

IMMIGRATION AND CITIZENSHIP LAW
Spring 2005
M, W 1–2:15 PM

Contact information

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About the course

This course is about immigration and citizenship law. Throughout the semester, we will ask and attempt to answer numerous important and complex questions, such as

- Who is a citizen and what is the meaning of U.S. citizenship?
- Who can come to this country as an immigrant, a visitor, or a refugee?
- When and why can noncitizens in the United States be forced to leave?
- What is the appropriate balance between openness to outsiders and national security?

Required texts

- T. Alexander Aleinikoff, David A. Martin & Hiroshi Motomura, *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* (5th ed. 2003)
- Aleinikoff, Martin & Motomura, *IMMIGRATION AND NATIONALITY LAWS OF THE UNITED STATES: SELECTED STATUTES, REGULATIONS AND FORMS* (2004) – **N.B., Be sure to have the 2004 edition, and you must bring this to class everyday!**
- Anne Fadiman, *THE SPIRIT CATCHES YOU AND YOU FALL DOWN: A HMONG CHILD, HER AMERICAN DOCTORS, AND THE COLLISION OF TWO CULTURES* (1997). In addition to a fascinating read, this book tells us much about the immigration experience and how professionals relate to it. We will discuss the book in class on Monday, February 7th, so please read the entire book by then.

Outside reading

For studying, there are two books that might help with the course as a whole and two articles that might help with the constitutional aspects of immigration. For the course as a whole, the “Nutshell,” David Weissbrodt, *IMMIGRATION LAW AND PROCEDURE* (4th ed. 1998), gives a basic overview. Do, however, take the date of publication into consideration when using this book. For a practitioner’s guide to immigration law, I suggest you consult Ira Kurzban, *IMMIGRATION LAW SOURCEBOOK* (8th ed. 2002), which is on reserve in the library under the materials for the Legal Aid

Civil Practice Clinic (Prof. Gilbert). On the constitutional aspects of immigration law, you may want to consult two articles written by a former CU professor and an author of your casebook, Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992); *Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L. J. 545 (1990).

For an in-depth discussion of some of the issues we will address in this course, I suggest the following books:

Gerald L. Neuman, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* (1996) (on reserve)

David Cole, *ENEMY ALIENS* (2003) (on reserve)

David Cole, *TERRORISM AND THE CONSTITUTION* (2002) (on reserve)

TWEN

Please sign up for the course on TWEN. I will use this medium often throughout the semester. As noted below, substantive postings to TWEN count toward class participation.

Learning Plus

Please create an account on Learning Plus, by going to <http://mtroom.colorado.edu> and entering the requested information. I will use this software throughout the semester. Do not worry if you do not have a laptop computer; you may share with a neighbor.

Class expectations and requirements

Class participation: I highly value class participation and will count it toward your final grade. Although I expect you to do the reading in advance of every class, in light of the complex nature of the material, I will use an on-call system for calling on you. You must sign up on TWEN (under “sign-up sheets”) for two days to be on-call. One of these days must be before spring break. **My expectations for those on call will be much higher than if I used a random calling system.** I expect you to have read the material carefully, know all the facts of the cases, be familiar with the legal rules set forth in the cases, and thought through the implications of the rules for immigration law, as well as relate the cases to the larger themes of the class. Additionally, I expect you to help lead class discussion by asking questions of other students, as well as answering my questions.

If you miss class on a day you are on-call, your grade will be negatively affected. If you are obviously not prepared for class discussion on a day you are on-call, your grade will be negatively affected. If you are not able to attend class or to be prepared on a day you are on-call, you must let me know before class. You will either be scheduled

to be on-call for the next class period, or a class period mutually agreed upon by you and me.

In addition to the on-call system, voluntary participation is encouraged. Your grade will be positively affected by insightful contributions to class made on days you are *not* on call. Indeed, speaking only when you are “on call” will result in an average grade for class participation; consistent, thoughtful participation throughout the semester will result in an excellent class participation grade. Substantive postings to the TWEN discussion site count toward class participation.

Final exam: There will be a three-hour, open-book final examination. Your grade for the course will be based on the final examination and your class participation.

