



Automatic Injustice

A Report on Prosecutorial Discretion in the
Southeast Asian American Community



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The photo on cover features Ched Nin and his family. Ched is currently detained at Adelanto Detention facility in Los Angeles, awaiting interview with the Cambodian consulate for possible deportation in October 2016. If deported, Ched would leave behind his wife, Jenny, and 5 children—all U.S. citizens.

Executive Summary

The Southeast Asian American (SEAA) community has been heavily impacted by automatic, mandatory criminal deportation policies. This stems from the group's unique struggles as refugees, which have made them vulnerable to high levels of criminalization over the last four decades. Community members who do not naturalize are often flagged as deportation priorities by Immigration and Customs Enforcement (ICE). As a result, almost 16,000 SEAs have received final orders of removal since 1998—78% of which were based on old criminal records.¹

In this report, SEARAC presents findings from interviews with ICE field offices in Los Angeles, Philadelphia, and Seattle around the agency's "prosecutorial discretion" policies, or its authority to use judgment in deciding whether to detain or deport individuals based on their criminal, immigration, and personal background. In an effort to streamline deportation efforts, the Department of Homeland Security (DHS) released guidance in 2014 outlining how and for whom ICE should exercise prosecutorial discretion to delay, suspend, or close an individual's deportation case.² SEARAC found evidence that positive factors or "equities" are not being considered in a consistent manner for those with old criminal convictions. As a result, prosecutorial discretion is not being fully implemented to achieve the intent of the guidance—to allocate government resources strategically to keep communities safe. Instead, communities have faced heightened trauma as even valued community leaders have been torn from their families.

SEARAC FOUND THAT:

1 Positive equities are not weighed in a clear or consistent manner in the evaluation of prosecutorial discretion for people with criminal convictions.

ICE ERO offices in LA, Philadelphia, and Seattle shared that the recent prosecutorial discretion memo guidelines were beneficial in helping them set their priorities for detention and removal. However, when pressed for specifics on how they analyze and evaluate the exceptions to the priorities, their answers were vague, leading advocates to believe that in most instances, positive equities were not weighed, especially for individuals with aggravated felonies on their record.

2

There is a lack of a uniform data collection system to capture prosecutorial discretion implementation.

After asking about overall numbers of individuals released as a result of the new guidance, field office staff indicated that there is currently no database in place to track these numbers. They explained that due to the numerous ways discretion could be exercised, it would be difficult to track. Often individuals are not entered into the system prior to being released.

BASED ON THESE FINDINGS, THIS REPORT OUTLINES THE FOLLOWING RECOMMENDATIONS:

1

Clarify guidelines and technical assistance training to emphasize the following positive equities:

- Individuals whose convictions are based on offenses committed as minors should be considered strongly in favor of prosecutorial discretion, even if they were tried as adults.
- Families admitted to the United States as refugees should be strongly considered for prosecutorial discretion.
- The length of time living in the United States should be considered in favor of prosecutorial discretion.

- Individuals with U.S. citizen and lawful permanent resident spouses, children, parents, and other relatives should not be a priority for detention and deportation.
- Individuals who are able to demonstrate that they have been rehabilitated and pose no threat to their community should not be deported.

2

Collect and report data that include the following:

- Name
- Location
- Age
- Ethnicity
- Country of origin
- If a removal priority, list description of crime/offense
- Detailed analysis outlining the weighing process between negative factors against positive equities to support a final determination
- Form of discretion exercised

Refugees Deported Back to Countries They Fled

Over one million refugees were resettled from Cambodia, Laos, and Vietnam in the 1970s and 1980s after the decades-long war in Vietnam, the bombings of Laos and Cambodia, and the Khmer Rouge genocide. Due to challenges upon initial resettlement, SEAs have historically struggled with high rates of poverty, post-traumatic stress disorder, and poor educational outcomes.

These circumstances have made many community members, especially youth, prone to higher than average rates of criminalization. Unfortunately, the growing intersection between the criminal justice system and immigration enforcement has had a devastating impact on deportation numbers for SEAs.

Deportations particularly spiked after 1996, when Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). These laws restricted the ability of immigration judges to evaluate the individual circumstances of a case before ordering removal, penalized noncitizens for crimes committed prior to the law's passage, and most devastating of all, expanded the definition of "aggravated felonies"—a category of offenses that makes an individual automatically deportable.

