

FACTS ABOUT Detention and Deportation

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"With close to 400,000 people removed from the country each year, the United States is now carrying out historic numbers of removals."¹

The current debate about federal immigration reform highlights the need to make changes to immigration enforcement policies that have resulted in the massive separation of families and destabilization of our communities. This fact sheet summarizes the "Detention and Removal" chapter of the Migration Policy Institute's report *Immigration Enforcement in the United States: The Rise of a Formidable Machinery* and provides the National Immigration Law Center's recommendations with respect to the issues the report raises.

NILC RECOMMENDATION

Prevention of family separations resulting from deportations should be a touchstone of immigration policy. The U.S. Department of Homeland Security (DHS) should scale back deportations and end the disproportionate double punishment of immigrants for past convictions by narrowing the definition of "aggravated felony" and removing punitive and overbroad definitions of "conviction" and "term of imprisonment."

DHS has increasingly relied on administrative mechanisms rather than the immigration court system to deport people. Administrative mechanisms include expedited removal orders (whereby people seeking entry to the U.S. or who are encountered within 100 miles of a land border are physically removed without a hearing), removal orders for non-lawful permanent residents with previous aggravated felony convictions, stipulated removal orders (orders issued when people facing deportation sign paperwork agreeing to a speedy deportation in exchange for not asserting their rights to a hearing in immigration court), and reinstatement of previous removal orders (whereby DHS may remove a person without a hearing if the person reentered the U.S. unlawfully after having been previously ordered removed). The

¹ Doris Meissner, et al., *Immigration Enforcement in the United States: The Rise of a Formidable Machinery* (Migration Policy Institute, Jan. 2013), www.migrationpolicy.org/pubs/enforcementpillars.pdf, p. 34.

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number of people DHS removes through its own administrative orders far exceeds the number ordered removed by immigration judges through immigration court proceedings.

NILC RECOMMENDATION

DHS's administrative removal process deprives noncitizens of their day in court and ability to have their case considered by a judge. DHS should use its administrative authority to require that people who may be subject to removal from the U.S., including people who have signed a stipulated order of removal, must have an in-person hearing in immigration court before a final order of removal may be entered against them.

An increase in removal orders issued by immigration judges can be attributed to barriers to asylum, limited options to defend against removal under current immigration law, and lack of legal representation, which impairs the ability to present an effective defense.

NILC RECOMMENDATION

Expanding the availability of waivers and reducing the heightened standards for obtaining waivers would increase people's ability to defend themselves in removal proceedings and permit immigration judges to exercise discretion in meritorious cases. This should be done — and it could be done by creating a simple, general waiver applicable to the grounds of inadmissibility and removability. This uniform waiver would allow people to remain in the U.S. based on their family and community ties.

People in removal proceedings — where the consequences of separation from one's family and life in the U.S. can be greater than in a criminal case — should be entitled to government-appointed legal representation. Congress should establish a right to government-appointed counsel, at a minimum, for individuals with substantial defenses, lawful permanent residents, and vulnerable populations facing deportation.

In recent years, DHS has significantly increased the number of people with criminal convictions that it has removed from the U.S. Those convictions may have been for offenses committed years ago when they were not considered to be grounds for removal. People subject to such grounds of removal have little or no opportunity to seek relief from removal, even if their cases for relief are compelling.

NILC RECOMMENDATION

DHS should not rely on convictions that result from programs such as 287(g), the Criminal Alien Program (CAP), and Secure Communities, which entangle state criminal justice systems in immigration enforcement. These programs should be eliminated because they render immigrants more vulnerable to increased racial profiling and cause communities to live in fear of law enforcement. Congress should

ensure that immigrants and refugees are guaranteed fair court proceedings and meaningful review of their individual cases by amending the 1996 laws to restore judicial discretion and due process.

Immigration and Customs Enforcement's (ICE's) civil detention system is "large, complex and sprawling,"² with detention facilities ranging from county jails to ICE-run detention centers to private for-profit prisons. The number of people in immigration detention has risen dramatically due to laws and policies such as mandatory detention, ICE's enforcement priorities, and ICE permitting only a small number of people to participate in alternatives-to-detention programs.

NILC RECOMMENDATION

Detention should be the exception rather than the rule; mandatory detention of immigrants should end and alternative-to-detention programs should be greatly expanded. Screening systems and procedures should be established to ensure that vulnerable populations are not detained. Detention standards, including interpretation and translation assistance and access to quality medical care, mental health services, legal counsel, legal resources, and family members should be made legally enforceable.

The backlog of cases waiting to be heard by the immigration courts has reached a record level, due to ICE's "new enforcement initiatives involving cooperative relationships with state and local law enforcement,"³ the current shortage of immigration judges, the low level of discretion DHS has been granted to decide who should be put in removal proceedings, and the fact that U.S. Citizenship and Immigration Services increasingly places noncitizens in removal proceedings if they have administratively applied for and been denied immigration benefits. ICE's 2011 prosecutorial discretion policies that provided for focusing enforcement efforts on people who had committed serious crimes, were national security threats, or had entered the U.S. recently have resulted in the administrative closing of almost 11,000 cases and the filing of fewer deportation cases with immigration courts. Nevertheless, the immigration court backlog has increased.

NILC RECOMMENDATION

Consistent rules for the exercise of prosecutorial discretion should exist across all branches of DHS, and prosecutorial discretion should be exercised more robustly. The "cooperative arrangements" with state and local law enforcement through programs such as 287(g), CAP, and Secure Communities should be eliminated.

Here's an example that demonstrates the need for robust, compassionate prosecutorial discretion, a generous waiver from deportation, and increased judicial discretion:

² *Id.*, p. 25.

³ *Id.*, p. 31.

Siphone was born in a refugee camp in Thailand where his family was living after they fled the war in Laos. In 1984, when Siphone was 5 years old[,] he and his entire family were brought to the U.S. as refugees. Siphone had a difficult adolescence and got in trouble with the law on several occasions for car theft and vandalism. When Siphone was 20 he was convicted of burglary and served one year in jail. While in jail, Siphone received counseling, finished his high school diploma, and began taking college classes. When he got out of jail, he got his Associate's Degree in counseling and worked with young refugee boys. He married an American citizen and has a 3-year-old citizen daughter. At his citizenship interview, his case was denied and he was taken into immigration detention. The immigration judge's only option under the 1996 laws was to deport Siphone He will never be able to return to the U.S. to his wife and daughter.⁴

⁴ *A Toolkit for Change: How You Can Keep U.S. Families Together and Uphold Our American System of Justice* (Hate Free Zone, Immigrant Justice Network & Southeast Asian Resource Action Center, undated), http://depts.washington.edu/diffdial/documents/sentence_home%20toolkit.pdf, p. 5.