Immigration Detention and the Law: U.S. Policy and Legal Framework

A Global Detention Project Working Paper

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PROGRAMME FOR THE STUDY OF GLOBAL MIGRATION

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* This Global Detention Project (GDP) working paper is the result of a collaboration involving a number legal scholars and practitioners, as well as GDP researchers. The principal authors of the paper were Isabel Ricupero, a GDP legal consultant and former assistant to the UN Special Rapporteur on the Human Rights of Migrants, and Christina Fialho, a J.D. candidate at the Santa Clara University School of Law who undertook research at the GDP during Summer 2010. Additional contributors included Diego Bonasetti, a Chicago-based migrant-rights advocate formerly with the Illinois Coalition for Immigrant and Refugee Rights, and Michael Flynn, the GDP's lead researcher. Early drafts of this paper were reviewed by Vincent Chetail of the Graduate Institute of International and Development Studies, Raha Jorjani of the U.C. Davis School of Law, and Anna Gallagher of the International Detention Coalition. Any errors in the paper are those of the Global Detention Project.

I. International Obligations

The United States is party to several international instruments that are relevant to non-citizens placed in administrative detention. These include: the Protocol Relating to the Status of Refugees (1967)[1], through which the United States undertakes obligations found in the Convention Relating to the Status of Refugees (1954)[2]; the International Covenant on Civil and Political Rights (1976)[3]; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987)[4]; the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime (2000)[5]; the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (2000)[6]; and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography (2002).[7]

The United States is also a member of the Organization of American States (OAS) and is thus a part of the regional Inter-American Commission on Human Rights system, which was created under the American Declaration of the Rights and Duties of Man (1948)[8] and the Charter of the OAS (1948).[9]

While a treaty may constitute an international obligation, it is not binding in U.S. domestic law unless Congress enacts statutes implementing it or the treaty is self-executing and ratified on that basis.[10] For example, the Vienna Convention on Consular Relations (1967),[11] which the United States ratified in 1969, is neither self-executing nor has it been implemented by binding congressional legislation.[12] The United States also has bilateral treaties with individual countries that address the conduct of consular relations. These treaty obligations may extend or replace obligations under the Vienna Convention.[13]

Additionally, when a treaty is not self-executing, laws enacted to implement the treaty domestically may slightly alter the treaty's provisions. For instance, the U.S. Senate's advice and consent to ratification of the Convention against Torture (CAT) was subject to the declaration that CAT was not self-executing. Instead, CAT was implemented by provisions in the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA). FARRA contains the policy not to expel, extradite, or otherwise effect the involuntary removal of any person to a country where substantial grounds exist for believing that the person would be in danger of being subjected to torture. However, whereas CAT article 3 applies to all persons, FARRA excludes from protection persons who have been convicted of serious crimes or who are considered a security risk.[14]

The United States has also limited the effect of treaties by making use of reservations, understandings, and declarations (RUDs). Thus, for instance, a U.S. understanding to the International Covenant on Civil and Political Rights (ICCPR) can impact the ability of unlawfully detained persons to obtain compensation. Articles 9(5) and 14(6) of the ICCPR provide for compensating victims of unlawful arrest or detention; however, the United States qualifies this entitlement by subjecting it to "reasonable requirements of domestic law." Thus, U.S. citizens who have been wrongly detained by U.S. Immigration and Customs Enforcement have had difficulty seeking compensation from the government as lawsuits for wrongful detention or deportation are usually brought under the Federal Tort Claims Act.[15] (See section below on "Detention Standards.")

II. Domestic Law

1. Relevant Norms

The principal legal provisions applicable to non-citizens in administrative detention are:

• **The U.S. Constitution and its Amendments.** The U.S. government "is one of enumerated powers," meaning that the federal government "can exercise only the powers granted to it" in the United States Constitution.[16] The Tenth Amendment, part of the Constitution's Bill of Rights, states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."[17] Determining the boundary between state and federal power has been the subject of many U.S. Supreme Court decisions.

By virtue of its authority under the U.S. Constitution to "establish an uniform Rule of Naturalization,"[18] Congress has full and plenary legislative power over naturalization.[19] Congress has exercised this Constitutional power through successive acts, beginning with the act entitled, "An act to establish an uniform rule of naturalization," passed in 1790 by the Second Session of the First Congress under the Constitution.[20] In contrast to federal power over immigration, state laws may govern the rights, privileges, and duties of aliens within the state. However, if the state statute has been pre-empted by—or is in conflict with—any federal laws, the state statute is invalid under the U.S. Constitution, article VI, clause 2 (also known as the "Supremacy Clause").[21]

The first U.S. Supreme Court case to discuss the forced detention of a non-citizen was *Chae Chan Ping*, which concerned the detention of a Chinese labourer by a steam-ship captain who was trying to comply with the Chinese Exclusion Act of 1882, which provided an absolute moratorium on Chinese labour immigration.[22]

• **The U.S. Code (U.S.C.) and the Immigration and Nationality Act (INA).**[23] The INA of 1952 (also known as the McCarran-Walter Act) brought into one comprehensive statute the multiple laws that previously governed immigration and naturalization in the United States. Although the INA is a unique body of law, it also is contained in the U.S.C. The U.S.C. is a compilation of all federal laws passed by Congress. Title 8 of the U.S.C. covers "Aliens and Nationality." Congress has amended the INA and the U.S.C. many times by enacting various public laws.

• **The Code of Federal Regulations (C.F.R.).** The C.F.R. is a codification of the general and permanent federal rules, which are necessary to enforce or carry out laws enacted by Congress. The rules, or regulations, are written by executive departments and administrative agencies of the federal government. Title 8 of the C.F.R. covers "Aliens and Nationality."

