



Protecting the Civil Rights of Detained Immigrants in Minnesota

This policy brief is adapted from an article that appeared in the Spring/Summer 2010 issue of the CURA Reporter. The article was written by Jacob Chin, Charles Miles, and José D. Pacas, graduate students in the Master of Public Policy program at the University of Minnesota's Hubert H. Humphrey School of Public Affairs; Katherine Fennelly, professor of public affairs at the Humphrey School; and Kathleen Moccio, adjunct professor in the School of Law at the University of St. Thomas.

EXECUTIVE SUMMARY

Of the 11 million undocumented immigrants estimated to be living in the United States, nearly one-half million are in civil immigration detention, and U.S. immigration officials expect that number to grow. Latino-rights and human-rights groups have expressed concerns about how immigration detention has expanded, as well as the threat to civil rights represented by this expansion. This study is one of the first to systematically interview attorneys for their perspectives on the violations of the rights of detained immigrant clients. The researchers interviewed 31 attorneys in Minnesota to learn about their experiences communicating with their immigrant clients, as well as their clients' treatment during incarceration. The attorneys described serious violations of a number of federal standards for detention. The authors suggest policy reforms that can help to ensure that the rights of detained immigrants are respected.

HIGHLIGHTS

- On any given day, between 200 and 300 persons are in immigration detention in Minnesota.
- Undocumented immigrants, as well as some lawful permanent residents, end up in civil immigration detention through various channels that include seeking asylum in the United States, arrests at worksite raids or in homes, random stops for civil violations, and arrests or convictions for crimes
- Courts do not appoint immigration attorneys to represent indigent immigrants detained for civil immigration law violations; immigrants must find a pro bono attorney or private lawyer willing to take their cases, or forego representation.

FOR MORE INFORMATION

- **Contact Dr. Katherine Fennelly**
fenne007@umn.edu
- **Download the CURA Reporter article, "Attorneys' Perspectives on the Violation of the Civil Rights of Immigrants Detained in Minnesota"**
www.cura.umn.edu/publications/catalog/reporter-40-1-2-6

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KEY FINDINGS

Characteristics of Clients

- More than one-third (38%) of immigration lawyers interviewed reported that, in the past two years, they had represented at least one U.S. citizen who was in immigration detention, including some who were detained even after credible claims to U.S. citizenship had been made.
- Of the detained immigrant clients represented by attorneys in this study, just under one-third (29%) were lawful permanent residents. The vast majority (91%) had been in the United States for more than a year, and almost two-thirds (66%) had been in the United States for more than five years.

Barriers to representation

- Courts do not appoint immigration attorneys to represent indigent immigrants detained for civil immigration law violations; immigrants must find a pro bono attorney or private lawyer willing to take their cases, or forego representation. Nationally, only 16% of detained immigrants have representation during court proceedings.¹
- Some attorneys reported that it can take six or more days before they are able to make initial contact with their detained clients. In the absence of this contact, a large number of immigrant detainees are deported without ever seeing a lawyer.
- Attorneys spend substantial amounts of case-related time on non-legal activities, such as traveling to detention facilities, collecting necessary documents, and addressing issues unrelated to direct representation of their clients such as family concerns, untreated medical conditions, and fears of abuse.

¹ American Bar Association Commission on Immigration, *Reforming the Immigration System, Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases, Executive Summary ABA, February 2010 at ES-39.*

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- Despite the existence of U.S. Immigration and Customs Enforcement (ICE) detention standards, attorneys reported clear violations of even the most minimal standards.
- Both public defenders and immigration attorneys reported significant barriers to communication with their clients that hinder representation, and force them to spend large portions of their case-related time on issues unrelated to legal representation.
- Public defenders reported being hampered in their representation of immigrant detainees by enormous caseloads, a lack of expertise in immigration law, and immigrants' reluctance to go to court, out of fear of the negative consequences of conviction.
- Immigration attorneys reported being overwhelmed by the sheer number of detained immigrants seeking legal services, many of whom lacked resources to pay, or who were deemed to be ineligible for relief under immigration laws.

