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## **Use of Force Against Immigration Detainees**

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### **Introduction**

Many state and local prisons, jails, and other detention facilities number immigration detainees among their population, either under agreements with federal immigration authorities or because local law enforcement has itself taken such individuals into custody.

There are many millions of illegal immigrants in the U.S. today, as well as many immigrants who entered the country on valid student, work, or tourist visas who are out of compliance with the terms of their visas or whose visas have simply expired.

Addressing the issue of illegal immigration is a controversial contemporary issue.

Given the number of immigration detainees in U.S. facilities today, legal issues arising out of their care and custody will increasingly be reflected in detainee lawsuits. There appears to be, however, a relative dearth of existing caselaw on the question of use of force by correctional personnel against immigration detainees.

One federal appeals court recently examined the issue of the use of force against such detainees, in a case that involved the selection of the appropriate legal standard by which to judge whether such force is excessive, as well as issues of supervisory and municipal liability.

This article focuses on that case and its reasoning. At the conclusion of the article, there is a list of relevant resources and references.

## **Due Process Legal Standard**

In [\*Porro v. Barnes\*](#), #10-6002, 2010 U.S. App. Lexis 2324 (10th Cir.), a federal immigration detainee held in a county jail claimed that jail personnel used excessive force against him.

The first legal issue presented was that of what is the appropriate legal standard by which to judge whether the force used against an immigration detainee is excessive. What provision of the Constitution should this court use to analyze a federal immigration detainee's claim of excessive force?

The incident that gave rise to the lawsuit began when members of a certified emergency response team (CERT) at the Jefferson County Jail in Oklahoma responded to a call that a federal immigration detainee, was acting in a disruptive manner in his cell, and destroying parts of it.

Members of the CERT team removed him from his cell, and then walked him to the jail's booking area, placing him in a restraint chair. Up until that point, no one challenged the legality of the team's actions, taken to respond to a destructive detainee and restore order.

After the detainee was restrained, however, a CERT team member tasered the detainee "at least three times." That use of force became the basis for the detainee's federal civil rights lawsuit seeking damages for excessive use of force.

The detainee sued the CERT member who tasered him, the county sheriff, and the sheriff's successor. He sued the CERT member and sheriff in their individual capacities, as well as the sheriff and his successor (constituting, in their essence, claims against the county) in their official capacities.

The trial court granted summary judgment for the detainee against the CERT team member, and awarded him \$100,000 in damages, finding, among other things, that the defendant violated county rules prohibiting the use of a taser against a restrained detainee who presented no threat of harm, and that the force applied was constitutionally excessive. This judgment was not appealed, so that most of the appeals court decision involves the claims against the sheriffs and the county.

Addressing the issue of the appropriate legal standard for excessive force claims involving immigration detainees, the court noted that excessive force claims can be brought under the Fourth, Fifth, Eighth, or Fourteenth Amendment, "all depending on where the defendant finds himself in the criminal justice system, and each carries with it a very different legal test."

**The Fourth Amendment** “protects against unreasonable searches and seizures and pertains to the events leading up to and including an arrest of a citizen previously at liberty, excessive force claims arising during this period are generally reviewed under a relatively exacting objective reasonableness” under [\*Graham v. Connor\*](#), 490 U.S. 386 (1989). It applies until formal charges are brought or an arraignment is held because force used is part of the seizure.

**The Eighth Amendment** governs claims by prisoners already convicted of a crime who claim that their punishments involve excessive force must proceed under the more restrictive terms of the cruel and unusual punishments clause. This is based on whether the force “was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.” [\*Hudson v. McMillan\*](#), 503 U.S. 1 (1992).

**Due Process:** “When neither the Fourth nor Eighth Amendment applies-when the plaintiff finds himself in the criminal justice system somewhere between the two stools of an initial seizure and post-conviction punishment-we turn to the due process clauses of the **Fifth** or **Fourteenth Amendment** and their protection against arbitrary governmental action by federal or state authorities.” See [\*County of Sacramento v. Lewis\*](#), 523 U.S. 833 (1998).

To illustrate how the due process legal standard works, the court pointed to the example of an arraigned pretrial detainee who brings an excessive force claim:

“He doesn't dispute that he's been lawfully seized and committed to pretrial detention, and he isn't complaining about any punishment meted out as part of a post-conviction sentence. Instead, his complaint is about arbitrary governmental action, taken without due process, while he is detained awaiting trial. In these circumstances, our precedent instructs us to focus on three factors: (1) the relationship between the amount of force used and the need presented; (2) the extent of the injury inflicted; and (3) the motives of the state actor. We've also said that force inspired by malice or by unwise, excessive zeal amounting to an abuse of official power that shocks the conscience may be redressed under the Fourteenth Amendment.”

The court held that it was this due process standard that controls excessive force claims brought by federal immigration detainees like the plaintiff.

Whether the detainee was in the county jail for violating parole or was awaiting deportation, it was not disputed that that he had been lawfully seized and detained, unlike an arrestee complaining about force used to effect his seizure in his initial encounter with the police, which would trigger the Fourth Amendment's protections.

The detainee was also unlike a convicted prisoner, “who may be lawfully subjected to punishment as part of his sentence, but who complains that his punishment involves

excessive force and so must resort to the Eighth Amendment.” No “conviction” caused the plaintiff’s immigration detention.

The detainee was most similar to an arraigned pre-trial detainee, and was therefore protected by the due process clause (of the 14<sup>th</sup> Amendment for claims against state or local officials, and of the Fifth Amendment for any claims against federal personnel).

