



Red de las Américas sobre Nacionalidad y Apatridia
Americas Network on Nationality and statelessness
Réseau des Amériques sur la Nationalité et l'Apatriado
Rede das Américas sobre Nacionalidade e Apátrida



**United Stateless
Americas Network on Nationality and
Statelessness
&
Institute on Statelessness and Inclusion**

Joint Submission to the Human Rights Council at the
36th Session of the Universal Periodic Review

(Third Cycle, April-May 2020)

United States of America

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United Stateless, the Americas Network on Nationality and Statelessness and the Institute on Statelessness and Inclusion

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Introduction

1. United Stateless, the Americas Network on Nationality and Statelessness (Red-ANA) and the Institute on Statelessness and Inclusion (ISI) make this joint submission to the Universal Periodic Review (UPR), on the right to a nationality and human rights challenges pertaining to statelessness in the United States of America.
2. This submission focuses on gaps in the national legal framework concerning nationality and statelessness, the risk of denaturalization of naturalized Americans, the lack of an identification and protection framework for stateless persons, the arbitrary detention of stateless persons, and the rights of stateless persons.
3. *United Stateless* is a registered non-profit organization in the United States representing stateless persons and their allies. Its mission is to build and inspire community among those affected by statelessness and to advocate for their human rights.¹
4. *Red ANA* is a network of civil society organizations, academic initiatives, and individual experts committed to addressing statelessness in the Americas. We believe that all human beings have a right to a nationality and that those who lack nationality altogether – stateless persons – are entitled to adequate protection.²
5. *The Institute on Statelessness and Inclusion* is an independent non-profit organization dedicated to promoting an integrated, human rights-based response to the injustice of statelessness and exclusion. Established in August 2014, it is the first and only global center committed to promoting the human rights of stateless persons and ending statelessness. The Institute has made over 50 country specific UPR submissions on the human rights of stateless persons, and also compiled summaries of the key human rights challenges related to statelessness in all countries under review under the 23rd to the 35th UPR Sessions.³

¹ For more information about United Stateless, see: www.unitedstateless.org/.

² For more information about Red-ANA, see: <http://www.americasns.org/>

³ For more information about the Institute on Statelessness and Inclusion, see: www.institutesi.org.

Previous UPR of the United States of America under the First and Second Cycle

6. Previously, the U.S. was reviewed during the first UPR cycle in 2010 and the second cycle in 2015. The issues of statelessness and the right to a nationality were not specifically addressed during either cycle. However, during the second the U.S. received over 20 recommendations related to the rights of migrants, including by Algeria, the Holy See, Mexico, Botswana, Sweden, Brazil, Thailand, Spain, Nicaragua, Bolivia, Senegal, Benin, Portugal, Uruguay, Peru, Honduras, Paraguay and the Maldives. The U.S. also received recommendations on detention, including by Egypt, the Czech Republic, Azerbaijan, the Russian Federation, Sweden, Brazil, Thailand and Paraguay. In particular, the recommendations made by Sweden, Brazil, Thailand and Paraguay, out of which two noted and two accepted, were on detention of migrants.⁴
7. The U.S. also received a number of recommendations on treaty ratifications.⁵ The U.S. has yet to ratify a number of the core human rights treaties that protect the right to a nationality and protect the rights of stateless persons. The U.S. received specific recommendations to accede to the Convention on the Rights of the Child (CRC), which guarantees every child's right to acquire a nationality and to birth registration (Article 7) and to preserve their nationality (Article 8), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which mandates the end of discrimination against women in nationality laws in Article 9, and the Convention on the Rights of Persons with Disabilities (CRPD), which guarantees the right to a nationality in Article 18. Further, at regional level, the American Convention on Human Rights (ACHR), which the U.S. has signed but not ratified, stipulates the right to a nationality for all in Article 20.

