detention policies reflect the social and political forces of the time. And our time is not lacking in complicated social and political forces, both domestically and abroad. As the Trump administration clarifies and implements post-election policies, it will do so amid significant upheaval in Central America, the Middle East, and Europe, and the inevitable Supreme Court *Rodriguez* decision. ☉



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³Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 U. CHI. L. REV. 137, 139 & n.8 (2013).

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⁹See, e.g., *Knauff v. Shaughnessy*, 338 U.S. 537 (1950);

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¹⁷*Id.* at 40-45.

¹⁸*Chae Chan Ping v. United States*, 130 U.S. 581, 595-96 (1889); see also Lindsay, *supra* note 5, at 42 (discussing case).

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³⁰Silverman, *supra* note 5, at 4.

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- ⁴⁹*Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953).
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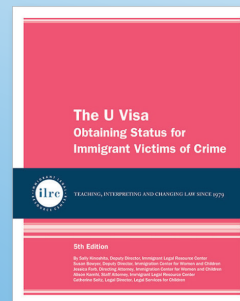
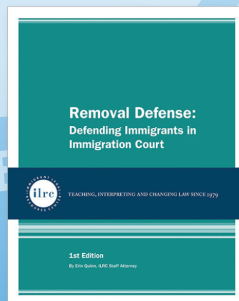
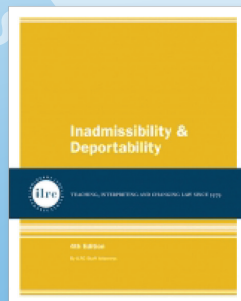
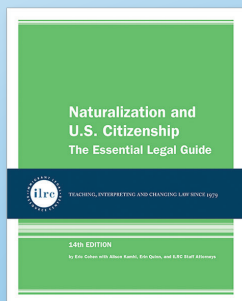


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