The United States is a highly criminalized society—1 in 3 Americans has some kind of criminal or arrest record.³ Immigration enforcement policies after 1996 are so rigid that if applied to the U.S. population, 20 million people would be subject to automatic deportation based on a felony record. That is approximately 1 in 12 Americans.⁴

Because communities of color are disproportionately criminalized in the United States, immigrant communities of color are especially vulnerable to policies that doubly punish immigrants with criminal convictions.

Today, more than 2.5 million SEAs live in the United States, but almost 16,000 community members have received final orders of deportation. More than 12,000 of these orders are based on old criminal records, a rate far exceeding that of most other immigrant groups. While 29% of other immigrant deportations are based on old convictions, a staggering 78% of SEAs in removal proceedings face deportation because of old criminal convictions, often for mistakes they may have made years in the past.⁵ Further, due to unique repatriation agreements with Cambodia, Laos, and Vietnam, a total of at least 13,000 SEAs with deportation orders continue to live in the United States, not knowing when or if they will be deported.⁶ This results in extreme psychological and emotional trauma, not only for those facing deportation, but for their family, friends, and the communities who support and love them.

“Families Not Felons” Fallacy

In response to the growing demand of immigration advocates to end unjust deportations, the Obama administration announced its effort to focus on the removal of “felons not families” during his term.

In conjunction with these priorities, ICE released public guidelines⁷ in 2011 detailing factors considered in the use of “prosecutorial discretion”—the ability of ICE agents to use their judgment and authority in deciding whether to detain and deport individuals based on their background. These guidelines urged agents to look at a variety of positive factors in a person’s background, or “positive equities,” when evaluating whether deportation would be a good use of resources, even for immigrants with a criminal conviction record. For example, these guidelines listed the following as “factors to consider when exercising prosecutorial discretion”:

- the person’s length of presence in the United States, with particular consideration given to presence while in lawful status;
- the circumstance of the person’s arrival in the United States and the manner of his or her entry, particularly if the alien came to the United States as a young child;
- the person’s ties and contributions to the community, including family relationships;
- whether the person has a U.S. citizen or permanent resident spouse, child, or parent; and
- whether the person’s nationality renders removal unlikely.

In 2014, ICE released an updated prosecutorial discretion memo, with three new priorities for removal to focus on the deportation of those deemed “criminals” or recent border crossers. Many SEAs with criminal convictions were flagged as a

“Priority 1,” which targets “threats to national security, public safety, and border security.”⁸

However, the guidance explicitly states that “the removal of these aliens must be prioritized *unless* in the judgment of an ICE Field Office Director, CBP Sector Chief, or CBP Director of Field Operations, *there are compelling and exceptional factors that clearly indicate the alien is not a threat to national security, border security, or public safety and should not therefore be an enforcement priority.*”

Unfortunately, SEARAC has seen exceedingly few worthy individuals benefit from the practice of prosecutorial discretion. Even SEAs whose stories are indeed “compelling and exceptional,” who indeed are valued family members (mothers, fathers, aunts and uncles), and who have demonstrated rehabilitation and pose no threat to those around them continue to be deported.

Unlike the 2011 guidelines, the updated 2014 memo lacks clear language outlining examples of what positive equities should look like and instead focuses on removal priorities. Many SEA community members classified as a “Priority 1” for removal are former refugees who have undergone a process of transformation since completing their sentences. They are productive community members, business owners, and family members who support U.S. citizen spouses and children. Despite the intent of DHS to prioritize resources only on those who threaten public safety and national security, the agency is failing to apply its own guidance for individuals who are clearly worthy of discretion.

Deported or Living in Limbo

SEARAC has worked with community members directly impacted by criminal deportation since 2002. Each campaign is a rigorous undertaking, integrating public education, community-based mobilization, a comprehensive communications/media plan, as well as administrative and legislative advocacy. We have seen a variety of outcomes as a result of these efforts.

A. WHEN PROSECUTORIAL DISCRETION HAS FAILED SEAS

Despite his dedication to his family and community, Chea Bou was deported to Cambodia in October 2015.

