



UNITED STATES

# Costly and Unfair

Flaws in US Immigration Detention Policy

HUMAN  
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WATCH



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## Costly and Unfair: Flaws in US Immigration Detention Policy

Human Rights Watch calls upon the US Congress and the Immigration and Customs Enforcement agency (ICE) to appropriately limit the US government's broad and relatively unchecked power to detain immigrants. Each year ICE detains hundreds of thousands of immigrants. In 2009 ICE held between 380,000 and 442,000 people in some 300 US detention facilities, at an annual cost of \$1.7 billion. These people are not imprisoned as punishment for criminal offenses. Instead, they are detained for civil immigration violations, held administratively as they wait for a court hearing or pending their deportation.

**The US government's broad and relatively unchecked power to detain must be appropriately limited.**

Many will be deprived of their liberty for months, some for years. And many are being held unnecessarily, at great cost to themselves, their families, and US taxpayers.

At least since 1996 ICE has enjoyed relatively unchecked powers to sweep non-citizens into detention. These powers include detaining non-citizens who have committed crimes, but already served their sentences. Of particular concern are policies that mandate ongoing detention, without so much as a hearing, of certain nonviolent offenders, lawful permanent residents, and individuals who committed offenses decades ago.

ICE also detains many people even after court rulings in their favor, people granted refugee status who fail to do proper paperwork, and people for whom detention conditions can be particularly harsh, such as individuals with disabilities and unaccompanied minors.

Not only are detention powers broad, they are sometimes without temporal limit. Immigrants may be placed in custody for months or years with no fixed or clear end to their detention.

Since 1988, Human Rights Watch has investigated and exposed harsh conditions in detention facilities, including the failure to provide adequate medical care and to prevent deaths in detention. Negative media stories and congressional hearings beginning in 2008 have prompted ICE to adopt some reforms and improve conditions in detention.

The number of non-citizens detained, however, is increasing. In large part this reflects the broad detention mandate given to ICE by Congress. There are also pressures inside the agency to deport 400,000 non-citizens in 2010, a numerical goal publicly set by the assistant secretary for homeland security that is likely to lead to increasing numbers of detainees, including individuals who should not be detained in the first place.

ICE is under pressure to detain more and more immigrants, including those who do not belong there.

Many non-citizens with strong claims that they should be allowed to remain in the country—including lengthy residence or relationships with US citizen spouses and children—are discouraged from pursuing their claims because of the prospect of additional months or years of detention. As one legal resident detainee told Human Rights Watch, “After a while [in detention], some guys just sign for their [voluntary] departure.” Another detainee said, “I’ve been in detention for seven months. I give up. I’m not going to appeal anymore.”

The United Nations Working Group on Arbitrary Detention recognizes “the sovereign right of states to regulate migration” and yet cautions: “immigration detention should gradually be abolished.... If there has to be administrative detention, the principle of proportionality requires it to be a last resort.” This means that immigration detention should only be used in those cases in which legitimate government interests cannot be fulfilled through any other means.

“I’ve been in detention for seven months. I give up. I’m not going to appeal anymore.”

While the United States has a legitimate interest in detaining some non-citizens to guarantee their appearance at hearings and to ensure the deportation of those judged to be removable, the power of immigration authorities to detain people is currently too broad, leading to unwieldy, unnecessary, and costly detention.

This report, drawing on extensive Human Rights Watch research conducted between 2007 and 2010 (see list of reports on p. 11, below), details six areas in which ICE’s power to detain should be more narrowly circumscribed, with separate sections addressing each area in turn.

A fundamental principle running through our analysis and recommendations is that, to remain true to human rights principles and standards of efficiency, the United States should detain only those immigrants who are dangerous or unlikely to appear for hearings unless they are locked up.