Current Treaty Obligations of the United States

8. The U.S. is a party to the International Covenant on Civil and Political Rights (ICCPR), which mandates in Article 24 that every child has the right to a nationality at birth. The U.S. largely satisfies this obligation through its application of both *jus soli* and *jus sanguinis*, as well as free, widely available birth registration. The right to a nationality under the Covenant forms part of a larger international framework through which the right to a nationality for all persons is recognized as a fundamental right, which is included in, among others, the CEDAW (Art 9), CRC (Arts 7 & 8) and Convention on Enforced Disappearances (CED) (Art. 25).
9. The United States has also ratified the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which guarantees equal enjoyment of the right to a nationality in Article 5(d)(iii). It has also ratified the optional protocols to the Convention on the Rights of the Child (child soldiers and child labor), but not the Convention itself. Further, the U.S. has ratified the Abolition of Forced Labor Convention (ILO No. 105). The United States, however, has not enacted national legislation to implement these treaties.
10. As set out above, the U.S. is not party to the CRC, CEDAW and CRPD, and has received recommendations to ratify these conventions. Further, the U.S. is also not party to the Convention on the Protection of the Rights of All Migrant Workers (ICRMW) or the CED.

⁴ Report of the Working Group on the Universal Periodic Review: United States of America (20 July 2015).

⁵ 176.1-176.9, 176.16-176.42; 176.46-176.61, 176.72: Ratification of human rights instruments and ending reservations to existing ratifications, specifically, CEDAW, CRC and the Disabilities Convention, as well as the Inter-American system.

11. Significantly, the U.S. is also not party to the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. Further, it has also not acceded to the International Labor Organization Discrimination (Employment and Occupation) Convention and the Inter-American human rights instruments contain important protections for undocumented persons and migrant workers, groups in the U.S. which may include stateless persons. Ratification of these treaties would assist in efforts within the U.S. to ensure that all members of the U.S. population enjoy their right to a nationality.
12. Finally, the U.S. is a member of the Organization of American States (OAS) and, as such, is subject to the jurisdiction of the Inter-American Commission on Human Rights (IACHR). The American Declaration on the Rights and Duties of Man, in Article 9, guarantees the right to a nationality for all. The U.S. has signed, but not ratified, the ACHR, which mandates the right to a nationality in Article 20.

Gaps in the National Legal Framework

13. Despite participating in the drafting process of both statelessness conventions, the United States has not ratified either. U.S. Law offers no definition of statelessness, nor is there a procedure for identifying stateless persons, protecting them and resolving their situations through facilitated naturalization. The Immigration and Nationality Act (INA) provides a path to naturalization that requires non-citizens to first acquire lawful permanent residence. Indeed, adjusting status to lawful permanent resident for some people requires leaving and reentering the country, something that is not possible for most stateless people. The lack of a legal framework and procedures which recognize and address the unique position of stateless persons, leaves them in limbo with no solution or access to justice or rights.
14. Article 7(1) of the CRC and Article 24(3) of the ICCPR guarantees that every child has the right to acquire a nationality. The right of the child to acquire a nationality must be implemented in accordance with the general principles of the CRC, including the right to non-discrimination and the best interest of the child. Articles 3 and 7 of the CRC require that no child should be left stateless for an extended period of time but should be granted the right to acquire a nationality at birth or as soon as possible after birth. While the U.S. applies *jus soli* at birth to all children born within the territory of the United States (with some exceptions – for example, those born in American Samoa are not citizens by birth) and *jus sanguinis* to qualifying children born abroad, it does not guarantee the right to a nationality for children who arrived in the United States after birth, and who would otherwise be stateless.
15. The 2017 U.S. Supreme Court case *Sessions v. Morales-Santana* mandated an extension of the residency requirement for unwed U.S. citizen mothers to pass on their nationality to children born abroad, at once resolving a case of discrimination and increasing the risk of statelessness. In that case, the U.S. Supreme Court found the requirement that unwed U.S. citizen fathers reside in the U.S. for a longer period than unwed U.S. citizen mothers constituted a violation of Equal Protection under the U.S. Constitution. The Court remedied that violation by extending the residency requirement for unwed U.S. citizen mothers, choosing to apply a more burdensome standard on mothers, as opposed to easing the burden on fathers. Notably, an amicus brief filed with the Court by scholars on statelessness pointed out that unwed U.S. citizen fathers faced similar challenges to unwed mothers in passing their nationality abroad, and that their children faced a similar risk of statelessness. In its decision, the Court recognized the importance of this observation in discrediting the U.S. government's argument that the