• **Relevant provisions are also contained in the following acts, among others:** the Refugee Act of 1980; the Immigration Reform and Control Act of 1986; the Immigration Marriage Fraud Amendment of 1986; the Anti Drug Abuse Act of 1988; the Immigration Act of 1990; the Immigration Technical Corrections Act of 1991; the Judiciary Appropriations Act of 1993; the Violence Against Women Act (VAWA) of 1994; the Immigration and Nationality Technical Corrections Act of 1994; the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) of 1996; the

Antiterrorism and Effective Death Penalty Act of 1996; the Nicaraguan Adjustment and Central American Relief Act (NACARA) of 1997; the 1997 Public Law 105-141 (establishing, *inter alia*, a program in local prisons to identify, prior to arraignment, criminal aliens and aliens who are unlawfully present in the United States); the Omnibus Consolidated Appropriations of 1998; the International Religious Freedom Act of 1998; Torture Victims Relief Act of 1998; the Intelligence Authorization Act for Fiscal Year 2000; Victims of Trafficking and Violence Protection Act of 2000; the United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (the USA Patriot Act); the Homeland Security Act of 2002; the Intelligence Authorization Act for Fiscal Year 2002; the Enhanced Security and Visa Entry Reform Act of 2002; the Trafficking Victims Protection Reauthorization Act of 2003; the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, for the fiscal year ending September 30, 2005, and for other purposes (included the Real ID Act of 2005); the National Defense Authorization Act for Fiscal Year 2008; and the Human Rights Enforcement Act of 2009.[24]

2. Relevant Government Entities

The government agency responsible for the detention and removal of migrants in the United States is the Department of Homeland Security (DHS), which was created in 2003 by the Homeland Security Act 2002. Before the 2002 Homeland Security Act took effect, these powers rested with the now-defunct Immigration and Naturalization Service (INS), which was part of the Department of Justice (DOJ).

The following DHS bureaus play key roles in implementing immigration policy: Citizenship and Immigration Services (USCIS), which process applications for residency, naturalization, asylum, work permits, and other immigration and citizenship benefits; Customs and Border Protection (CBP), which is a federal law enforcement agency in charge of the Border Patrol and ports of entry; and Immigration and Customs Enforcement (ICE), which is responsible for enforcing immigration laws within the United States. ICE administers the country's detention infrastructure and oversees deportations through its Office of Detention and Removal Operations (DRO).

According to the ICE website, "DRO is responsible for promoting public safety and national security by ensuring the departure of all removable aliens from the United States through the fair enforcement of the nation's immigration laws. DRO employs its resources and expertise to locate and arrest fugitive aliens; to detain certain aliens while their cases are being processed; and to remove them from the United States when so ordered."[25] In August of 2009, ICE announced the creation of the Office of Detention Policy and Planning to oversee the implementation of comprehensive detention reform.[26]

Most immigration legal proceedings are carried out by immigration judges of the Executive Office of Immigration Review (EOIR) within the U.S. Department of Justice (DOJ). Attorneys from both the DOJ and DHS prosecute immigration-related offenses. Because immigration proceedings are "civil" as opposed to "criminal," there is no guaranteed right to counsel as in criminal matters under the Sixth Amendment of the Constitution. Persons in immigration proceedings may be represented by counsel so long as there is "no expense to the government."[27] The Board of Immigration Appeals (BIA), which is also a part of EOIR, hears appeals from immigration courts across the United States and is the highest administrative body for interpreting and applying immigration laws.

Asylum cases are adjudicated either by EOIR or USCIS. Asylum seekers can file *affirmative* applications through USCIS and obtain a non-adversarial asylum office interview—regardless of their immigration status or whether they have entered the country legally—as long as they have not been apprehended by DHS and put into removal proceedings in immigration court. USCIS can either grant the applicant asylum or refer him or her to an immigration judge at EOIR. USCIS's website states that an affirmative asylum applicant is rarely detained by ICE and may remain in the country while his or her application is pending before USCIS and/or before EOIR.[28]

On the other hand, asylum seekers can find themselves in *defensive* asylum proceedings for the following reasons: they are referred to an immigration judge at EOIR by USCIS after a finding of ineligibility at the conclusion of the "affirmative" asylum process; they are placed in removal proceedings because they were apprehended in the United

States or at a U.S. port-of-entry without proper legal documents or in violation of their status; they were caught trying to enter the United States without proper documentation, placed in the expedited removal process, and found to have a credible fear of persecution or torture by an Asylum Officer. Persons who are referred by USCIS to EOIR are rarely detained. Those who arrive at ports of entry can be detained but may be released.[29]

An immigration judge at EOIR will hear the persons defensive asylum case in an adversarial (courtroom-like) proceeding. The immigration judge may either grant or deny asylum. If asylum is denied, the immigration judge will determine whether the individual is eligible for any other forms of relief from removal. If no other forms of relief are available, the immigration judge will order the individual to be removed from the United States. Either party may appeal the immigration judge's decision.[30]

According to the Office of Immigration Statistics, 22,119 individuals were granted asylum in 2009, including 11,933 who were granted asylum affirmatively by USCIS and 10,186 who were granted asylum defensively by an immigration judge during removal proceedings. The leading countries of nationality for persons granted asylum in 2009 were China, Ethiopia, and Haiti.[31]

Asylum office interviews as well as immigration court and BIA hearings are "administrative" proceedings under the executive branch of government. According to the DOJ website, BIA decisions "are binding on all DHS officers and Immigration Judges unless modified or overruled by the Attorney General or a Federal court."[32] There are three types of federal courts. Article III of the U.S. Constitution established the highest federal court—the U.S. Supreme Court—which may hear petitions for *writs of certiorari* mostly from decisions in the circuit courts (essentially appeals). Article III left Congress with the task of creating the federal court system, and Congress created two other types of federal courts: District Courts, which is the trial level courts, where detainees may file petitions for writs of habeas corpus and mandamus actions; and the Circuit Court of Appeals, which hear appeals from decisions of district courts as well as petitions for review of decisions by appellate administrative bodies, including the BIA.