### Nonviolent Offenders Denied Bond Hearings

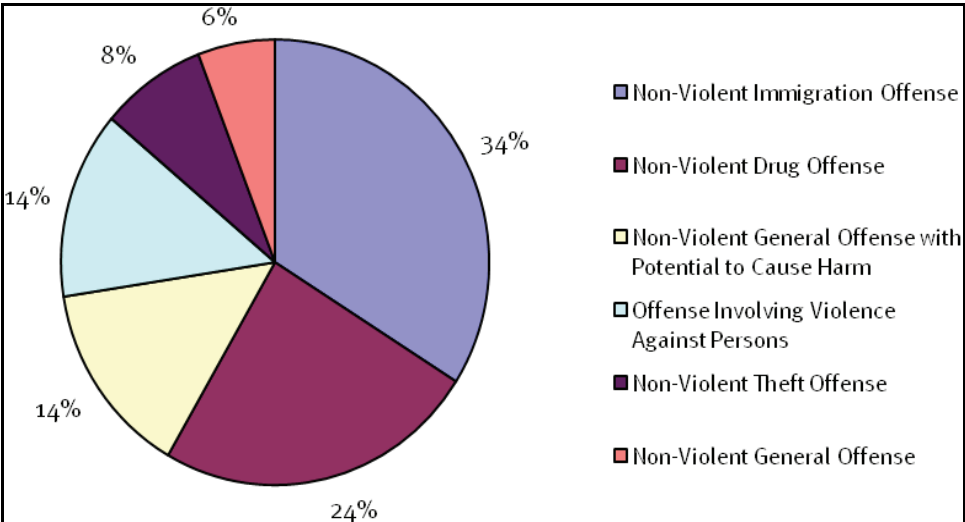
As documented in our 2009 report *Forced Apart (By the Numbers)*, 72 percent of all non-citizens found deportable after serving their sentences for committing crimes between 1997 and 2007 were found so based on nonviolent offenses such as drug possession and theft.

Only dangerous immigrants or those unlikely to appear for hearings should be detained.

Our findings are bolstered by those of the US Department of Homeland Security, which found that only 11 percent of felons in its custody on September 1, 2009 had been convicted of violent crimes.

Not only are many nonviolent offenses grounds for deportation, they also trigger a “mandatory detention” provision. 8 U.S.C. Section 1226(c). This provision requires ICE to detain non-citizens who have finished serving sentences for certain crimes without even the possibility of a bond hearing to determine whether it is appropriate to release them pending the outcome of deportation proceedings. By contrast, in the US criminal justice system no one is held in comparable circumstances (in pre-trial detention, for example) without a hearing to determine if they are a flight risk or dangerous. In an October 2009 report, the US Department of Homeland Security determined that 66 percent of all immigration detainees were confined due to this mandatory detention provision.

Crime Category Forming Basis for Deportation\*



72 percent of all non-citizens deported for crimes between 1997 and 2007 were deported for nonviolent offenses.

\*Excluding cases with no crime data. Dataset obtained by Human Rights Watch from the Immigration and Customs Enforcement agency of the US Department of Homeland Security in August 2008. Data contained information on 897,099 people deported on criminal grounds between April 1, 1997, and August 1, 2007.

The nonviolent crimes that can result in mandatory detention after the criminal sentence is served include controlled substances offenses (including minor possession), two or more crimes of “moral turpitude” (including so-called “fraud” crimes such as shoplifting), and any crime of moral turpitude with a sentence of imprisonment of two years or more. The mandatory detention of non-citizens who have nonviolent criminal records is out of step with international human rights standards. Non-citizens with these types of nonviolent criminal histories should be exempt from mandatory detention and afforded a bond hearing to assess each individual’s circumstances, such as community ties, and the likelihood they would appear at hearings.

**The mandatory detention of non-citizens who have nonviolent criminal records is out of step with international human rights standards.**

The US Congress should ensure that nonviolent offenders have access to bond hearings by limiting the current mandatory detention provision to non-citizens convicted of crimes involving the “use of physical force against” a person, as defined in the federal criminal code.<sup>1</sup> In all other cases, non-citizens should continue to be held only if an immigration judge determines that they pose a flight risk or danger to the community.

Oscar W. (a pseudonym) was adopted by US citizen parents when he was a child, but they never filed the paperwork for his lawful permanent resident status. As an adult, Oscar married a US citizen, and had three US citizen children. A 2000 fraud conviction for writing bad checks triggered mandatory detention when he was arrested by immigration authorities in 2008 for deportation based on his 2000 conviction. Despite his conviction, Oscar was eligible for lawful permanent resident status based on his marriage. Yet he was detained for approximately nine months while the immigration court heard his case.

Oscar was housed in California’s Yuba County Jail, a criminal detention facility, hours away from his family in San Jose. His children were aged two, five, and seven at the time of his detention. Oscar was ready to give up on his case many times; he only pursued his case with encouragement from his family. The immigration judge ultimately approved Oscar’s application and granted him the right to live indefinitely in the United States as a lawful permanent resident.

