

2017 Convention
**Champions
for Justice**

13. How Immigration Status Affects Court Access

Lauren Morgan Ellerman
Frith & Ellerman Law Firm, PC
P.O. Box 8248
Roanoke VA 24014-0248
Tel: 540-985-0098
Email: l Ellerman@frithlawfirm.com
Website: <http://www.frithlawfirm.com/>

How Immigration Status Affects Court Access in Virginia

Lauren Ellerman
Attorney – Frith & Ellerman Law Firm
Roanoke, Virginia

How Immigration Status Affects Court Access America, an experiment in liberty

*The sacred rights of mankind are
not to be rummaged for among
old parchments or musty records.*

- Alexander Hamilton

*They are written, as with a
sunbeam, in the whole volume of
human nature, by the hand of the
divinity itself, and can never be
erased.*

How Immigration Status Affects Court Access. What does the Constitution say?

Article 1, Section 8

Congress shall have Power to

*Establish a uniform rule of
Naturalization, and uniform Laws
on the subject of Bankruptcies
throughout the United States*

Note on Language:

Illegal Immigrant

- A person cannot be illegal
- They are a person
- Consider criminal lawyers having to face the following language in criminal cases: Commonwealth v. Criminal

Undocumented Immigrant

- reflects legal status
- respects personhood

How Immigration Status Affects Court Access. What does the Bill of Rights (Articles I-X) say about access to civil or criminal justice system?

Amendment I

- Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the **right of the people peaceably to assemble, and to petition the government for a redress of grievances.**

Amendment II

- A well regulated militia, being necessary to the security of a free state, **the right of the people to keep and bear arms**, shall not be infringed.

Amendment III

- No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV

- The right of **the people to be secure in their persons, houses, papers, and effects**, against **unreasonable searches and seizures, shall not be violated, and no warrants shall issue**, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

How Immigration Status Affects Court Access. What does the Bill of Rights (Articles I-X) say about access to civil or criminal justice system?

Amendment V

- No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a **grand jury**, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor 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; nor shall private property be taken for public use, without just compensation.**

Amendment VI

- In all criminal prosecutions, the accused shall enjoy the right to a **speedy and public trial, by an impartial jury of the state and district** wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, **and to have the assistance of counsel for his defense.**

Amendment VII

- In suits at common law, where the value in controversy shall exceed twenty dollars, **the right of trial by jury shall be preserved**, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

Amendment VIII

- **Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.**

How Immigration Status Affects Court Access. What does the Constitution say? Very little

Article 1, Section 8

Congress shall have Power to

Establish a uniform rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States

Tenth Amendment

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, **are reserved to the states respectively, or to the people.**

How Immigration Status Affects Court Access The Commonwealth of Virginia & beyond

- Rights are essentially decided on a state by state basis
- Few rights have been deemed by the Federal Courts, to be unalienable rights:

Public Education (Primary and Secondary Education)

Plyler v. Doe, 457 US 202 (1982)

Right to Remain Silent (in State or Federal Criminal Proceedings, but not deportation) Hibbel v. Sixth District Judicial Court of Nevada

How Immigration Status Affects Court Access The Commonwealth of Virginia & beyond

- Over 11,000,000 Undocumented Persons in the United States
- **There were 11.1 million unauthorized immigrants in the U.S. in 2014**, a total unchanged from 2009 and accounting for 3.5% of the nation's population.
- The number of unauthorized immigrants peaked in 2007 at 12.2 million, when this group was 4% of the U.S. population.*
- Virginia has tenth highest population nationwide

*Pew Research Center (2016) <http://www.pewresearch.org/fact-tank/2016/11/03/5-facts-about-illegal-immigration-in-the-u-s/>

How Immigration Status Affects Court Access The Commonwealth of Virginia & beyond

- Virginia has tenth highest population nationwide – 270,000 undocumented immigrants call Virginia home *

*Migration Policy Institute (2016) <http://www.pewresearch.org/fact-tank/2016/11/03/5-facts-about-illegal-immigration-in-the-u-s/>

Undocumented immigrants in Virginia 2014

Migration Policy Institute

Demographics	Estimate	% of Total
Unauthorized Population	272,000	100%
Top Countries of Birth		
Mexico	43,000	16%
El Salvador	42,000	16%
Honduras	25,000	9%
Guatemala	25,000	9%
Korea	13,000	5%

Undocumented immigrants in Virginia 2014

Migration Policy Institute

Years of U.S. Residence		
Less than 5	71,000	26%
5 to 9	85,000	31%
10 to 14	74,000	27%
15 to 19	24,000	9%
20 or more	18,000	7%
Age		
Under 16	22,000	8%
16 to 24	47,000	17%
25 to 34	86,000	32%
35 to 44	64,000	24%
45 to 54	31,000	12%
55 and over	22,000	8%

