



APPENDIX:

U.S. LEGAL FRAMEWORK RELATING TO MIGRANT DETENTION

1. In the United States, Congress holds the authority to make the laws that govern admission, protection, and removal of non-citizens. Federal immigration law, however, must be understood in its context within the U.S. tripartite system of government. The Executive branch agencies, including the Department of Homeland Security, the Department of Justice, and the Department of State, promulgate regulations that directly govern the application of U.S. immigration law. Myriad public and internal policy guidance spells out how the U.S. immigration system operates in practice. Federal courts also play a role in providing a final review of individual decisions made in removal proceedings in administrative courts.
2. Federal immigration law in the U.S. continues to be based on the Immigration and Nationality Act of 1952 (INA)¹. Reforms to the INA were made in 1965, which amended the INA to set a permanent annual worldwide level of immigration divided into categories for family-related immigrants, employment-based immigrants, and diversity immigrants. Refugees are excluded from these numerical limits; the Refugee Act of 1980 defines the U.S. laws relating to refugees.²
3. In 1986, Congress enacted the Immigration Reform and Control Act (IRCA) to toughen sanctions against employers who hired undocumented persons and limit access to federally funded welfare benefits.
4. In 1988, Congress created the “aggravated felony” category of deportable crimes which it dramatically expanded in 1990.³ Immigrants who were convicted of one of the newly defined

¹ The INA of 1952 also created the Immigration and Naturalization Service (INS), the federal agency responsible for administering immigration law and policy until the creation of the Department of Homeland Security in 2003. *See* Immigration and Nationality Act, 8 U.S.C. § 1187 (2006).

² The term “refugee” means “any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” INA § 101(a)(42).

³ *See* INA § 101(a)(43). *See also* The Anti-Drug Abuse Act of 1988, Pub. L. 100-690, subtitle J, 102 Stat. 4181 (Nov. 18, 1988) (creating a separate ground of deportation for serious crimes such as murder, drug trafficking or illegal trafficking of firearms or destructive devices), Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (Nov. 29, 1999) (substantially expanding the category of aggravated felony).

“aggravated felony” crimes were subject to mandatory detention.⁴ In 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA)⁵ and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)⁶ added additional crimes to the aggravated felony ground for deportation and reduced the term of imprisonment threshold requirement to one year.⁷

5. IIRIRA also expanded statutory authority for mandatory detention without an individualized custody determination by a judicial authority in a broad category of cases, including arriving asylum seekers,⁸ non-citizens convicted of certain crimes,⁹ and certain refugees awaiting adjudication of their applications for permanent residence.¹⁰ These categorical detention determinations violate norms of proportionality and non-discrimination.¹¹
6. The 1996 IIRIRA also created the “expedited removal” system for arriving aliens without proper documentation for admission¹² which has resulted in the routine detention of arriving asylum seekers and the summary expulsion of 111,000 people in 2010 alone.¹³
7. The USA PATRIOT Act of 2001,¹⁴ passed just weeks after the 9/11 terrorist attacks, and the REAL ID Act of 2005¹⁵ expanded the class of individuals who are inadmissible to the U.S. for having provided “material support” to terrorism.
8. The Department of Homeland Security (DHS) was created in 2003 as part of federal agency reform following the 9/11 terrorist attacks, shifting immigration enforcement into the arena of anti-terrorism policy. The Immigration and Naturalization Service (INS) was replaced with three different agencies within DHS: U.S. Customs and Border Protection (CBP), U.S.

⁴ See Anti-Drug Abuse Act of 1988; see also Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. C.R.-C.L. L. REV. 601, 610-11 (2010), available at <http://harvardcrcl.org/wp-content/uploads/2009/06/601-6341.pdf> (describing enactment of mandatory detention into U.S. law in 1988 and the dramatic expansion of the class of migrants subject to detention).

⁵ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

⁶ Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

⁷ See INA § 101(a)(43).

⁸ INA § 235(b)(1)(B)(iii)(IV).

⁹ Section 236(c) of the INA mandates detention of any alien who is inadmissible by reason of having committed any offense covered in § 212(a)(2); is deportable by reason of having committed any offense covered in INA § 273(a)(2)(A)(ii), (A)(iii), (B), (C), or (D); is deportable under INA § 237(a)(2)(A)(i) on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year; or is inadmissible under INA § 212(a)(3)(B) or deportable under INA § 237(a)(4)(B) when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

¹⁰ Human Rights Watch, *Costly and Unfair: Flaws in US Immigration Detention Policy*, May 2010, at 8-9.

¹¹ See, e.g., Barbara A. Frey and X. Kevin Zhao, “The Criminalization of Immigration and the International Norm of Non-Discrimination: Deportation and Detention in U.S. Immigration Law,” XXIX *Law and Inequality: A Journal of Theory and Practice* 2, Summer 2011, at 310-11.

¹² INA § 235.

U.S. Dept. of Homeland Security, Office of Immigration Statistics, Policy Directorate, “Annual Report,” June 2011, available at <http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf>.

¹⁴ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

¹⁵ Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Div. B, Pub. L. No. 109-13 (2005).

Citizenship and Immigration Services (USCIS), and U.S. Immigration and Customs Enforcement (ICE). The Executive Office of Immigration Review (EOIR), which has jurisdiction over the immigration courts, is left within the Department of Justice (DOJ). In other words, two federal agencies in the U.S. – DHS and DOJ – are responsible for immigration enforcement and the adjudication of immigration cases.

9. Federal law gives the Department of Homeland Security, which includes both ICE and CBP, the authority to apprehend and detain aliens under the Immigration and Nationality Act (INA) §232 (Detention of Aliens for Physical and Mental Examination), §235 (Inspection by Immigration Officers; Expedited Removal of Inadmissible Arriving Aliens; Referral for Hearing); §236 (Apprehension and Detention of Aliens; §236A (Mandatory Detention of Suspected Terrorists; Habeas Corpus; Judicial Review), and §241 (Detention of Aliens Ordered Removed) and by corresponding federal regulations.
10. Because immigration is a matter of federal law, state and local governments in the U.S. have historically played a very limited role in immigration enforcement. Recent policies, however, expanded responsibility for enforcing civil immigration laws to state and local police through formal DHS programs such as the 287(g) program, the Criminal Alien Program (CAP), and Secure Communities¹⁶ and informal cooperation between immigration authorities and public safety officials.

¹⁶ Local enforcement of immigration laws has resulted in problems with racial discrimination and profiling. *See generally* U.S. Dept. of Homeland Security, Office of Inspector General, *The Performance of 287(g) Agreements* (Mar. 2010); ACLU of N.C. Legal Found. and Immigration and Hum. Rights Policy Clinic at the U. of N.C. at Chapel Hill, “The Policies and Politics of Local Immigration Enforcement Laws: 287(g) Program in North Carolina,” (Feb. 2009), available at <http://www.law.unc.edu/documents/clinicalprograms/287gpolicyreview.pdf>; Gov’t Accountability Office, *Report to Congressional Requesters, Immigration Enforcement: Better Controls Needed Over Program Authorizing State and Local Enforcement of Federal Immigration Laws* (Jan. 2009), available at <http://www.gao.gov/new.items/d09109.pdf>; Trevor Gardner II & Aarti Kohli, The Chief Justice Earl Warren Inst. on Race, Ethnicity & Diversity at the U.C. Berkeley L. Sch., *The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program*, (Sept. 2009), available at http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf.