S. HRG. 113–54

BUILDING AN IMMIGRATION SYSTEM WORTHY OF AMERICAN VALUES

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

MARCH 20, 2013

Serial No. J–113–11

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
81–774 PDF WASHINGTON : 2013

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

COMMITTEE ON THE JUDICIARY

PATRICK J. LEAHY, Vermont, *Chairman*

DIANNE FEINSTEIN, California	CHUCK GRASSLEY, Iowa, *Ranking Member*
CHUCK SCHUMER, New York	ORRIN G. HATCH, Utah
DICK DURBIN, Illinois	JEFF SESSIONS, Alabama
SHELDON WHITEHOUSE, Rhode Island	LINDSEY GRAHAM, South Carolina
AMY KLOBUCHAR, Minnesota	JOHN CORNYN, Texas
AL FRANKEN, Minnesota	MICHAEL S. LEE, Utah
CHRISTOPHER A. COONS, Delaware	TED CRUZ, Texas
RICHARD BLUMENTHAL, Connecticut	JEFF FLAKE, Arizona
MAZIE HIRONO, Hawaii	

BRUCE A. COHEN, *Chief Counsel and Staff Director*
KOLAN DAVIS, *Republican Chief Staff Director*

CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

WITNESSES

QUESTIONS AND ANSWERS

SUBMISSIONS FOR THE RECORD

ADDITIONAL SUBMISSIONS FOR THE RECORD

Submissions for the record not printed due to voluminous nature, previously printed by an agency of the Federal Government or other criteria determined by the Committee, list:

American Immigration Council—"Two System of Justice" http://www.immigrationpolicy.org/sites/default/files/docsaic—twosystemofjustice.pdf

BUILDING AN IMMIGRATION SYSTEM WORTHY OF AMERICAN VALUES

WEDNESDAY, MARCH 20, 2013

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 2:06 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Christopher Coons, presiding.

Present: Senators Coons, Hirono, and Grassley.

OPENING STATEMENT OF HON. CHRISTOPHER COONS, A U.S. SENATOR FROM THE STATE OF DELAWARE

Senator COONS. Good afternoon. I would like to call to order this hearing of the U.S. Senate Committee on the Judiciary. I welcome our five witnesses and look forward to their testimony this afternoon.

Let me just say at the outset, I apologize to our witnesses and those watching. I have just been notified there may be as many as seven votes beginning in 10 minutes, and I will do my best to keep the flow of the hearing moving forward, but the obligation to go cast a vote may interfere with the smooth forward motion of this hearing. I would just ask all of your indulgence as we do our best to keep moving forward through those many votes on our budget this afternoon.

America earned its place in the world because of the immigrants who have come before us, bringing their culture, bringing their passion, bringing their ideas to our shores. And when I have asked Delawareans and Americans what they expect in the changes being considered in our immigration system, they say they want a system that keeps us safe from foreign threats and terrorism and from dangerous individuals in our communities. They say they also want a system that protects the American work force and grows our economy. And they want a system that is fair and transparent and reflects our most fundamental humanitarian values.

I think our immigration system does a good job of enforcement. We certainly spend enough, more than $15 billion in the last Fiscal Year alone, as compared to $11 billion on all other Federal law enforcement combined.

Let me say that again. In terms of enforcement, we are certainly investing enough, nearly $16 billion in the last fiscal year, which is more than spent on the FBI, the ATF, the DEA, and the U.S. Marshals Service combined.

And it has a significant and broad impact. There are 32,000 immigrants in detention in the United States right now in more than 250 facilities. And there will be about 400,000 at some point in the course of the year in detention. ICE deported about the same number, roughly 400,000 people from this country last year, and that number has been steadily climbing and now stands at about double the number of removals in 2001.

But when I tell people that our immigration system does not allow immigration judges to consider circumstances, to balance different factors, to consider risk of flight, ties to the community, and whether or not there are U.S. citizen children who are dependent, they do not think that is consistent with our most basic values. And yet, immigrants in detention are denied any opportunity to make these and other arguments in roughly two-thirds of cases. And they are surprised, many, to learn that about a quarter of those deported have U.S. citizen children who must face either a childhood without their parent or effective deportation themselves.

Now, those who are entitled to bond must wait weeks for an opportunity to present their case. Our civil detention system is geared toward maintaining a minimum number of detainees in its current construction rather than ensuring the safety of our community as its first priority.

Long-time legal permanent residents with a U.S. family, a history of steady employment, those even who have served honorably in our armed forces can be, and in some cases have been, deported for any of a litany of relatively minor offenses that qualify only under the immigration code as aggravated felonies.

Immigrants, even children and those with mental disabilities, lack not just the right to appointed counsel, but also the ability to obtain badly needed documents from the Government necessary to prove their cases. Even for immigrants entitled to relief under the law, the deck is in many ways stacked against them.

While our Constitution prohibits ex post facto criminal laws, our immigration law does not respect that basic fairness principle under the 1996 revisions to the code. The list of crimes and activities leading to mandatory deportation was expanded and given retroactive effect. As a result, the law now requires mandatory deportation even for decades-old, non-violent offenses, such as petty theft, simple drug possession, or failures to appear in court, all of which were not grounds of deportation before 1996.

As I said at the beginning, we are a Nation of immigrants, but in my view, there are important elements of our immigration law that are inconsistent with America's fundamental values. Our system exacts a high cost on families, on human dignity, and on civil liberties. This cost, in my view, is unnecessary, unwarranted, and unfair.

At roughly $163 per day per bed, our current detention system is also enormously expensive to maintain. It could be cheaper while also better serving our national security interests and our national commitment to civil rights.

To cite briefly just one program, the Legal Orientation Program, which provides some immigrants with a basic overview of their legal rights, it costs just $70 per participant. Armed with knowledge of their rights, and in many cases their ineligibility for any

form of relief, participants in the program spend as many as 12 fewer days on average in detention.

Those who have a right to remain are able to make their case. Those who understand they have no rights to present leave sooner. According to the Department of Justice, these combined effects resulted in a nearly $18 million savings last year alone.

I understand that there are dangerous individuals in this country who should not be here, and I strongly support the work of the brave men and women who serve in ICE and CBP to find these individuals and remove them from our communities and reduce the threats on our streets.

My concern is that we must also afford a minimum level of due process consistent with our national values to those people who find themselves in an immigration system that, although civil, looks in many ways like a criminal proceeding. Detention and deportation decisions should be made in the public interest and subject to independent review, where appropriate, for immigrants with no history of violence. Less restrictive alternatives to detention ought to be used to guarantee enforcement of the court's orders. Immigrants ought to be advised of their legal rights and have meaningful access to discovery.

Where necessary to participate meaningfully, particularly in cases involving children and those with mental disabilities, I think counsel should be provided. These are not exceptional goals, and they do not describe our current system.

Under our current system, just to give one case, Hiu Lui Ng, a Chinese national, was detained by ICE when he appeared for his green card interview with his U.S. citizen wife and their two U.S. citizen children. Even though Mr. Ng had a good job as a computer programmer, and he was eligible for a green card based on a petition filed by his wife, ICE held him in detention for a long overdue past in absentia removal order. He was in custody for over a year and died due to lack of medical care while there.

Also under our system, R.C., an Irish native who came to the United States as a lawful permanent resident in 1955 as a 5-year-old, was detained by ICE for 10 months just a few years ago while he fought, and then ultimately won, cancellation of removal for a misdemeanor drug offense from 2006. These and many other example cases suggest reasons for this hearing today and for us to reconsider the cost, the values, the burden, and the fairness of our current deportation and detention system.

Comprehensive immigration reform cannot be truly "comprehensive" if it does not address current flaws that deny minimum due process rights consistent with our values.

In closing, it is worth noting that we are only a few days away from important religious holidays of different faiths, whether Easter or Passover, when many of my colleagues will take time to reflect on our shared values.

The book of Exodus tells us: "You shall not oppress the stranger of foreigner; you know how a foreigner feels, for you lived as strangers in the land of Egypt." Pope Francis just this week was equally clear in his inaugural homily, exhorting leaders of many nations to be protectors of the most vulnerable amongst us.

I want to particularly thank Chairman Leahy for allowing me to hold this hearing today, as well as Ranking Member Grassley, who I welcome. I am glad you have joined us, Senator Grassley. And I would like to welcome our five witnesses today, who bring a broad range of experiences with our system. I look forward to their testimony and answers to our questions.

I will now turn to Senator Grassley for an opening statement. Thank you. Senator.

STATEMENT OF HON. CHUCK GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Thank you, Senator Coons.

In the next few weeks, a group of Senators will unveil a comprehensive immigration bill that will include measures to secure the border, enhance work site enforcement, deal with millions of people who have come here without papers, and improve the channels for people to enter legally.

The group's goal is to ensure that this legislation is a "successful, permanent reform to our immigration system that will not need to be revisited."

Let me say I hear that is what I thought in 1986 when we passed the last bill. We have a lot of lessons to learn from that bill that did not accomplish what we wanted it to accomplish.

In order to be successful in this endeavor and to ensure that we do not need to revisit the problem, we need a system that respects the rule of law and allows people to enter legally. We need to protect American workers and secure our borders.

The title of this hearing is a reminder that we need to build an immigration system that is worthy of our values, including, but not limited to, the values of freedom, acceptance, strength, and hard work.

The system must also sustain the test of time. We need creative solutions, a commitment to enforcement, and policies that future generations will embrace for years to come.

To move forward requires a complete change in our behavior. We cannot simply legalize 12 million people, enforce the laws later, and say that the immigration system is worthy of American values that we have long espoused.

I am particularly troubled with this administration's approach to immigration because in the last several weeks, Immigration and Customs Enforcement released thousands of undocumented immigrants from detention facilities. It was clear from the start that the administration did not have control of the situation and did not consider the ramifications to public safety.

On March 4th, Secretary Napolitano claimed that only hundreds of individuals were released due to budget reductions. However, the head of ICE came forward and acknowledged that the Department misled the American people, and over 2,300 people were released. Some of these were Level 1 offenders or violent offenders convicted of aggravated felonies.

The administration has also been accused of cooking the books on deportation statistics. They are using deceptive marketing tactics and claiming that they have deported more people than ever

before. Now, even the President said the statistics were "deceptive."

Today we will hear about the need to consider alternative forms of detention. But before we make policy changes in this area, we need to have accurate data. Former immigrant Judge Mark Metcalf found that, in 2005 and 2006, 59 percent of the people here without document released before their hearing date never showed up for trial. The Executive Office of Immigration Review's own statistics indicate that 52,517 aliens failed to appear for their court dates in 2009 and 2010. This figure is on top of hundreds of thousands of unenforced court orders from previous years.

