

Asylum, Detention, Deportation and the Legal Rights of the Undocumented

The United States has had a proud tradition of providing refuge for people fleeing persecution from countries around the world. Although only a small number of people actually seek safety from persecution at our borders and airports, our treatment of those who seek asylum in the United States sets the standard for how the rest of the world treats persons seeking asylum at their borders. Unfortunately, for the most part, we treat them the same as we treat all other undocumented persons. We detain most of them and make them wait in detention until their asylum claim has finally been decided. This often further traumatizes people who are already fleeing persecution.

To better understand the processes by which persons can apply for asylum in the United States see “Understanding Immigration Categories” available on the Refugee and Immigration Ministries Web site at <http://www.discipleshomemissions.org/files/RIMImmCategoriesEng.pdf>. Go to the section on “Asylees (Persons Granted Asylum).”

With the creation of the Department of Homeland Security (DHS), the responsibilities of the former Immigration and Naturalization Service (INS) have been divided into three separate bureaus in DHS. Two of those bureaus deal with asylum seekers and undocumented persons who are caught at the border or inside the country without proper documentation. U.S. Customs and Border Protection (USCBP) enforces immigration law along the border (Border Patrol), at airports (Airport Inspectors), and at ports (Port Inspectors). U.S. Immigration and Customs Enforcement (USICE) enforces immigration laws inside the United States and is in charge of detentions and deportations.

Affirmative Asylum Application

Persons who enter the country on a temporary visa, persons who cross the border undetected, or persons who present themselves and ask for asylum at a border can file an affirmative asylum application with the U.S. Citizenship and Immigration Service (USCIS), another part of DHS. USCIS will schedule a non-adversarial interview with a member of the Asylum Officer Corps. Asylum applicants in this process are not subject to mandatory detention. If the asylum officer denies the application, it is referred to an immigration judge for review. However, persons who manage to avoid detection as they enter the United States have only one year to apply for affirmative asylum.

Apprehension and Defensive Asylum Application

Persons who overstay their temporary visas or cross the border and are caught can only file a defensive application for asylum. That is done when they are placed in removal proceedings and ask for asylum instead. These persons may be detained until an immigration judge rules on their application.

USCBP and USICE officers may search and detain persons who do not have the proper documentation to be in the United States. USCBP officers can search any land within 25 miles of the border, search any vehicle at fixed search points within 100 miles of the border, and search any person at a Port of Entry. Each day, they process passengers arriving in airports and seaports, inspect trucks, containers, vessels, aircraft, and cars coming into the country, and apprehend persons crossing illegally into the country.

USICE officers can stop people on the streets, but they cannot enter private homes/buildings or private land without a search warrant or without the permission from the homeowner or manager of the business. With a warrant they can enter any home or building.

They are increasingly raiding businesses and making arrests on immigration-related violations. Persons picked up in these raids are being promptly removed from the country, unless they apply for asylum.

As a response to the events of September 11, 2001, the Border Patrol on both the Canadian and Mexican borders has been strengthened – especially on the Mexican border (where more than 97 percent of apprehensions occur) this has pushed persons coming to the United States seeking asylum into more treacherous crossing routes. This has led to significant increases in deaths from hypothermia, dehydration and other environmental causes. It has also led to the emergence of organized and predatory criminal smuggling networks, which frequently abandon immigrants and extort money from their families. Even so, persons fleeing persecution in their own countries continue to seek safety in the United States through the asylum process.

Many border-crossers, including persons who wish to apply for asylum, are apprehended at the border and put into detention. Persons who have passed through a “safe-third country” (a country that is a signatory to the U.N. Refugee Protocol) may be returned to that country if the United States has an existing agreement with that country (e.g. Canada).

The 287(g) regulation established in 1996 allow local police officers to act as immigration agents when they have an agreement with the federal government to do so. That has been expanded in a new “Secure Communities” program that is supposed to give more regulation that prevents racial stereotyping. These initiatives are also being expanded in laws passed by state and city legislators, like the new Arizona law requiring the police to look for undocumented persons in the course of their daily work. This is resulting in increased deportations, including a few deportations of American citizens.

Even persons who have already attained legal status in the United States are subject to apprehension if they are not citizens and have committed a crime. They may be arrested and placed in removal proceedings when they apply for asylum, adjustment of status, naturalization, or for reentry into the United States after a trip abroad. In other words, they may face arrest, detention, and/or deportation any time they become known to the authorities. This applies to persons who commit a “crime involving moral turpitude” or an “aggravated felony.” Unfortunately, a crime classified as a “misdemeanor” under state and federal criminal codes may be considered an “aggravated felony” under immigration law. In general, a crime with a sentence of one year or longer is considered an aggravated felony, even if there was a plea bargain and no time was served.