BACKGROUND.....

Regardless of their legal status, detained immigrants have certain basic rights in the United States. These rights stem both from the U.S. Constitution, and from local and federal laws. Constitutional rights include a right to due process (Fifth Amendment), a right to equal protection under the law (Fourteenth Amendment), and protection from cruel and unusual punishment (Eighth Amendment). Immigrants also have a right to counsel, although the scope of that Sixth Amendment right is in contention. A central issue related to immigrant detention is the determination of what standards govern the treatment of detained immigrants, so that their rights are not violated.

The Department of Homeland Security–U.S. Immigration and Customs Enforcement (ICE) has created national guidelines that are intended to establish a standard of consistent care and fair treatment for detainees in immigration custody. First created in 2000, these standards were updated and renamed *detention standards* in 2008. Forty-two detailed standards outline specific protocols related to issues such as dietary needs, medical access, telephone use, and visiting hours. However, the ICE detention standards are not codified and have no force of law. The lack of binding guidelines restricts the agency's accountability in protecting immigrant detainees' rights.

In Minnesota, immigrants detained by ICE are held in one of five facilities that are operated or subcontracted by the Department of Homeland Security. ICE maintains subcontracts with county jails in Carver, Freeborn, Nobles, Ramsey, and Sherburne counties to house long-term immigration detainees. Each facility is responsible for the treatment of detainees in its custody, which further complicates compliance with ICE detention standards.

METHODOLOGY.....

The study focused on two groups of lawyers who represent immigrants in detention: immigration attorneys who provide private, nonprofit, or pro bono immigration services, and public defenders who are appointed to represent indigent immigrants detained for criminal violations. When these two groups were combined, approximately 585 attorneys were identified who represented detained clients in Minnesota between 2007 and 2009. We selected a 7% sample, yielding an initial list of 40 potential respondents, each of whom was then contacted by phone. Of these, 31 (78%) agreed to participate in an in-depth, face-to-face interview in their offices. These were structured interviews of about 50 questions, with a few open-ended questions. Interviews lasted between 50 and 75 minutes. The tape-recorded interviews were then transcribed before being coded and analyzed using NVivo content analysis software.

CONCLUSIONS.....

Foreign-born persons deserve the same protections as U.S. citizens when they are arrested and held in detention. The U.S. Department of Homeland Security has issued ICE detention standards that address a detained immigrant's rights to safety and freedom from physical violence, to access to medical care and needed medications, to communication through mail and telephones, to family visits, and to representation, including the opportunity for private communication with attorneys. However, standards are only meaningful if they are met. From the perspectives of attorneys who handle immigration cases in Minnesota, clear violations of even the most minimal standards frequently occur, and in many cases there are flagrant violations of detainees' civil and constitutional rights.

These violations have serious consequences. They prevent attorneys from accepting foreign-born clients, from receiving information relevant to legal cases, and from meeting with or communicating privately with their detained clients. From the perspectives of immigrants in detention, violations of the voluntary ICE standards can lead to prolonged and inappropriate detention, the inability to secure legal advice and representation, lack of access to important documents, physical isolation from attorneys, family members, and friends, an inability to communicate with lawyers or corrections facility staff, instances of abuse from other inmates or staff, untreated medical conditions and accumulated stresses that can cause or exacerbate mental health problems.

POLICY IMPLICATIONS AND RECOMMENDATIONS.....

Few Americans would disagree that fundamental fairness should be a hallmark of the administration of justice in the United States. Yet many officials are unaware or unconcerned that this principle has been lowered—and, in some cases, abandoned—for foreign-born residents. Reforms are required to ensure fairness, transparency, and accountability in the administration of immigration laws. Several of the Minnesota

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- Almost three-fourths of public defenders (70%) reported representing an immigrant who failed to appear at a criminal hearing because he or she was being held in ICE detention and was prohibited from being released.
- The sheer volume of detainees presents its own barrier; immigration attorneys (both nonprofit pro bono and private) report a large disparity between requests for representation and their ability to accept cases. On average, private attorneys reported representing only 20% of the detained immigrants seeking their services. Pro bono lawyers provided services to a higher percentage of detainees, but typically this consisted of very brief consultations prior to immigration court hearings. Failure to obtain representation increases the likelihood that the person will stay in custody, and makes it much more difficult to obtain relief from removal.

