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FEWER RIGHTS IN PENNSYLVANIA THAN GUANTANAMO: SOME REACTIONS TO THE THIRD CIRCUIT'S DECISION IN CASTRO V. DEP'T OF HOMELAND SECURITY

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On August 29, 2016, the Court of Appeals for the Third Circuit issued its decision in *Castro v. Dept. of Homeland Security*, a consolidated set of habeas corpus petitions brought by asylum-seekers subject to expedited removal orders and detained within the Eastern District of Pennsylvania (likely at the Berks County Residential Center). The Third Circuit held that the petitioners, who had been detained by U.S. Customs and Border Protection shortly after crossing the border into the United States, did not have the constitutional right to challenge their detentions in federal court other than in a very limited way under 8 U.S.C. §1252(e). Unlike the Guantanamo Bay detainees whose habeas petitions were found by the Supreme Court to be constitutionally protected in *Boumediene v. Bush, 553 U.S. 723 (2008)*, the Third Circuit ruled, recent unlawful entrants such as the *Castro* petitioners were not protected by the Suspension Clause of the U.S. Constitution, and had been stripped by Congress of their right to seek judicial review except under extremely limited circumstances not applicable here. Given that the petitioners had no claim to be U.S. citizens or to have already been granted a lawful immigration status, they could only seek review of whether they were the persons referred to in pieces of paper signed by immigration officers that purported to be expedited removal orders. Since they did not dispute that, the case was at an end, and the Third Circuit affirmed the district court's order dismissing the habeas petitions for lack of subject-matter jurisdiction.

Professor Steve Vladeck of the University of Texas School of Law (who I note, in the interest of full disclosure, was a law-school classmate of the author of

this blog post) has described the Third Circuit's opinion as "breathtaking". Professor Vladeck writes that it was "simply nuts" for the Third Circuit to conclude that under *Boumediene* "non-citizens physically present within the United States are less entitled to Suspension Clause protections than enemy belligerents captured on foreign battlefields and detained outside the territorial United States." This author is inclined to agree with that sentiment. *Boumediene* arose because the Bush Administration had tried to keep detainees in a sort of Constitution-free zone in Guantanamo Bay, Cuba, purportedly outside the jurisdiction of U.S. courts. (Fortunately, the Supreme Court did not let the Bush Administration "switch the Constitution . . . off" in this way, *Boumediene,* 553 U.S. at 765, and the ultimate outcome of *Boumediene* is a testament to the crucial importance of habeas review: on remand, petitioner Lakhdar Boumediene was found by the District Court to be detained without sufficient basis, was released, and as of 2012 was living in France.) Pennsylvania is a far cry from Guantanamo Bay, and it seems very peculiar to suggest that non-citizens detained in Pennsylvania, clearly within the jurisdiction of the United States, could have a lesser constitutional right to habeas corpus than non-citizens detained in Guantanamo.

One might wonder whether the Third Circuit could have reached the same result by acknowledging the applicability of the Suspension Clause, but holding the petitioners in *Castro* to lack relevant constitutional rights which they could enforce through a habeas petition even if the courts had jurisdiction over such a petition. Indeed, the government appears to have made such an argument in briefing quoted by the Third Circuit: "because Petitioners 'have no underlying procedural due process rights to vindicate in habeas,' Respondents' Br. 49, the government argues that 'the scope of habeas review is [] irrelevant.'" *Castro, slip op.* at 65. However, there would be a problem with this approach. While applicants for admission to the United States may have limited due process rights under current Supreme Court case law, they do have some due process rights, and it appears to have been those rights which the *Castro* petitioners were seeking to assert.

The Supreme Court's decision in *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), cited by the Third Circuit to support its decision in *Castro*, held that "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Knauff, 338 U.S. at 544*. Assuming for the sake of argument that the petitioners in *Castro* qualify for constitutional

purposes as aliens denied entry into the United States, they would thus still be entitled, as a matter of due process, to "the procedure authorized by Congress". It appears that the *Castro* petitioners were attempting to assert that they did not receive the benefit of this Congressionally authorized procedure.

The Third Circuit's decision in *Castro* describes two claims which were said to be "uniform across all Petitioners" in the case:

> *first, they claim that the asylum officers conducting the credible fear interviews failed to "prepare a written record" of their negative credible fear determinations that included the officers' "analysis of why .. . the alien has not established a credible fear of persecution," 8 U.S.C. § 1225(b)(1)(B)(iii)(II); and second, they claim that the officers and the IJs applied a higher standard for evaluating the credibility of their fear of persecution than is called for in the statute.*

Castro, slip op. at 20 n.8. These claims, grounded in the governing statute, assert that the petitioners did not receive "the procedure authorized by Congress," *Knauff, 338 U.S. at 544*. That statutory procedure includes a written record of a credible fear review, and determination according to a specified legal standard. It is alleged by the *Castro* petitioners that, contrary to the statutory procedure, no such record was prepared and the specified standard was not used. Thus, these claims would appear to be valid even under the limited degree of due process that applies under *Knauff* to "an alien denied entry"—even assuming for the sake of argument that this limited due process is appropriate to apply to an alien who has in fact effected an entry, albeit illegally.

Moreover, the Supreme Court in *Boumediene*, as acknowledged by the Third Circuit, had held that at a bare minimum any "constitutionally adequate habeas corpus proceeding" must "entitle[] the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law," *Boumediene*, 553 U.S. at 773 (quoting *INS v. St. Cyr, 533 U.S.289, 302 (2001)*); *Castro, slip op.* at 48-49. Thus, the constitutional habeas proceeding protected by *Boumediene* should, if available to the *Castro* petitioners, have entitled them to challenge whether their cases had been handled in accordance with 8 U.S.C. §1225(b)(1), as they were attempting to do.