Expedited Removal

A 1996 immigration law changed the procedures by which arriving asylum seekers may ask for protection in the United States. The new expedited removal process allows for the immediate removal of persons who are caught arriving without valid travel documents or are suspected of obtaining those documents under false pretenses. This means that an immigration officer from the USCIBP will determine if the person has a “credible” fear of persecution and can have the person deported without the opportunity to present his/her asylum case for consideration. Those who are not found to have a “credible” fear and those who do not know they need to ask for asylum face immediate deportation.

Those who demonstrate a “credible” fear are placed in detention to await the opportunity to explain their asylum claim to an immigration judge. With backlogs in immigration court dockets, it may take years for their asylum claims to be heard.

Detention

During the 1980s, the former INS began to detain those persons who entered the United States without proper documentation. Even children as young as two years of age have been subject to detention. This new detention policy was a shift from the former INS’s previous policy

of allowing undocumented persons to be released on parole, while in the process of applying for asylum. It is estimated that 10 percent of detainees are asylum seekers.

Although asylum seekers are technically eligible for release from detention after they have been shown to have “credible fear,” many remain detained until they are granted asylum – even asylum seekers with families in the United States who are ready and waiting to care for them. Detaining asylum seekers who have already survived torture, rape, imprisonment, or other persecution has inflicted further harm on their physical and mental health. Some give up hope and either commit suicide or give up their applications and return to the danger of their homeland. Some, most notably those denied asylum whose countries will not take them back, have been detained for decades. Those asylum seekers who are released from detention are not allowed to apply for work authorization until 150 days after filing their asylum application, and the USCIS has 90 days to grant or deny the request.

USICE is one of the largest detention systems in the United States using facilities in 49 of the 50 states as well as Puerto Rico, Guam and the U.S. Virgin Islands. These include seven USICE-owned-and-operated detention centers and hundreds of “contract facilities” such as city/county jails or facilities run by groups like the Corrections Corporation of America. Since 2005, USICE has increased the number of detention beds by 78 percent.

USICE spend \$1.7 billion on custody operations each year. The contract facilities are paid two or more times as much for keeping immigrants as they are for keeping criminals. Money not spent on the detainees becomes profit for the facility. On any given day more than 37,000 non-citizens are jailed for immigration violations at the cost of about \$95 per day. Alternatives to detention, many of which have proven to be just as effective, cost as little as \$12 per day.

Although the USICE does not release complete information about all the immigration detention centers it contracts with, advocates are compiling a map of detention centers from the information they can gather. You can see that map on the Detention Watch Network Web site at <http://www.detentionwatchnetwork.org/dwnmap>. Check to see if there is a detention center near you!

One of the main reasons for the large numbers of detained persons is the 1996 immigration law requiring the arrest and eventual deportation of all non-citizens (including Permanent Residents) who have committed an aggravated felony. “Aggravated felony” refers equally to a person who crosses the border and becomes a serial killer and a person who has been legally in the country for 40 years but who committed a youthful misdemeanor of petty theft 30 years ago. Many persons, who came to the United States legally as children but who never became citizens, have been detained and eventually deported because they committed minor crimes as youth and plea-bargained for sentences of a year or more which they never served. Any sentence of a year or more made them subject to deportation as an aggravated felon. The majority of persons in detention committed these aggravated felonies and are awaiting deportation.

In many of the detention centers or contract facilities, asylum seekers have been denied even the most basic services. Over 100 people have died in USICE custody since 2003. Serious medical conditions have been ignored or mismanaged; translation services have been nonexistent or difficult to access; sexual abuse has occurred; hygiene items have been denied; outdoor recreation has been denied; solitary confinement has been inappropriately used; and telephone and visitation systems have made contact with lawyers and family members in the United States almost impossible. When they have been detained in county jails, asylum seekers have often been housed along with criminals, causing further trauma. Most families are not held together in detention, so for at least a few days a mother may be placed in a county jail while her child is placed in a contract facility in another location.

Additionally, the Sixth Amendment to the Constitution gives the right to a government-paid attorney only in criminal matters. Because immigration issues fall under civil law, the