General: I encourage you to let me know if you are not satisfied with any aspect of this class. This is a cooperative venture with the goal of you learning as much as possible about immigration law and how to be an effective lawyer. If something is hindering your ability to learn, I want to know about it. You may speak with me in person, send me an e-mail, or leave me an anonymous note in my mail box in the faculty assistants room.

Lunches

I would like to get to know you better. To this end, I have posted a sign-up sheet on the TWEN course page for informal brown bag lunches in the Kelly Room, Fleming 294, on four Mondays during the semester. Please sign up in advance. Participation is entirely voluntary and will not affect your grade.

Class policies

Religious accommodation: The University of Colorado has a written policy on accommodations for religious observances and obligations. *See* http://www.colorado.edu/policies/fac_relig.html. If you need an accommodation, please notify me in advance so we can work this out. Any work missed can and should be made up.

Sexual harassment: The University of Colorado has a written policy on sexual harassment, which applies to all students, staff and faculty. Sexual harassment is unwelcome sexual attention. It can involve intimidation, threats, coercion, or promises or create an environment that is hostile or offensive. Harassment may occur between members of the same or opposite gender and between any combination of members in the campus community: students, faculty, staff, and administrators. Harassment can occur anywhere on campus, including the classroom, the workplace, or a residence hall. Any student, staff, or faculty member who believes s/he has been sexually harassed should contact the Office of Sexual Harassment (OSH) at 303-492-2127 or the Office of Judicial Affairs at 303-492-5550. Information about the OSH and the campus resources available to assist individuals who believe they have been sexually harassed can be obtained at: <http://www.colorado.edu/sexualharassment/>.

The sexual harassment policy requires all supervisors, which includes all faculty members, who experience, witness or receive a written or oral report or complaint of sexual harassment or related retaliation to promptly report it to the campus sexual harassment officer. This means that as a faculty member, I must report all allegations of sexual harassment that come to my attention; however, there are several offices on campus that can provide free, confidential guidance to faculty, staff and students who believe they have been sexually harassed. A complete list of these offices can be found at: <http://www.colorado.edu/sexualharassment/resources.html>

Disability accommodations: The University of Colorado has a written policy on accommodating people with disabilities. If you believe that you need such accommodation, please contact me, Assistant Dean Lorenzo Trujillo (303-492-6682, lorenzo.trujillo@colorado.edu), or Director of Disability Services Cathy Donahue (303-492-5614, donahuec@colorado.edu, Willard 322, www.colorado.edu/disabilityservices). If you qualify for accommodations because of a disability, please submit to me a letter from Disability Services in a timely manner so that your needs may be addressed. Disability Services determines accommodations based on documented disabilities.

Care of dependents: Finally, although there is no University or Law School policy regarding students who are pregnant or who are taking care of young or elderly dependents, I am open to making reasonable accommodations for such students. Please see me in advance so that we can work out any necessary accommodations.

Reading Assignments – Part One

CB = casebook

Citizenship

1. The concept; citizenship and the Constitution; dual nationality

CB 1-14, 89-93

To what extent and in what ways might noncitizens be understood as members of the U.S. community? See notes 1 and 3 on page 9.

How does Chief Justice Rehnquist's characterization of citizenship differ from Alexander Bickel's? What do they have in common? Which do you find more persuasive?

Please consider the issues in note 1 on pages 13-14

2. Jus soli and jus sanguinis acquisition of citizenship by birth

CB 15-35, 52 (starting with note 2) - 53

Should we grant citizenship based simply on birth in the United States?

Please do problems 1 and 2 (including subparts a and b for problem 2) on page 34.

As a member of Congress, would you vote for any of the proposals at the top of page 53?

3. Naturalization

CB 53-69, 80-84 (skip subsection d “Knowledge of civics and history” on pages 66-67)

Please do problems 1, 2, and 3 on pages 60-61. For problem 1, look at INA § 334 regarding the timing of applications.

Would you change the requirements of English-language proficiency, knowledge of civics and history, or good moral character? What is the purpose of these requirements?

Foundations of the Immigration Power

4. History of immigration to the United States; constitutional judicial review

CB 145-82

What are the recurring themes in the history of immigration to the United States, and in U.S. immigration and citizenship law? How do current events reflect these themes?

To understand the Chinese Exclusion Case, you will need to identify the parts of the decision that address (1) the power of the United States as a nation vis-a-vis other nations; (2) the power of the federal government vis-a-vis the states; and (3) the power of the courts vis-a-vis the other branches of the federal government.