Undocumented immigrants in Virginia 2014

Migration Policy Institute

Economics	Estimate	% of Total
Family Income		
Below 50% of the poverty level	25,000	9%
50-99% of the poverty level	34,000	13%
100-149% of the poverty level	35,000	13%
150-199% of the poverty level	36,000	13%
At or above 200% of the poverty level	143,000	52%
Access to Health Insurance		
Uninsured	159,000	58%
Home Ownership**		
Homeowner	87,000	32%

Undocumented immigrants in Virginia 2014

Migration Policy Institute

English Proficiency		
Population ages 5 and older	270,000	100%
Speak only English	26,000	10%
Speak English "very well"	87,000	32%
Speak English "well"	61,000	23%
Speak English "not well"/"not at all"	96,000	35%

How Immigration Status Affects Court Access The Commonwealth of Virginia

- 4% of US population is undocumented (11 million)
- 3% of Virginia residents are undocumented (270,000)
- 1/3 own their own home
- 65% proficient English speakers
- 58% have no health insurance

How Immigration Status Affects Court Access The Commonwealth of Virginia

PROPERTY RIGHTS:

- Can own a home
- Can pay property taxes
- Can rent (though most landlords require valid State issued ID to rent)

How Immigration Status Affects Court Access The Commonwealth of Virginia

FAMILY RIGHTS:

- Can draft a valid Will
- Can serve as Administrator or Executor of an Estate
- Can serve as a Guardian
- Can be a beneficiary under a Will
- Can ask the court for Child Support / be ordered to pay
- Can ask the court for Spousal Support / be ordered to pay
- Seek judicial intervention on custody / protective orders, etc.
- Can marry a US Citizen
- **Cannot marry another undocumented person and have the marriage deemed valid by Virginia**

(But marrying another undocumented person in the United States will not be a valid marriage unless validated by County of origin)

How Immigration Status Affects Court Access The Commonwealth of Virginia

EMPLOYMENT RIGHTS:

- **Cannot work legally**
- **Cannot collect unemployment**
- Can own a corporation
- Can serve as an officer of a corporation
- Entitled to Minimum Wage
- Can have wages garnished
- Can file an EEOC claim
- Can be a plaintiff in a discrimination case
- Can pay employment taxes
- Can file Worker's Comp. Claims (though will likely be denied as employer failed to meet legal standards in verifying employment)
- **Cannot file for disability**

How Immigration Status Affects Court Access The Commonwealth of Virginia

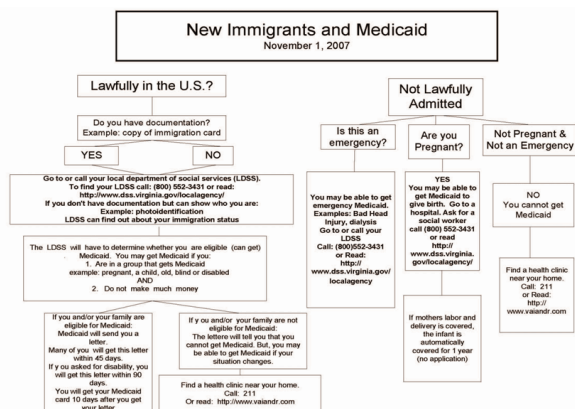
TAXATION RIGHTS:

- Can get ITIN number from IRS to pay income taxes
- Can get Child Tax Credit
- **Cannot claim earned income tax credit**

How Immigration Status Affects Court Access The Commonwealth of Virginia

HEALTH CARE RIGHTS:

- Can get health insurance
- **Cannot qualify or apply for healthcare under affordable care act / health insurance exchange**
- **Cannot get subsidies under exchange**
- **Cannot qualify for Medicare**
- Cannot qualify for Medicaid ** for self
- Can apply for Medicaid for child if US Citizen



How Immigration Status Affects Court Access The Commonwealth of Virginia

GENERAL RIGHTS:

- Cannot receive SS Death benefits
- Cannot get Social Security
- Cannot get Concealed Carry Permit
- Cannot apply for Virginia Driver's license
- Few banks will open accounts
- Few credit card companies will extend credit
- Few banks will offer loans / mortgages
- Cannot join the military
- Cannot vote

How Immigration Status Affects Court Access The Commonwealth of Virginia

CRIMINAL JUSTICE SYSTEM:

- Public Defender (**unless in deportation proceeding, no right to counsel exists**)
- Right to incur court costs and pay restitution
- Can be detained and transferred to ICE / Deportation

Deportation / ICE agents

Once deportation proceedings begin – Bill of Rights goes out the window:

- No speedy trial
- No jury
- No right to counsel
- No protection from search and seizure
- No Miranda rights

How Immigration Status Affects Court Access The Commonwealth of Virginia

CIVIL JUSTICE SYSTEM:

- Right to file Personal Injury / Medical Malpractice Claim
- Right to claim lost wages in such a claim
- Right to benefit from such an action

Remember: unlikely to have insurance; valid marriage according to Virginia (wrongful death laws); less likely to have liens – no ERISA, no Medicare etc.