difference in treatment was necessary in order to protect against the risk of statelessness. While the Court's remedy resolved the gender-based discrimination at the heart of the case, it failed to account for the risk of statelessness faced by children born to unwed U.S. citizen fathers, and ultimately increased the risk of statelessness faced by the children born abroad to unwed U.S. citizen mothers.⁶ The risk of statelessness faced by the children of unwed U.S. citizen parents abroad could have been substantially reduced had the Court remedied the constitutional violation by applying the residency requirement for mothers to fathers.

16. Statelessness is not regulated under U.S. law and there is no procedure for identifying stateless people. This lack of recognition affects the rights of stateless persons in numerous ways, including under the immigration law, family law, adoption law and other areas of the law.
17. According to the U.S. State Department Policy on Assisted Reproductive Technology (ART) and Surrogacy Abroad, even if local law recognizes a surrogacy agreement and finds that U.S. parents are the legal parents of a child conceived and born abroad through ART, if the child does not have a biological connection to a U.S. citizen parent, the child will not be a U.S. citizen at birth. The identified loophole increases the risk of statelessness regarding children born to surrogate parents outside of the U.S.
18. It has also been recently reported that the U.S. State Department has rejected citizenship applications of children of same-sex couples who were born abroad through a surrogate parent on the false account that they are born out of wedlock even if the parents listed on the birth certificate are legally married in the U.S. This discriminatory practice increases the risk of these children to be rendered stateless and requires further attention.⁷
19. Due to the complexity of international adoption procedures, a large number of adoptees, although legally adopted, never received U.S. citizenship. In February 2019, the Washington DC based news channel NBC 4 Washington reported that tens of thousands of adoptees may never have received U.S. citizenship.⁸ The Adoptee Rights Campaign (ARC) estimated in 2018 that "the number of children adopted from 1945 to 1998 who entered adulthood without U.S. citizenship ranges from 25,000 to 49,000. An additional 7,321-14,643 children adopted from 1999 to 2016 are at-risk of reaching adulthood without U.S. citizenship". Some of these children, the report warns, these children could become stateless. In addition, ARC estimated that with regards to those children adopted after 2016, "*the total number of children adopted by U.S. citizens living without the protection of U.S. citizenship will increase to a new total of 32,000 to 64,000 adoptees [by] 2033*".⁹
20. Introduced in 2015 and 2018, and most recently in May 2019, the Adoptee Citizenship Act would have addressed the issue granting automatic citizenship to adult adoptees as well. As of September 2019, this Act is still pending in the judiciary Committee.¹⁰

⁶ https://files.institutesi.org/stateless_bulletin_2017-06.pdf.

⁷ https://www.advocate.com/family/2019/9/12/fathers-sue-state-dept-pompeo-over-denial-childs-citizenship?utm_source=twitter&utm_medium=social&utm_campaign=family.

⁸ https://www.nbcwashington.com/investigations/Tens-of-Thousands-of-Adoptees-Learn-They-Arent-U.S.-Citizens-Even-After-Decades-Living-Here-505213201.html?fbclid=IwAR26TsOpbVsR32CPji82TDSL6cQLZ9DYkVgGrh3_ecPK9YCyises2dQmk.

⁹ [https://media.nbcwashington.com/documents/National-Report-for-Release-to-Congress-Apr-29+\(2\).pdf](https://media.nbcwashington.com/documents/National-Report-for-Release-to-Congress-Apr-29+(2).pdf).

¹⁰ <https://www.congress.gov/bill/116th-congress/house-bill/2731>.