What light does the Chinese Exclusion Case shed on the constitutionality of measures directed against noncitizens from predominantly Arab or Muslim countries?

How strong is the argument that constitutional judicial review of immigration decisions is inappropriate because immigration decisions involve foreign affairs?

5. Constitutional judicial review continued

CB 182-210

In Fong Yue Ting, why does Justice Gray treat deportation and exclusion alike?

What light does Fong shed on the constitutionality of measures directed against noncitizens from predominantly Arab or Muslim countries?

In his dissent in Fong, why does Justice Brewer object to the 1893 Act? To what extent does Field share Brewer's reasoning? What about Fuller?

How does each dissenter in Fong distinguish the Chinese Exclusion Case? See note 2 on pages 205-06.

6. Theories of migration; moral constraints on the immigration power
CB 210-37

Who is more persuasive, Borjas or Portes/Borocz? What kinds of legislative proposals might follow from their analyses? See the questions on page 218.

What fundamentally distinguishes Walzer's view of immigration policy from Carens' view? Which do you find more persuasive, and why?

Should we distribute immigrant visas through an auction? See note 4 on pages 236-37.

Admissions: Categories and Inadmissibility

7. Admission categories; federal agencies and courts
CB 265-90, 238-64

Please work through problems 1 through 4 on page 277 using the latest Department of State Visa Bulletin, at http://travel.state.gov/visa/frvi/bulletin/bulletin_1343.html

Which agencies and courts might at some point become involved in the final resolution of problems 1 through 4 on page 277?

8. Constitutional limits on admission categories; spouses
CB 290-322

How (if at all) does Fiallo modify the rules for constitutional judicial review established in the Chinese Exclusion Case and Fong Yue Ting?

Would the Fiallo majority have struck down a statute making admission turn on race or ethnic group? See note 2 on pages 299-300.

Would Adams be decided the same way today? See notes 1, 2 and 4 on pages 305-08.

Please do problems 1 through 8 on page 318.

Are Bark and Dabaghian still good law after IMFA?

How if at all would you revise IMFA?

9. Employment-based immigration

CB 331-51, 359-64

Does Information Industries give employers useful guidelines? See note 2 on page 345.

What alternative(s) do you propose to the labor certification system?

10. Investors; immigration reform proposals

CB 364-92

Should we expand, maintain, or reduce the investor immigrant program?

What specific changes to the current admission scheme would you support?

11. Nonimmigrants

CB 392-411, 420-27

Which nonimmigrant category is best for the Engineer in the exercise on pages 396-97?

How does the Vice President's situation differ from the Engineer's?

Should we rely more on nonimmigrant categories to admit noncitizens who might later become permanent residents?

12. Inadmissibility; crimes; immigration control; fraud; public charge; public health

CB 427-52

Focusing on both inadmissibility grounds and waivers, please do: problems 1 and 3 on pages 431-32; problem 6 on pages 439-40; and problems 7 and 8 on page 442.

What options are available in the exercise on page 449?

Please do problem 10 on pages 451-52 (focus on both inadmissibility and waivers).

Reading Assignments – Part Two

Admission Procedures

- 13. Constitutional due process**
CB 453-72

Is there a meaningful difference between the facts in Mezei and Knauff?

How, if at all, might the reasons for constitutional judicial review in Knauff, Chew and Mezei differ from the need in Fiallo?

- 14. Constitutional due process continued**
CB 473-97

After Plascencia, is anything left of Knauff and Mezei? See note 1 on pages 312-13.

Please do the exercise on pages 482-83.

- 15. Modern admission procedures; consular review; parole; efficiency and security; adjustment of status; expedited removal**
CB 497-528

How would you balance efficiency and security after September 11th?

Please do the exercise on pages 517-18.

Should Congress enact § 245(i) permanently?

Does expedited removal strike the right balance between efficiency for the inspection system and protection for individuals fleeing persecution? Would you change anything?

Deportability and Relief from Removal

- 16. Constitutional limits on deportability grounds**
CB 535-50

Should the First Amendment limit Congress's power to enact deportability grounds? What about the Equal Protection Clause of the Fourteenth Amendment? Should Congress have more power to enact grounds of inadmissibility than deportability?

