

Immigrant's Rights

- What's happening at the border?
 - Lawyers and doctors monitoring conditions in border facilities have reported terrible conditions and inhumane treatment of people detained along the border.
 - [According to Clara Long](#) who's been working as part of a team of lawyers and doctors monitoring conditions in border facilities:
 - "Children should spend no more than a few hours in short-term border jails and US-law limits their detention under typical circumstances to 72 hours, but many of the children interviewed had been there for three or four weeks."
 - "Based on our interviews, officials seem to be making no effort to release children to caregivers - and many have parents in the US - rather than holding them for weeks in overcrowding cells sleeping on concrete floors."
 - "Children at Clint told us they don't have regular access to showers or clean clothes, with some saying they hadn't been allowed to bathe over periods of weeks and don't have regular access to soap."
 - "The US government argued in court on Tuesday that its obligation to provide "safe and sanitary" conditions does not require it to provide kids with hygiene items such as soap or toothbrushes.
 - "Many of the kids in the Clint facility are too young to wash or feed themselves, yet they are left to fend for themselves with

the help of unrelated older children.”

- Family Separations

- To continue separating families, immigration agents appear to be taking advantage of a loophole in the court decision. The injunction doesn't apply when parents have criminal histories or communicable diseases. Nor does it explicitly apply when children are accompanied by relatives like siblings or grandparents, unless those relatives are their legal guardians.
 - As part of the case the court ruled on, the ACLU receives lists every month of separated families, with brief notations about the government's justification.
 - Some of the misdeeds that are listed are extremely minor. For example, a 6-month-old was taken from his father because the father had a conviction for marijuana possession. Another dad lost his kid because he admitted to a conviction for driving with an expired license.
 - In some cases, the parents hadn't been convicted of anything at all, but border agents claimed that they had gang affiliations.
 - Anthony Enriquez, director of the unaccompanied minors program for Catholic Charities, represented a child who was sent to New York after her mother was hospitalized for a leg injury in California. Even after the mother was discharged and released from immigration custody, Enriquez said, the government balked at returning her daughter to her until he

threatened to sue.

- Constitutional rights of “illegal aliens”
 - In decisions spanning more than a century, the US Supreme Court has ruled that the Constitution’s guarantees apply to every person within the US borders, including “aliens whose presence in this country is unlawful.”
 - “The government has the power to decide who to let into the country and under what circumstances. But once here, even undocumented immigrants have the right to freedom of speech and religion, the right to be treated fairly, the right to privacy, and the other fundamental rights US citizens enjoy.”
 - In a 1903 case called *Yamataya v. Fisher*, the US Supreme Court ruled that the INS could not deport someone without a hearing that meets constitutional due process standards. Most people facing deportation are entitled to:
 - A hearing before an immigration judge and review, in most cases, by federal court;
 - Representation by a lawyer (but not at government expense);
 - Reasonable notice of charges, and of a hearing’s time and place;
 - A reasonable opportunity to examine the evidence and the government’s witnesses;
 - Competent interpretation for non-English speaking immigrants, and

- Clear and convincing proof that the government's grounds for deportation are valid.
- Many parts of the Constitution uses the term "people" or "person" rather than "citizens." Those laws apply to everyone physically on US soil, whether or not they are a citizen.
- Section One of the 14th Amendment to the Constitution
 - "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
 - "Critics claim that undocumented workers or immigrants or migrants don't have legal rights because they are lawbreakers by entering the country illegally and owe no loyalty to the United States. They claim that only US citizens (natural born or naturalized) are protected by the Constitution."
 - James Madison, a principal author of the Constitution and the fourth president of the United States, wrote: "that as they [aliens], owe, on the one hand, a temporary obedience, they are entitled, in return, to their [constitutional] protection and advantage."
 - More recently, the US Supreme Court ruled in (2001) that "due process" of the 14th Amendment applies to all aliens in the United States whose presence maybe or is "unlawful, involuntary or transitory."
 - Twenty years before Zadvydas, the Supreme Court ruled that the state of Texas could not enforce a state law that prohibited illegally

present children from attending grade schools, as all other Texas children were required to attend. The court ruled in that:

