

Limiting Immigration Detention AND PROMOTING ACCESS TO COUNSEL

by Sharon Bradford Franklin and Karen S. Bloom, The Constitution Project

At a Senate committee hearing in May 2010, Senator Al Franken spoke of an Ethiopian woman held for a year with convicted criminals in a U.S. detention center. She wasn't a criminal but was merely applying for asylum.¹ Unfortunately, muddled detention actions are increasingly destabilizing lower-income communities and families nationwide.

Hundreds of thousands of noncitizens are detained annually, sometimes in conditions that endanger their health.² The number of detained on any given day increased by approximately 40 percent between 2003 and 2007 and continues to grow.³ Most detention facilities are overcrowded.⁴ And compared with the criminal prison system, detention facilities are often characterized by worse living conditions and fewer rights.

Despite the nominally "civil" nature of their alleged offenses, more than half of noncitizens detained by immigration authorities are held in state and local jails. The eight federal and seven privately run immigration detention centers cannot handle the increasing reliance on detention in connection with immigration proceedings, and therefore detainees are scattered throughout 350 state and local prisons. Often, noncriminal detainees

are held with individuals accused or convicted of violent crimes, putting them at risk. Many report confrontations and violence—even physical and verbal abuse at the hands of facility guards.

Wherever they are held, noncitizen immigration detainees lack the access to lawyers that is provided as a matter of right to citizens and noncitizens charged with criminal offenses. Even when the government detains a person in an immigration case, it is not required under current U.S. law to provide an attorney if the person is unable to afford one.⁵

A Bipartisan Report

In 2009, the Constitution Project's bipartisan Liberty and Security Committee issued *Recommendations for Reforming Our Immigration Detention System and Promoting Access to Counsel in Immigration Proceedings*.⁶ The report addressed questions about who can be detained, described the conditions and increasing use of detentions (and the barriers to obtaining legal assistance), and offered recommendations.

Who Gets Detained?

The Department of Homeland Security (DHS) has authority to detain both

noncitizens alleged to have violated U.S. immigration laws and noncitizens that DHS seeks to return to their home countries. In some cases, detention is discretionary. In others—including when a noncitizen has been convicted of certain crimes, is seeking admission to the United States without proper documentation, or is inside the country without being officially admitted or paroled—detention is mandated.⁷

The amount of time individuals spend in detention has increased. For example, while the law requires DHS to remove noncitizens from the United States within 90 days of a final removal order, many of those who have received orders are detained for months—even years.⁸

The increased reliance on immigration detention strains government resources and imposes human costs. People are being unnecessarily deprived of liberty.⁹

Physical Hardships

During their detentions, many noncitizens are subject to physical restraint. They may have limited privacy and restricted access to necessities such as exercise or communication with the outside world. In some facilities, two or three detainees sleep in one-person cells. Overcrowding

also strains shared resources such as cafeterias and bathrooms.

Most significantly, overcrowding limits access to medical care. Serious deficiencies in health care for noncitizens have resulted, including long delays for medically necessary procedures. Typical situations were outlined in May 2008 articles in the *Washington Post*.¹⁰ Reports of potentially avoidable deaths occurring in custody also highlight the dangers of an overwhelmed system.¹¹

Family and Economic Hardships

Noncitizen detainees may be separated from families and friends for long periods with little to no idea of the date or conditions of their release. Some detainees miss family events such as births or deaths while in prison—irreparable losses.¹²

Detention also puts an economic strain on noncitizens and their families. When a family's primary wage-earner is being held in detention, spouses and children may struggle to provide for themselves.

Barriers to Legal Resources

Under federal law, noncitizens in removal proceedings are provided with “the privilege of being represented” by counsel but “at no expense to the government.” Hence they rarely have a lawyer's assistance. Without that, they are much more likely to agree to deportation, even if their claims have merit. Indeed, one study found that having an attorney in an asylum case is the most important factor determining the outcome.¹³

Other barriers include a lack of information about *pro bono* legal services, heavily restricted visitation rights, the absence of a confidential venue for meeting with counsel, restricted access to a telephone or other form of communication, no system for receiving messages, limited access to legal materials, and incomplete or untranslated legal materials.

Recommendations

The report's recommendations were endorsed by the Constitution Project's Liberty and Security Committee, an ideologically diverse group including former members of Congress, judges, diplomats, and former U.S. State Department and DHS officials.