Chea Bou

Chea Bou arrived in the United States as a refugee in 1980 at the age of 11 with his parents and five siblings after fleeing the Khmer Rouge genocide. Because he witnessed multiple murders and acts of violence at such a young age, he was later diagnosed with PTSD. In 2011, he was involved in a federal investigation of a drug conspiracy case at his place of employment for trying to help a friend secure illegal pills. While the others charged were owners and managers of the establishment, Chea was the only line staff involved in the investigation. Chea Bou took full responsibility for his crime and served his sentence of 12 months and one day. Unfortunately, this mistake was enough to trigger deportation proceedings against him, and on March 10, 2015, he was issued a final order of removal.



Chea Bou is married to a U.S. citizen and is a father to three U.S. citizen children, two of whom are minors. He and his wife, Sambath, have been married almost 30 years. With her husband behind bars awaiting removal, she alone carried the burden

of working to support her family. Just four years ago, the family was devastated when their 16-year-old son died from leukemia. His son wrote a letter to the Make a Wish Foundation before he passed, asking that his father be kept safe from deportation. In 2006, they lost another son to violence in their community. Although Chea suffered many tragedies,

he continued to live a very active life in his faith community. He was a member of the Church of Jesus Christ of Latter Day Saints since 1985, volunteering at events and donating money to support the local Cambodian community. Despite his dedication to his family and community, Chea Bou was deported to Cambodia in October 2015.

He was given no notice, no time for a last visit with family or his children, and his family was not allowed to bring him any luggage or money.

Mout Iv



Mout was just a child when he fled Pol Pot's Communist regime in Cambodia with his family. He was resettled in the United States when he was 9 years old, and grew up impoverished in Philadelphia neighborhoods.

In 1998 he was 21, Mout was involved in a neighborhood fight, which resulted in a conviction that made him deportable. After serving four years in a correctional facility, Mout was placed in deportation proceedings to remove him from the United States. Because DHS was not able to obtain the proper documents from Cambodia for his deportation, Mout was freed on supervised release, and he reported regularly to ICE on his whereabouts. In the seven years after his release, Mout started his own thriving small business as a barber, became a role model and advocate for inner-city youth in his community through volunteer work, and became the proud father of two U.S. citizen girls.

Mout was detained again in September 2010 and waited in prison for eight months before finally being deported in May 2011. He was given no notice, no time for a last visit with family or his children, and his family was not allowed to bring him any luggage or money. He arrived in Cambodia with only the clothing he was wearing the day he was detained.

At the last minute, Leach was granted a “stay of deportation,” but before the notice was granted, ICE had already put him on a plane to Cambodia, where he remains today.

Leach Chhoeun

Leach Chhoeun came to the United States as a refugee from Cambodia when he was 4 years old, after most of his family was killed during the genocide. Like other refugees, Leach’s family was resettled in an impoverished neighborhood plagued by gang violence, poor schools, unemployment, and a lack of resources for new immigrants. Cambodian youth were picked on and began joining together for protection. By elementary school, Leach was in a gang.

In 1996, at the age of 18, Leach was arrested for assault with a firearm following an incident in which his cousin exchanged gunfire with a rival gang. Leach was present but unarmed, and no one was injured in the incident, but Leach served one year in state prison. Weeks after his conviction, Congress retroactively designated it as an “aggravated felony” under new 1996 legislation.

Leach decided to leave gang life in 1999, months after his brother was mistakenly targeted and killed in a drive-by shooting. He married his wife (now of 19 years) and focused on raising his two daughters, now 14 and 6 years old. His father and both sisters tragically died of lupus. He was the last surviving relative and primary caretaker of his mother, who suffered from major depressive disorder, memory loss, and seizures.



In April 2014, ICE arrested Leach, seeking to deport him to Cambodia for his 1996 conviction. At the last minute, Leach was granted a “stay of deportation,” but before the notice was granted, ICE had already put him on a plane to Cambodia, where he remains today. He currently has an appeal pending at the Bureau of Immigration Appeals (BIA) on a motion to reopen his case, but it is uncertain how long it will take for a decision to be made.

B. WHEN PROSECUTORIAL DISCRETION IS NOT ENOUGH

ICE has not tried to pursue her deportation again, but she lives every day with the fear and uncertainty that she could be separated from her son.