3. Migration-related Detention under the Law

a. Overview

It has long been recognized that non-citizens, including those who are in the United States unlawfully, are entitled to the fundamental guarantees of the Constitution. As early as 1903, the Supreme Court ruled that an alien could not be deported without an opportunity to be heard that met constitutional due process standards, although this did not mean an opportunity for a judicial proceeding.[33] Today, the Due Process Clause applies to citizens and non-citizens alike.[34] Thus, once foreign nationals (or "aliens") have entered the country, they are theoretically granted protection against deprivation of liberty without due process regardless of their immigration status. As the Supreme Court ruled in 1982: "Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."[35] Nevertheless, non-citizens have not been accorded the same rights as U.S. citizens.

Many changes to U.S. immigration law have been introduced since the mid-1990s that point to a trend toward restricting the rights of non-citizens. Among the more recent changes have been the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA).[36] The changes introduced by these acts include: increased application of mandatory detention to certain categories of non-citizens and asylum seekers during removal and/or asylum proceedings, and the application of "expedited removal" procedures to certain categories of arriving aliens considered inadmissible. In addition, the AEDPA and the 2001 Patriot Act introduced new procedures that can be initiated against non-citizens on security grounds. These laws also erode remedies to removal or limit access to these remedies for aliens.[37]

b. Grounds for Detention

Generally, ICE can detain both "pre-removal" non-citizens (those who are awaiting "a decision on whether the [they are] to be removed from the United States") and migrants in "post-removal" proceedings (who have received an administrative final order of removal). Grounds for detention include: national security considerations[38]; attempting to enter unlawfully; violating immigration laws; overstaying or violating the conditions of their immigration status; or being convicted in certain criminal proceedings and/or found to be involved in certain criminal acts enumerated under INA section 236(c).[39]

Mandatory detention. Mandatory detention of non-citizens pending their immigration proceedings under INA section 236(c) "does not allow for individualized determinations as to when detention is necessary, as often required by international law. It requires for categorical detention without exception, regardless of the most compelling of circumstances."[40] Specifically, section 236(c) requires the detention of a subset of non-citizens with a prior criminal background. In general, the statute lists the following grounds for mandatory detention: a crime or conspiracy to commit a crime of "moral turpitude"; a violation of a U.S controlled substance law, unless committed before the alien turned eighteen and more than five years prior to applying for a visa; an aggravated felony; a terrorist activity. (Asylum seekers are also subject to mandatory detention. See the section on "Vulnerable Persons.")

However, the BIA's evolving interpretation of the statute differs from federal judicial interpretations, causing difficulties for DHS officers, immigration judges, and

detainees.[41] For instance, in the 2008 case *Matter of Saysana*, the BIA concluded that mandatory detention was triggered when an alien is removable due to one of the triggering offenses listed at INA § 236(c)(1), and the alien is "released" from any non-DHS custodial setting, even if not convicted of that crime.[42]

Then, in 2010, the BIA overruled *Saysana* in the *Matter of Garcia Arreola*, which held that mandatory detention applies where there has been a (a) release (b) from non-DHS custody (c) after October 8, 1998, (d) that is "directly tied" to the basis for detention under INA §§ 236(c)(1)(A)–(D).[43]

Federal judges have long disagreed with *Saysana*, applying their own interpretations of INA § 236(c). In a 2009 1st Circuit federal decision directly related to the *Matter of Saysana*, the court held that mandatory detention applied only when the non-citizen was convicted and released from criminal custody for one of the qualifying felony offenses.[44]

c. Grounds for Inadmissibility at a Border or Port of Entry

At ports of entry, all non-citizens must show CBP inspectors that they are not ineligible for admission under the "grounds for inadmissibility" of INA section 212.[45] Persons considered inadmissible by statute include: those suffering from a "communicable disease of public health significance"; those who have or have had a physical or mental disorder that has "posed a threat to the property, safety, or welfare of the alien or others"; those determined to be drug abusers and addicts; those having committed certain criminal violations involving "moral turpitude" or a controlled substance; and those who raise national security and terrorism concerns, among others.[46] If a CBP inspector determines that a non-citizen is inadmissible, the individual "will either be placed in detention, or temporarily held until return flight arrangements can be made." If a CBP inspector cannot determine if the non-citizen is admissible, the non-citizen may be instructed to go to another office for further processing.[47] If the non-citizen has a valid visa and the CBP inspector determines the non-citizen to be inadmissible, the non-citizen may request a hearing before an immigration judge.[48]

"Expedited removal." Non-citizens found inadmissible at the border either because they lack proper immigration documentation or have committed fraud or wilful misrepresentation of fact to gain admission into the United States are subject to "expedited removal." Expedited removal is an immigration enforcement strategy according to which an inadmissible alien may be removed from the country without any further hearings or review, unless the alien indicates either an intention to apply for asylum or a fear of persecution.[49] Previously, expedited removal only applied to arriving aliens at ports of entry from April 1997 to November 2002.[50] A 2005 study by the United States Commission on International Religious Freedom documented widespread problems in the implementation of expedited removal policy by CBP immigration officers at ports of entry.[51]