Recommended changes in the use of detention in immigration cases included several suggestions for DHS:

- parole noncitizens who confront legitimate medical emergencies;
- set finite deadlines by which the hearings must occur;

- consider electronic monitoring and other alternatives to custodial detention if detainees do not present a danger to the community or pose a flight risk;
- keep those with no criminal records from being housed with criminal inmates; and
- implement procedures to more effectively identify the warning signs of genuine medical emergencies.

Ideally, all indigent noncitizens facing removal proceedings also would be afforded government-funded counsel where voluntary *pro bono* services were not available. That is not currently feasible, so the committee recommended, among other things, that Congress require immigration judges to appoint counsel if the issues are particularly complex, if the noncitizen has a disability or other incapacity, or if removal would present an unusual hardship. Expanding both the Board of Immigration Appeals' *Pro Bono* Project (which matches unrepresented litigants with *pro bono* counsel) and the Federal Legal Orientation Program (which educates detainees on immigration laws and processes) was also recommended. Establishing a federally funded system to refer noncitizens facing removal proceedings to *pro bono* attorneys was also thought likely to reduce the numbers in detention. Finally, the Committee emphasized the importance of removing barriers to the attorney-client relationship by, for example, requiring agencies to consider whether proposed sites for detention facilities provide sufficient access to interpreters and attorneys.

In fall 2009, DHS Secretary Janet Napolitano announced reforms to the immigration detention system that would improve the conditions, including medical care.¹⁴ However, the reforms do not appear to have had much impact yet, and no proposed reform would improve access to legal assistance. As the nation begins to address these issues, policymakers may find the Liberty and Security Committee's recommendations helpful.

Sharon Bradford Franklin is senior counsel at the Constitution Project in Washington, DC. Karen S. Bloom is an associate at Fried, Frank, Harris, Shriver & Jacobson LLP and a former legal fellow at the Constitution Project.

Endnotes

- ¹ Patrick Giantonio, giving testimony on May 19, 2010, to the Senate Judiciary Committee hearing on Renewing America's Commitment to the Refugee Convention: The Refugee Protection Act of 2010.
- ² *Immigration and Customs Enforcement's Tracking and Transfer of Detainees* (Washington, DC: U.S. Department of Homeland Security, 2009).
- ³ The expanded use of detention is attributable partly to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and increased enforcement of immigration laws post-9/11.
- ⁴ For example, in Massachusetts. See *Detention and Deportation in the Age of ICE* (Boston: American Civil Liberties Union, December 10, 2008).
- ⁵ By definition, immigration detention and immigration cases concern noncitizens. As a point of comparison, in cases involving a similar loss of liberty (being held in a prison) in which people are charged with a crime rather than an immigration offense, they would be entitled to a lawyer (for free if they could not afford one) regardless of citizenship status.
- ⁶ The Washington-based Constitution Project “seeks consensus solutions to difficult legal and constitutional issues ... through constructive dialogue across ideological and partisan lines.”
- ⁷ Noncitizens are detained as part of immigration proceedings mainly when (a) they have been apprehended before they officially enter the country; (b) they are under Department of Homeland Security's discretionary authority and categorized as “criminal aliens”; and (c) they are awaiting implementation of a final removal order.
- ⁸ It is often difficult to remove noncitizens to their country of origin if that country does not have a valid repatriation agreement with the United States.
- ⁹ Donald Kerwin and Serena Yi-Ying Lin, *Immigration Detention: Can ICE Meet Its Legal Imperatives and Case Management Responsibilities?* (Washington, DC: Migration Policy Institute, 2009).
- ¹⁰ Dana Priest and Amy Goldstein, “System of Neglect,” *Washington Post*, May 11, 2008.
- ¹¹ For example, a detainee awaiting deportation to China died in a Central Falls, Rhode Island, facility in August 2008. See <http://www.riaclu.org/CourtCases/Case/HuiLuiNgWyatt.html>.
- ¹² Unaccompanied minors in detention facilities face possible physical restraints, excessive discipline, and cohousing with juvenile offenders or adults. The special protections under law are often not applied in practice.
- ¹³ Jaya Ramji-Nougales, Andrew I. Schoenholtz, and Philip G. Schrag, “Refugee Roulette: Disparities in Asylum Adjudication,” *Stanford Law Review* 60 (2008): 295, 340-341.
- ¹⁴ See http://www.dhs.gov/news/releases/pr_1254839781410.shtm.