- The illegal aliens who are... challenging the state may claim the benefit of the Equal Protection clause which provides that no state shall 'deny to any person within its jurisdiction the equal protection of the laws.' Whatever his status under immigration laws, an alien is a 'person' in any ordinary sense of the term... the undocumented status of these children does not establish a sufficient rational basis for denying benefits that the state affords other residents.
 - In *Yick Wo v. Hopkins* (1973) the court ruled that all criminal charge-related elements of the Constitution's amendments (the First, Fourth, Fifth, Sixth and 14th) such as search and seizure, self-incrimination, trial by jury and due process, protect non-citizens, legally or illegally present.
 - In *Wong v. United States* (1896), the court ruled that it must be concluded that all persons within the territory of the United States are entitled to the protection by those amendments [Fifth and Sixth] and that even aliens shall not be held to answer for a capital or other infamous crime, unless on presentment or indictment of a grand jury, nor deprived of life, liberty, or property without due process of law.
- How do these rights and protections work in practice?
 - The right to due process

- The Fifth Amendment states that “no person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.”
- The issue of due process is at the heart of many immigration cases, including the 1993 Supreme Court case that has returned to the spotlight with the surge in family separations. The case led to an agreement requiring the government to release children to their parents, a relative or a licensed program within 20 days.
- In the ruling, Justice Antonin Scalia wrote “it is well established that the Fifth Amendment entitled aliens to due process of law in deportation proceedings.”
- “But in reality, says Andrew Arthur, a resident fellow in law and policy at the conservative Center for Immigration Studies, “courts of law run the gamut.”
- In some cases, immigrants are not granted a hearing at all. When asked about the president’s tweet, White House Press Secretary Srah Sanders pointed to the process of “expedited removal,” which was created by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.
 - “Just because you don’t see a judge doesn’t mean you aren’t receiving due process,” Sanders said.
- Under the expedited removal process, immigrants who have been in the country illegally for less than two years and are apprehended within 100 miles of the border can be deported

almost immediately without going through a court hearing. The exception is asylum seekers, who must be granted a hearing.

- “In immigration court, you have very few rights,” said John Gihon, an immigration attorney who spent six years as a prosecutor for ICE.
 - Gihon says the bar for what constitutes evidence is lax in immigration court. Documents do not have to be authenticated, and hearsay counts as admissible evidence. Hearsay is not allowed in most US courts.
 - “In the majority of cases, it’s a lock solid 100 percent guaranteed conviction because there is little defense, and most would confess they crossed the border illegally.”
- The right to legal counsel
 - The Sixth Amendment states that “In all criminal prosecutions, the accused shall... have the assistance of counsel for his defense.” The Supreme Court ruled in the 1963 case *Gideon v. Wainwright* that if a person is too poor to hire an attorney, the government must appoint one.
 - Because most deportation proceedings are civil rather than criminal cases, the right to legal counsel often doesn’t apply.
 - Under the law, anyone facing a criminal charge has the right to counsel. However, the government is only required to provide counsel if the person is accused of a felony.

Crossing the border illegally is a misdemeanor.

- In recent weeks, people have donated millions of dollars to nonprofit groups to pay for immigrants' legal fees.

- The right to vote or hold office
 - The Constitution does not prohibit anyone from voting. Instead, it spells out who cannot be denied the right to vote. The 14th Amendment says men who are US citizens and over the age of 21 must be allowed to vote, unless they have committed a crime. The 15th Amendment prohibits anyone from denying the right to vote based on skin color and the 19th Amendment prohibits denying the right to vote based on sex.