Nevertheless, the George W. Bush administration expanded expedited removal to include non-citizens who have arrived by sea and who have not been in the United States for at least two years. In 2005, DHS gave CBP agents the power to apply expedited removal to a non-citizen apprehended within 100 miles of the border and within 14 days after an entry without inspection.[52]

Non-citizens subject to expedited removal must be detained until they are removed and may only be released due to medical emergency or, if necessary, for law enforcement

purposes. Their procedural safeguards are limited, and they are not granted the right to counsel, the right to examine the government's evidence, or the right to appeal.[53] In fact, DOJ regulations specifically state that immigration judges do not have jurisdiction to review decisions made by ICE involving individuals apprehended at the border.[54] In addition, aliens who have been expeditiously removed are barred from returning to the United States for five years.[55]

d. Apprehended inside the United States

A different set of rules applies to individuals apprehended inside the country who are not subject to expedited removal. After obtaining a warrant from the Attorney General, ICE may arrest and detain a non-citizen, and then release him or her on a cash bond of at least USD $1,500, on a "own recognizance" bond, or on parole.[56] ICE also has the power to revoke bond or parole that it has granted and re-arrest the non-citizen under the original warrant.[57] Where the non-citizen is apprehended and detained inside the country, an immigration judge might review a detention decision at the request of the detainee or his or her representative. Exceptions include: (i) aliens who have violated national security grounds; and (ii) aliens convicted of certain crimes, including non-violent, first time offenses as well as state misdemeanors.[58] Even where the immigration judge decides to release the non-citizen, ICE has the authority to invoke an "automatic stay," which means that the non-citizen remains in detention pending an administrative review process.[59]

Persons not in "expedited removal" proceedings are generally accorded standard due process rights, but many of these rights are not meaningful in practice. For example, detainees are afforded the right to be represented by counsel, although not at the government's expense.60 They also maintain the right to receive notice of the reasons for detention and the right to examine and present evidence.61 Persons not in "expedited removal" also have the right to an interpreter as well as the right to a hearing before an immigration judge and review by an appellate court. However, documents, forms, and evidence are not translated, and interpreters only communicate what is orally communicated in court. If a non-citizen appeals his or her case, "everything must be in English. So, effectively, there is no *meaningful* right to appeal for individuals who can't afford attorneys and do not speak English—or for that matter—cannot read or write."[62] (See the section on "Detention Standards" for a further discussion on practical constraints on detainee rights.)

4. Judicial Review and Challenging the Legality of Detention

There is no automatic or periodic review of the decision to detain under the law by an independent judicial or other body. As mentioned earlier, while judicial review is available upon request in many detention situations, it is *not available* to non-citizens subject to "expedited removal." Additionally, the Real ID Act of 2005 purports to eliminate *habeas corpus* review over final orders of removal. The federal courts that have addressed this issue have agreed that the Real ID Act does eliminate *habeas corpus* review over final orders of removal, but these federal courts have found a petition for review under 8 U.S.C. § 1252(a)(2)(D) to be an adequate and effective substitute for *habeas* review.[63]

Nonetheless, the REAL ID Act did not impact the availability of habeas corpus to challenge the length or conditions of immigration detention.[64] In 2001, the Supreme Court held in *Zadvydas v. Davis* that habeas corpus may be used to bring statutory and constitutional challenges to post-removal order detention.[65] Then, in 2003, the Supreme Court held in *Demore v. Kim* that habeas corpus may be used to bring a constitutional challenge to pre-removal order detention.[66] In 2005, the Supreme Court held in *Clark v. Martinez* that its decision in *Zadvydas* applied to government detention of persons found to be inadmissible.[67]

Regarding the situation of asylum seekers, Human Rights First observes that "while a few asylum seekers have tried to file federal habeas petitions, it often takes months or years for federal courts to decide a petition, making the effort pointless for many asylum seekers."[68]

5. Limits to the Length of Detention

Immigration statutes and regulations do not establish any limits to the period of time a non-citizen may be held in immigration detention. The Constitution Project reported that non-citizens are often detained for weeks or months, and some are even in detention for years before their final removal hearing.[69] The lack of procedural time limits to detention is in direct contrast to U.S. criminal law, where the Speedy Trial Act of 1974 established specific time limits between various stages of federal criminal proceedings to ensure protection for defendants deprived of their liberty.[70]

The INA does specify that after a removal order is issued against an alien, the person concerned must be removed within 90 days unless otherwise specified.[71] The same law also provides that the "removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal."[72] However, the U.S. Supreme Court held in *Zadvydas* that once removal is no longer reasonably foreseeable, continued detention of a lawful permanent resident in a post-removal setting is not authorized under the INA. The Supreme Court deemed six months to be the presumptive limit to a reasonable time in which to effect the expulsion.[73] In 2005, the court extended its ruling in *Zadvyas* to all non-citizens deemed inadmissible.[74]