How Immigration Status Affects Court Access America, an experiment in liberty

The sacred rights of mankind are not to be rummaged for among old parchments or musty records.

- Alexander Hamilton

They are written, as with a sunbeam, in the whole volume of human nature, by the hand of the divinity itself, and can never be erased.



- I. Rights of Undocumented Immigrant in Virginia
 - a. Fundamental Rights?
 - b. What does the Constitution say?
 - c. What does the Virginia Constitution say?
 - d. Rights are not consistent from group to group / state to state / person to person
 - e. Where are these rights defined? Federal or state court? Yellow is State law

Citizen / Permanent Resident in Virginia	Undocumented Immigrant in Virginia
Documentation / Immigration Rights	
Have a Driver's License	No (unless had one prior to 2004) Travis v. Reno, 12 F. Supp. 2d 921 (WD Wisc. 1998)
Apply to become a US Citizen	No
Request Visas for family members	No
Educational Rights	
In-State tuition for College	No
Primary & Secondary Education	Primary & Secondary Education – Yes <u>Plyler v. Doe</u> , 457 US 202 (1982)
Attend Public School	Attend Public School – Yes <u>Plyler v. Doe</u> , 457 US 202 (1982)
Estate Rights	
Executor of an Estate	Yes
Administrator of an Estate	Yes
Draft a Valid Will	Yes
Serve as a Guardian	Yes
Be a beneficiary under a Will	Yes
Family Rights	
Get Married in the United States to a non- US Citizen	Get married to a US Citizen – Yes (not another undocumented immigrant – it won't be considered a valid marriage in some states) Virginia?
Serve as a Guardian	Yes
Pay Spousal Support / collect	Yes

Pay Child Support / collect	Yes
Own a Business	Yes
Start a Corporation	Yes
Be an officer of a Corporation	Yes
Public Benefits	
Join the Military	No
Eligible for Social Security / Medicare / Medicaid	No * unless emergency Medicaid for condition or pregnancy Medicaid ** Child can qualify for Medicaid / WIC and other benefits 426 US 67 189 F3d 598
Apply for Medicaid for children	Yes * some undocumented parents can apply for Medicaid for their children, FAMIS etc.
Criminal Justice Access	
Incur Court Costs	Yes
4 th Amendment	Yes – state / federal court No – evidence found by unlawful search can be used in deportation proceedings INS v. Lopez v. Mendoza, 468 US 1032 (1984)
5 th Amendment	Yes
Right to counsel	Yes – state / federal court (public defender) Yes – ICE hearing, but no appointed rights if one cannot be afforded
Bond	Yes – state / federal court Yes* - ICE detention (emergency, no bond) 8 CFR 287.3(d)
Employment Rights	
Collect Unemployment	No
Minimum Wage	Yes
Garnishment	Yes
Work in the US legally	No
File EEOC claim	Yes
Be a plaintiff in an employment case	Yes
Property Rights	
Rent Property	Yes – though, can be refused (landlord can require driver's license, SSN or ITIN)
Own Property	Yes
Taxation Rights	
Child Tax Credit	Child Tax Credit – Yes

Earned Income Tax Credit	No
Pay taxes	Yes – get an ITIN number from the IRS *
Other	
Social Security Death Benefits	No
Concealed Cary Permit	No
The right to remain silent	Right to Remain Silent <u>Hibbel v. Sixth District Judicial District Court of Nevada</u> Yes in state / federal court No in ICE
General Business	
Open a bank account * (some banks)	Yes * (some banks)
Get Car Insurance * (some companies in states where drivers licenses are permitted)	Yes * (some companies in states where drivers licenses are permitted)
Apply for Credit Cards * (yes)	Yes*
Get a loan / apply for Credit * (yes)	Yes *
Purchase health insurance through affordable care Act	No
Qualify for subsidies through Affordable Care Act	No
Run for public office	NO 467 US 216
Civil Justice	
File Medical Malpractice Lawsuit	Yes
Claim Lost wages in Med. Mal or injury lawsuit	Yes
File PI claim	YES
Fair Housing Claims	Yes
Federal Tort Claim Act Claims	Yes
	** is qualified yes – possible, but not guaranteed

New Immigrants and Medicaid

November 1, 2007