Denaturalization

21. The 14th Amendment of the U.S. Constitution guarantees citizenship to everyone born in the United States, with a few limited exceptions. However, President Donald Trump has suggested that the country should revise this rule of birthright nationality. In 2018, various news outlets reported that increasingly, the U.S. State Department had denied passports to Americans born near the U.S.-Mexico border at an increased rate.¹¹ This trend suggests that public authorities may be influenced by the administration's calls for a more restricted access to U.S. citizenship.¹²
22. In January 2018, the United States Citizenship and Immigration Service (UNCIS) introduced "Operation Second Look" aiming to refer approximately 1,600 people for prosecution after reviewing an estimated 700,000 immigration files for evidence of fraud.¹³ Operation Second Look grew out of a UNCIS program started under the Obama administration called Operation Janus, which also had the aim of identifying cases in which people might have been naturalized despite deportation orders, fraud or criminal charges at the time.¹⁴ However, there is a real concern about the scope and mandate of Operation Second Look.
23. In the first two years of the Trump Administration, nearly three times more denaturalization cases were filed (29.5 per year) than the average (12 per year) over the previous eight administrations. Under the Obama Administration, this number was 15.8 denaturalization cases per year.¹⁵ The increased focus on already naturalized American citizens also has a profound effect on running applications for naturalization. The Department for Homeland Security (DHS) has proposed a budget reallocation that would transfer U.S.\$207.6 million from naturalization processing to immigration enforcement, including denaturalization and deportation. In comparison, Operation Janus had a budget of approximately U.S.\$5 million.¹⁶
24. The potential implications of the efforts by the federal government to restrict access to citizenship and strip citizenship from others could include statelessness. Thus far, the statelessness problems in the U.S. have been primarily limited to persons who were made stateless by the actions of other countries. However, the current efforts of the federal government of denaturalization could result in the U.S. depriving its citizens of their nationality and rendering stateless within its borders.¹⁷

¹¹ https://www.washingtonpost.com/world/the_americas/U.S.-is-denying-passports-to-americans-along-the-border-throwing-their-citizenship-into-question/2018/08/29/1d630e84-a0da-11e8-a3dd-2a1991f075d5_story.html?utm_term=.d2a0ad6658db.

¹² <https://www.opendemocracy.net/en/democraciaabierta/statelessness-in-united-states-update/>.

¹³ Open Society Foundations, *Unmaking Americans: Insecure Citizenship in the United States*, p.8, 2019. For a clear overview, a corresponding factsheet is available here: <https://www.justiceinitiative.org/uploads/08cbf518-8a19-4601-897b-7187f04cea27/unmaking-americans-insecure-citizenship-in-the-united-states-fact-sheet-20190916.pdf>.

¹⁴ <https://www.nytimes.com/2018/12/19/magazine/naturalized-citizenship-immigration-trump.html>.

¹⁵ Open Society Foundations, *Unmaking Americans: Insecure Citizenship in the United States*, p.10, 2019.

¹⁶ *Id.* P. 71.

¹⁷ <https://www.opendemocracy.net/en/democraciaabierta/statelessness-in-united-states-update/>.

The Rights of Stateless Persons

25. While the exact number of stateless persons in the United States is unknown, it is likely that there are a number of individuals residing in the United States both legally and out-of-status who are not considered to be the nationals of any country. Stateless persons in the U.S. are highly vulnerable to arrest, detention and, in some cases, deportation to countries with which they have no established ties. Their immigration status cannot be resolved under U.S. law while they are often denied essential human rights and cannot access many social and welfare services.
26. Testimonies provided by stateless persons in the United States demonstrate the paralyzing effect of statelessness in day-to-day life:

"I was on a vacation in Florida this past January for my birthday and I had to travel by bus to get there because I have no state ID to board an airplane. When it was time for me to go back, I have seen a news report that there had been an ICE raid in the same greyhound station I had arrived from. I was too afraid to go back on the bus to Chicago, so my brother had to fly to Florida and rent a car to drive me back home."