However, as a result of the distinction between post-removal and pre-removal detainees, these court decisions have not put an end to the indefinite detention of non-citizens.[75] As mentioned above, pre-removal detainees are those who are in removal proceedings, while post-removal detainees are those who have received an administrative final order of removal and await physical deportation. In *Demore*, the Supreme Court upheld mandatory detention for pre-removal order detainees for the "brief period necessary" to complete removal proceedings, but did not define "brief period" as the Supreme Court did for post-removal detainees in *Zadvydas.*[76] At least one court has recognized that in the absence of a repatriation agreement, pre-removal detainees should be subject to similar release conditions as those in post-removal proceedings. In *Ly v. Hansen* (2003), the Sixth Circuit applied *Zadvydas*' concept of a "presumptively reasonable period of detention" to pre-removal detention, upholding the grant of *habeas corpus* to a Vietnamese national who was detained for almost 17 months without a hearing.[77] This extension of *Zadvydas* does not appear to be the norm, although the 9th Circuit held in *Casas-Castrillon* that mandatory detention is not authorized for an indefinite period without a bond hearing when a non-citizen files a petition for review of a removal order with the Court of Appeals.[78] If bond is denied, a non-citizen can be detained for as long as his or her case is under review, even if that means three to seven years.[79]

6. Detention Standards

In 2000, the former INS adopted 38 standards for the minimum conditions and procedures for immigration detention, which are enumerated in the DHS Detention Operations Manual. In September of 2008, ICE announced the publication of 41 new Performance-Based National Detention Standards.[80]

Significantly, these standards are not binding regulations, making them legally non-actionable. Thus, in general, organizations running detention units cannot be sued merely for failure to strictly adhere to the standards. There are four types of facilities that can be used for long-term detention purposes: Service Processing Centers (SPCs), which are owned by ICE and operated by private companies; Contract Detention Facilities (CDFs), which are owned and operated by private companies; state and county jails contracted by DHS through Intergovernmental Service Agreement (IGSAs); and Federal Bureau of Prisons (BOP) facilities.[81] CDFs, jails contracted through IGSAs, and BOP facilities often hold convicted criminals, including those who have already served time for their crimes, together with non-citizens in detention. (ICE operates two other types of facilities for briefly confining migrants—holding areas and staging locations—which are located in field offices and sub-field offices. Additionally, U.S. Customs and Border Protection operates short-term holding facilities at ports of entry.)

In theory, the detention standards are mandatory for SPCs and CDFs. However, they are only guidelines for many private, state, and county prisons and jails, which hold the majority of immigrants in detention.[82] Also some county jails that have IGSA contracts delegate operations of the jail to private contractors, further complicating the legal relationship between the entities involved.

Many observers have argued that because the standards are non-binding they do little to prevent abuses. In 2007, for example, Amnesty International stated in its alternative report to the UN Committee on the Elimination of Racial Discrimination: "Reports of abuses in immigration detention centres persist, despite the nationwide non-binding detention guidelines referred to in the U.S. government's report to the Committee. In July 2007, the General Accountability Office (GAO), the investigative body for Congress, reported that many detained immigrants were improperly barred from making even an initial phone call to a lawyer, as required under the guidelines, and that ICE did not reliably track the number of complaints received or their outcome."[83]

Compounding this situation is the fact that federal laws such as the Federal Torts Claim Act (FTCA) and the Public Health Service Act (PHSA)—as well as burdens imposed on plaintiffs by the Federal Rules of Civil Procedure[84]—often prevent detainees or their surviving family members from bringing claims for constitutional violations. For example, in the 2010 Supreme Court case *Hui v. Castaneda*, the court held that the PHSA precluded an action brought by survivors of a detainee for constitutional violations arising out of the official duties of employees of the United States Public Health Service, which provides medical personnel to federal prisons and detention facilities.[85] While detained by immigration authorities, "Francisco Castaneda persistently sought treatment for a bleeding, suppurating lesion. Although a U.S. Public Health Service (PHS) physician's assistant and three outside specialists repeatedly advised that Castaneda urgently needed a biopsy … a PHS physician and a commissioned PHS officer denied the request. After Castaneda was released from

custody, tests confirmed that he had metastatic cancer."[86] Castaneda eventually died as a result of the lack of urgent treatment.

Cases such as Castaneda's have raised concerns among immigrant and human rights advocates that as the number of immigrants detained in the United States continues to increase—reaching approximately 380,000 in 2009—standards of treatment will decline.[87]

One growing problem concerns the transfer of detainees from facility to facility. According to Human Rights Watch, detainees are "routinely transferred by ICE hundreds or thousands of miles away to remote detention facilities. … Previously unavailable data obtained by Human Rights Watch shows that over the 10 years spanning 1999 to 2008, 1.4 million detainee transfers occurred. … Transfers erect often insurmountable obstacles to detainees' access to counsel."[88] Approximately 84% of detainees do not have counsel.[89] For those who do have counsel, attorneys often spend days, sometimes weeks searching for the new location of their clients because transfers arise suddenly, without prior notice and detainees are routinely prevented from making the necessary call.[90] Without counsel, detainees can be subjected to coercion by officials. Observers have testified to the Inter-American Commission on Human Rights that law enforcement has "deployed coercive tactics to force individuals into signing various immigration documents without the assistance of counsel."[91]

ICE's launch of the Online Detainee Locator System (ODLS) on July 23, 2010, has been regarded as a step toward helping families and attorneys remain aware of detainee transfers. ODLS is a publicly accessible, internet-based tool designed to assist family members, attorneys, and other interested parties in locating detained aliens in ICE custody.[92] To protect the most vulnerable groups in detention, detainees applying for asylum or for the U or T visas will be able to opt out of the system to protect their identity. Additionally, ODLS cannot search for children under the age of 18.[93]

7. Intersection of Immigration and Criminal Law

Violating U.S. immigration law is not a crime; it is a civil (or "administrative") violation. However, over the last 15 years, Congress and the courts have expanded the types of crimes that can subject a non-citizen to drastic consequences, such as mandatory deportation for various criminal convictions. Both immigration and federal courts have interpreted the 1996 "aggravated felony" provisions of the INA, as amended by IIRAIRA,[94] to require the deportation of non-citizens convicted of crimes, including minor, non-violent offenses. The following non-violent crimes may constitute "aggravated felonies": nonviolent theft and drug offenses, forgery, receipt of stolen property, perjury, fraud or deceit where the loss to the victim exceeds $10,000, and tax evasion where the loss to the government exceeds $10,000.[95]

Moreover, the legislation Congress passed in 1996 precludes immigration judges from considering whether deportation would be excessively harsh in light of the immigrant's family relationships, community ties, and other extenuating circumstances. In 2009 alone, ICE "deported 139,188 so-called criminal aliens, but the number included both lawful residents and illegal immigrants, officials said."[96] According to a 2010 study conducted between April 1997 and August 2007, "the United States deported the lawful permanent resident mother or father of approximately 103,000 children. At least 88,000 (86 percent) of these children were U.S. citizens. Moreover, approximately 44,000 of these children were under the age of 5 when their parent was deported."[97] Human Rights Watch estimates that the mandatory deportation of non-citizens convicted of a crime, even a minor one, has separated over 1.6 million children and adults, including U.S. citizens and lawful permanent residents, from their non-citizen family members.[98]

Yet, while non-citizens do not have the right to a court-appointed attorney in immigration proceedings, most criminal proceedings require the court to appoint an attorney at no cost to an indigent defendant, including a non-citizen. In *Padilla*, the Supreme Court held that criminal defence lawyers must advise their non-citizen clients about the risk of deportation if they accept a guilty plea.[99]

8. Criminalization of Immigration Violations

a. Federal versus State Jurisdiction

Historically, a clear division existed between the enforcement of civil immigration laws and the enforcement of criminal immigration laws. Federal authorities had exclusive jurisdiction over civil immigration violations, while federal, state and local authorities had concurrent jurisdiction over enforcement of criminal immigration laws. However, in 1996, the U.S. Congress amended the INA with section 287(g), which authorizes the federal government to enter into agreements with local law enforcement agencies and to deputize local law enforcement officers to "perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States."[100] Since the inception of the 287(g) program, federal officials, law enforcement, and community groups have charged that the program has resulted in the wrongful detention of U.S. citizens and lawful permanent residents.[101] Numerous cases have been documented, such as Pedro Guzman's. In May 2007, Guzman, a developmentally disabled U.S. citizen from California was mistakenly identified as a Mexican national under a section 287(g) agreement, transferred to an ICE detention centre, and deported.[102]

b. Criminal Immigration Laws at the Federal Level

The United States has been steadily criminalizing immigration laws, while increasing the severity of penalties for non-citizens who violate immigration laws. According to DOJ data analyzed by Syracuse University's Transactional Records Access Clearinghouse, overall federal criminal prosecutions in FY 2009 increased by 9 percent from FY 2008 and 42 percent from FY 2004. "The major factor driving the overall increase has been the sharp rise in individuals prosecuted for immigration offenses. Last year immigration prosecutions jumped 15.7 percent—from 79,431 during FY 2008 to 91,899 in FY 2009." Immigration prosecutions now make up more than 50 percent of all federal criminal filings.[103]

In March 2008, 78 percent of federal criminal immigration prosecutions took place in U.S. Magistrate Courts, which handle less serious misdemeanour cases. The most frequently cited lead charge in these cases was Title 8 U.S.C. section 1325 involving the "Entry of alien at improper time or place; etc."[104] Data from the Justice Department show that "during the first six months of FY 2010 the government reported 20,432 new convictions for these matters. Those cases also had a lead charge of 8 U.S.C. section 1325."[105]

Title 8 U.S.C. section 1325 provides that any alien who attempts to enter the U.S. either uninspected or by misleading representation of a material fact shall be fined or imprisoned not more than six months for the first offense and not more that two years for the second offense.[106] Similar federal statutes, such as Title 8 U.S.C section 1326 (involving the "re-entry of removed aliens"), also account for federal criminal immigration prosecutions.[107]

Additionally, in 2005, DHS introduced "Operation Streamline"[108] along a five-mile, high-traffic stretch of the southwest border with Mexico to target unauthorized border-crossers for criminal prosecution prior to placing them in administrative removal proceedings. Since its inception, DHS has expanded the program to include portions of five out of nine Southwest Border Patrol sectors. Non-citizens facing criminal prosecution under Operation Streamline are entitled to legal representation, which does not always mean adequate representation. According to a report released by the

Berkeley Law Warren Institute, "many Operation Streamline defendants complete the entire criminal proceeding—meeting with counsel, making an initial appearance, pleading guilty, and being sentenced after waiving a pre-sentence report—in a single day" and public defenders often "represent up to 80 clients in one hearing."[109] Persons jailed for criminal immigration offenses spend on average between four to 72 days in one of the 833 prison facilities under the custodial jurisdiction of the U.S. Marshals Service.[110] After serving time for their illegal border crossing, non-citizens are transferred to ICE, where they remain in civil detention until they are deported or granted some form of relief from deportation.

c. Criminal Immigration Laws at the State Level

Several states and municipalities have enacted laws criminalizing unauthorized immigration. For example, in April 2010, Arizona Governor Jan Brewer signed into law the "Support Our Law Enforcement and Safe Neighborhoods Act." The controversial law makes it a misdemeanour for a non-U.S. citizen—including a lawful permanent resident—to fail to carry proper immigration documentation, punishable by up to six months in prison and a fine. Furthermore, the law requires law enforcement to question individuals about their immigration status during everyday police encounters "where reasonable suspicion exists that the person is an alien who is unlawfully present in the United States."[111] It also provides criminal penalties for employers who fail to verify the legal status of their employees. In a rare move, the Barack Obama administration filed a lawsuit through the DOJ to strike down the law.[112]

