

Constitutional and Other Legal Issues Related to Indefinite and/or Mandatory Detention in US Detention

Kevin COSTELLO (2001). *"Without a Country: Indefinite Detention as Constitutional Purgatory."* *University of Pennsylvania Journal of Constitutional Law* 3(1): 503 - 539.

In this article, Costello describes the plight of “lifers” – non-citizens who are stuck in indefinite detention in the USA, often in prisons or prison-like facilities – and the choices then facing the US Supreme Court over how to decide their constitutional rights in a pre-9/11 world. Costello focuses on the troubling legal, historical, and discretionary aspects of the US practice, for example noting that, effectually, “low-level INS [now ICE] bureaucrats are using their own discretion to determine whether or not the lifer poses a threat to the community.” (528)

Costello highlights the significant legal differences between “deportable aliens” and “excludable aliens” in indefinite detention: the former are people who entered the US on valid tourist, work, student, or other visas but were subsequently found in breach of visa conditions, and then usually imprisoned for a criminal offence before being transferred to detention; whereas the later are people who were never given legal permission to enter the state and must have passed through the border without being detected. The choice facing the courts over deportable aliens is complex: “On the one hand, a lifer's release into the United States on immigration parole is in tension with her final order of deportation. On the other, prolonged, indefinite detention without criminal conviction and supported only by a vacuous administrative purpose contradicts our basic notions of liberty for all persons within our borders.” (534 – 535) Excludable aliens also present notable legal difficulties, mostly related to the entry fiction: namely, the notion that because non-citizens whose legal status does not permit them entry are nevertheless arrested inside the territory, the law permits the state to treat them as though they were found still standing at the border and requesting permission to enter. Therefore, “because their status of being outside our border leaves them beyond the cloak of constitutional protection, courts have allowed for their prolonged detention.” (536) Since not all “lifers” are excludable but rather deportable aliens, however, Costello argues that the state owes a duty to its legal permanent residents that includes access to constitutional rights such as substantive due process rights that could set limits to their periods of time spent in detention.

Further reading:

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