Some believe that the number of those who did appear for their hearing actually includes those who were in Federal Government custody. So, of course, they have to appear. The fact is the data is flawed, and that is what needs to be corrected if we are going to make new policy. And we are going to make new policy.

An October 2012 report from the Inspector General of the Department of Justice concluded that, "Immigration court performance reports are incomplete and overstate the actual accomplishment of the immigration court in adjudicating immigration cases."

The report says that the office reports completions even when the immigration courts have made no decision on whether to remove the aliens from the United States. As a result, the Inspector General says a case may be completed multiple times. Again, the administration is overstating success.

The Inspector General's report concluded that, "These flaws in the Executive Office for Immigration Review's performance reporting precluded the Department of Justice from accurately assessing the court's progress in processing immigration cases or identifying needed improvements."

The American people deserve more from this administration. Because everybody is entitled to accountability, the administration has a constitutional duty to faithfully uphold the laws, and when they do not, the American people deserve an explanation.

And I am sure that what I say about this administration is probably true of previous administrations as well to some extent.

So we must have America's commitment to compassion remain as unprecedented as it has been. Our immigration system is a powerful expression of that commitment. My hope is that we will reform our immigration system for the better while preserving the commitment to freedom as well as to the rule of law.

End of my statement. If you are Chairwoman——

Senator HIRONO [presiding]. Thank you very much, Senator Grassley, and I will be chairing this hearing until Chairman Coons returns.

Before we begin the witness testimony, I would like to ask all of the witnesses to stand while I administer the oath. If you could raise your right hands. Do you solemnly swear that the testimony you are about to give to the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. ARULANANTHAM. I do.

Mr. CUTLER. I do.

Judge GRUSSENDORF. I do.

Mr. TING. I do.

Ms. STAMPP. I do.

Senator HIRONO. Please be seated. Thank you, and let the record show that the witnesses have answered in the affirmative.

Our first witness today is Ahilan Arulanantham. Mr. Arulanantham is the deputy legal director at the ACLU of Southern California and senior staff attorney at the ACLU Immigrants' Rights Project. He has successfully litigated a number of cases to protect the rights of immigrants, including several large class actions. He has served as a Lecturer in Law at the University of Chicago Law School, where he taught a course on Preventive Detention. Just what we are talking about today.

Mr. Arulanantham, please proceed.

STATEMENT OF AHILAN T. ARULANANTHAM, SENIOR STAFF ATTORNEY, AMERICAN CIVIL LIBERTIES UNION, IMMIGRANTS' RIGHTS PROJECT, AND DEPUTY LEGAL DIRECTOR, AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, LOS ANGELES, CALIFORNIA

Mr. ARULANANTHAM. Thank you, Madam Chairman and Ranking Member Grassley, and I want to thank Senator Coons for holding this hearing. My name is Ahilan T. Arulanantham, and I am a senior staff attorney at the ACLU. I have spent the last 12 years representing thousands of immigrants.

My work has been united by a common theme. It is the Fifth Amendment's guarantee that no person should be deprived of their liberty without due process of law. And the Supreme Court decided over 100 years ago that immigrants, whether lawfully present or not, are entitled to the Fifth Amendment's protections. But in the last two decades, we have largely abandoned that principle. Too often our immigration enforcement system does not provide a fair day in court to those who aspire to be citizens, and the results can be devastating.

As Senator Coons stated, DHS imprisons over 400,000 people every year. This is an entirely modern phenomenon. in 1995, we detained about 85,000 people for that year, and today, when money is tight, we imprison almost 5 times that many.

I have spent a lot of time in immigration detention centers and can tell you firsthand that they are prisons. People were colored jumpsuits and sleep in locked cells or pods that are patrolled by armed guards. Some are placed in solitary confinement. And all of them lose their freedom, including the right just to hug their children or their spouses, because there are no contact visits in the overwhelming majority of immigration detention centers.

Unlike in other prisons, nearly half of the inmates have never been convicted of a crime. They are refugees fleeing persecutions or migrants who came for a better life. And others are long-time lawful permanent residents, green card holders, who have a criminal history. But all of them, by definition, have finished serving their sentences. They remain imprisoned only because they are immigrants.

Because immigration detention and deportation are considered civil penalties rather than criminal punishments, immigrants have no right to many of the basic protections that criminal defendants have. The most important of these may be the right to appointed

counsel for those who cannot afford it. The Government recognizes no right to an appointed attorney for anyone in deportation proceedings.

Three years ago, we filed a lawsuit on behalf of Jose Antonio Franco Gonzalez. Mr. Franco has a very serious cognitive impairment. He does not know his own birthday or his age. He cannot tell time. When the Government sought to deport him, a psychiatrist determined that he had a severe cognitive disturbance that rendered him totally unable to understand the proceedings. But the judge did not appoint an attorney to represent him. Instead, he closed the case, citing his incompetence, and sent Mr. Franco back to his detention cell. And because he had no lawyer to argue for his case and no right to a bond hearing because of a single criminal conviction, he remained there with no active proceedings in his case for the next 4½ years. Taxpayers spent nearly $300,000 to detain him, money that could have paid for lawyers for dozens of immigrants.

Sadly, Mr. Franco's case is not unusual. Every day in our immigration courts, trained DHS attorneys argue for the deportation of indigent, unrepresented people who are not capable of defending themselves. Some of them will be deported without the benefit of legal representation, even though they may have lived here for years, or face separation from their U.S. citizen family members who may be the only support system they have ever known. Every day people who could face persecution or torture if deported and speak and read no English have to present claims for asylum entirely by themselves. And even children suffer this fate. They go before immigration judges on a daily basis with no attorney to assist them.

Immigrants facing deportation also have no right to a prompt bail hearing, and in most cases, no right to a bail hearing at all. Although detention—when you hear that word, it brings to mind a brief period of stay. I have represented many people who lost years of their lives in the so-called detention centers. My first client in Los Angeles was a refugee from Sri Lanka, who shared my name. His name is Ahilan, and he spent 4½ years, half of his 20s, locked in an immigration prison because DHS was appealing his case.

Just this morning, I heard from another one of my clients, the Reverend Raymond Soeoth. He is a Christian minister who fled Muslim majority Indonesia. He lost 2½ years of his life—and his successful small business as well—while his case was pending in front of immigration courts. When a Federal court finally ordered a bail hearing for him, the immigration judge ordered him released on bond.

Perhaps most troubling of all, in the last 20 years our immigration laws have taken away from immigration judges the power to consider each individual's case on its own. I have known too many American children faced with the brutal choice, lose the benefits of growing up in this, our great Nation, your great Nation, or lose your parents, because the judge has no discretion to consider your equities.

I have also endured the pain of watching long-time lawful permanent residents, green card holders who are my clients, torn from

their families, from their churches, from their communities because our rigid immigration laws ignore the suffering of their American families.

As this Committee considers reforming our immigration laws, I hope it will remember people like this, like Jose Franco, Reverend Soeoth, and Ahilan, and work to create a system that treats them as people, too.

Thank you very much, Madam Chairman.

[The prepared statement of Mr. Arulanantham appears as a submission for the record.]

Senator HIRONO. Thank you, Mr. Arulanantham.

Our next witness is Michael Cutler. Mr. Cutler began working for the Immigration and Naturalization Service in October 1971 as an immigration inspector assigned to John F. Kennedy International Airport. In August 1975, he became a criminal investigator for the INS in New York City. From 1988 until 1991, he was assigned as the INS representative to the Unified Intelligence Division of the DEA in New York. He also served on the Organized Crime Drug Enforcement Task Force. After a 30-year career, Mr. Cutler retired from the INS in February 2002.

Mr. Cutler, please proceed.

STATEMENT OF MICHAEL W. CUTLER, SENIOR SPECIAL AGENT (RET.), IMMIGRATION AND NATURALIZATION SERVICE, NEW YORK, NEW YORK

Mr. CUTLER. Thank you, Madam Chairman. I appreciate the opportunity to be here, and I thank Chairman Leahy, Senator Coons, Ranking Member Grassley, and certainly I thank you.

I greatly appreciate this opportunity to provide my perspectives at this hearing concerning how America's immigration system may be made more reflective and worthy of American values. And, you know, for me, immigration was not just my life's work. It was also the story of my own family.

My career, however, provided me with a unique front-row seat to the true importance of America's immigration laws to nearly every challenge and threat confronting America and Americans.

Rather than simply being a single issue, immigration is a singular issue that impacts everything from national security, criminal justice, and community safety to the economy, unemployment, health care and public health, education, and the environment, to name the most prominent.

America's immigration laws were enacted to achieve two critically important goals: Protect American lives and protect the jobs of American workers.

A review of Title 8, United States Code, Section 1182 will make the purpose and intentions of our immigration laws clear. This section of the Immigration and Nationality Act enumerates the categories of aliens who are ineligible to enter the United States. Among these categories are aliens who have dangerous communicable diseases, suffer extreme mental illness, and are prone to violence or are sex offenders. Criminals who have committed serious crimes are also excludable as are spies, terrorists, human rights violators, and war criminals. Finally, aliens who would work in violation of law or become public charges are also deemed excludable.

It is vital to note that there is nothing in our laws that would exclude aliens because of race, religion, or ethnicity.

Our valiant members of the armed forces are charged with keeping our enemies as far from our borders as possible while the DHS is charged with securing our borders from within. While mentioning our borders, it is vital to understand that any State that has an international airport or has access to a seaport is as much a border State as are the States to be found along America's northern and southern borders.

We are constantly told that the immigration system is broken. What is never discussed, however, is the fact that for decades the Federal Government has failed to effectively secure America's borders and enforce and administer the immigration laws with integrity. These failures convinced desperate people from around the world that the United States is not serious about it borders or its laws. This impression was further exacerbated by the amnesty created by IRCA in 1986 which enabled more than 3.5 million illegal aliens to acquire lawful status and a pathway to United States citizenship.

This supposed one-time program that was to finally restore integrity to the immigration system was an abysmal failure. And it could be argued that the failures to effectively enforce the immigration laws, especially where employer sanctions were concerned, aided and abetted and encouraged the greatest influx of illegal aliens into this country in the history of the United States.

Respect for America's immigration laws has been further eroded by the advocacy by the administration and some leaders for the creation of a program under the aegis of "Comprehensive Immigration Reform" that, if enacted, would provide millions—actually, unknown millions of illegal aliens, whose true identities and entry data are unverifiable, with pathways to citizenship. This program is problematic for a number of reasons, but first and foremost is the undeniable fact that there is no way to determine the true identities of these aliens or verify how or when they entered the United States.