To deny the *Castro* petitioners even the right to judicial oversight of whether

they received "the procedure authorized by Congress", therefore, the Third Circuit really did have to find them to lack Suspension Clause rights. It was not merely a question of alternate analytic routes to the same result. The outcome of *Castro* can only be justified on the basis that an applicant for asylum detained shortly after entry and held within the continental United States has less of a constitutional right to habeas corpus than an accused terrorist detained at Guantanamo Bay, and so cannot even enforce in court any constitutional or statutory rights which she may have. This is a highly dubious proposition.

The *Castro* opinion's rejection of jurisdiction over essentially statutory claims by the petitioners is particularly problematic because 8 U.S.C. §1252(e) itself can be read to permit such claims, implying that they should be allowed under the doctrine of constitutional doubt without the need to strike down the restrictions on habeas as unconstitutional. Even the limited habeas review which §1252(e)(2) purports to allow with respect to "any determination made under section 1225(b)(1)" includes "determinations of . . . whether the petitioner was removed under such section." 8 U.S.C. §1252(e)(2)(B). The Third Circuit asserted in *Castro* that this means "review should only be for whether an immigration officer issued that piece of paper and whether the Petitioner is the same person referred to in that order." *Castro, slip op.* at 28 (quoting *M.S.P.C. v. U.S. Customs & Border Prot., 60 F. Supp. 3d 1156*, 1163-64 (D.N.M. 2014), vacated as moot, No. 14-769, 2015 WL 7454248 (D.N.M. Sept. 23, 2015)). But just because an immigration officer has signed a piece of paper purporting to be an expedited removal order under section 1225(b)(1) does not necessarily mean that the order has been issued "under such section".

Article VI of the U.S. Constitution provides that "treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land" along with statutes. No one would understand that to mean that a purported treaty, signed by the President but not ratified by the Senate, was the supreme law of the land. This is because such a purported treaty would not truly have been made "under the authority of the United States" given the President's failure to comply with governing procedures. Similarly here, one could argue that a purported expedited removal order issued without compliance with the statutory requirements of a written record, a proper standard, and so on, is not actually issued "under" section 1225(b)(1), because it violates 8 U.S.C. §1225(b)(1)(B)(iii)(II) and other relevant statutory provisions. At

the least, this argument should have been enough for the *Castro* petitioners to invoke the doctrine of constitutional doubt. The Third Circuit, however, held that in asserting constitutional doubt regarding the meaning of §1252(e)(5), the petitioners in *Castro* "were attempting to create ambiguity where none exists." *Castro, slip op.* at 26-27.

The courts may not be able, under the statute, to review "whether the alien is actually inadmissible or entitled to any relief from removal," 8 U.S.C. §1252(e)(5), as the Third Circuit pointed out. *Castro, slip op.* at 26. However, "n determining whether an alien has been ordered removed under section 1225(b)(1)," the courts are authorized by the statute to review whether "such an order in fact was issued and whether it relates to the petitioner." 8 U.S.C. §1252(e)(5). The reference to "such an order" relates back to another reference to removal "under section 1225(b)(1)"—and, once again, 8 U.S.C. § 1225(b)(1)(B)(iii)(II), relating to the necessity of a written record, is just as much a part of 1225(b)(1) as any other part, so that it is at least unclear whether an order issued in violation of 8 U.S.C. § 1225(b)(1)(B)(iii)(II) is issued "under section 1225(b)(1)". In its assertion that there is no relevant ambiguity in the statute, as in its constitutional analysis, the *Castro* panel opinion strikes this author as unpersuasive.

Depressing though the decision in *Castro* may be, however, it is important to note that even the Third Circuit's decision in *Castro* does not foreclose all habeas corpus petitions brought to review expedited removal orders. Beyond the restricted review that it saw as permitted by 8 U.S.C. §1252(e), the *Castro* opinion conceded that the statutory limitations on habeas corpus might be unconstitutional as applied to, for example, "an alien who has been living continuously for several years in the United States before being ordered removed under § 1225(b)(1)." *Castro, slip op.* at 34-35 n.13. For reasons explained by this author in a previous article, some long-term nonimmigrant residents may have the sorts of constitutional rights to which the Third Circuit referred here even if returning from a brief trip abroad, along the lines of the rights possessed by the permanent resident who was placed in exclusion proceedings after returning from a brief trip abroad in *Landon v. Plasencia*, 459 U.S. 21 (1982). Thus, even under *Castro*, there may be scope for habeas review of an expedited removal proceeding against a long-term nonimmigrant resident. In that sense, for some potential habeas petitioners, all is not yet lost.

Asylum applicants who are not returning residents, however, should also have

rights under the Suspension Clause, no less than the detainees at Guantanamo Bay who were held to have such rights in *Boumediene*. And in exercising those rights, they should have resort to the courts to ensure that they have at least received "the procedure authorized by Congress"—as it appears the petitioners in *Castro* did not.

The purpose of the Suspension Clause is to ensure that the government can be held to account in court when it detains someone, whether that someone is a suspected terrorist or a woman fleeing persecution with her child. The Third Circuit panel in *Castro* denied the petitioners in the case that Constitutionally guaranteed ability to demonstrate that they were being held pursuant to an erroneous application or interpretation of the law. We can hope, however, that the Third Circuit on rehearing en banc, or the Supreme Court on certiorari, may restore it to them.