The appeals court noted that this same conclusion had been reached by two other courts, in [\*Edwards v. Johnson\*](#), 209 F.3d 772 (5th Cir.2000) and [\*Sidorov v. Sabol\*](#), 2010 WL 500415 (M.D.Pa. Feb. 4, 2010).

## **Supervisory Liability**

The trial court granted summary judgment to the sheriff and his successor in their individual capacities. The appeals court upheld this result.

The plaintiff had failed to show that the excessive use of force by the CERT team member was something in which these individuals were personally involved in any way.

The sheriff did not employ any force on the plaintiff, was not present when the force was applied, and never gave any advance approval to the use of a taser on him. Supervisory liability for a federal civil rights claim cannot be strict liability or simply vicarious liability for the actions of subordinates, but must involve some level of personal involvement and responsibility for the incident, and for causing the alleged rights violation.

“In the due process context, this means the focus is on the force the supervisor used or caused to be used, the resulting injury attributable to his conduct, and the mens rea [mental state] required of him to be held liable, which can be no less than the mens rea required of anyone else.”

## **Municipal Liability**

Finally, both the trial and appeals courts rejected any claim that the sheriff or his successor, in their official capacities (the county), were liable for the excessive use of force. Such municipal liability could only be based on an official policy or custom causing the rights violation.

“The undisputed facts show that the county trained jailers to use tasers only if and when an inmate should become violent, combative, and pose a direct threat to the security of staff. The record also shows that” the officer knew he was acting in defiance of this policy when he tasered the detainee.

Far from exhibiting deliberate indifference to the detainee's due process rights against the use of excessive force or causing his injury -- "the county actively sought to protect those rights" and it was only the officer's improper actions, taken in defiance of county policy, that caused the detainee's injuries.

The appeals court rejected the argument that the county's "failure to enforce a prophylactic policy imposing a standard of care well in excess of what due process requires," such as banning the use of a taser on an immigration detainee, was "enough by itself to create a triable question over whether county officials were deliberately indifferent to the Constitution." The tasing was no more than a random act or isolated event that occurred outside of the policies and procedures implemented by the county.

## Resources

The following are some useful resources related to the subject of this article.

- ["Detained and Dismissed: Women's Struggles to Obtain Health Care in United States Immigration Detention,"](#) (Human Rights Watch 2009). Also see the response by immigration officials, [Letter from US Immigration and Customs Enforcement to Human Rights Watch](#) (March, 2009).
- [Detention Operations Manual](#) of the [U.S. Immigration and Customs Enforcement](#). [PDF format, downloadable by Chapter].
- [Dying for Decent Care: Bad Medicine in Immigration Custody](#) a report by the [Florida Immigrant Advocacy Center \(FIAC\)](#). (77 pages .pdf) (February 2009).
- [Enforcing Immigration Law: The Role of State, Tribal and Local Law Enforcement](#). An IACP (International Association of Chiefs of Police) position paper.
- [Foreign Prisoners](#). Summaries of cases reported in AELE publications.
- [Immigrants & Immigration Issues](#). Summaries of cases reported in AELE publications.
- ["Immigration Detention Overview and Recommendations,"](#) report by Dr. Dora Schriro (U.S. Department of Homeland Security, Immigration and Customs Enforcement, Oct. 6, 2009). Companion fact sheet: ["ICE Detention Reform: Principles and Next Steps. Secretary Napolitano announces new immigration detention reform initiatives."](#)

## Prior Relevant Monthly Law Journal Articles

- [Staff Use of Force Against Prisoners--Part I: Legal Standard and Individual Liability](#), 2008 (9) AELE Mo. L.J. 301.
- [Staff Use of Force Against Prisoners--Part II: Governmental and Supervisory Liability](#), 2008 (10) AELE Mo. L.J. 301.

- [Staff Use of Force Against Prisoners--Part III: Use of Chemical Weapons](#), 2008 (11) AELE Mo. L.J. 301.
- [Staff Use of Force Against Prisoners--Part IV: Firearms](#), 2009 (1) AELE Mo. L.J. 301.
- [Staff Use of Force, Part V: Cell Extraction](#), 2009 (4) AELE Mo. L. J. 301.
- [Civil Liability for Use of Tasers, stunguns, and other electronic control devices--Part III: Use Against Detainees and Disabled or Disturbed Persons](#), 2007 (5) AELE Mo. L.J. 101.

#### References:

- Sasha Aslanian, "[ICE quietly relaxes ban on using stun guns on jailed detainees](#)," (June 2, 2010).
- "[The Performance of 287\(g\) Agreements](#)," Department of Homeland Security Office of the Inspector General (April 2, 2010).
- Dept. of Homeland Security, Office of the Inspector General, "[Treatment of Immigration Detainees Housed at Immigration and Customs Enforcement Facilities](#)," (Dec. 2006).
- Charlotte Granville-Chapman, Ellie Smith, Neil Moloney, "[Excessive force during removal of immigration detainees](#)," Clinical Forensic Medicine, [Volume 12, Issue 4](#), Pages 209-211 (August 2005). (abstract).

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- The purpose of this publication is to provide short articles to acquaint the reader with selected case law on a topic. Articles are typically six to ten pages long. Because of the brevity, the discussion cannot cover every aspect of a subject.

- The law sometimes differs between federal circuits, between states, and sometimes between appellate districts in the same state. AELE Law Journal articles should not be considered as “legal advice.” Lawyers often disagree as to the meaning of a case or its application to a set of facts.

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