We are also seeing the same problem with the program known as DACA, Deferred Action for Childhood Arrivals. There is no way of verifying the information contained in these applications. It should be noted that the aliens who would apply for DACA would be aliens who would have been able to make this filing under the DREAM Act, but that did not pass the legislative process.

What is really important to understand, though, is that time and again the GAO and the OIG have pointed to a lack of integrity to the immigration benefits program. Fraud not only undermines the immigration system but national security and opportunities for American workers as well.

Here are two important excerpts from the 9/11 Commission Staff Report. First of all, the preface of the reports begins by saying:

"It is perhaps obvious to state that terrorists cannot plan and carry out attacks in the United States if they are unable to enter the country. Yet prior to September 11, while there were efforts to enhance border security, no agency of the U.S. Government thought of border security as a tool in the counterterrorism arsenal."

The next paragraph I want you to consider is that, "Terrorists in the 1990s, as well as the September 11 hijackers, needed to find a way to stay in or embed themselves in the United States if their operational plans were to come to fruition." And they determined that it "could be accomplished legally by marrying an American citizen, achieving temporary worker status, or applying for asylum after entering. In many cases, the act of filing for an immigration benefit sufficed to permit the alien to remain in the country" where they had the opportunity to "conduct surveillance, coordinate operations, obtain and receive funding, go to school and learn English, make contacts in the United States, and acquire necessary materials to execute an attack."

On December 7, 2012, the OIG did a study on the SAVE program and noted that 800,000 illegal aliens who were currently at large may well have criminal histories, yet the SAVE program does not have all of its data in the files that need to be there, and this study that was done identified that 12 percent of the time the files are wrong, so that there are instances where illegal aliens or aliens who should be subject to removal are being considered as being here legally.

Adding to this, we have the problem of prosecutorial discretion where the administration has not been arresting illegal aliens, and most recently was the releasing of the criminal aliens, in fact, that Senator Grassley talked about.

I want to make this clear: Law enforcement is at its best when it creates a climate of deterrence to convince those who might be contemplating violating the law that such an effort is likely to be discovered and that, if discovered, adverse consequences will result for the law violators. Current policies and statements by the administration, in my view, encourages aspiring illegal aliens from around the world to head for the United States. In effect, the starter's pistol has been fired, and for these folks, the finish line to this race is the border of the United States.

Back when I was an INS special agent, I recall that Doris Meissner, who was at the time the Commissioner of the INS, said that the agency needed to be "customer oriented." Unfortunately, while I agree about the need to be customer oriented, what Ms. Meissner and apparently too many politicians today seem to have forgotten is that the "customers" of the INS and of our Government in general are the citizens of the United States of America.

I look forward to your questions.

[The prepared statement of Mr. Cutler appears as a submission for the record.]

Senator COONS. [presiding.] Thank you, Mr. Cutler.

Our next witness is Paul Grussendorf. Judge Grussendorf was an immigration judge in Philadelphia and San Francisco from 1997 to 2004. In Philadelphia, he was responsible for hearing the deportation cases of immigrants serving prison sentences at Allenwood Federal Penitentiary for felony convictions. In San Francisco, he was the judge responsible for hearing the cases of all detained immigrants in northern California. Paul Grussendorf is also the author of a legal memoir entitled, "My Trials Inside America's Deportation Factories."

Welcome, Judge Grussendorf. Please proceed.

STATEMENT OF PAUL GRUSSENDORF, RETIRED IMMIGRATION JUDGE, SHEPHERDSTOWN, WEST VIRGINIA

Judge GRUSSENDORF. Thank you, Acting Chairman Coons and Ranking Member Grassley and the distinguished members of this Committee. It is my honor to appear before you today.

As you mentioned, Senator, when I was in Philadelphia, I was responsible for the so-called Institutional Hearing Program, which is the program that accelerates removal hearings for individuals who are convicted of aggravated felonies, and the hearings are held in Federal penitentiaries prior to the individuals' release from their criminal sentence in order to accelerate their eventual removal from the country. And, again, when I was in San Francisco, myself and my excellent colleague Michael Yamaguchi, we were the two judges responsible for the entirety of all detained individuals, migrants, aliens who came into ICE custody in northern California.

I want to emphasize that today I am here as a private citizen. I am retired. I am not representing either DOJ or EOIR or any Government agency. My views are my own. But I can assure you that having spoken recently with many of my former colleagues, many of my colleagues share my views.

Over the past two decades, Congress has severely curtailed the discretion of immigration judges to evaluate cases on an individual basis and grant relief to deserving immigrants and their families. Moreover, under current law, the Federal courts have also been stripped of their jurisdiction to review most deportation and agency decisions. Congress should restore judicial review and afford judges greater latitude in their deliberations, especially on issues of detention.

It is my view that no individual who comes into ICE custody should be without access to counsel. If an individual cannot afford counsel, then the Government should provide an attorney for them. It is not in conformity with American values to detain someone in a remote facility, often in the desert, separated from their family, from medical care providers, under circumstances where it is virtually impossible for someone, especially from a different culture, a different language, to be able to obtain counsel.

When I was in San Francisco, I had a compelling case that I heard involving a young woman from El Salvador. She was the mother of a U.S. citizen infant. She had been convicted of a so-called aggravated felony, namely, shoplifting. She had been shoplifting baby diapers for her infant. And when she came before me, I had to inform her that I had no power at all to consider any bond or her terms of custody. After a couple of continuances, she made the difficult decision to return with her infant to conditions of turmoil in El Salvador rather than fighting while in custody a case that she might well have been eligible to have won, either as an asylee or eventually as a lawful permanent resident.

I would propose that anytime that ICE comes into contact with a migrant, if ICE wants to question them to determine that they are not lawfully in the United States, that ICE should question, ICE should issue charging documents, ICE should give a court date, and ICE should send them home so that they can continue to work, to feed their families, they can continue to support their community and our American tax base.

Another case that I heard when I was in San Francisco was that of an Iranian asylum applicant, a woman who had, unfortunately, been diagnosed with schizophrenia. And her schizophrenia had also led her to be involved with a couple of extremely minor shoplifting instances, which then qualified her as an aggravated felon. She was married to a U.S. citizen. Together they had two U.S. citizen teenaged children. But ICE detained her, and we heard her case to renew her asylum status over a period of several months. I granted her case for asylum, and then because ICE appealed my grant to the Board of Immigration Appeals, she continued in custody for another year until the Board of Immigration Appeals finally upheld my grant of asylum. She was removed from the support of her family and of her medical caregivers due to the extremity of the current situation of mandatory detention.

Congress should restore fairness and flexibility to our system by expanding the authority of immigration judges to consider the circumstances of each case. Judges are drawn from the ranks of immigration professionals, those who have spent their careers working in Government as well as those who have advocated on the side of immigrants. They should be trusted to make the correct calls.

For example, in fiscal year 2012, immigration judges completed 380,000-some cases. Of those, only 26,000 cases were appealed. It seems that most parties to these proceedings are happy with the judges' decisions. Our Government and ICE should also be happy to defer to the immigration judges on issues of discretion, especially where custody is concerned.

Thank you.

[The prepared statement of Judge Grussendorf appears as a submission for the record.]

Senator COONS. Thank you very much, Professor Grussendorf.

Next we turn to Professor Jan Ting, our first of two witnesses from the first State of Delaware. Professor Ting is a professor of law at the Temple University Beasley School of Law in Philadelphia. He joined the law faculty in 1977 and teaches in areas of citizenship, immigration law, and tax law. Professor Ting was Assistant Commissioner of the Immigration and Naturalization Service of the U.S. Department of Justice from 1990 to 1993. Professor Ting is also a senior fellow and board member at the Center for Immigration Studies.

Professor Ting, please proceed.

STATEMENT OF JAN C. TING, PROFESSOR OF LAW, TEMPLE UNIVERSITY BEASLEY SCHOOL OF LAW, PHILADELPHIA, PENNSYLVANIA

Mr. TING. Thank you, Senator Coons, and I thank all the members of the Committee for the invitation to appear today, in particular Chairman Leahy and Ranking Member Grassley.

I have submitted written testimony, and I would like to make three additional points in addition to the written testimony that I have already submitted.

I want to talk about this access to counsel issue. I think there is a historic distinction between civil and criminal litigation. The United States has never provided at taxpayer expense legal representation in civil matters. On the other hand, as someone who

is in the business of training young lawyers, it would be very hard for me to oppose a properly labeled "Lawyers' Full Employment Act of 2013." If I were a sitting Member of Congress—and I tried once to become one—I would be wary of advocating taxpayer-funded lawyers for foreigners in civil litigation when, under our current practice, taxpayer-funded lawyers are not provided to United States citizens, even in high-stakes litigation over things like home foreclosure, child custody, or lost jobs. American citizens go into child custody battles with whatever legal representation they can afford. I think we have to think about American citizens first before providing—forcing them to pay for taxpayer-funded lawyers for non-citizens.

I also want to talk about mandatory detention. It seems to me that the 1996 reforms to our immigration laws—and let me make the obvious point, that all of our immigration laws that we are talking about were enacted by the Congress of the United States for good and valid reasons at the time. And I think the mandatory detention provisions were enacted to ensure the appearance of aliens for hearings and for removal. And the whole purpose of detention in the immigration context is to ensure the expeditious hearing and removal of aliens who do not belong in the United States. So there is a reason for it. And it seems to me that when alternatives are proposed that result in increased non-appearances, the whole purpose of the immigration system is frustrated. I think the burden ought to be on proponents of alternatives to detention to demonstrate that enforcement of the laws will not, in fact, be delayed.

I also want to say something about prosecutorial discretion in general. If prosecutorial discretion is based on limited resources, it ought to consist of priorities for prosecution without putting any lawful cases off limits for political or policy reasons. Again, I emphasize that the laws of the United States were enacted by the Congress for good and valid reasons.

If prosecutorial discretion is based on backlogs in the immigration court, that, it seems to me, is a management issue for the executive branch. Administrative immigration judges were intended to expeditiously process immigration cases without burdening our Article III courts. The backlog that we confront today is a manifestation of failure to deter illegal immigration. Cases should not be delayed because of pending visa applications. They should be decided on the merits, and then ICE can decide whether discretion is warranted in deferring removal. That would be a proper exercise, it seems to me, of prosecutorial discretion.

Let me say that both my parents were immigrants. Of course, we should respect and admire immigrants, but that is not the question. The question is, the fundamental question is: How many? Should we limit immigration or should we allow unlimited immigration, as we did for the first century of the Republic, or as Senator Rand Paul said yesterday, "If you want to come here and live and work, we will find a place for you." That was an articulate statement of, I think, the open borders position.

Our failure to make a choice between those two alternatives is at the root of our dilemma over immigration policy. On the one hand, we find it hard to accept unlimited immigration. But on the

other hand, we find it hard to say no to or to deport hard-working immigrants who remind us of our own ancestors just to maintain a numerical limit on immigration. But there is no third way. It is intellectually incoherent and indefensible to argue that we need to retain numerical limits on immigration but we do not have to enforce them, and that we can instead periodically grant amnesty to immigration law violators whenever they attain a sufficiently large number.

The current U.S. immigration system is the most generous in the world. I want to make that point. We provide each year more green cards for legal permanent residents with a clear path to full citizenship than all the rest of the nations of the world combined. This is an immigration system worthy of American values. It needs to be defended, and the enforcement provisions of U.S. immigration law are essential to maintaining the statutory numerical limit on legal immigration and deterring would-be violators. Border enforcement alone is never going to be sufficient.

People who violate our immigration laws engage in a cost/benefit analysis before they decide to violate our laws. If we want less of them coming to the United States, we have to raise the costs through more enforcement and lower the benefits by assuring removal from the United States.

If we want more illegal immigration, then the way to do it is to lower the costs through discretionary prosecution and to increase the benefits through things like amnesty. That is the fundamental choice that we have to make, and it is our refusal to choose between a policy of unlimited immigration or limited immigration that is at the root of our dilemma today. We have to answer that question one way or another. Otherwise, we end up with a dysfunctional system which is not worthy of our American values.

Thank you.

[The prepared statement of Mr. Ting appears as a submission for the record.]

Senator COONS. Thank you, Professor Ting.

Our final witness today is also from the great State of Delaware. Pamela Stampp is an attorney at the Castro Law Firm, where she has practiced immigration law for the last decade. Her practice deals primarily with adjustment of status, consular processing, waiver applications, VAWA, and U-visa applications, removal defense, and I–9 compliance. Ms. Stampp also handles business immigration applications and is herself a native of Jamaica and a naturalized U.S. citizen since 2007. So she has experienced the U.S. immigration system both as an attorney and as a client.

Ms. Stampp, please proceed.

STATEMENT OF PAMELA A. STAMPP, MANAGING IMMIGRATION ATTORNEY, CASTRO LAW FIRM, WILMINGTON, DELAWARE

Ms. STAMPP. Thank you, Senator Coons, Ranking Member Grassley, and other Committee members. It is indeed my privilege to share with you today some of the concerns regarding the due process challenges being faced by many undocumented immigrants who try to navigate their way through our complex immigration system. I currently manage the immigration law area of practice at The

Castro Firm in Delaware, and because of our firm's commitment to the community, I have had the opportunity of assisting many undocumented immigrants.

As Senator Coons so graciously acknowledged, I myself am an immigrant, and I had to contend with the issues on my path to citizenship of having access to counsel to guide me through this complex process, although not in an undocumented state. The need for representation by counsel is even more important in cases where an individual is placed in removal proceedings because the consequences can be far more dire than the normal civil proceedings.

The need for counsel demonstrates the importance when we think of the court administrative time and, consequently, increased costs when immigration judges are required to spend additional time guiding pro se respondents through proceedings. But it should never be forgotten that the role of the immigration judge is not to represent the respondent. It is the role of counsel to ensure that all forms of available relief have been adequately explored, that all issues for proper consideration have been brought to the attention of the court and that the law has been correctly applied to the facts and circumstances of the particular respondent. The greater the access to counsel, the less the likelihood of exploitation of undocumented immigrants by "notarios" and "immigration consultants."

A framework really needs to be established to ensure that vulnerable groups—such as juveniles, VAWA, U-visa, or asylum candidates, or persons with mental disabilities—are identified at the earliest opportunity and provided with representation by counsel in their immigration matter.

As an example, an undocumented immigrant was in an abusive relationship for a number of years during which she suffered from repeated acts of domestic violence. Having acquired only an elementary level education and been repeatedly warned by her abuser that if she told anyone, she would be deported, her situation only came to light when an act of physical violence against her in a public parking lot was actually observed by a patrolling police officer. The offender was charged, but had a friend not recommended that she contact our firm for assistance, she likely would never have learned of the possibility of a U-visa application being filed on her behalf.

When it comes to the issue of custody determinations and mandatory determination, everyone placed in removal proceedings should have prompt access to a bond hearing with the immigration judge having full discretionary authority to make a determination based on all factors relevant to the grant of release on bond, such as flight risk, the respondents' ties to the community, and the likelihood that he will pose a threat to the community, or threaten the interests of national security.

I am, in fact, reminded of the case of one immigrant who arrived in the U.S. in 1999 but later fell out of status. In 2001, he started a business in order to support himself and his family. He made sure that this business was duly licensed and insured and paid taxes for every year it was operating. By 2011, he had, in fact, acquired two residential properties, was able to provide employment for two additional persons, was the sole financial supporter for his 7-year-old U.S. citizen son, and had taxable earnings of over

$100,000 for the tax year of 2010. In 2011, however, he was detained and placed in removal proceedings.

When he was detained, no bond application was entertained until a bond redetermination hearing was requested in immigration court. Bond was granted by the immigration judge, but only after he had spent 10 days incarcerated. For the sole operator of a small business, this is, in fact, detrimental.

As indicated by my colleague Professor Grussendorf, immigration judges should be afforded broader discretionary powers to review the facts and arguments presented by both sides and to grant relief based on the merits.

The prosecutorial discretion policy, for example, vests power solely in the hands of DHS, who are in reality the adverse party in immigration proceedings. Does this not amount to giving them the final determiners or arbiters? The ability of an immigration judge to exercise judicial discretion in such circumstances and arrive at a decision on the merits would go a long way toward ensuring the interests of justice are served.

In the normal process of immigration matters, one of the ways in which you ascertain information to assist your cases through the discovery process is called a FOIA, a Freedom of Information Act request. Many immigration clients are unable to provide a clear and comprehensive or accurate record of their immigration history, despite the assistance of counsel. The current mechanism for determining this process of past immigration history, the FOIA request, has become time-consuming because of the lengthy delays in receiving the requested information. Even where the more expedited format is adopted because the immigrant is in removal proceedings, this process can still take months.

This could easily be alleviated if there was an established procedure for ensuring that counsel representing an immigrant has access to the immigration and criminal records in the possession of DHS in the fashion of the normal adverse party discovery process.

In conclusion, changes in the law to afford access to counsel, prompt bond hearings for all, greater judicial discretion, and a more efficient discovery process would, in my view, certainly contribute to an immigration system worthy of American values.

Thank you.

[The prepared statement of Ms. Stampp appears as a submission for the record.]

Senator COONS. Thank you, Ms. Stampp.

I would like to thank all five of our witnesses today. I have a wide range of questions I would like to ask you in response to your testimony. If you will forgive me, however, we are between the second and third vote, and in the absence of other members, I am going to recess this hearing for about 20 minutes while I go to the floor, cast two votes, and then return, and hopefully we will have a chance for some broad questioning then.

Again, my apologies, but I have to go vote. Thank you. This hearing is in recess.

[Recess at 2:56 p.m. to 3:27 p.m.]

Senator COONS. I would like to call this meeting back to order. I again just want to express my appreciation to today's panel of

witnesses for your patience with the many votes going on over in the Capitol.

Mr. Arulanantham, if I might start with you, in preparing for this hearing, I was surprised to learn that Congress has, in fact, mandated each year since, I think, 2010 that DHS maintain over 34,000 detention beds, whether DHS or whether ICE needs them or not, and this is, if I have my numbers right, more than 1,000 over the requested bed level for this year.

How do legislatively mandated bed quotas drive ICE policy with respect to bond or parole recommendations, in your view?

Mr. ARULANANTHAM. Well, there is no question that the bed mandate does drive ICE policy, and I think in a very irrational way, because as I was mentioning in the testimony and as you can see in the appendix to my written testimony, there are thousands of people who are not a danger, not a flight risk, whom immigration judges would release on bond if they could get a hearing that ICE detains under the mandatory detention laws. I think there is an obvious relationship between that bed quota, which requires a particular level, even if detention is not otherwise necessary, and that mandatory detention law which requires the detention of people who, if they got a hearing, if they got their day in court, would show that they do not have to be locked up.

I think particularly in this time, as well, Senator, it does not make a lot of fiscal sense, and we know alternatives to detention, ICE's own data as well as the data from the companies that do intensive supervision assistance, show that now we have very sophisticated technologies that will allow for a very high appearance rate. Well over 90 percent is reported routinely, 99 percent in southern California where I practice, 99 percent in the BI, which is the company that does this, in their national statistics. Those are 99-percent appearance rates at court hearings for people who are released but kept on intensive supervision.

Senator COONS. Would you just briefly explain what technologies are today available for intensive supervision that may not have been available when the provisions were passed and when these requirements were put in place? And just say something about, given the bed quota, how widespread are these alternatives?

Mr. ARULANANTHAM. Well, remember, the provisions were passed in 1996, and they were based on studies that were done before then. At that time the bed capacity was far lower, so ICE released—actually, INS, excuse me, back then, released people without doing an analysis of whether they were a flight risk just because there was not space to hold them. So at that time, when those findings were made, there was not any kind of individualized, you know, reticulated way to analyze and determine who was a flight risk. We did not have at that time, obviously, at least the widespread availability of GPS monitoring devices that can be put on electronic collars that you can put on people's ankles. We did not have the sophisticated telephone reporting systems that we have today.

So there is a great variety of technologies that produce these high appearance rates that were never tested back in the mid-1990s when the statute was previously passed.

Senator COONS. And how widely are those currently being deployed or demonstrated?

Mr. ARULANANTHAM. They are being deployed all across the country, Senator, but the problem is under ICE's interpretation—that is not the problem. The problem is under ICE's interpretation of the law, they interpret custody in Section 1226(c), the mandatory detention statute, to mean locked up. So they do not allow the release and alternatives to detention of people who are required to be detained under that law. So you have people who have family members, maybe people who were released on the criminal case—they had a criminal case, they were released on bond, they appeared for their plea hearing or trial, then they were convicted, they go to immigration, and they cannot ask for bond. And that does not make any sense.

Senator COONS. If I might, Ms. Stampp, just a follow-up to that, in your experience when you encounter a defendant, when you represent someone, how often are they aware of the rights they may or may not have under law? And then, specifically, what sorts of defenses to removal of an immigrant who has no access to counsel and is not particularly informed about the process and how it is going to work, what might they raise but that they in your experience often fail to raise because they are unaware of their——

Ms. STAMPP. Senator Coons, in my experience, most times they are not aware of the legal options available to them. Most of the undocumented immigrants, in particular, they have no concept of what legal rights they have. In fact, many feel that if they encounter law enforcement in any form or fashion, they will be placed in deportation proceedings.

They may have in many instances a legitimate claim for remedies such as asylum, cancellation of removal in certain circumstances. They may have the ability to apply for protection under the Convention Against Torture. They may also be VAWA, Violence Against Women Act, appropriate candidates or U-visa, victim of crimes, applicants as well.

But if they have not got the information to inform them that these are options available to them, it may never be raised.

Senator COONS. And, Ms. Stampp, if they do not have access to counsel—and in a majority of cases they do not—then where do immigrants in these circumstances turn? Where do they get legal advice? You mentioned in your spoken testimony these "notarios." Say a little bit more, if you would, about their role, their cost, their effectiveness in this process.

Ms. STAMPP. Indeed, Senator, the "notarios," who are not attorneys, they are, in fact, many times operating under the guise of immigration consultants, so-called, but they are indeed dispensing legal advice on which many applicants or petitioners will act to their detriment. They will move forward with applications which are either unsupported or not properly substantiated on the advice of these notarios and put themselves in a far worse situation than if they had been afforded the opportunity to get proper advice from counsel.

In some communities, because of the nature of how these "notarios" are viewed, especially, if I may indicate, in the Hispanic community, which I am very close to, they are seen as a source of

information, as a resource to go to, because they do not see any other options available to them.

Senator COONS. Professor, I would be interested if you would comment on this, but also you said in your testimony that it is often the case that immigrants have spent weeks, possibly months, in detention before appearing before a judge for the first time. Now, that seems like a long time to spend in detention before seeing a judge. Can you tell me why individuals typically spend such a long time in detention before they see a judge for a bond hearing?

Mr. TING. Well, you know, I think Judge Grussendorf would be more of an expert on that than I. I think the usual reason is because there is a tremendous backlog of cases that stands in the way, and they are in detention to ensure their appearance. You know, prior to 1996, we had a very bad record of people showing up for their immigration hearings if they were not, in fact, detained. We have a very good record of their appearing if they are detained prior to the hearing. So, you know, the detention, the sole purpose is to facilitate the congressionally designed administrative removal process.

And the issue of legal counsel, I would just emphasize that, in general, people cannot be removed from the United States without a decision of an immigration judge. And immigration judges are given broad discretion in how they conduct their hearings. They understand the law, and they are free to gather information, to interrogate witnesses, including the alien, and their job is to mete out a fair interpretation of the immigration laws case by case. And I think the administrative system is designed through immigration judges to ensure that there is someone there who understands the immigration law and is responsible for seeing that it is properly applied to the individual alien.

Senator COONS. Professor Ting, if I might, before I turn to Judge and Professor Grussendorf, in terms of a cost/benefit analysis, I take your point about 1996. But as Mr. Arulanantham suggested, with modern technology—GPS, ankle bracelets—that really were not available broadly, did not exist back in 1996, there are districts that are now showing—regions that are showing 99 percent. Would it make sense if there are instances where there is virtually no risk to society and the flight or escape risk is so low to allow supervised detention rather than physical detention?

Mr. TING. Yes, you know, I am certainly open to pilot projects to demonstrate that there is no loss of appearances as a result of these alternate technologies. I think a lot of people are skeptical about these alternate technologies, and I think to the extent that you weaken the enforcement function, you add to the dysfunction of our immigration system generally, at the root of which, as I have said in my written statement, is our failure to make a clear decision on whether we favor numerically limited immigration, which requires enforcement, or unlimited immigration, as I think some Members of Congress do, which does not require enforcement. And if we decide, oh, we are for numerical limits, then you have to enforce those limits, and you have to find a way to do so. And that is why we have the system in place that we do.

Senator COONS. Understood.

Professor Grussendorf, if I might, I have relatively little time until the next vote, which has been called, if you could just comment on the length of time before folks, typically immigrants, appear before a judge and have a chance at a bond hearing, the impact of the consequences of this process where we are using detention and holding people for long periods of time without them being aware of their rights or their alternatives, and then what you think are the best paths forward. Are detainees entitled to request a bond hearing? Should we accelerate bond hearings?

Judge GRUSSENDORF. Thank you, Senator. First of all, I would say that it varies widely from jurisdiction to jurisdiction, but certainly it is not unusual for a migrant to be detained for a couple of weeks before they are even able to be brought before an immigration judge due to the busy dockets of the immigration courts.

Now, as far as any possible solution, one solution is, of course, to do away with the wide-ranging laundry list of grounds for so-called mandatory detention to roll back on the so-called aggravated felonies which, if someone is convicted of that which qualifies as an aggravated felony, then they are automatically subject to mandatory detention.

Most of these so-called aggravated felonies, they are not crimes that involved dangerousness or any type of vile nature, and in my opinion and that of many of our colleagues, individuals could be released into the community, especially with alternatives to detention methods, and to assure their return, and that there would not be then such a backlog on the custody calendar.

Now, as far as providing counsel to those who are detained, I would like to draw an analogy. It is actually the case that right now there are many so-called illegal migrants who do have Government-appointed counsel, and that is mainly at the border when individuals are arrested for illegal entry and illegal re-entry under 8 U.S.C. 1324, 1325, and 1326. And the situation there is that the Federal public defenders, for example, in San Diego, they do represent the individuals. They are not involved in dilatary tactics trying to slow down the system at all. In fact, the district court judges and the U.S. Attorney's Offices, they recognize that without the Federal public defenders being there to represent such a volume of criminal detainees, the entire system would break down.

Now, I would submit that currently the immigration detention system has broken down because the detainees do not have attorneys who can help facilitate their cases. In a situation where nobody has a form of relief where it might be best for them to take an order to return, an attorney can explain that to them and they can understand, "Well, there is no reason for me to languish in detention another couple weeks or months."

Senator COONS. Let me ask you a quick followup, then, if I might. I referenced in my opening the Legal Orientation Program, which, if I understand right, can reduce costs by reducing the amount of time it takes to resolve a case, because immigrants, once more aware of their options and their rights, will either choose to accept deportation, recognizing they have no other likely path, or make a successful claim.

Can you tell me a little bit more about what the LOP does or does not do and how it affects timeliness and cost of resolution of cases?

Judge GRUSSENDORF. Well, yes, sir. I was impressed when the Executive Office for Immigration Review first initiated that program and supported organizations in the community. The problem with that program, though, is that we are still talking about trying to advise individuals of their rights, usually en masse, that there is no privacy, there is no opportunity to sit down with an individual and really spend any time with them to assess their individual case, to assist them in pulling together documents and witnesses, and so on. It is really more of an en masse type situation, and I am certain that many of the respondents, especially when you are dealing through a second language, are still unaware of what their options are.

Senator COONS. Mr. Arulanantham, we are marking the 50th anniversary of *Gideon* v. *Wainwright* and the recognized right to counsel for American citizens in the criminal process. Immigration detention has withstood challenges because it is deemed to be civil, not criminal.

Could you comment on that and on what aspects of it really seem or have the consequences of a criminal process and what the courts have said about the due process rights of detainees? And describe, if you would, some of the alternatives. Professor Ting was saying he could see his way toward a demonstration program. What are the current demonstration programs? How have they demonstrated cost-effectiveness? And in what ways might they have improved the process and respected due process?

Mr. ARULANANTHAM. Well, it is not quite right to say that there is only a right to appointed counsel in criminal cases. The Supreme Court recognized a right to appointed counsel in every juvenile delinquency case, even though that is a form of civil proceeding, not a criminal proceeding. The Supreme Court has also recognized that counsel may be necessary in some cases involving parental termination in the *Lasser* decision, in civil contempt proceedings in the *Turner* v. *Rogers* decision, and in other contexts. In fact, the overwhelming majority of States—I think it is 47—provide counsel as a matter of statute to people in parental termination proceedings.

Now, if you think about it, many deportation cases are parental termination proceedings. Many of them are. And even ones that are not, people who could be tortured or persecuted if returned, if their case is decided the wrong way, I mean, the stakes in immigration cases are often greater than they are in criminal cases, as the Supreme Court has recognized in the *Padilla* decision.

So deportation is unique. It cannot be understood—you know, you cannot pigeonhole it and compare it simply to one form of other kind of proceeding or another. I think the real question is, you know, when you have a person who has a serious mental illness and you have got the DHS represented by a trained prosecutor who is trying to get that person deported, is it fair to have that person make all the arguments that they have to make for themselves? Is it fair for a child to be put in that position?

All we are recommending, Senator, is that the Attorney General have the option—that we require counsel for the people who are

most vulnerable who need it, like children and people with mental disabilities, and then that the Attorney General have the ability on a case-by-case basis to determine whether counsel is necessary in other situations, which is the same thing that the law requires, that the Due Process Clause requires, in parental termination cases, in civil contempt cases, and other contexts.

And you had asked about pilots. I think the best way to assess cost savings in the appointed counsel context, because we have not, unfortunately, had pilots with full-blown appointed counsel—we are trying, but they have not been authorized by Congress—is by looking at LOP. And you can see in the Legal Orientation Program even with that, as Judge Grussendorf was saying, that process of providing information, we see in EOIR's statistics report substantially decreased detention times because of cost savings in that context.

Now, if you think about what that means, every time a judge puts over a case for a month in order to try and find a lawyer to represent a mentally ill person—and I see this every day in our litigation on that issue—that is $50,000. It is $50,000 that you just spent by taking 30 extra days while you are begging people to find lawyers. The same is true for children. The same is true for prompt bond hearings. And think about how many people you could represent. I mean, depending on where you are in the country, $50,000 will pay for almost a whole lawyer for a year.

Senator COONS. If you will forgive me, thank you very much, Mr. Arulanantham, for that statement.

I want to thank all the witnesses. I apologize. I have just a few minutes left to get back to the floor on a vote that is live.

I am going to keep the record open on this hearing for a week for statements; if there are any closing statements witnesses would like to make for the record, issues we did not get to today, I apologize; if there are members who were not able to attend and who have questions for the record that they might like the witnesses to answer.

Congress has a lot of significant issues to work through if we are to be successful in reaching an appropriate compromise and improvements, enduring improvements, to our immigration system, and it is my hope that we will not lose sight of some of the due process concerns raised here today and that we will find a way to come together and make significant, sustained improvements to America's immigration system.

I want to thank all five witnesses again for their patience today with the difficulties of our schedule, and this hearing is hereby adjourned.

[Whereupon, at 3:48 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

Building an Immigration System Worthy of American Values

Senator Grassley's Questions for
Michael W. Cutler, INS Senior Special Agent (Ret.)

1. Over the years, the Department of Homeland Security has had its share of mistakes. Report after report has pointed out their inefficiencies and weaknesses. Back in 2005, the Citizenship and Immigration Service lost track of 111,000 files and processed citizenship applications without them. The agency continues to over-count H-1B petitions despite a congressionally mandated cap. The department has not implemented a biometric exit system that Congress mandated in 1996. In February, Immigration and Customs Enforcement released 2,228 illegal immigrants from local jails for budgetary reasons. As a former INS agent, what grade would you give the new Department of Homeland Security? Do you think they are up to the task?

Answer:

Let me begin by answering the last part of your first question first. I would have to give the Department of Homeland Security an unequivocal grade of "F."

There is no satisfaction in coming to this conclusion. As I noted in my prepared testimony, the issue of immigration profoundly impacts nearly every challenge and threat America and Americans faces today. The immigration laws, at their foundation, are *supposed* to protect American lives and American jobs. These failures of the immigration system could not be more serious.

As you will see, my responses to your questions are lengthy and I took the liberty of providing extensive background in conjunction with my answers. I therefore thought I should provide a brief synopsis of my answers to begin with, but I urge you and those who would read my responses to please take the time review my in-depth responses as well.

To begin with a number of your questions addressed a few monumental examples of nonfeasance, misfeasance and malfeasance. To wit:

In 2005 USCIS claimed to have lost 111,000 immigration files relating to applications filed for benefits including United States citizenship.

Recently for budgetary reasons DHS released 2,228 Illegal aliens who had criminal histories who should have been remained in ICE custody.

The administration has taken the unprecedented step of declining to lodge detainers on illegal aliens in custody of other law enforcement agencies claiming that this is to make best use of limited resources to focus on criminals and terrorists.

The administration has taken the additional unprecedented step of using prosecutorial discretion to

provide illegal aliens who claim to have been brought to the United States when they were under the age of 16 with identity documents and a temporary period of employment authorization provided that they had not attained their 31st birthday by June 15, 2012. In conjunction with your concerns about how this sort of program would have questionable integrity you asked about the pitfalls that may be found in the implementation of Comprehensive Immigration Reform.

As you will see in my detailed responses, my concerns about all of these issues is the lack of integrity to the immigration system that was designed, in principle, to protect the lives and jobs of Americans.

Adjudicating applications for benefits including United States citizenship have clear national security implications. To cause the adjudicators to process such important applications without the relating files is an egregious example of malfeasance as does the release of aliens who have criminal histories. These actions pose serious potential threats to national security and public safety.

Fraud also poses another huge problem. As you will see in my detailed responses, I am greatly concerned that although we are being told that if Comprehensive Immigration Reform was to be enacted that 11 million or 12 million illegal aliens would emerge from those mythical shadows to participate in this ill-conceived program. I fear that the number aliens who would seek to participate in Comprehensive Immigration Reform would actually turn our to be a ***multiple*** of 12 million. I am basing this on our experiences with the Immigration Reform and Control Act of 1986 when we were told that about 1 million to, at most 1.5 million illegal aliens would come forward. The reality was that more than 3.5 million actually participated in that massive amnesty program.

Fraud has been a major problem in the immigration benefits program. It has permitted terrorists to enter the United States and embed themselves and it has also permitted many aliens to gain immigration benefits to which they are not entitled. It must be presumed that a massive amnesty program would attract illegal aliens from around the world and, with a lack of integrity to the process, it should be anticipated that millions of applications will be filed that contain lies concerning material facts including dates of entry and other such qualifying factors and that these acts fraudulent assertions will go undetected.

My more detailed responses that follow address this possibility of a human tsunami that would likely be created by enacting Comprehensive Immigration Reform. I know that I am supposed to answer your questions, but I am compelled to ask how would granting potentially ***tens of millions*** of illegal aliens lawful status under the aegis of Comprehensive Immigration Reform impact the United States and its citizens?

Must of us have come to understand the need to "look before we leap." Those advocating for Comprehensive Immigration Reform must understand that if they leap, they will be taking America and every American along with them.

Specifically in addition to national security and public safety, I am thinking about the impact on unemployment, schools, hospitals and infrastructure including roads, public transportation and the environment.

Why is no one challenging the numbers of aliens who might ultimately be involved and what this would really mean?

While it is true that law enforcement agencies routinely exercise prosecutorial discretion to create a sort of triage to marshal limited resources, it makes no sense to not at the minimum, process aliens who are released from prisons if for no other reason than to create a record of these individuals with DHS that coincide with the arrest records that landed them in jail, no matter the outcome of the criminal

proceedings. These are, after all, illegal aliens and the immigration law does not preclude deporting aliens who are present in the United States in violation of law.

Because of an extreme lack of resources and for other possible reasons as well, large numbers of applications for immigration benefits are being processed without the aliens who filed the applications being called in for face-to-face interviews. This exacerbates the potential for fraud. This sort of fraud undermines the integrity of the entire immigration system and, as you will see in my more detailed responses, creates profound national security vulnerabilities for the United States.

Your other questions dealt with finding alternatives to holding illegal aliens in detention facilities. These decisions need to be treated the same way that a bail hearing is conducted taking primarily two issues into consideration, namely risk of flight and danger to the community. These decisions must be deliberative and fact-driven. In far too many cases, the release of illegal aliens from custody has resulted in an abysmal rate of absconders who fail to appear when they are supposed to. This undermines the integrity of the immigration system and ultimately encourages more illegal immigration.

You also asked about the Supreme Court decision that mandates that aliens may not be kept in custody for more than six months if they cannot, for one reason or another be deported. In conjunction with this issue are those countries that refuse to provide travel documents to their citizens who are ordered deported. Your concern properly included how these cases might impact public safety, especially where criminal aliens are concerned. Your concerns should be the concerns of both the administration as well as you colleagues in both houses of Congress.

I believe that the State Department needs to work with those countries and see what leverage can be exerted to get those countries to comply. Perhaps we could tighten up on the visa issuance process or look at funding the United States is providing those countries. This goes outside my area of expertise, but as my mom used to say, "Where there is a will, there is a way!"

Let's now move on to my more detailed responses by noting that at present, members of Congress and the administration are debating the issue of Comprehensive Immigration Reform with many politicians stating that they could not support Comprehensive Immigration Reform until and unless the U.S. / Mexican border is made secure. The point being ignored by them is that our immigration system consists of far more than that border. The immigration system has many moving parts. The insightful questions that you have given me are wide ranging but still don't cover all of the components of the immigration system. These questions provide ample evidence that there is far more to the issue of immigration than the security (or lack thereof) to be found along America's Southwest Border.

I have come to think of the issue of security of the U.S. / Mexican border as being analogous to the wing on an airplane, without the wing the airplane will not fly, however, a wing by itself will go nowhere.

Synergy has been described as a situation wherein the total effect of a cooperative effort is greater that then sum of the components operating individually. A successful team is a good example of synergy. Immigration has always lacked this team approach. Consider that no matter what efforts may be expended to secure the Southwest Border of the United States, there will be no meaningful success if determined individuals know that as long as they are willing to be stopped numerous times by the Border Patrol that they can ultimately make their way past the Border Patrol and gain access to the interior of the United States, where sanctuary cities and states are willing to effectively shield them

from detection by the federal government.

Meanwhile, if this is a game of "hide and seek," the aliens might be hiding, but the federal government is certainly not seeking.

The federal government itself has made it clear that once an alien runs the border, if he or she can make it into the interior of the United States it will be easy to find a job and hide in plain sight with the hope that the administration's stated goals of providing pathways to United States citizenship for illegal aliens will include them. All that they will need to do is obtain bogus documentation that will attest to whatever will be necessary to, at least on paper, (and phony paper at that), provide evidence that the alien in question meets the requirements.

The highly publicized and utterly unprecedented policies of the current administration to not seek to arrest or seek the removal of illegal aliens who have no convictions for serious crimes, provides encouragement for aspiring illegal aliens around the world to head for the United States.

In 1986 the Reagan Administration enacted a massive amnesty program that was supposed to involve about one million illegal aliens. By the time the bureaucratic dust settled, more than 3.5 million illegal aliens availed themselves of the opportunities presented by the implementation of IRCA (the Immigration Reform and Control Act). My colleagues and I who worked for the INS back then were convinced that while some of the increase in actual aliens who applied for amnesty as compared with the original estimates was the result of an under-estimation by the administration and politicians who were eager to enact IRCA, we also were positively convinced that many of these illegal aliens had entered the United States well beyond the cutoff date and lied about their arrival dates on their applications.

Back then the production of fraud-laden supporting documents literally became a cottage industry. Today, with all of the advances in computers and desk-top publishing it is likely that there will be no shortage of fraud document vendors who know that they run nearly no risk of detection and hence no risk of prosecution.

Failures to enforce the immigration laws from within the interior of the United States, expansion of the Visa Waiver Program, and lack of real quality control in the immigration benefits program all act to undermine border security.

When aliens are able to enter the United States by evading the Border Patrol or by violating the terms of their admission into the United States when they enter under the auspices of the Visa Waiver Program or by acquiring a visa through fraud, they add to the constantly growing population of illegal aliens in the United States. These illegal aliens wind up taking more jobs, sending more money back to their home countries and perhaps becoming involved in identity theft and filing more applications for immigration benefits such as engaging in sham marriages that, because of a lack of resources at ICE and USCIS and political will, often go undetected. These factors succeed in creating an ever-growing population that acts as a huge "haystack" in which transnational criminals and international terrorists hide themselves in the United States. This creates a vicious cycle and it is self-perpetuating.

In addition to creating obvious national security vulnerabilities and creating opportunities for transnational criminals to set up shop, especially in the immigrant communities across America, comprised of immigrants from around the world, this of influx of foreign workers entering the United States likely outpaces the number of new jobs that are being created.

This constitutes the reverse of synergy- here the sum of the parts are working in opposition to the disproportionate detriment to the enforcement of our immigration laws and the stated goal of achieving

border security.

What has always been lacking in efforts that were purportedly implemented to solve the immigration crisis that confronts the United States, is a vision of immigration as a coherent system that needs to work in a coordinated fashion. The interior enforcement mission has been all but neglected and even when interior enforcement is discussed, it usually focuses on punishing employers who intentionally hire illegal aliens and seek to apprehend aliens who have been convicted of serious crimes. These goals are, undeniably essential, however, immigration benefit fraud goes largely undetected and therefore unpunished. Consequently national security is compromised as is the system that is supposed to protect the jobs of high-tech American workers who face unfair competition from foreign workers.

These are not new problems. The predecessor agency, the INS, failed abysmally to secure America's borders and enforce the immigration laws. The evidence of these failures is found in the huge numbers of illegal aliens who are present in the United States. The failures certainly manifested themselves when, in 1993 and again in 2001, terrorists who gamed the visa process and/or the immigration benefits program were able to mount terrorist attacks in the United States, killing thousands of innocent victims and profoundly impacting so many other aspects of life in America and, indeed, around the world in the aftermath of those attacks.