"Not having a work authorization card meant that not only I did not have way to a legal form of identification but that I could not work legally, acquire a drivers license, access to higher education financial assistance, own a bank account, have a phone account, purchase property, enter certain buildings nor claim mail at the post office. When my then boyfriend and I decided to marry, we could not legally marry in our own city but traveled to a different state with a more lenient marriage certification identification requirement."

"After nearly 20 years of trying to resolve my status in the U.S., I found out about my statelessness while attempting to voluntarily deport myself to my home country to be with my dying father, only to be denied this right on the grounds that my country no longer recognized me as a citizen."

"I've been to the DMV about three different times trying to obtain a visitor's driver's license, but I was unable to because they wouldn't accept my Dutch birth certificate, as a form of identification. I was told I need a passport to show, which I do not have. I tried explaining my situation to the supervisor, but she told me she never heard of the term stateless and has never run into someone with my situation before. I was told to come back when I have an asylum/refugee card."

27. Stateless persons in the U.S. experience limited freedom of movement, in violation of the ICCPR Article 12(1). They may spend years under a final order of removal from the U.S. but cannot be removed or resolve their status. Without the ability to travel outside the U.S. or to sponsor family members, stateless people may spend years, even decades, separated from family members. Stateless persons lack documentation to facilitate movement on airplanes and buses. According to members of United Stateless, they are often unable to get driver's licenses and, if they are without a visa, they risk arrest and detention when they travel. Stateless persons also frequently cannot obtain travel documents to travel abroad because of gaps in the procedures for issuing such documents. For example, one member of United Stateless who has a green card has been unable to get a travel document because of such loopholes, even though he is entitled to one.

28. Many stateless persons lack work authorization in the U.S. and cannot work. Recent actions taken by the Trump Administration, such as removing work authorization for persons in the process of claiming asylum, may make access to work for stateless persons even more difficult.¹⁸ Most members of United Stateless have obtained a work authorization only because they are under a final order of removal, but they cannot be removed because of their statelessness.
29. Depending on their status, stateless persons in the U.S. often have no way of getting identity documents or, if they have access to documents, they often struggle to meet the requirements or maintain these documents over a long time period. Even for individuals who qualify for relevant documents, statelessness may negatively affect their ability to get Green Cards, work authorizations, drivers licenses, city ID cards, passports and other documents. Lack of ID card has a devastating effect on stateless people, restricts their movement, prevents them from working or attending university and makes it difficult to apply for credit cards, bank accounts, cell phones and any other service that requires an ID card. In some cities, even accessing buildings or other spaces may be difficult due to the need to provide an ID card for security reasons. Likewise, encounters with government agents or police officers are a constant concern for stateless persons.

Lack of a procedure to identify and protect stateless persons

30. While the United States has an obligation to ensure that all persons who have a right to U.S. nationality can exercise this right without any impediment, it should also implement a dedicated statelessness determination procedure to ensure that all stateless persons who live in the United States (and who do not have a right to U.S. nationality) are identified, protected and offered pathways to facilitated naturalization.
31. The U.S. does not at present have a specific procedure for the determination of statelessness. The identification of stateless persons is critical in a country's ability to guarantee the rights of stateless persons living within its borders. A formal statelessness determination procedure would offer the most effective means to protect the rights of stateless persons who do not have the right to American nationality and would assist the State in its implementation of its statelessness safeguards. It would also allow the U.S. to better understand the extent of statelessness on its territory and to better monitor the status and treatment of stateless persons.
32. In order to determine statelessness in full accordance with the relevant international standards, a statelessness determination procedure should, according to the UNHCR Handbook on Protection of Stateless Persons, be simple, accessible to everyone within the territory, and be fair and efficient. The procedure should be formalized in law and observe due process guarantees. In compliance with these standards, United States' statelessness determination procedure should provide for a shared burden of proof, the standard of proof should be reduced and applicants should be offered an individual interview. Moreover, information and counselling about the procedure should be widely disseminated in order to facilitate access to the procedure. Additional procedural and evidentiary safeguards for child applicants should be put in place, including 'priority processing of their claims, provision of appropriately trained legal representatives, interviewers and interpreters as well as the