Had the immigration judge been able to grant bond to Oscar while the court addressed his case, the government could have saved thousands of dollars on his detention, and Oscar’s US citizen family would not have suffered the painful and difficult separation caused by his detention.

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<sup>1</sup> Although 18 U.S.C. Section 16 covers both crimes of violence against people and property, Human Rights Watch does not support the detention of non-citizens for property crimes. Accordingly, Human Rights Watch urges Congress to amend the mandatory detention provision with a reference to the crime of violence definition contained in 18 U.S.C. Section 16, only to the extent that it includes crimes involving the use of force against another person.



## Lawful Permanent Residents

Lawful permanent residents, or “green card holders,” are non-citizens who have been granted permission to stay in the United States indefinitely. Lawful permanent residents usually obtain their status through close family or employment sponsorships, so most have extensive ties to the United States. Lawful permanent residents who are convicted of certain crimes are subject to immigration detention and removal after serving their criminal sentences. In most such cases, they are subject to the mandatory immigration detention provision described above. While citizens convicted of the same crimes are able to return to the community as soon as they complete their sentences, ICE holds lawful permanent residents indefinitely pending removal proceedings without even a bond hearing.

The question is whether people already found worthy of legal status in the United States should have a bond hearing before being detained for immigration violations.

The US Supreme Court has held that “once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly.” *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). This principle is arguably not respected when immigration officials subject lawful permanent residents to mandatory detention. The immediate question is not whether some lawful residents should be deported for certain crimes, but rather whether people already found worthy of legal status in the United States should have a bond hearing before being detained for the duration of their post-sentence immigration proceedings.

The principle of proportionality requires that administrative detention of lawful permanent residents should be used only to protect the community from danger or to prevent someone who is likely to abscond from fleeing. Human Rights Watch believes that all lawful permanent residents should be exempt from mandatory detention and entitled to a bond hearing before being detained indefinitely by immigration authorities. We also believe that, given their status, when considered for bond there should be a presumption that they are neither flight risks nor dangerous, which could be rebutted by the government during the bond hearing.

Lawful permanent residents typically have strong family ties to the United States. Many are the parents and spouses of US citizens.

Lawful permanent residents are unlikely to be flight risks because they have a vested interest in maintaining their legal status by appearing in court, and usually have employment and residential ties to the community. They also often have strong family ties to the United States. In fact, many are the parents and spouses of US citizens.



Although they have been placed in removal proceedings, many lawful permanent residents are not dangerous since they are often subject to removal from the United States for a host of nonviolent offenses including minor controlled substance and property crimes. In *Forced Apart (By the Numbers)*, Human Rights Watch found that 68 percent of lawful permanent residents deported on criminal grounds between 1997 and 2007 were deported for nonviolent offenses.

Joe Desiré, whom Human Rights Watch interviewed in 2006, had lived in the United States as a lawful permanent resident for 40 years, since coming to the United States from Haiti when he was 11 years old. Desiré was married in 1971, and has four US citizen sons, two of whom are in the military. Desiré himself was in the US military from 1970 to 1974. He was based in North Carolina, Oklahoma, New Jersey, Okinawa, Panama, South Korea, and did a one-month tour of duty in Vietnam. Desiré told a Human Rights Watch researcher that during his years in the military he developed a drug habit.

Desiré had worked his entire life. He was a welfare fraud investigator and went to college at night after leaving the military. He explained, “my intention was to go into law enforcement, but then I got into my own business. I became a certified cable technician and worked for HBO and NACOM, and as a sales manager for American Cable Systems. I also worked on the side as a limo driver.”

Desiré admitted that it was his drug habit that caused him to get in trouble with the law. He had two drug possession convictions and one drug sale conviction—all from the mid-1990s—for which he served his criminal sentence. When we spoke to him, he had already spent eight years in immigration detention while the courts weighed whether or not he should be deported.

**US military veteran Joe Desiré spent eight years in immigration detention while the courts determined whether or not he should be deported.**

## **Non-Citizens Detained for Decades-Old Offenses**

For many years, the mandatory detention provision in US immigration law was applied only to non-citizens who were convicted of crimes and sentenced after 1998. However, under a recent Board of Immigration Appeals’ (BIA) interpretation of the provision, mandatory detention is now being extended to non-citizens who have criminal records that are decades old.

In 2008, the BIA issued its decision in *Matter of Saysana*, 24 I. & N. Dec. 602 (2008), ruling that people incarcerated before 1998 for offenses that would trigger mandatory detention if committed today are subject to mandatory detention for that old offense if subsequently arrested for any reason after 1998.