 - It wasn't until 1926 that all states passed laws barring noncitizens from voting. Congress passed a law 70 years later prohibiting illegal immigrants from voting "for the office of President, Vice President, Presidential elector, Member of the Senate, Member of the House of Representatives, Delegate from the District of Columbia, or Resident Commissioner."

 - If you are not a US citizen, voting in a federal election could land you in prison for up to three years or lead to deportation. States can impose their own, sometimes harsher, penalties for breaking the law.
 - However, because elections are largely a local affair, some states allow local governments to decide

whether noncitizens can vote in local elections.

- The right to education
 - There is no “right to education” in the Constitution. However, in the case *Plyler v. Doe* the Supreme Court ruled that if children who are citizens have access to a free, public education, so should undocumented immigrant children. That is because the 14th Amendment says the government cannot “deny to any person within its jurisdiction the equal protection of the laws.”
 - This case means undocumented children cannot be prohibited from enrolling in a public school. The Flores settlement requires that facilities where children are kept must meet the minimum requirements for providing health care, education, recreation and other child care services.
- Right against unreasonable search and seizure
 - The Fourth Amendment establishes the right “against unreasonable searches and seizures.”
 - While this law would generally apply to both citizens and noncitizens, there is a key caveat known as the “border search exception.”
 - This exception dates back to the very first Congress, which passes a law allowing searches at the border as a means to collecting duties. As a result, courts have long upheld that searches at the border are not considered “unreasonable” for the very fact that they

occur at the border.

GTMO

- Human Rights Watch: Four Good Reasons Why Guantanamo Should be Closed
 - Guantanamo is a symbol of lawlessness. It was chosen as a detention site because it is located offshore, on a foreign territory, and the Bush Administration therefore believed it was safely beyond the jurisdiction of any court. It was, as a British court pointed out in a 2002 decision, a “legal black hole”.
 - Guantanamo was attractive as a place of detention for one reason alone: it was thought to be a legal black hole. More specifically, because of a series of court rulings in the 1990s involving Haitian and Cuban refugees, Guantanamo was believed to be beyond the reach of the Constitution and the courts.
 - The Supreme Court’s 2004 decision in *Rasul v. Bush* which held that the courts had habeas corpus jurisdiction over Guantanamo, changed this picture dramatically. Detainees got access to counsel, and information about Guantanamo began to reach the public.
 - The detainees at Guantanamo have been arbitrarily detained, physically abused, and even tortured. They have spent years without any fair legal process, held on the basis of secret evidence.
 - Detainees at Guantanamo have been subject to arbitrary detention. The combatant status review tribunals that are supposed to assess whether the detainees are enemy combatants base their decisions on secret evidence that the detainees have no opportunity to confront. The decision-making process is quick, efficient, and nearly

worthless in terms of reaching a reliable result.

- Ex-detainees have reported beating and cruel treatment. Muhammed al-Qahtani, a Saudi citizen who is alleged to have been implicated in the September 11 plot, was physically and mentally mistreated from mid-November 2002 to early January 2003. For six weeks, he was intentionally deprived of sleep, put into painful stress positions, forced to stand for long periods, and subject to sexual and other physical humiliation. He was refused trips to a latrine, so that he urinated on himself at least twice.

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- Guantanamo has harmed the fight against terrorism. It has undermined international cooperation and alienated Muslim communities.

- Abuses committed in the name of counterterrorism have aggravated the terrorist threat. International counterterrorism cooperation has weakened, as courts in places as varied as Spain, France and Kuwait have condemned Guantanamo and refused to accept information obtained there. The use of torture and arbitrary detention against Muslim detainees has alienated Muslim communities.

- The moral authority of the US has been severely compromised by Guantanamo's existence, with disastrous results for the US government's ability to promote human rights abroad.

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- "Because Congress has said that you can't move them to the United States and forbidden anyone who's held as a detainee at Guantánamo to be transferred to the United States for any reason — for trial, for detention, for medical care — the

reality is it sounds very much like it'll exist until the last detainee dies and they can shut it down." Rosenberg said. "Many of these men aren't chargeable. They're not accused of being criminals. They're accused of being foot soldiers for an enemy force which currently has no leader to surrender."