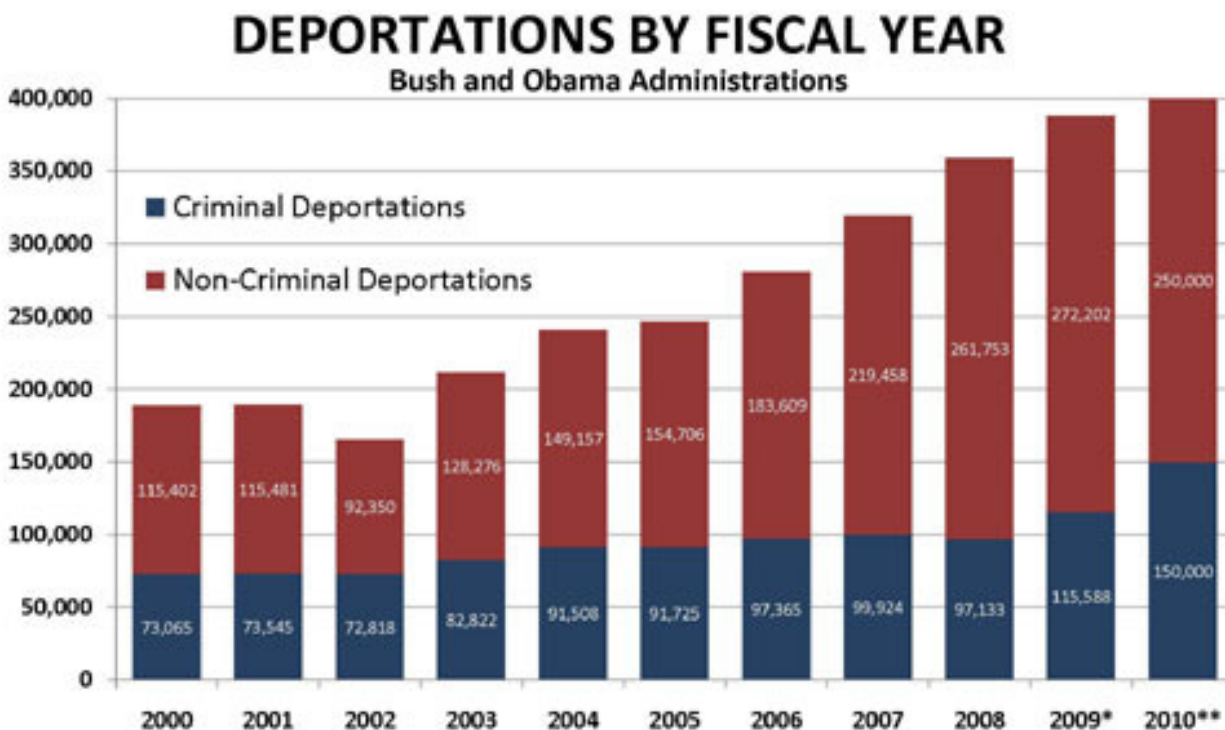
majority of asylum seekers come before an immigration judge without the benefit of a lawyer. Although *pro bono* and private attorneys work on behalf of asylum seekers, the burden is on the detainee to find and pay for legal counsel. Finding an attorney while in detention can be incredibly difficult, especially for people who do not speak English or who are held in detention centers or jails in isolated locations. Only about 10 percent of immigrants in detention are represented by legal counsel. Another problem is that often persons in immigration detention are moved, sometimes in the middle of the night, from one detention center to another hundreds of miles away, with no notice to the detainee or their attorney, if they have one.

The former INS developed new uniform standards that were to be in place in all facilities that detain immigrants by 2003. The standards cover issues such as: access to chaplains; free telephone calls to courts, consulates, and lawyers; on-site legal-rights presentations for detainees; no strip searches before or after visits from attorneys; visitation allowed both weekend days; clean underwear and linens on a regular basis; and adequate medical care. However, these standards are not official regulations (only guidelines).

Deportation

Only a small number of asylum cases are granted each year. If the applicant can avoid persecution by relocating to another part of his/her country, asylum is usually not given. If asylum is granted by the immigration judge, the applicant will be released from detention and allowed to apply for permanent residence status and eventually citizenship. If asylum is not granted, the applicant will be deported.

Deportation of asylum seekers, persons who committed aggravated felonies, and other undocumented persons is on the rise. Just under 400,000 persons were deported in 2009 (see chart below).



Data from FY 2000-FY 2008 from DHS' Yearbook of Immigration Statistics 2008.

*From the Washington Post, 3/19/10.

**ICE goals for FY 2010, according to a 2/22/10 internal memo released by the Washington Post.

www.AmericasVoiceOnline.org

For the United States to send people who have been ordered deported through formal proceedings back to their home countries, it must secure travel documents for their return. This can be very difficult, if not impossible, for people from countries with which the United States has no diplomatic relations, or when countries refuse to accept the return of particular individuals. For these people, their detention may have no end in sight. A Supreme Court decision has called for a review of the detention of each person in this situation every six months, but effective implementation and monitoring of these procedures are still lacking.

To learn more about the history and current realities of deportation see the book *Deportation Nation: Outsiders in American History* by Daniel Kanstroom, available in your local bookstore.

Legal Rights

All persons in the United States, whatever their immigration status, have certain basic rights which must be respected by the USCBP and USICE. These fundamental rights are guaranteed by the U.S. Constitution, U.S. immigration laws and regulations, and international human rights law. While there is no basic right to enter the United States and while undocumented persons have considerably fewer rights than permanent residents or citizens, U.S. government agents cannot discriminate against or punish an undocumented person or asylum applicant for exercising his/her rights. Following is a general summary of the basic immigration rights applicable to the undocumented and asylum applicants.