A portrait of Lundy Khoy, a woman with dark, curly hair, smiling. The image is partially obscured by an orange overlay on the left side, which contains her name.

Lundy Khoy

Lundy Khoy was born in a Thai refugee camp to Cambodian parents fleeing the war. When Lundy was a year old, she and her family were resettled as refugees in the United States. In 2000, when she was 19 and a freshman in college, she was approached by a police officer after a party, who asked her if she had any drugs. She truthfully told him she had several tabs of ecstasy but that she was planning on giving them to other people, which resulted in her arrest for possession with intent to distribute. Under the advice of her lawyer, Lundy pled guilty and was given a

five-year sentence. Due to her good behavior, she was released after three months and placed on supervised probation. Lundy went back to school and began to work to get her life back on track.

Toward the end of her probation period in 2004, as she began to excel at school and turn her life around, Lundy was detained by ICE and informed that she would be deported to Cambodia. With no prior warning, Lundy was incarcerated for almost nine months during her deportation hearings.

Since Cambodia did not issue the travel documents necessary for deportation, Lundy was finally released. After working with a filmmaker to document her story in the short film, “Save Lundy,” she began to advocate in Congress for fair and humane deportation laws. She currently works as an operations manager at SEARAC and recently gave birth to a baby boy in January 2016. In April of this year, Lundy received a governor’s pardon. ICE has not tried to pursue her deportation again, but she lives every day with the fear and uncertainty that she could be separated from her son.

Touch's three-year stay of removal is merely a temporary reprieve. ICE has made it clear that once he has successfully donated his kidney, they plan to once again pursue his deportation.

Touch Hak

Touch Hak fled the Khmer Rouge genocide in Cambodia in 1979 with his parents. After six years in a refugee camp in Thailand, the family was resettled in Stockton, Calif. When Touch was 11 and a fifth grader at Cleveland Elementary, he witnessed a lone gunman walk into the schoolyard and kill five Southeast Asian refugee children. Touch found it difficult to recover from this trauma and began to struggle in school. After the birth of his daughter in 2005, Touch was charged with a drug crime: possession with intent to distribute. His public defender advised him to plead guilty, without understanding that a guilty plea could later result in his deportation. He served his time, but upon his release from prison, he was immediately detained for imminent deportation to Cambodia.

Touch's brother Puthy has been living with kidney failure and undergoing dialysis for almost three years. Though desperate to donate his kidney, Touch had no way of fighting his deportation order, despite taking full responsibility for his crime, serving his time, and rehabilitating his life in the process. After a groundswell of community and Congressional support in 2014 and 2015, ICE finally agreed to give Touch a three-year "stay of removal" to allow him to be reunited with his family and undergo treatment to donate his kidney to Puthy.



Sadly, this positive outcome is uncommon among many Southeast Asian Americans fighting deportation orders for old criminal convictions. In fact, Touch's field office originally denied his request for a three-year extension and only yielded when advocates met with officials at ICE Headquarters to plead his case. Unfortunately, Touch's three-year stay of removal is merely a temporary reprieve. ICE has made it clear that once he has successfully donated his kidney, they plan to once again pursue his deportation.

In 2007, Washington Gov. Christine Gregoire pardoned Many's 1994 conviction. Unfortunately, deportation laws are so rigid that even a governor's pardon did not eliminate his final deportation order.

Many Uch

Many Uch arrived in the United States as a refugee from Cambodia in 1984 when he was 8 years old. Adrift in a poor neighborhood in Seattle, he was swept up at age 14 into a local gang with his peers, and in 1994, he was arrested for driving a car for friends who had committed armed robbery. Many served 40 months in prison, where he transformed his life. Unfortunately, during this time, Congress passed IIRIRA and other legislation that retroactively made Many's crime a deportable offense with no opportunity for relief. Upon release, he was held by ICE in immigrant detention for an additional 28 months. Cambodia began accepting deportees from the United States in 2002, but with hundreds of others on the "waiting list," it was impossible to know when he might be deported. His case was featured in the documentary, "Sentenced Home."

