

Southeast Asia Resource Action Center's (SEARAC) Views on Detention

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1.1. SEARAC's Views on Detention

1.1.1. WHY IS SEARAC CONCERNED?

Many Southeast Asian community members have been very successful in adapting to life in the United States. They have revitalized run-down neighborhoods, nurtured successful businesses, and raised strong, healthy families. However, Southeast Asian families continue to experience a variety of difficulties that can be traced to histories of trauma and recent displacement.

Currently it is estimated that one third of all immigrants in long-term detention are of Southeast Asian descent. The disproportionate number of Southeast Asian immigrants currently held indefinitely in detention facilities across the country makes the issue of long-term detention a particular concern to SEARAC.¹

The 1996 laws retroactively allow for deportation for minor offenses and deny the Attorney General the discretion to permit humanitarian exceptions to such deportation orders. SEARAC believes that constitutional and humanitarian concerns have been seriously disregarded by the 1996 legislation. As a population with a large number of permanent residents who have not adjusted their status to become U.S. citizens, the Southeast Asian community is particularly vulnerable to the changes to deportation policy instituted by the 1996 laws. Indefinite detention constitutes a life sentence for many that have already served their time, have been rehabilitated, and whose debt to society should be considered paid.

1.1.2. COMMUNITY EDUCATION

Southeast Asians who live in the United States are often ill-equipped to understand the American legal system because of the language difficulties and because the legal systems of their homelands are so different. These facts mitigate against the abilities of many Southeast Asians to protect their own interests in courts of law.

- Southeast Asians need to be made aware of the importance of naturalizing. As a citizen of the United States a person may not be deported.
- Southeast Asians need to be informed about the consequences of pleading guilty and being convicted of offenses they may not have committed when the plea is made for the purposes of expediting their release and gaining suspended sentences.
- Southeast Asians who have committed deportable offenses should seek counsel before applying for citizenship.
- Southeast Asians who have committed deportable offenses should seek counsel before traveling outside U.S. borders.

1.1.3. INS POLICIES

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SEARAC believes that current policies that require the mandatory detainment of permanent residents with criminal records are excessively harsh. First, 1996 immigration laws unfairly subject long-time residents to detention without bond and to deportation without the possibility of discretionary relief or judicial review. We believe that protections described in the Constitution should apply equally to all residents of the United States, regardless of citizenship status. "Court stripping" provisions included in the 1996 law should be overturned and the Attorney General should be permitted to release from detention facilities immigrants who do not pose a safety risk and are not likely to flee. Second, the retroactive nature of the 1996 laws, making a person deportable for an offense committed decades ago, is unfairly onerous. Third, the 1996 laws expanded the definition of a felony for INS purposes to included offenses that are considered misdemeanors under state laws. SEARAC believes that such offenses should not be grounds for deportation. Finally, the indefinite detention of Southeast Asians is cruel and unusual in light of the refugee experience. Southeast Asians are being forced to languish for months on end fearfully waiting to be removed to the country where they themselves or their families may have suffered gross atrocities and torture.

To ensure that the rights of those indefinitely detained are protected and their families can provide appropriate support to document their rehabilitation and guarantee that they are no longer threats to society because the community will provide opportunities upon their release, we recommend the following:

1.1.3.1. Due Process

- Reverse certain aspects of the 1996 laws.

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As of February 17, 2000 the INS reported that there are 121 Cambodians, 173 Laotians, and 423 Vietnamese who are long term detainees. Long term detainee is defined as a person who has been held longer than 90 days.

- Immigrants with strong family and community ties who are not flight risks should be allowed to post bond.
- Eliminate the retroactive effect of the laws. Immigrants who committed offenses decades prior to the enactment of the 1996 laws should not have old offenses used against them in enforcing new deportation policies.
- Allow for discretionary relief and judicial review before the enforcement of deportation.
- Mandatory review should be enforced to allow consideration of a detainee's circumstances.
- Set a maximum limit of time a person may be held in detention not to exceed one year for those individuals who cannot be returned to their country of origin.
- Permit face-to-face interviews of family members at the hearings. As many parents of detainees do not speak, read or write English a face-to-face interview will enable the families to better express their support for their children or spouses who are held in detention.

1.1.3.2. Services to the Detained

- Affordable or pro-bono legal services specializing in immigration law should be provided at detention centers and available to families.
- Permit visits by community leaders and social service workers at detention sites to provide counseling and other community support.
- Provide interpretation and translation services to the detainee and their family members whenever necessary.