In late July 2010, Phoenix district court Judge Susan Bolton enjoined key provisions of Arizona's law, recognizing that the federal government has primary authority over making and enforcing immigration law, and that while states have limited authority in this arena, they cannot interfere with federal enforcement or undermine federal priorities. The provisions enjoined by the judge do not prevent law enforcement from addressing public safety threats in Arizona, such as drug smuggling and border violence. Arizona plans to file an expedited appeal at the United States Court of Appeals for the 9th Circuit.[113] Observers warn that the law in its entirety would require Arizona to dramatically increase its ability to accommodate an influx of new prisoners. One politician called for the creation of state-wide "tent cities" to detain the immigrants expected to be arrested.[114]

(The first "tent city" was created in 1993 in Maricopa County, Arizona, by Sheriff Joe Arpaio to house a surplus of Maricopa County prisoners. The approximately 2,500 inmates of "tent city" are housed in surplus military tents upon a cement base outside in temperatures that often reach 100-120 degrees Fahrenheit in the summer. In February 2009, 200 undocumented non-citizens were "chained and marched into a separate area of Tent City," where they served their incarceration sentences before being deported, according to a Maricopa County Sherriff's Office Press Release.[115])

Other states and localities have passed similarly restrictive legislation.[116] For example, in May 2010, Massachusetts passed a law requiring state contractors to confirm that the status of their employees.[117] Also in 2010, a number of small towns in New York passed or tried to pass laws requiring that all town business be conducted in English.[118] In June 2010, the small town of Fremont, Nebraska, passed an ordinance requiring renters to apply for an occupancy license—which also requires a legal immigration status check—before renting an apartment or house. The law obliges city businesses to use a federal database to check for illegal immigrants.[119]

Earlier, in 2007, Oklahoma enacted H-1804, which made it illegal to knowingly transport unauthorized immigrants, required state contractors to check the immigration status of all workers, revoked business licenses of employers who knowingly hired unauthorized immigrants, denied unauthorized immigrants driver's licenses, and required proof of citizenship for certain government benefits. However, the U.S. Court of Appeals for the Tenth Circuit, for the most part, enjoined Oklahoma's immigration statute from going into effect.[120]

9. Vulnerable Persons

a. Asylum Seekers

Asylum seekers are subject to mandatory detention and can be detained for months or even years as they await an asylum hearing in immigration court. Asylum seekers "may be released on parole on a case-by-case basis for 'urgent humanitarian reasons' or for 'significant public benefit' where the individual presents neither a security risk nor a risk of absconding."[121] However, for such persons, there is no possibility of appeal from either the decision to detain or the denial of a request for parole.[122]

In an effort to "reduce the detention of asylum seekers, offer them fundamental due process, and improve the conditions of their confinement in those cases where detention is appropriate," Senators Patrick Leahy (D-Vermont) and Carl Levin (D-Michigan) introduced the Refugee Protection Act of 2010.[123] As of mid-2010, the bill had not been passed. (For more information, see section entitled "Migration-related Detention under the Law.")

b. Stateless Persons

The United States is neither party to the 1954 Convention relating to the Status of Stateless Persons nor the 1961 Convention on the Reduction of Statelessness. Additionally, there is no formal immigration procedure for determining who is stateless; as a result, "stateless persons who are in need of protection are often compelled to go through asylum procedures, because there is no procedure through which they can apply for recognition as a stateless person." As "officials have no clear duty to consider whether [an applicant denied asylum] may be stateless … the persons concerned have no opportunity to seek protection as a stateless person." Thus, stateless persons may be treated as other asylum seekers and placed in immigration detention.[124] According to The Equal Rights Trust in London, there is a "severe lack of statistics and information on stateless persons" in the United States.[125] Refugees International reported in 2005 that "several thousand ... individuals held in U.S. immigration detention facilities are believed to be stateless."[126] The first piece of U.S. legislation to attempt to comprehensively address this issue, the Refugee Protection Act of 2010, was introduced by Sen. Patrick Leahy (D-VT) in March 2010'.[127]

c. Victims of Trafficking and Domestic Abuse

Trafficking in persons includes "the recruitment or transportation of persons through force, fraud, or coercion for the purposes of modern-day slavery or involuntary servitude. Victims of this growing transnational crime problem—predominantly women and children—are trafficked into a wide variety of exploitative settings, ranging from the sex industry to domestic servitude to forced labour on farms and in factories."[128]

The United States has adopted numerous measures in recent years to combat trafficking in persons. In 2005, the United States ratified the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children supplementing the UN Convention against Transnational Organized Crime.

Previously, the United States had adopted specific legislation to protect victims, prosecute perpetrators, and prevent trafficking, including the Victims of Trafficking and Violence Protection Act (TVPA 2000) and the Trafficking Victims Protection Reauthorization Act of 2003 (TVPRA 2003). These laws re-defined crimes related to trafficking and enhanced sanctions for perpetrators, provided for the protection and assistance of victims of trafficking, and expanded U.S. national and international action

to prevent the practice. U.S. law now requires a yearly report from the Attorney General to Congress on the activities to combat trafficking in persons.