When Many was finally released from custody, he devoted his life to helping other Cambodian youth by founding the grassroots social justice group Khmer in Action to organize the community around deportation issues affecting so many young men. Many spoke at schools and youth groups about gang prevention, and even spoke before the U.S. Congress on deportation and immigration law.



In 2007, Washington Gov. Christine Gregoire pardoned Many's 1994 conviction. Unfortunately, deportation laws are so rigid that even a governor's pardon did not eliminate his final deportation order. Today, Many is married to a U.S. citizen and is raising two daughters, while he continues to work as a pivotal community activist and a national advocate for humane and fair immigration laws. ICE has not tried to actively pursue his deportation in recent years, but he continues to be haunted by the ongoing possibility of deportation at any time.

Failed Prosecutorial Discretion

In an effort to better understand the implementation of prosecutorial discretion in the cases of SEAA community members, SEARAC met with ICE Enforcement and Removal Operations (ERO) field offices in Los Angeles, Philadelphia, and Seattle—agencies that oversaw the detention of the highest number of SEAAAs throughout the country in 2015.⁹ These meetings were attended by SEARAC staff, local advocacy organizations, legal service providers for SEAA community members facing criminal deportation, as well as the ICE ERO field office directors and assistant field office directors. These meetings resulted in two main findings:

1 Positive equities are not weighed in a clear or consistent manner in the evaluation of prosecutorial discretion for people with criminal convictions.

ICE ERO offices in LA, Philadelphia, and Seattle shared that the recent prosecutorial discretion memo guidelines were beneficial in helping them set their priorities for detention and removal. However, when pressed for specifics on how they analyze and evaluate the exceptions to the priorities, their answers were vague, leading advocates to believe that in most instances, positive equities were not weighed, especially for individuals with aggravated felonies on their record. ICE ERO-LA said they often exercise prosecutorial discretion for individuals with mere visa stay violations, but focus enforcement on those who fall under the listed priorities. The field office directors and assistant field office directors mentioned that no special considerations are made for refugees. *None of the officers indicated that they consider using discretion to prevent deportation of those who fall under the enforcement categories, despite the guidance that they should do so when positive equities demonstrate that they do not pose a security threat. In the case of Touch Hak, for example, ICE ERO-LA maintained*

that it would not have changed its original decision to deport him had it not been for intervention from Headquarters. Unfortunately, the field office refused to consider the compelling humanitarian factors of Touch Hak's case as significant evidence in favor of discretion.

While we have some evidence that prosecutorial discretion has been exercised as a result of past SEARAC advocacy efforts, there continue to be many instances where this is not the case. SEARAC suggests that field officers would benefit from increased training on how positive equities should be weighed in favor of discretion, as well as improved documentation and data collection. This would work to minimize the inefficiency of elevating individual deportation cases to ICE Headquarters for review, and streamline the process of case-by-case advocacy in favor of a more coordinated system of review and decision making.

2

There is a lack of a uniform data collection system to capture prosecutorial discretion implementation.

After asking about overall numbers of individuals released as a result of the new guidance, field office staff indicated that there is currently no database in place to track these numbers. They explained that due to the numerous ways discretion could be exercised, it would be difficult to track. Often individuals are not entered into the system prior to being released.

Around the country, advocates are seeing deportations of individuals who clearly pose no

threat to national security, and who have positive equities that anchor them to the United States. Due to the number of procedures immigrants go through during the detention and removal process, and the complex coordination and communications between Headquarters and field offices, SEARAC believes that a form of tracking is essential to help stakeholders inform their understanding and strategy around implementation of the current guidance.

Recommendations

1

Clarifying Guidelines and Technical Assistance Training

The current guidelines around prosecutorial discretion clearly define the characteristics of individuals that fall under each of the priorities for removal, but they also provide general guidance on exceptions to each priority. Because the language on exceptions to each priority is vague, they are often interpreted in a variety of ways by the field offices (if at all). Similar to the explicit positive equities stated in the 2011 guidance, SEARAC recommends that following criteria be explicitly considered when evaluating individual deportation cases. These clarifying guidelines should be shared with all field offices and integrated into training and technical assistance to ensure consistent implementation throughout the country:

- **Individuals whose convictions are based on offenses committed as minors should be considered strongly in favor of prosecutorial discretion, even if they were tried as adults.**¹⁰ State laws and legal representation vary widely in the ways minors are treated in judicial systems across the country, creating a great deal of inconsistency. In addition, we know that individuals grow significantly between their teen years and adulthood, and believe that

individuals who have not had infractions with the law as adults should not be a priority for issuing orders of removal or for acting on orders of removal.