The right to remain silent: The Fifth Amendment to the Constitution gives every person the right not to answer questions asked by a police officer or other government agent (both of which will hereafter be referred to as “agent”). In most states, you cannot be arrested for refusing to identify yourself, although this may make the agent suspicious. In some states, it is a minor crime not to provide your name when asked by an agent. While punishment for the crime of not giving your name is minor, you still could be arrested. However, providing your name has risks, because your name can be used to start a deportation process against you.

If you are driving a vehicle, you must show your license and registration. Otherwise, you do not have to talk to anyone – if you’re on the street, if you’re at home or the office, if you’ve been arrested, or even if you’re in jail. Only a judge has the legal authority to order you to answer questions.

Tell the agent that you want to talk to a lawyer. Once you say this, they should stop questioning you and should make any further contact through your lawyer. You have the right to say that you want to talk to a lawyer, even if you do not already have one. However, the government does not have to provide you with a free lawyer, unless you are charged with a crime in addition to your immigration violation.

The right to be free from “unreasonable searches and seizures”: The Fourth Amendment protects privacy. Without a warrant, agents may not search your home or office without your consent, and you have the right to refuse to let them in. Do not open the door, because that might allow the agent to consider that you gave consent for him/her to enter. Ask the agent to slip the warrant underneath the door. If your roommate or guest consents to a search of your house, the agent can enter if he/she believes that your roommate or guest has the authority to give consent. Also, your employer can consent to a search of your office or place of employment.

If the agent has a warrant, it must provide specific details of the places to be searched and the people or things to be seized. You cannot stop the agent from entering and searching, but you should still tell the agent that you do not consent to a search. This will limit the agent to search only where the warrant authorizes. Get a receipt for any property taken by the agent.

New laws have expanded the government’s authority to conduct surveillance. E-mail, phone calls, and conversations (in homes, offices, cars, etc.) can be monitored without your

knowledge. These laws also allow agents to surreptitiously search and not notify you until afterward, under certain circumstances.

The right to advocate for change: The First Amendment protects the rights of groups and individuals who advocate changes in laws, government practices, and even the form of government. However, non-citizens can be targeted for deportation while exercising their First Amendment rights, as long as they could be deported for other reasons. Being present at a pro-immigrant demonstration provides no protection from being picked up by an agent, if the agent can prove that you were picked up for reasons other than being at the demonstration.

If you are arrested for an immigration violation: Find out who has arrested you. Don't sign any documents before speaking with a lawyer (you may be signing a voluntary departure form that could lead to your immediate removal from the country). Contact your attorney or a family member to let them know what has happened to you. Contact your consulate, which may assist you in finding a lawyer or offer to contact your family. Ask for bond and a copy of the "Notice to Appear" (a document that shows the immigration charges against you).

If you are arrested for a crime: Ask your attorney to help you get released from police custody. Local police must charge you with a crime in court within 48 hours or release you. In many locations in the country, the police will contact the immigration authorities to learn about your immigration status, and the immigration authorities may then place a "detainer" on you, which gives immigration an additional 48 hours to pick you up and start deportation proceedings against you. As you proceed through the criminal court process, make sure that the plea you make will not affect your immigration status.

Hand the agents a card: If you are picked up, hand the agents a card that says: "Please be informed that I am choosing to exercise my right to remain silent and the right to refuse to answer your questions. If I am detained, I request to contact an attorney immediately. I am also exercising my right to refuse to sign anything until I consult with my attorney."

Develop a safety plan: Talk with your co-workers to see if they are willing to make a collective decision that everyone (regardless of their immigration status) will remain silent and ask to speak with an attorney in the event of a workplace raid. Tell co-workers not to run and to remain calm if there is a raid.

Carry a card with the contact information of your immigration attorney. Carry a card for the agent (see above). Do not carry any documents that show your relationship to another country.

If you have children or elderly relatives, make arrangements in advance for someone to care for them if you are detained. Have the phone number of this person with you at all times. Make sure you have persons you trust to make decisions for you if you are detained. They can help you withdraw money for legal expenses or to pay your regular bills.

If you have legal status, make sure your family has your immigration number (your "A" number), full name and date of birth. Make sure your family knows how to contact you if you are detained – the local office of Immigration and Customs Enforcement's Detention and Removal Branch.

Find an attorney who specializes in deportation defense who might be able to represent you if you are detained. Memorize that name and phone number. Have the names and phone numbers of immigration attorneys posted near the phone at home so your family can call an attorney if you are detained.

Keep a copy of all immigration documents that you have filed with a friend or family member, along with birth certificates, marriage certificates and passports.

(Updated 2010)