¹⁸ <https://www.vox.com/policy-and-politics/2019/9/11/20853362/trump-work-permit-asylum>.

assumption of a greater share of the burden of proof by the State'. Government officials who may come in contact with stateless persons through their regular work (for example, social services or immigration control) should be trained to identify potential applicants and should refer them to the determination procedure. Finally, authorities involved in the identification of stateless persons should be provided with training on statelessness and the human rights of stateless persons.¹⁹

Arbitrary Detention of Migrants and Stateless People

33. Article 9 of the ICCPR obligates the U.S. not to arbitrarily and unlawfully detain individuals including migrants and stateless people. Many stateless people in the United States are undocumented but undeportable. In *Zadvydas v. Davis*, the Supreme Court held that undeportable aliens cannot be held in detention for longer than 6 months without a hearing unless there are special circumstances. The right of detained immigrants to due process was confirmed in *Clark v. Martinez*. Nevertheless, because there is no process to determine statelessness in the U.S., detention and removal officers may be unconvinced that an individual is stateless and therefore undeportable. In such cases, officers may declare that a removable non-citizen is uncooperative, or otherwise find their removal reasonably foreseeable, such that the 6-month limit on detention will not apply. As a result, stateless persons continue to face a risk of prolonged or indefinite immigrant detention in the U.S., a situation that likely violates Article 9 of the ICCPR.
34. Statelessness is not a defense against removal in the U.S., and removal procedures do not take account of a person's statelessness when a country for removal is determined. As a result, there have been cases of stateless persons deported to countries to which they have no meaningful links. In cases where stateless persons cannot be removed because they lack a nationality link to any country in the world, they may be subject to prolonged detention (discussed above), or released from detention on an order of supervision. Stateless persons under an order of supervision are often required to report monthly to immigration authorities, sometimes for years, even though there is no legal pathway to resolve their case. Often, these reporting requirements are arbitrary and onerous, governed by vague administrative regulations and policies that leave great leeway for discretion to individual detention and removal officers.
35. While in immigration detention, some stateless persons are subjected to forced labor, which may violate the Abolition of Forced Labor Convention Article 1, which prohibits the use of forced labor as part of discrimination on the grounds of nationality. For example, United Stateless has received reports of stateless youth in detention being forced to clean the toilets of immigration guards.

¹⁹ <https://www.unhcr.org/protection/statelessness/53b698ab9/handbook-protection-stateless-persons.html>.

Recommendations

36. Based on the above information, the co-submitting organizations urge reviewing States to make the following recommendations to the United States of America:

- I. Adopt a definition of statelessness under U.S. law, in line with Article 1 of the 1954 Convention Relating to the Status of Stateless Persons;
- II. Ratify and fully implement the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness, and core human rights treaties, including the CRC, CEDAW, CMW and CRPD;
- III. Ensure that no child shall be stateless, including in the context of adoption and surrogacy, by abolishing all discriminatory practices which undermine the equal right to citizenship of children;
- IV. Cease arbitrary, discriminatory denaturalization processes and ensure that procedural safeguards are in place to safeguard the equal citizenship rights of all naturalized U.S. citizens;
- V. Adopt legislation prohibiting denaturalization where it would result in statelessness;
- VI. Establish a statelessness determination procedure, ensuring that the procedure is fair, effective and accessible to all persons in the United States, regardless of their legal status;
- VII. Provide all stateless persons with an identity document while their status is pending, a work authorization and access to an international travel document, as well as pathways to facilitated naturalization;
- VIII. End the arbitrary detention of stateless persons who cannot be deported;
- IX. Facilitate the collection and assessment of disaggregated statistical data concerning stateless individuals.