17. Statutory grounds

CB 550-81

Leocal v. Ashcroft, 125 S. Ct. 377 (2004)

Please do problems 1 and 2 on pages 553-54.

Please do problems (a) through (d) on page 555.

Would you favor eliminating the concept of the current definition of “crimes involving moral turpitude”? What should take its place? See note 1 on pages 559-60.

Is it a problem that the immigration consequences of criminal convictions are not uniform from state to state? Is it a problem that some state law misdemeanors are “aggravated felonies”? How are these two questions related to each other?

Is there a better way to define crime-related deportability? How would you handle a “statute of limitations,” retroactivity, and other issues beyond just defining deportable crimes?

18. Consequences of removal; cancellation of removal

CB 581-600

How would you have decided Gonzalez Recinas? What is the smallest change in the facts that would make you change your mind?

Should the government adopt regulations that more precisely guide the application of the hardship standard for cancellation of removal?

What result in the Hernandez family scenario on pages 599-600?

Removal Procedures

19. Role of immigration judges and counsel

CB 621-46

How does Yamataya fit in with the other constitutional decisions that we have read?

Why isn't it enough due process for Jacinto that she received written notice of her rights, including the right to have a lawyer represent her, plus a list of attorneys available to do so at little or no cost? See note 1 on page 637.

20. Fairness v. finality; evidentiary rules; enforcement and ethnicity; removal based on criminal convictions

CB 646-54, 658-61, 669-78, 688-96

21. Detention: overview and indefinite detention; detention pending removal hearings

CB 696-750

Justice Scalia apparently believes that since both Kim and Zadvydas had final removal orders that ended their permanent resident status, Mezei should control the result. What is the majority's response to this argument? What is your response?

What explains why the majority and the two dissenting opinions in Zadvydas reach different outcomes? Do they reflect different views of what detention is? Of the courts' role in immigration cases? Of the rights of noncitizens?

How big an exception does Zadvydas make for detaining terrorists? See note 9 on page 728.

On the question of whether the Constitution requires a bond hearing, does it matter what the noncitizen's possible defenses to removal are (if any)? See note 1 on page 748.

Didn't Kim get an individualized hearing? See note 3 on pages 748-49.

How should a court respond to a constitutional challenge to § 236(c) by a noncitizen who is not a permanent resident? See note 8 on page 750.

Reading Assignments – Part Three

Refugees and Political Asylum

22. Introduction

CB 790-805, 935-46

We will watch the short documentary “Asylum” in class; the director and producer of Asylum, Sandy McLeod, hopefully will be a guest lecturer.

23. Introduction to political asylum

CB 831-46, 855-59

24. Persecution “on account of”; past persecution and “particular social group”

CB 885-900, 905-13, 916-27

Unauthorized Migrants in the United States

25. Unauthorized migration as historical and social process; border enforcement

CB 1096-1128

Undocumented Immigrants: Facts and Figures (Urban Institute, January 2004)
(available under Course Materials on TWEN)

The Dispersal of Immigrants in the 1990s (Urban Institute) (available under
Course Materials on TWEN)

How aggressively should we act to control undocumented immigration? With regard to border enforcement, what additional approaches would you adopt? What current approaches to border enforcement would you emphasize or deemphasize?

Immigration and National Security

26. Background; freedoms of speech and association

CB 1183-1209

Assume you represent a noncitizen whom the government is trying to deport under a hypothetical statute that makes deportable “any alien who provides material support, including the payment of membership dues, to any terrorist organization.” Your client paid dues and thus is a member, but has no further involvement. How would you argue that that the statute as applied to your client is unconstitutional? Now assume you are a government attorney. How would you argue that the statute as applied doesn't violate the Constitution?

27. Inadmissibility and deportability grounds

CB 1209-12; 1223-43

Please do problems 1 and 3 on pages 121 I-12.

How if at all would you revise the terrorism-related inadmissibility and deportability grounds to prove better protection of First Amendment values? How would you allocate the risk of error that is part of this line-drawing? See note 4 on pages 1242-43.

28. Enforcement and ethnicity

CB 1243-67

Is there a difference between the focus on nationality in Narenji and the measures adopted after September 11? See note 3 on page 1255.

What aspects of the government's campaign against terrorism constitute "profiling"? What, if anything, is wrong with profiling in this context? Is it unconstitutional?