- Barack Obama talked about shutting Guantanamo down during his 2007 presidential campaign, his argument was predicated on the hypocrisy of the United States claiming to be fighting a war in defense of Western values while also suspending habeas corpus.
 - Obama called Guantanamo an "enormous recruitment tool" for terrorists. Morris Davis, a retired colonel and former Gitmo prosecutor turned critic, concurs, "If you need proof of whether Guantanamo helps ISIS promote its brand among those who might be susceptible to its influence, just look at the murder videos they've recorded and released. The murder victims are dressed in orange jump suits for a reason: To make them look like the Guantanamo detainees shown in the iconic X-Ray pictures."

- Constitutional debate over Guantanamo Bay
 - Article I
 - Most detainee litigation has centered on Article I, Section 9, Clause 2 - the Suspension Clause, which describes the circumstances ("when in Cases of Rebellion, or Invasion the public Safety may require it") by which the right of habeas corpus may be suspended. In early 2002, the Center of Constitutional Rights began to file habeas petitions on behalf of Gitmo detainees, challenging the US government's right to hold them indefinitely.

 - In 2004, the Supreme Court ruled in *Rasul v. Bush* that federal courts have jurisdiction over Gitmo habeas petitions, but in

found that Congress's 2001 Authorization for Use of Military Force authorized law of war detention for enemy combatants, noting that detention is a "fundamental... incident of war."

- Article II

- After 9/11, the Justice Department argued for an expansive view of Executive power to enable the President "to take whatever actions he deems appropriate to pre-empt or respond to terrorist threats from new quarters,"

- For instance, the doctrine of "extraordinary rendition" was justified on the basis that "the President has plenary constitutional authority, as the Commander in Chief" to transfer aliens being held outside the United States to third countries for the purpose of extrajudicial detention and interrogation.

- The Supreme Court in *Hamdi* focused on the AUMF as statutory authority for detaining enemy combatants and did not address the President's Article II power to do so. But in *Hamdan* the COurt limited presidential power by invalidating executive military commissions that bypassed both Congress and the judiciary.

- Bill of Rights

- Some assert that Gitmo detainees have no constitutional rights, others insist that Bill of Rights provisions from the Fifth to the Eighth Amendments should apply to them.

- In the Court did not rule on whether Gitmo detainees have any Fifth Amendment rights. But in the Court held that the Fifth Amendment's due process guarantees gave Hamdi, an American citizen, the right to contest his designation combatant before a neutral decision maker.

Prisoner Rights

- Rights of Prisoners
 - Cruel and Unusual Punishments
 - Every inmate has the right to be free under the Eighth Amendment from inhumane treatment or anything that could be considered "cruel and unusual" punishment. The Eighth Amendment did not clearly define what "cruel and unusual" punishment would include, but the Supreme Court held that such punishments would include:
 - Drawing and Quartering
 - Disemboweling
 - Beheading
 - Public Dissection
 - Burning Alive
 - Sexual Harassment or Sex Crimes

- Inmates have a right to be free from sex crimes or sexual harassment. This applies to crimes or harassment from either other inmates or prison personnel.

- Right to Complain About Prison Conditions and Access to the Courts
 - Inmates have the right to complain about prison conditions and voice their concerns to both prison officials and the courts.

- Medical and Mental Health Care
 - Prisoners are entitled to receive medical care and mental health treatment. As with accommodations for the disabled, these treatments need only be reasonable or “adequate” As a result, if someone has a cavity, they might not be entitled to a filling, but only to having a tooth pulled. Often, even those with life threatening illnesses, like AIDS or various forms of cancer, are given only the minimum treatment necessary to keep them reasonably comfortable, not necessarily to extend their life.