Barriers to communication with clients

- All of the immigration attorneys and more than half of public defenders had encountered barriers to private confidential meetings with detained clients in contravention of ICE standards. Barriers included meeting spaces that made private conversations impossible, surveillance equipment in meeting rooms, and refusal to allow attorneys to have personal meetings with immigrant clients.
- A majority of attorneys reported phone restrictions that hampered their ability to represent detained immigrants, despite ICE standards recommending free and unrestricted phone calls to legal representatives, and easy access to phones for this purpose. Barriers included failure to provide phone calls free of charge, lack of access to working phones, provision of instructions for phone accounts and equipment only in

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English, arbitrary restrictions on hours of phone use or duration of calls, and failure to deliver attorney phone messages to detainees.

- Two-thirds of attorneys reported significant barriers to written communication, despite ICE standards that incoming and outgoing mail should be delivered within 24 hours, and that prohibit staff from reading or copying mail. Barriers included late delivery, undelivered mail, lack of privacy, and lack of access to envelopes and stamps. Unreliable mail service forced some attorneys to spend time and resources traveling to detention facilities to obtain signatures.
- Despite clear ICE standards recognizing detainees' rights to access documents and other personal property while in detention, many attorneys reported that their clients were unable to do so because property was misplaced or inappropriately withheld.
- Visitation restrictions impede detained immigrants' abilities to obtain important legal documents. More than three-fourths of attorneys reported that clients experienced difficulty visiting with family members and friends, most often because they did not understand the visitation procedures, they lacked required information (such as visitors' birthdates), or visitors feared being detained themselves. In addition, most detention facilities limit visitation to short video meetings, rather than in-person visits, hampering the ability to discuss issues related to the detainee's case.
- Despite ICE standards that stipulate that "detainees shall have frequent informal access to and interaction with key facility staff members, as well as key ICE staff, in a language they can understand," nearly all attorneys mentioned language barriers and the lack of interpreters as significant impediments to communication. The inability to communicate with facility staff exacerbated immigrants' difficulties using telephones,

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attorneys interviewed for this study made suggestions regarding how to achieve these reforms.

At the federal level, fairness should begin with regular Department of Homeland Security review of individual detention decisions to ensure that only those noncitizens who pose a danger to society are subject to ongoing incarceration during the pendency of removal proceedings, and that detainees are not subjected to abuse. Defendants held in custody are rarely, if ever, served with copies of immigration hold documents, even though these documents can keep them in jail after completion of their criminal cases or sentences. At a minimum, defendants who face ongoing immigration detention should be served with copies of their immigration hold documents, and with copies of all immigration paperwork that they have been asked to sign. ICE should also take steps to delay questioning of immigrants charged with crimes until the appointment of a criminal defense counsel and until a translator is available, if one is needed.

Some reforms are particularly important to safeguard the Sixth Amendment right to counsel for immigrants who have been charged with crimes. ICE should be required to notify counsel when a criminal defense client is taken into immigration detention or transferred from one facility to another, and to provide the detainee and defense counsel with what is known as the individual's "A number." Currently, the online detainee locator system requires an exact match with the name that ICE employees initially enter into the system. If a name does not exactly match the name used in criminal proceedings, there is no way to locate the individual. The online detainee locator system needs to be modified to enable attorneys to find clients more easily. The inability to locate a client in ICE detention impedes an attorney's ability to provide legal advice to the client and jeopardizes his or her defense. It also wastes court resources when scheduled hearings do not proceed and warrants are issued needlessly.

Whether standards are voluntary or mandatory, compliance with ICE guidelines at state and county levels is essential to guarantee the rights of detained immigrants. Facilities that subcontract with ICE must ensure that detainees have the right to counsel, including access to free, confidential telephone services to contact attorneys and the opportunity for private, confidential, face-to-face meetings. Detainees should be provided with explanations of their rights in languages that they understand, and the government should work with stakeholders to establish an independent hotline for detained immigrants, their families, and their attorneys to report noncompliance with standards. Furthermore, detainees should not be subjected to arbitrary time restrictions that limit their interactions with counsel.

ICE places immigration detainees on most immigrants detained for criminal proceedings, whether the charge is a felony or a misdemeanor. It is costly to hold immigrants who would otherwise be released on bail, and state and local authorities should examine whether the detention of nonviolent offenders is consistent with their criminal-justice initiatives and cost-containment goals. State courts need to be vigilant to ensure that bail decisions are not biased against immigrants, and courts need to track the frequency and types of cases in which defendants turned over to an immigration hold are unable to appear for their criminal cases, and the frequency with which warrants are issued or charges are dropped.

Finally, when detainees receive medical or mental healthcare, state and local facilities should provide them with complete copies of their records, including lists of all prescribed medication and the dosages received. These records are critical to ensure that detainees receive needed care once they are transferred to ICE custody.

ICE subcontracts with county jails are proliferating, but this practice must not be an excuse for abandoning standards of fair treatment. To the contrary, oversight, monitoring, and accountability are even more important when the agency delegates to local facilities primary responsibility for detainees.

There are some promising signs. The original *CURA Reporter* article on which this policy brief is based generated considerable interest. It became the basis for public defender training in Hennepin County, Minnesota, has been cited in immigration litigation, and led to a follow-up study by students at the University of Minnesota Law School's Human Rights Clinic.

On March 31, 2010, the U.S. Supreme Court issued a decision that recognized immigrants' rights to accurate legal advice. In *Padilla v. Kentucky*, the Court held that criminal defense lawyers must advise their noncitizen clients about the risk of deportation. In its ruling, the Court acknowledged that "the importance of accurate legal advice for non-citizens accused of crimes has never been more important." Federal, state, and local officials should follow the spirit of the *Padilla v. Kentucky* decision by ensuring transparency and accountability in the treatment of incarcerated immigrants.

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accessing funds and personal documents, receiving visitors, and obtaining medical care.

Other conditions of detention

- According to ICE standards, civil immigration detainees are to be housed separately from criminal inmates. However, all of the attorneys reported that they had immigrant clients who were mixed in with the general jail population. This can result in abuse from other (criminal) inmates, and makes it difficult or impossible for facilities to follow ICE standards for detainee treatment.
- Both public defenders and immigration attorneys reported physical and mental abuse of immigrant detainees by correctional officers. Incidents included not being fed on time, being put in isolation without cause, and being classified as "uncooperative" for exercising their right to remain silent (resulting in a higher bond being set for release).
- Egregious violations pertaining to untreated medical conditions, some of which have resulted in deaths, have been widely documented in immigrant detention.² The ICE standard for medical care requires all detainees to have access to health care. Despite this, 90% of all attorneys interviewed reported having immigrant clients who have had problems obtaining needed medical care.

² N. Bernstein, "U.S. to Reform Policy on Detention for Immigrants," *The New York Times*, 5 August 2009.

CENTER FOR URBAN AND REGIONAL AFFAIRS (CURA)

University of Minnesota
330 Humphrey Center
301 19th Ave. S.
Minneapolis, MN 55418
cura@umn.edu • 612-625-1551

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RECOMMENDED RESOURCES

The Advocates for Human Rights, “Energy of a Nation: Immigration Resources” (links to articles on detention)

www.energyofanation.org/Immigration_Detention_in_the_U_S.html

Amnesty International, *Jailed Without Justice* (Washington, D.C.: Amnesty International, March 2009).

www.amnestyusa.org/immigration-detention/immigrant-detention-report/page.do?id=1641033

Detention Watch Network

www.detentionwatchnetwork.org/

ICE 2008 Detention Standards

www.ice.gov/partners/dro/PBNDS/index.htm

Inter-American Commission on Human Rights, *Report on Detention in the United States: Detention and Due Process* (Washington, D.C.: Organization of American States, December 2010).