Victims of trafficking or other forms of criminal activity may be eligible for federal services, temporary visas, and in certain cases, permanent resident status. The T visa was created by the TVPA and allows persons who have been trafficked into the United States to remain in the country while the case against their trafficker is pursued. The U visa is available to persons who are either victims of or who possess information concerning one of the enumerated forms of criminal activity.[129]

Under the Violence against Women Act (VAWA) passed by Congress in 1994, the spouses and children of U.S. citizens or lawful permanent residents may self-petition to obtain lawful permanent residency. The immigration provisions of VAWA allow certain battered immigrants to file for immigration relief without the abuser's assistance or knowledge in order to seek safety and independence from the abuser.[130]

The U.S. government holds the position that a victim of trafficking should not be held in immigration detention or any other type of detention facility.[131] However, Human Rights Watch has reported a number of cases in which victims of trafficking have been detained.[132]

d. Children

The Homeland Security Act of 2002 transferred the responsibility for the care and placement of unaccompanied children[133] from the now-defunct INS to the U.S. Department of Health and Human Services (HHS), Office of Refugee Resettlement (ORR). ORR created the Division of Unaccompanied Children's Services (DUCS) to provide care and services to unaccompanied non-citizen children. An unaccompanied non-citizen child—often referred to as an Unaccompanied Alien Child, or UAC—is a "legal term referring to a child who has no lawful immigration status in the United States; has not attained 18 years of age; and has no parent or legal guardian in the United States, or for whom no parent or legal guardian in the United States is available to provide care and physical custody."[134] Approximately 8,000 UACs are under the custody and care of ORR nationally per year, most of whom are in Texas and Arizona.[135] The majority of unaccompanied children are released to relatives or sponsors; of those children not eligible for release, many are housed in child-friendly shelter facilities or foster home placements.[136]

If a UAC is apprehended by CBP, ICE, or local law enforcement, he or she is immediately transferred to a DHS facility and then transferred to ORR within 3 to 5 days. While in DHS custody, the child is held separately from adults in a detention facility. However, if a UAC has been issued a final order of removal or has a criminal record, DHS may directly place the UAC in expedited removal. If placed in expedited removal, DHS will transfer the UAC to ORR; in this case, ORR must maintain custody of the child in a child-friendly shelter facility.[137] If the UAC is issued a deportation order, ORR will transfer the UAC back into DHS custody where the UAC will remain detained and await deportation. Frequently, such removals take more than a month.[138]

Studies released in 2008 show that 50 to 70 percent of detained unaccompanied children who face an immigration judge lack legal representation.[139] Moreover, a study conducted by the Center for Public Policy Priorities on children from Mexico and Honduras found that it was rare that a child was asked whether he or she was afraid to return home.[140] Additionally, the same study found instances of child abuse and

maltreatment by U.S. Border Patrol officers, including: "inattention to repeated requests for medical attention; no access to water while in the border patrol station; having to sleep on the floor without a blanket in a heavily air conditioned cell; not being given any or enough food; not being allowed to contact family; being struck and knocked down by agents; being handcuffed; and being transported 'like dogs,' in kennel like compartments."[141]

Since the Trafficking Victims Protection Reauthorization Act of 2003 (TVPRA 2003) took effect in March 2009, the legal situation for UACs has improved. While UACs are not guaranteed legal representation and many children appear before a judge to determine their immigration status without an attorney,[142] TVPRA gives HHS the responsibility of ensuring pro bono counsel to the greatest extent practicable and consistent with INA, section 292, for all UACs who either are or have been in ORR or DHS custody.[143] A report on the number and proportion of UACs provided pro bono legal representation is to be included in the fiscal year 2011 budget justification for HHS.[144]

According to the Congressional Research Service, there have been allegations that DHS arrests a child and designates him or her "accompanied"—and thus subject to DHS detention and not ORR care and custody—because the child has lived previously in the United States with a parent or legal guardian, even though no guardian is at the moment present. DHS denied this accusation and explained that the criteria for a child being considered accompanied is that the child's parent or legal guardian is *present* and able to provide care to the child.[145] However, statistics indicate that DHS classifies some children as "accompanied" despite not having legal guardians present, but information about this group—including the number of children defined as such and their whereabouts—is unclear.[146] Orrick Herrington & Sutcliffe, LLP, and the Women's Refugee Commission (WCG) requested this information in 2009 both at meetings with DHS and through a formal Freedom of Information Act request, but the response was inconclusive.[147]

The director of WCG's Detention and Asylum Program told the Global Detention Project that the number of "accompanied" children that DHS retains in custody is probably quite small—less than 100 children annually. Usually these children have committed serious crimes, such as sexual assault of a family member. In these cases, the children are unable to return to their family's home after serving their criminal sentence because of safety concerns or even because of a court order that prevents return. DHS attempts to place these children in ORR custody, but ORR classifies these children as "accompanied" and refuses to provide them with care and custody. Therefore, these children remain in DHS custody, although DHS claims that this is no longer the case. According to WCG, these children are particularly vulnerable because while they are in DHS custody they often lack a connection to the outside world and are not under the care of their guardians as are other accompanied children held in DHS family detention.[148]

e. Families

Family detention space significantly increased in 2006 with the opening of the T. Don Hutto Residential Center, a privately run detention centre near Austin, Texas. However, after facing lawsuits from the American Civil Liberties Union and other groups because of the treatment of children at the facility, ICE converted it into a detention centre for women in 2008. As of mid-2010, there was only one facility used to house immigrant families, the Berks Family Shelter Care Facility, a former nursing home in Leesport,

Pennsylvania. The shortage of bed space in this family detention facility has resulted in the separation of children from their family.[149] The transformation of Hutto is part of a larger plan by ICE to reform the immigration detention system. Reviewing and redesigning all facilities, programs and standards will be the task of the new Office of Detention Policy and Planning.[150]

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