- First Amendment Rights
 - Inmates retain basic First Amendment rights only to the extent that the exercise of those rights do not interfere with their status as inmates.

- Discrimination

- Just as on the outside, inmates have the right to be free from discrimination while imprisoned. This includes racial segregation...
- What rights inmates do not have
 - Inmates generally lose their right to privacy in prison. They are not protected from warrantless searches of their cell or person...

Show Links:

Border Update

WAL 294: Separation of Immigrant Children at the Border - <https://wearelibertarians.com/294-separation-of-immigrant-children-at-the-border/>

'There Is a Stench': No Soap and Overcrowding in Detention Centers for Migrant Children - <https://www.nytimes.com/2019/06/21/us/migrant-children-border-soap.html>

Listening to On Point ('Torture Facilities': Eyewitnesses Describe Poor Conditions At Texas Detention Centers For Migrant Children) - <http://www.wbur.org/onpoint/2019/06/25/texas-border-control-facilities-migrant-children>

Migrant Child Freed from Clint Border Patrol Jail: "They Treated Us Badly". - https://www.democracynow.org/2019/7/2/headlines/migrant_child_freed_from_clint_border_patrol_jail_they_treated_us_badly

The Terrible Things Trump Is Doing in Our Name - <https://www.nytimes.com/2019/06/21/opinion/family-separation-trump-migrants.html>

Napolitano: Immigration Is a Natural Right - <https://reason.com/2013/01/31/immigration-and-freedom/>

What constitutional rights do undocumented immigrants have? - <https://www.pbs.org/newshour/politics/what-constitutional-rights-do-undocumented-immigrants-have>

From Natural Rights to Human Rights—And Beyond - <https://www.heritage.org/progressivism/report/natural-rights-human-rights-and-beyond>

Yes, illegal aliens have constitutional rights - <https://thehill.com/blogs/pundits-blog/immigration/255281-yes-illegal-aliens-have-constitutional-rights>

Migration rights, natural law, and the free society - <https://acton.org/pub/commentary/2000/11/27/migration-rights-natural-law-and-free-society>

The Rights of Immigrants -ACLU Position Paper <http://bit.ly/2Xtq8Jq>

Children at Risk in US Border Jails - <https://www.hrw.org/news/2019/06/20/children-risk-us-border-jails>

CODE RED: The Fatal Consequences of Dangerously Substandard Medical Care in Immigration Detention - https://www.hrw.org/sites/default/files/report_pdf/us0618_immigration_web2.pdf

IN THE FREEZER: Abusive Conditions for Women and Children in US Immigration Holding Cells - https://www.hrw.org/sites/default/files/report_pdf/uscrd0218_web.pdf

The Deported: Immigrants Uprooted from the Country They Call Home - https://www.hrw.org/sites/default/files/report_pdf/201712us_deported_web.pdf

GITMO

The constitutional debates over the military prison at Guantánamo Bay - <https://constitutioncenter.org/blog/the-constitutional-debates-over-the-military-prison-at-guantanamo-bay>

Ignoring Guantanamo Won't Make It Go Away - <https://www.theatlantic.com/politics/archive/2015/12/ignoring-guantanamo-wont-make-it-go-away/420795/>

Guantanamo: the Legal Mess Behind the Ethical Mess - <https://www.bu.edu/today/2013/gitmo-the-legal-mess-behind-the-ethical-mess/>

Four Good Reasons Why Guantanamo Should Be Closed - <https://www.hrw.org/news/2006/11/22/four-good-reasons-why-guantanamo-should-be-closed>

Prisoner Rights

Do Inmates Have Rights? If So, What Are They? - <https://www.hg.org/legal-articles/do-inmates-have-rights-if-so-what-are-they-31517>

Prisoners' Rights - <https://www.aclu.org/issues/prisoners-rights>

Basic Principles for the Treatment of Prisoners - <https://www.ohchr.org/Documents/ProfessionalInterest/basicprinciples.pdf>