1.2. “Immigration Fairness Restoration Act of 2000” Summary

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The **Immigration Fairness Restoration Act of 2000** would ensure that U.S. immigration law reflects our **tradition as a nation of immigrants** and a **nation of just laws**.

1.2.1. Elimination of Retroactivity

Immigration policy should not change the rules in the middle of the game. The IFRA would eliminate the retroactive effects of the 1996 immigration laws, which include the *Illegal Immigration and Immigrant Responsibility Act* (IIRIRA) and the *Anti-Terrorism and Effective Death Penalty Act* (AEDPA), by:

- Permitting an immigrant who committed a criminal offense before the effective date of IIRIRA (April 1, 1997) to apply for relief from removal (the term used in IIRIRA to encompass deportation and exclusion) as it existed on the day he or she committed the offense
- Preventing the “stop-time” rule (also known as the “clock-stopping” rule) from terminating the accrual of continuous presence for purposes of applying for relief from removal for those who committed an offense and for those who were put into deportation proceedings before April 1, 1997. The stop-time rule harms those whose offense occurred shortly after arriving in the United States, and who have for years and even decades been productive and law-abiding
- Making the term “aggravated felony” only apply to an offense that was an aggravated felony at the time the offense was committed
- Assuring that an immigrant would not be removable, deportable, or inadmissible for any offense that was not a ground of removal, deportation, or inadmissibility on the date the offense was committed
- Explicitly stating that the 1996 changes to the Immigration and Nationality Act would apply only to persons seeking admission or who became removable after the effective dates of the 1996 laws

1.2.2. Restoration of Proportionality to Grounds of Removal

Current laws punish legal residents out of proportion to their crimes. The IFRA would restore balance and fairness to our immigration laws by:

- Returning the definition of “crimes involving moral turpitude” to the pre- 1996 definition. Prior to the 1996 laws, an immigrant had to have been sentenced to a year for a crime involving moral turpitude to be deportable. Currently, the deportability ground is applied to any crime that *could* lead to a sentence of a year - even relatively minor crimes for which no jail time was served
- Ensuring that immigrants with relatively minor offenses are not classified as “aggravated felons” and precluded from all relief from deportation
- Ensuring that immigration laws respect criminal court judge and jury decisions not to enter a conviction of guilt or impose a jail sentence when they believe that the defendant does not deserve their harsh consequences.

1.2.3. Restoration of Discretionary Relief from Removal

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The IFRA would restore the discretion immigration judges previously had to evaluate cases on an individual basis and grant relief to deserving immigrants and their families by:

- Allowing immigrants to apply for cancellation of removal (if they meet the requirements) if they have not been convicted of an aggravated felony for which the sentence imposed was five years or more. Currently, no immigrant classified as an aggravated felon is eligible for any form of relief from removal, regardless of the circumstances and the equities in his or her case
- Repealing the "stop-time" rule
- Permitting an immigrant who leaves the United States temporarily for emergency reasons to accrue continuous presence for purposes of applying for relief from removal when he or she returns to the United States
- Restoring eligibility for withholding of removal (protection for those who face persecution if returned to their country)
- Restoring some waivers from removal for relatives of U.S. citizens and legal immigrants that were taken out of the law in 1996

1.2.4. Restoration of Judicial Review

The IFRA would ensure that there is adequate judicial review of immigration orders and decisions. Our judicial system is one of checks and balances and immigrants deserve their day in court.

1.2.5. Using Detention Only When Needed

The detention of individuals is an extraordinary power that should only be used in extraordinary circumstances. The IFRA would ensure that detention is not used to needlessly separate American families by:

- Requiring the Attorney General to release an immigrant from detention if he or she will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding
- Requiring the release of long-term detainees who cannot be removed to their countries of origin if the Attorney General cannot negotiate their return with the government of that country, and providing for regular review of an immigrant's continued long-term detention

1.2.6. Recognizing Immigrants' Strong Ties to their American Families And Communities

- The IFRA recognizes that immigrants who leave the United States temporarily do not necessarily abandon their homes here, and should not be treated as if they do
- The IFRA also recognizes that immigrants in the United States in any status should be treated with dignity and respect
- By repealing the 3- and 10- year bars to reentry and by allowing immigrants who were ordered deported because of the harsh 1996 immigration laws to reopen their cases in order to prove they deserve a second chance, the IFRA would keep American families together

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2. American Bar Association Fact Sheet Immigration

America prides itself as being a nation of immigrants. As befits a nation settled and built by immigrants, guarantees of fairness and due process have long been important features of our nation's immigration policy. These historically have included due process hearings when deportation is at stake, investing discretion in the Attorney General to grant waivers from deportation, recognizing that lawful permanent residents should not be denied equal protection of the laws, and ensuring federal court review of Immigration and Naturalization Service (INS) decisions and practices.

Sweeping changes were enacted in 1996 that severely eroded the legal protections long afforded to foreign-born residents. Immigrants and asylum seekers today are routinely detained without bond, deported without hearings, disallowed discretionary relief, restricted in their access to counsel, and barred from appealing to the courts. Moreover, the law is being applied retroactively, making long-term legal immigrants deportable for things they did years before the laws were changed. In essence, a two-tiered system of justice was established which puts many immigrants in jeopardy of being permanently separated from their U.S. families. These laws are unfair; *statutory reforms are essential*.

- **Restore fair hearings and judicial review of immigration decisions.** An essential aspect of the American justice system is that important decisions are made following a fair process. The decision to deport someone

is momentous, especially for refugees fleeing persecution and for legal immigrants who have lived most of their lives in this country and would be torn from their U.S. citizen and legal resident children, spouses and parents. Low-level INS officers should never have the final word.

- **Proportionality should be restored to the immigration laws.** Americans believe that the punishment should fit the crime but the immigration law penalizes small infractions as severely as serious crimes. Shoplifting, joy-riding and other minor offenses are now called “aggravated felonies” for which deportation is mandatory if a one-year sentence is imposed, even if it is entirely suspended. As a result, a person who never spent a night in jail is treated no differently than someone who has served decades in prison. Moreover, an offense that is expunged or vacated under a state rehabilitative statute is considered a deportable conviction for immigration purposes even if it is not a “conviction” under the state law. Immigrants are permanently banished for even youthful run-ins with the law.
- **Laws should not operate retroactively.** The 1996 laws are being applied retroactively. The new deportation grounds are being used to deport people for things they did long before 1996. *Ex post facto* laws are unconstitutional in criminal law; they should be avoided in the immigration context.
- **Discretion to make appropriate decisions should be given back to immigration judges.** Many deserving immigrants cannot be considered for relief today even if the United States has been their home for decades. Deportation is automatic regardless of the nature of their offense, the extent of their ties to the U.S., evidence of rehabilitation, and the severity of the hardship deportation may cause their U.S. citizen and legal resident family members. Immigration judges should be able to evaluate all of the relevant factors in a case and to give deserving immigrants a “second chance.”
- **Detention should be used only when a person is found to be a danger or a flight risk after an individual custody hearing before an immigration judge.** Immigrants and refugees are detained without bond or individual custody hearings while the INS presses administrative deportation charges against them. Because the INS lacks enough bed space, these individuals often are locked-up with criminals in state and local jails at great distances from their homes and families. They have lost jobs, their children are traumatized and their spouses need second jobs to pay for lawyers and to make ends meet. Detention also makes it difficult to access representation and to prepare their legal defenses.

3. MYTHS AND REALITIES LAWS WITHOUT MERCY AND THE NEED FOR IMMIGRATION REFORM

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Myth: INS deports only hardened, unreformed “criminal aliens.”

REALITY: The 1996 immigration law made drastic changes to traditional immigration laws and procedures, subjecting to deportation tens of thousands of long-term, law-abiding *legal* residents. Touted as legislation that would control illegal immigration, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) and the Anti-Terrorism and Effective Death Penalty Act (AEDPA) actually include many provisions that significantly affect American families, legal immigrants and others seeking to enter the United States legally. Many, including Members of Congress and the general public, have recognized the need to revisit and change certain provisions of IIRAIRA and AEDPA. One of the harshest provisions of IIRAIRA and AEDPA is the greatly and irrationally expanded definition of “aggravated felony.” This expanded definition, which is unrelated to any criminal law definition, includes minor, non-violent misdemeanors such as shoplifting, perjury and check kiting. *By casting this overly broad net, Congress has subjected tens of thousands of long-term legal residents to deportation without the possibility of relief—regardless of how long the immigrant has been in the United States, regardless of whether the immigrant has U.S. citizen family here in America, regardless of whether the immigrant has straightened out his or her life and demonstrated rehabilitation, and regardless of whether the immigrant has made significant contributions to American society.* For instance, military service makes no difference. Several Vietnam era veterans are subject to deportation under this draconian provision.

Myth: People do not get deported for minor incidents from years in the past.

REALITY: The new expanded definitions are *retroactive*. Thus, legal immigrants are placed into deportation proceedings today for minor offenses they committed decades ago. *Furthermore, there is absolutely no statute of limitations on this law.* This law operates retroactively *even if the offense at the time was not considered a serious crime, even if the defendant received a suspended sentence and served no time, and even if the crime has been*

expunged or the immigrant was pardoned. In many cases, judges have written letters or spoken on behalf of long-time legal residents who received no jail time for offenses committed in the '70's and '80's. These judges often gave suspended sentences, meaning that under criminal law the immigrant actually never was convicted, never served time in jail, and has no record.

4. FACT SHEET: PEOPLE HURT BY IIRAIRA

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Print and broadcast media nationwide have profiled many, including the following people, who have been hurt by the 1996 immigration laws. Their stories, and those of many others, need to be told if we are to succeed in successfully making our case to Congress and the media to change these harsh and unfair laws. Please advocate in support of rolling back the laws by letting us know about your clients!

- Guy Taylor, 17-year-old Canadian orphan who wants to enlist in the U.S. Army. INS won't let American grandmother adopt him, won't extend visa. *Source: Associated Press, Los Angeles Times.*
- Robert Glazewski, immigrant from Poland. Being deported for overstaying his visa while caring for his ailing mother. *Source: Associated Press.*
- Meng Li, real estate executive from Shanghai, strip-searched, handcuffed, held in jail before being subject to expedited removal. INS said Li used the same visa twice. *Source: New York Times.*
- Roberto Obergon, Nicaraguan immigrant, being deported for drunk driving conviction. Only potential kidney donor for his son, whose organs are failing. *Source: Houston Chronicle.*
- Elba Digna Wood, wife of a former Contra commander, denied entry into U.S. and barred for five years through expedited removal process. INS said Wood overstayed her visa in 1994, after she gave birth to her daughter. INS Commissioner acknowledged Wood should have been admitted. *Source: New York Times.*
- Olufemi Abdulai, fled Nigeria after being imprisoned and tortured. Indefinitely detained by INS for not having identifying documents. *Source: ABC News.*
- Donald Vega, world-renowned jazz pianist, being deported for illegally entering the country at the age of 11. *Source: Los Angeles Times.*
- Attila Hegyi, a Hungarian student, barred from the country for five years under expedited removal process. INS says Hegyi overstayed a visa by three months five years previously. *Source: New York Times.*
- Daniel Campbell, a Michigan business owner, being deported for a teenage prank committed in 1968. *Source: Detroit News.*
- Lulseged Dhine, held for nine years in detention, after arriving in this country as a refugee. Dhine helped raise the salaries of detention center guards, started Alcoholics and Narcotics Anonymous programs in the detention center, and was a mentor for juveniles and gang members. *Source: Miami Herald.*

5. INS PROSECUTORIAL DISCRETION: DOES NOT SOLVE PROBLEMS CREATED BY THE 1996 LAWS!

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The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 needs to be changed. INS' exercise of prosecutorial discretion does not address the problems that the 1996 laws have created for the following reasons:

- *There is no statute of limitations.* INS decisions not to proceed can be reversed at any time. As a result, immigrants live in constant fear: they have no closure, are unable to proceed with their lives, and are never sure that they will not be deported in the future.
- *There would be inconsistent application of IIRAIRA.* INS enforcement officials would have the power to make individual decisions that increasingly would be based on such variables as where someone lives, whether they speak English, and who represents them.
- *Immigration courts move slowly.* Unlike the criminal justice system, where prosecutors have a very limited amount of time to decide whether to pursue a case, the INS is subject to almost no time constraints. Even if the INS decides not to proceed with a case, it may be months before an immigrant is released from detention. Meanwhile, people are in detention thousands of miles from their families, jobs, and lawyers.
- *Immigration law is not criminal law.* Decisions to file criminal charges are based on a number of factors, including the strength of case and the severity of the crime. Judges, juries and grand juries review the case.

In immigration law, low level bureaucrats begin proceedings without the review of a neutral party, such as a judge or jury.

- *Judges still would have no discretion:* Immigration judges are neutral decision makers trained to evaluate each case based on evidence presented by both the INS and the immigrant. They also are able to evaluate someone's testimony, not merely review a paper record. They should be allowed to use discretion in deciding cases.
- *Prosecutorial discretion sidesteps the real issue: that IIRAIRA needs changing.* The 1996 immigration laws need to be changed. IIRAIRA violates American principles of law, justice, fairness, and family values. It denies people their day in court, denies them a second chance, changes the rules in the middle of the game, tears families apart, and hits the wrong target. The only way to change those failures is to change the law. Granting the INS discretion will not by itself solve the problems. Right the wrongs: Fix '96.