Immigration attorney Zachary Nightingale explained the ruling: “If you have a 1992 conviction for something as minimal as drug possession and then are arrested in 2009 for DUI [driving under the influence of alcohol or drugs] and the DUI charges are dropped, you are still subject to mandatory detention based on that 1992 conviction. It’s irrational. It’s completely inane. You have people stuck in mandatory detention where the criminal justice system has seen them fit to roam free for years. There is no reason to think that anyone in that situation is more dangerous or a flight risk.”

*Matter of Saysana* was reversed by the US Court of Appeals for the First Circuit in *Saysana v. Gillen*, 590 F.3d 7 (1st Cir. 2009), yet the BIA ruling still applies throughout the rest of the United States. In *Saysana v. Gillen*, the First Circuit criticized the BIA’s ruling, stating, “The affected aliens are individuals who committed an offense, and were released from custody for that offense, more than a decade ago. They have continued to live in the United States. By any logic, it stands to reason that the more remote in time a conviction becomes and the more time after a conviction an individual spends in a community, the lower his bail risk is likely to be.”

**“You have people stuck in mandatory detention where the criminal justice system has seen them fit to roam free for years.”**

The mandatory detention of people with very old criminal records serves no purpose, as these people are not likely to be a danger to the community or a flight risk, and, in their deportation hearings, are more likely to be granted the right to remain in the United States as a result of their longstanding residence and record of rehabilitation.

## **Non-Citizens Subject to Prolonged Detention during Appeals**

Non-citizens are also subject to detention during immigration removal proceedings, including any appeals of rulings by immigration judges, the Board of Immigration Appeals (BIA), or the federal courts, a process that can take months, if not years.

While administrative detention at any point in the process poses serious human rights concerns, detention during the appellate process can add months and sometimes years to the amount of time someone spends behind bars. Of primary concern are cases where non-citizens win their cases and are subject to detention during appeals brought by the government. A non-citizen may be granted permanent residence by an immigration judge, only to remain locked up while the government files an appeal.

**Non-citizens who win their cases remain in detention if the government appeals.**

To further aggravate the problem, a non-citizen may win his case in federal court or at the BIA, and yet remain in custody while his case is remanded back from federal court to the BIA or from the BIA to an immigration judge. Frequently, an upper court will grant a non-citizen's appeal, but then send the case back to a lower court for necessary follow-up proceedings, often to conduct an additional hearing to decide the case according to the higher court's ruling. Remand can add additional months to detention while the immigration judge schedules and hears the case.

The US Court of Appeals for the Ninth Circuit, noting that "aliens challenging an order of removal may languish in the system for years," has ruled that a non-citizen who wins an appeal is not subject to mandatory detention while his case is remanded. *Casas-Castrillon v. Lockyer*, 535 F.3d 942 (9th Cir. 2008). But in other circuits in the United States, non-citizens continue to be detained during the remand process even if they have prevailed on appeal at the BIA or federal circuit court level.

Non-citizens should be released when an immigration judge or higher court rules in their favor. If an immigration judge rules in her favor, a non-citizen should be released from custody pending any appeal the government files with the BIA. And if the BIA or a circuit court of appeals grants her appeal and remands her case for further proceedings, she should be released from custody during the remanded proceedings. Not only would such an amendment to the law reduce the severity of prolonged civil detention for large groups of people, but it would reduce the government's costs associated with detaining non-citizens throughout the appeal process.

**Non-citizens should be released from detention when an immigration judge or higher court rules in their favor.**

## **Refugees Detained**

Each year, the US government sends officials overseas to interview thousands of people displaced by persecution and conflict, classifies a select number as refugees in need of resettlement, and brings them to the United States. After a year in the United States, every resettled refugee is required to apply for lawful permanent resident status in a procedure known as "adjustment."

The government does not formally notify refugees of the upcoming deadline and their limited English, ignorance about the requirement, confusion over the legal process, and lack of resources often keeps them from filing on time. For some refugees the consequence of not filing on time is detention, as detailed in Human Rights Watch's 2009 report *Jailing Refugees*.

Sebastian Nyembo (a pseudonym) was a young boy when he was resettled from the Democratic Republic of Congo. He did not know about the requirement. “I was eight years old,” he told Human Rights Watch. “My father passed away. When I got older I realized I needed [to apply for a green card], but I didn't know it was mandatory.”

“I was eight years old. My father passed away. When I got older I realized I needed [to apply for a green card], but I didn't know it was mandatory.”

Although the law is not applied uniformly, ICE interprets 8 USC Section 1159(a) as mandating detention of all refugees who have been in the US for 12 months who have not filed to adjust their status, until they have filed for adjustment and their applications have been adjudicated.

The majority of resettled refugees interviewed by Human Rights Watch said that before their detention, they were unaware that they were required to file for adjustment of status. Most believed that filing for adjustment of status was optional, and were unaware of any potential legal repercussions for failure to file after one year.

Failure to adjust immigration status is not a chargeable criminal or civil offense and so, unlike criminal sentences which are of specified duration, the length of detention for resettled refugees is indefinite. When people are detained for this reason, they are held until they complete their application and the application has been fully adjudicated. This may take 4 to 6 months, and in some cases longer than a year.

Failure to adjust immigration status is not a chargeable criminal or civil offense, yet refugees are detained for improper paperwork.

Congress should change the law that currently permits ICE to detain these refugees by granting legal permanent residence to all recognized refugees upon admission to the US or when granted asylum, given that their cases have already been considered in depth as part of the asylum or refugee resettlement process. In the meantime, ICE should stop detaining these refugees and permit them to file for adjustment from their own homes and communities. The recommendation that refugees be admitted with lawful permanent resident status would still allow US immigration authorities to put those who commit crimes into removal proceedings.

## Members of Vulnerable Groups

Certain categories of non-citizens are in a vulnerable state when they come into contact with US immigration enforcement authorities. These include asylum seekers, unaccompanied minors, and persons with mental or physical illness or disability. For members of these groups who have endured

trauma and hardship, or who require specialized programs, professional care, and higher standards of treatment than is provided in detention facilities, there should be a categorical exemption from detention or, at minimum, priority access to alternative-to-detention programs.

Although ICE currently operates three alternative-to-detention programs that monitor non-citizens through global positioning software, telephone monitoring, radio monitoring, and home visits, these programs are only available to limited numbers of non-citizens who live within close proximity to the 24 field offices that run them. Human Rights Watch believes that ICE should expand these programs so that vulnerable persons can, at minimum, be placed in an alternative-to-detention program.

## **Recommendations**

### *To the US Congress:*

- Amend US immigration law to provide that only violent offenders are subject to mandatory detention;
- Amend US immigration law to state that lawful permanent residents shall not be subject to mandatory detention, and that they will be presumed to be neither a flight risk nor dangerous during bond hearings, with the burden on the government to prove otherwise;
- Amend US immigration law to impose mandatory detention only when a non-citizen commits a designated offense within the five years prior to the commencement of removal proceedings;
- Amend US immigration law to require the release of non-citizens when the government appeals a decision in their favor or during remanded proceedings; and
- Amend US immigration law to grant legal permanent residence to all recognized refugees in the United States.

### *To Immigration and Customs Enforcement:*

- Exercise discretion, wherever available, to release detained non-citizens who do not pose a flight risk or danger to the community; prioritize undocumented persons convicted of the most serious, violent criminal offenses for detention and deportation;
- Stop subjecting refugees to detention for failure to file for adjustment;
- Give priority to asylum seekers, children, and mentally and physically ill or disabled people in alternative-to-detention programs; and
- Expand alternative-to-detention programs throughout the United States.

For more information, please see Human Rights Watch reports:

- *Forced Apart*: <http://www.hrw.org/node/10857>
- *Forced Apart (by the Numbers)*: <http://www.hrw.org/node/82173>
- *Locked Up Far Away*: <http://www.hrw.org/node/86789>
- *Jailing Refugees*: <http://www.hrw.org/node/87370>

## Costly and Unfair

### Flaws in US Immigration Detention Policy

In 2009, the US Immigration and Customs Enforcement agency (ICE) held between 380,000 and 442,000 people in some 300 US detention facilities, at an annual cost of \$1.7 billion. These people are not imprisoned as punishment for criminal offenses, but rather are detained for civil immigration violations. Many will be deprived of their liberty for months, some for years. And many are being held unnecessarily, at great cost to themselves, their families, and US taxpayers. At least since 1996, ICE has enjoyed relatively unchecked powers to sweep non-citizens into detention. This report is one of a series looking at flaws in current immigration policy that can be remedied through specific administrative and legislative actions.

*A security guard closes the gate at Willacy Detention facility in Raymondville, Texas, on December 18, 2008, early morning.*

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