- **Families admitted to the United States as refugees should be strongly considered for prosecutorial discretion.** Refugee status upon arrival in the country must be a priority in providing discretion on whether to issue an order of removal

or act on an existing order of removal. Not only are refugee populations especially vulnerable, but the United States has made a special commitment to protecting and embracing these communities. Deportation sends individuals back to the countries where they were originally persecuted. We recommend policy that mandates deportation cases impacting refugees be elevated to ICE Headquarters for review to inform final field office decisions.

- **The length of time living in the United States should be considered in favor of prosecutorial discretion.** Many SEAA community members came to this country as refugee children and were raised as Americans. Further, a significant number of deportees were born in refugee camps and never stepped foot in their “native” country. These individuals are a product of American values and communities that have been systematically marginalized and made vulnerable to criminalization. As Americans, they have the right to restorative justice within our American criminal justice system, not an automatic sentence of deportation.

- **Individuals with U.S. citizen and lawful permanent resident spouses, children, parents, and other relatives should not be a priority for detention and deportation.** Because many SEAs grew up in the United States, a majority have strong family ties. In many cases, these individuals provide critical financial and emotional support to children, siblings, and parents. Prolonged detention and deportation not only tear families apart, but also create a population of vulnerable men, women, and children who must increasingly rely on government assistance or risk living in poverty.

- **Individuals who are able to demonstrate that they been rehabilitated and pose no threat to their community should not be deported.** Factors such as enrollment and successful completion of rehabilitation programs, as well as significant showing of community support, should be considered strongly in favor of discretion. Similar to the country’s growing attention to restorative justice policies in our prison systems, our immigration enforcement system must focus on rehabilitation and second chances. This will strengthen families and communities instead of wasting taxpayer dollars on growing detention and deportation costs.

2 Data Collection

Data collection to track prosecutorial discretion implementation is essential in understanding how field offices interpret discretion guidelines and evaluate positive equities. SEARAC recommends that the following data be collected for individuals released under prosecutorial discretion. This information, along with data collected from field office risk classification assessment reporting tools, should be released to the public upon request:

- Name
- Location
- Age
- Ethnicity
- Country of origin
- If a removal priority, list description of crime/offense
- Detailed analysis outlining the weighing process between negative factors against positive equities to support a final determination.
- Form of discretion exercised

Conclusion

As the largest community of refugees ever resettled in the United States, the SEAA community is uniquely impacted by deportation. After surviving war and extreme violence in their home countries, deportation retraumatizes and destabilizes vulnerable families. As a result, vicious cycles of poverty and crime are perpetuated, making it even harder for these communities to thrive. This impacts all Americans, as we all pay the price when families are separated and communities are destabilized.

Even 20 years after their passage, the legacy of IIRIRA and AEDPA continue to harm immigrant families. And while the Obama Administration has talked about the need for “smarter” criminal justice reform and immigration policy that focuses resources on keeping communities safe, advocates continue to witness the incarceration and deportation of individuals who have already turned their lives around to become productive members of the community. Many support families and contribute to the economy through a number of ways. Their resiliency should be celebrated and embraced. We must continue to push for immigration law reform, and support administrative policies that promote healing and restorative justice and prioritize second chances over criminalization.

Advocates with Asian American and Pacific Islander inmates in San Quentin State Prison, CA.



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ABOUT SOUTHEAST ASIA RESOURCE ACTION CENTER (SEARAC)

SEARAC is a national organization that advances the interests of Cambodian, Laotian, and Vietnamese Americans by empowering communities through advocacy, leadership development, and capacity building to create a socially just and equitable society. SEARAC defines Southeast Asian Americans as people in the United States whose heritage stems from Cambodia, Laos, or Vietnam. Southeast Asian Americans now number approximately 2.5 million, and most of them either arrived in the U.S. as refugees or are the children of refugees. SEARAC has been advocating for humane and just laws for immigrants with criminal convictions for over a decade to help keep more Southeast Asian American families together.

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