Those terrorist attacks of 9/11 were horrific. They were the stuff of the worst nightmares.

The 9/11 Commission issued a report, as did the 9/11 Commission staff that contained the findings of the investigation the 9/11 Commission conducted in the wake of those attacks with recommendations to make certain that everything that could be reasonably done to protect the United States against future attacks was done.

Here is the link to the 9/11 Commission Staff Report on Terrorist Travel:

http://govinfo.library.unt.edu/911/staff_statements/911_TerrTrav_Monograph.pdf

Both reports made it clear that the terrorist attacks could not have been carried out if the terrorists could not have entered the United States in the first place and then not had been able to embed themselves afterwards, thereby enabling them to hide in plain sight,

First of all, here is the first paragraph from the preface of the 9/11 Commission Staff Report on Terrorist Travel:

"It is perhaps obvious to state that terrorists cannot plan and carry out attacks in the United States if they are unable to enter the country. Yet prior to September 11, while there were efforts to enhance border security, no agency of the U.S. government thought of border security as a tool in the counterterrorism arsenal. Indeed, even after 19 hijackers demonstrated the relative ease of obtaining a U.S. visa and gaining admission into the United States, border security still is not considered a cornerstone of national security policy. We believe, for reasons we discuss in the following pages, that it must be made one."

Here is a paragraph under the title "Immigration Benefits" found on page 98:

"Terrorists in the 1990s, as well as the September 11 hijackers, needed to find a way to stay in or embed themselves in the United States if their operational plans were to come to fruition. As already discussed, this could be accomplished legally by marrying an American citizen, achieving temporary worker status, or applying for asylum after entering. In many cases, the act of filing for an immigration benefit sufficed to permit the alien to remain in the country until the petition was adjudicated. Terrorists were free to conduct surveillance, coordinate operations, obtain and receive funding, go to school and learn English, make contacts in the United States, acquire necessary materials, and execute an attack."

When I was growing up I recall that among the lessons taught to me by my parents was something my dad was absolutely adamant about. He said that there were no mistakes in life- only lessons, provided that we learned from what went wrong and made the appropriate changes in the way we do things. He was forgiving of me if I made a mistake the first time- but was completely intolerant if I failed to learn from previous mistakes.

Albert Einstein has been quoted as saying, "Insanity is doing the same things the same way and expecting a different outcome."

Our government has clearly not learned the lessons that the attacks of 9/11 should have taught us.

The creation of the Department of Homeland Security was our government's response to the terrorist attacks of September 11, 2001. The DHS is, however, hobbled by many factors- first and foremost are two- a lack of personnel and a lack of political will to effectively deal with the failures of the immigration system that made the 9/11 terrorist attacks possible.

Furthermore, with the creation of DHS, the missions of the former INS were divided into different agencies and combined with other law enforcement agencies and missions that diluted the focus of the employees who are charged with enforcing and administering the immigration laws of the United States that are contained in the Immigration and Nationality Act (INA).

At present there are just a few thousand ICE (Immigration and Customs Enforcement) agents who are charged with enforcing the immigration laws. Consider that the New York City Police Department has more than 35,000 police officers who are assigned to protect the City of New York.

According to published statistics, ICE has about 7,000 special agents and more than half of them are assigned to enforcing customs and other laws which have no bearing on violation of the immigration statutes.

This means that there are fewer than 10% as many ICE agents protecting the entire United States of America through the enforcement of immigration laws as there are police officers protecting the City of New York.

Additionally, statements made by the President and members of the administration about the need to place unknown millions of illegal aliens on pathways to citizenship and the implementation of DACA by executive order, have convinced aspiring illegal aliens from around the world that violations of America's borders and immigration laws will not only go unpunished but rewarded.

It has been said that you only have one opportunity to make a first impression. Failures to truly secure America's borders and statements made about how violations of immigration laws will not be enforced send a very dangerous message to folks around the world, including terrorists who seek to enter the United States and embed themselves in the United States awaiting a call to action.

Evidence that the DHS has failed abysmally in enforcing the immigration laws can be found in the fact that there are more illegal aliens present in the United States than ever before. Equally worrying is the fact that USCIS routinely issues immigration benefits and identity documents without even conducting face-to-face, in person interviews, as my answers will address shortly, reenforces the failures of the DHS to address the vulnerabilities that enabled the terrorists to attack the United States on its soil in 1993 and again in 2001.

These failures also result in thousands of people falling victim to criminal aliens who are at large across the United States, committing crimes on a daily basis including members of pernicious and violent transnational gangs and drug trafficking organizations. Each year, many more people fall victim to crimes of violence committed by alien criminals present in the United States than were killed on September 11, 2001. Many of these victims of criminal aliens would still be alive, had DHS lived up to its responsibilities of truly securing America's borders and effectively enforcing America's immigration laws from within the interior of the United States

Additionally, it must be presumed that aliens who support terrorism are also present among the unknown millions of illegal aliens who currently live and work in towns and cities across the United States, hiding in plain sight.

Violations of our immigration laws are not victimless crimes but under the current administration's policies, as I noted when I recently participated in a recent interview on a national news program, today violations of immigration laws have become punishmentless (sic) crimes.

Ample evidence of the failures of the DHS to perform its vital missions abound today.

There is a saying that a chain is as strong as its weakest link. As my responses to your questions will make crystal clear, in my judgement, if we compare the immigration system to a chain, that chain consists of weak and all but non-existent links.

Today there are millions of illegal aliens currently present in the United States whose true identities (including their true nationalities), backgrounds, potential affiliation with criminal and/or terrorist organizations and intentions for coming to the United States in violation of law are unknown and unknowable. This makes it clear, that for determined foreign nationals who desire to enter the United States by any means possible, including running America's borders thereby evading the inspections process that is supposed to protect national security, community safety and the jobs of American workers.

Secretary Napolitano has issued statements at press conferences in which she noted that hundreds of American cities have become infested by members of the extremely violent Mexican drug cartels and other violent transnational gangs. In those statements she provided ample substantiation that DHS is doing an abysmal job of living up to its primary responsibility of protecting American lives.

It is incongruous for her to say that the borders are secure while also reporting that increasing numbers of transnational gang members are operating in cities across our vast nation.

While there has been ample attention paid to the security, or lack thereof, to be found along the U.S. / Mexican border that is *supposed* to separate the United States from Mexico, other components of the immigration system are almost never discussed. While the debate about "border security" rages with an occasional nod given to the need to penalize employers who intentionally hire illegal aliens, the issue of the way that applications for residency and naturalization are processed is never raised. This is a huge oversight because it is through the adjudications process that the United States, in effect, hands out the "Keys to the Kingdom."

In January 2013, the Center for Immigration Studies issued a report on that provided ample examples of naturalized citizens who subsequent to naturalizing and thereby acquiring United States citizenship committed crimes involving that created national security threats for the United States:

- April 7, 2009, Shu Quan-Sheng, a *naturalized U.S. citizen* and Ph.D. physicist originally from China, was sentenced to 51 months in prison for illegally exporting space launch technical data and defense services to the People's Republic of China.
- May 4, 2010, Faisal Shazad, a *naturalized U.S. citizen* originally from Pakistan, is arrested and charged with an attempted bombing in New York City's Times Square.
- July 16, 2010, Jirair Avanessian, aka Jerry Avanes, a *naturalized U.S. citizen* originally from Iran, pled guilty to exporting to Iran in violation of law, vacuum pumps and pump-related equipment required for uranium enrichment.
- October 5, 2010, Faisal Shahzad, a *naturalized U.S. citizen* originally from Pakistan, was sentenced to life in prison after pleading guilty to an attempted bombing in New York City's Times Square.
- June 22, 2011, Hamid "Hank" Seifi, a *naturalized U.S. citizen* originally from Iran, was sentenced to 56 months in federal prison for conspiring to export parts for attack helicopters and fighter jets to Iran.
- July 11, 2011, Boniface Ibe, a *naturalized U.S. citizen* originally from Nigeria, was sentenced to prison for exporting arms and ammunition to Nigeria without a license.
- October 11, 2011, Manssor Arbabsiar, a *naturalized U.S. citizen* originally from Iran, is arrested with an Iranian co-conspirator and charged with plotting to assassinate the Saudi Arabian ambassador to the United States, a plot allegedly masterminded by the Iranian government.
- October 3, 2012, Alexander Fishenko, a *naturalized U.S. citizen* originally from Kazakhstan, is arrested with 11 other subjects after being federally indicted for stealing American military secrets on behalf of Russia over a period of several years.

This report also noted that in 2011 the United States naturalized 694,193 aliens, bestowing United Stats citizenship upon them. Even though one of the requirements for naturalization is that the person possess Good Moral Character, the extreme lack of resources at USCIS and ICE make it unlikely, if not impossible, that applicants for naturalization will have their backgrounds thoroughly investigated.

Furthermore, prior to a ruling by the federal Ninth Circuit Appeals Court in July 2000, aliens who committed fraud in their applications could be stripped of their citizenship through an administrative process. The decision of the Ninth Circuit eliminated this possibility and currently the only way for a naturalized citizen who commits fraud in his (her) application for citizenship is through civil suit or criminal prosecution in federal court.

Time and again officials at DHS promise to reduce or eliminate the backlog of applications to adjudicate applications for benefits more quickly. During his State of the Union Address President Obama discussed immigration. Here is a brief quote from his address:

"And real reform means fixing the legal immigration system to cut waiting periods, reduce

bureaucracy, and attract the highly-skilled entrepreneurs and engineers that will help create jobs and grow our economy."

My concern is that in pushing to clear up backlogs or, in the words of the President, "...fixing the legal immigration system to cut waiting periods, reduce bureaucracy..." the pressure will be on for the Adjudications Officers at USCIS to approve applications. What is not generally known is that an application can be approved in minutes while a denial may take hours or days. This is because a denial requires the preparation of a detailed report to make certain that if a denial is appealed that there is ample documentation to justify the denial.

As more applicants for immigration benefits that contain fraud, and the fraud is not detected, still more aliens will be emboldened to file fraudulent applications, thereby further increasing the workload at USCIS requiring the bureaucratic conveyor belt to run ever faster. It is a well established principle that there is an inverse relationship between speed and accuracy. As the bureaucracy reacts to the influx of more applications by working faster and vestiges of integrity will continue to erode.

Today, in fact, from what I have been told, applications for DACA (Deferred Applications for Childhood Arrivals) are processed without face-to-face interviews. This is a prescription for fraud and a national security nightmare for America.

Let us consider, once again an important excerpt from the 9/11 Commission Staff Report on Terrorist Travel. This is a paragraph under the title "Immigration Benefits" found on page 98:

"Terrorists in the 1990s, as well as the September 11 hijackers, needed to find a way to stay in or embed themselves in the United States if their operational plans were to come to fruition. As already discussed, this could be accomplished legally by marrying an American citizen, achieving temporary worker status, or applying for asylum after entering. In many cases, the act of filing for an immigration benefit sufficed to permit the alien to remain in the country until the petition was adjudicated. Terrorists were free to conduct surveillance, coordinate operations, obtain and receive funding, go to school and learn English, make contacts in the United States, acquire necessary materials, and execute an attack."

If USCIS lacks to resources to conduct in person interviews and is largely unable to conduct meaningful field investigation, what would the implementation of Comprehensive Immigration Reform do to this overwhelmed agency? We are told that these applications would be subjected to "security checks." What is not generally known, however, is that a security check is nothing like a security investigation. All that a security check entails is running the name of the applicant through a series of databases. If the alien applicant provides a false name, this component of the "security check" will be utterly worthless. If the alien in question has never been fingerprinted in the United States, there is a good chance that his (her) fingerprints will also come back as a "no hit" meaning that there is no derogatory information for that applicant. Many countries do not fully share their fingerprint records with the United States and even those that do may not have reliable systems in place- especially when we are dealing with Third World countries.

You asked about the reported loss of 111,000 relating immigration files concerning applications for

immigration benefits. The report that disclosed this shocking state of affairs at USCIS also noted that of the 111,000 files some 30,000 related to applications for United States citizenship. It was reported that the Adjudications Officers processed those applications without having the files available to them. They were literally "flying blind." I have never seen any reports that indicated that any disciplinary actions were taken as a result of this monumental example of misfeasance and possibly, malfeasance. I have no evidence to support my theory, but it forces me to wonder "out loud" if perhaps the files were intentionally not provided to the Adjudications Officers to enable them to process (approve) applications faster than would have been possible if they had to actually read the relevant files before rendering their decisions.

Again I am compelled to reiterate that I have absolutely no evidence that this happened, but as a former Adjudications Officer (I was detailed to the I-130 Unit back in the mid 1970's to conduct the marriage interviews for approximately one year, I could not imagine adjudicating a single application without the relating file in front of me, hear we are talking about such a process taking place years after the terrorist attacks of September 11, 2001 and tens of thousands of files were not provided to the adjudicators. This is a level of malfeasance that I personally find incomprehensible.

To expand on this point for a moment- On March 19, 2002 I was called to testify before the House Subcommittee on Immigration, Border Security and Claims on March 19, 2002 I joined three other witnesses at a Congressional hearing that was convened by the House Committee on the Judiciary, Subcommittee on Immigration and Claims, on the topic:

"INS'S MARCH 2002 NOTIFICATION OF APPROVAL OF CHANGE OF STATUS FOR PILOT TRAINING FOR TERRORIST HIJACKERS MOHAMMED ATTA AND MARWAN AL-SHEHHI"

Here is the link to the transcript of the hearing in its entirety

http://commdocs.house.gov/committees/judiciary/hju78298.000/hju78298_0f.htm

Here is a link to the C-Span video of the hearing:

http://www.c-spanvideo.org/program/id/165862

That hearing was convened when it was discovered that six months to the day, after the terrorist attacks of September 11, 2001 two of the dead terrorists, Mohammed Atta and Marwan Al-Shehhi had been granted authority by the former INS to change their immigration status so that they could attend flight school in the United States. You would have thought that this example of gross ineptitude and incompetence would have served as a wake up call to the leadership at USCIS but clearly it did not.

When I worked for the former INS, my colleagues and I were often frustrated and troubled by the failures of the INS to carry out its missions competently. I recall that out of frustration I had said that when I first found examples of incompetence I said the agency was in a state of "free-fall" and that bottom was elusive. In reading the reports and accounts of how the DHS now functions I would have to amend that assessment and tell you that bottom is not elusive- it is illusory- there apparently is no bottom.

You asked me about my perspectives on the H-1B Visa Program and I am so glad that you did. Prior to the Second World War the responsibility of enforcing and administering our nation's immigration laws

was the responsibility of the United States Department of Labor. Back then America's leaders in Washington who were a part of the "Greatest Generation" understood that it was vital to provide opportunities for American workers to excel. The concept behind the immigration laws was to make certain that American workers not face unfair competition from foreign workers. By doing this the United States created the largest most upwardly mobile Middle Class of any nation on the planet. This gave rise to the "American Dream."

Today we are told that unless we import foreign workers America will no longer be successful. According to the oft stated slogans it would appear that American workers are too lazy to do the hard dangerous jobs and too stupid to do the high-tech jobs. This is insulting to every hard working American worker, yet this is precisely what we are being told by all too many politicians who, at least in theory, were elected to represent American workers and their families.

Having raised this issue I am compelled to talk for a bit about Alan Greenspan, the former head of the Federal Reserve Bank.

On April 30, 2009 he was called by the Senate Immigration Subcommittee chaired by Senator Schumer to testify at a hearing conducted by that subcommittee on the topic

"Comprehensive Immigration Reform in 2009, Can We Do It and How?"

Here is a link to this hearing as it appears on the Senate Immigration Subcommittee Website:

http://www.judiciary.senate.gov/hearings/hearing.cfm?id=e655f9e2809e5476862f735da147e5ee

Mr. Greenspan's prepared testimony can be found at:

http://www.judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da147e5ee&wit_id=e655f9e2809e5476862f735da147e5ee-1-2

Mr. Greenspan's testimony provided some statements concerning his views on immigration that appear to run contrary to the best interests of American workers but would seem to be consistent with the views of those who favor the implementation of "Comprehensive Immigration Reform."

I would ask that you consider some of these troubling statements:

"Our skill shortage, I trust, will ultimately be resolved through reform of our primary and secondary education systems. But, at best, that will take many years. An accelerated influx of highly skilled immigrants would bridge that gap and, moreover, carry with it two significant bonuses.

First, skilled workers and their families form new households. They will, of necessity, move into vacant housing units, the current glut of which is depressing prices of American homes. And, of course, house price declines are a major factor in mortgage foreclosures and the plunge in value of the vast quantity of U.S. mortgage-backed securities that has contributed substantially to the disabling of our banking system. The second bonus would address the increasing concentration of income in this country. Greatly expanding our quotas for the highly skilled would lower wage premiums of skilled over lesser skilled. Skill shortages in

America exist because we are shielding our skilled labor force from world competition. Quotas have been substituted for the wage pricing mechanism. In the process, we have created a privileged elite whose incomes are being supported at noncompetitively high levels by immigration quotas on skilled professionals. Eliminating such restrictions would reduce at least some of our income inequality."

First it is important to note that Mr. Greenspan is being, to use a generous term, "disingenuous" when we says that education reform will alleviate what he claims is a "skill shortage" in America. I say this because even if you believe that there is such a skill shortage- and I am not convinced of this, by reducing "wage premiums" as he refers to the salaries paid to American skilled workers, we will remove incentives for Americans to attend universities and trade schools. I believe in providing incentives for achievement. This is at the foundation of capitalism. If we reduce "income inequality" I fear that we will convince many Americans that acquiring skills and education, at great expense, will not likely enable them to earn more money.

Next it would appear that Mr. Greenspan would use a massive influx of foreign workers and their families to shore up the housing market that subprime mortgages undermined. Mr. Greenspan had been a key advocate for those mortgages just a few years earlier. In essence it would appear that in part, he views increases in immigration as a way of importing customers for houses that American families lost to their inability to make mortgage payments and to foreclosure when they lost their jobs.

It is clear that Mr. Greenspan is not a fan of expanding our Middle Class. In fact, it would certainly appear that if he had his way he would reduce the wages of American workers who have skills (or education). Here is the sentence in which he makes this goal of his abundantly clear

"Greatly expanding our quotas for the highly skilled would lower wage premiums of skilled over lesser skilled."

It is disconcerting that Greenspan used the term *"wage premiums"* to describe salaries. Furthermore, the next few sentences illuminate his goals which clearly run contrary to the best interests of hard working Americans and their families:

"Skill shortages in America exist because we are shielding our skilled labor force from world competition. Quotas have been substituted for the wage pricing mechanism. In the process, we have created a privileged elite whose incomes are being supported at noncompetitively high levels by immigration quotas on skilled professionals. Eliminating such restrictions would reduce at least some of our income inequality."

It is the height of chutzpah for Mr. Greenspan to refer to Americans who have worked hard to acquire skills or education to improve their lives as *"a privileged elite"* who, in his judgement, need to face foreign competition to eliminate *"income inequality."* This last phrase, *"income inequality"* is particularly worrisome and offensive at the same time.

Americans are sensitive to the need to eliminate inequality when it is based on race, religion, ethnicity, gender and age. In fact these concerns have been codified in laws and regulations that are enforced and administered by the federal government as well as state and local governments. Here Mr. Greenspan's use of the term "income inequality" is both deceitful and infuriating– he uses this term to describe the salaries of American workers who are paid more when they achieve more in terms of acquiring skills and education which, I might add, currently often cause these Americans who take the time, money and effort to acquire those skills to owe massive student loans that are the equal of many home mortgages.

For generations the path to attaining success in America was often linked to acquiring skills and education. This was largely responsible for the "American Dream." Today we have come to see the new reality for many American families. For the most part, it is feared that today's young workers will not do as well as their parents did. This is a reversal of America's generations-old trend and expectation that succeeding generations would, by and large, do better financially than their parents did.

Failures to properly administer the H-1B Visa Program has resulted in two problems. First of all, since there is a lack of resources to investigate all but a relative handful of those companies that file applications for H-1B workers and to make certain that once such foreign workers enter the United States that they are not being hired by companies that could have found suitable and qualified American and lawful immigrant workers. The consequence is not only that American and lawful immigrants may have been displaced in the workforce, but that the wages that the American and lawful immigrant would have earned are being earned by foreign workers who are eager to send their wages back to their homelands. This acts as a drain to the economy of the United States. Additionally, by not adhering to the limitations in the number of H-1B visas that are in place, even more high-tech workers are being admitted into the United States exacerbating the plight of American workers who, although qualified, are displaced by foreign workers.

Each month, even as record numbers of American workers who are unemployed or under-employed the United States continues to import tens of thousands of foreign workers who are authorized to work in the United States.

The H-1B Visa Program failures whether by design, ineptitude or both runs parallel to the clearly articulated goals of Mr. Greenspan who would, if he could, eliminate immigration quotas altogether.

It is clear that when he speaks of "Immigration Reform" Greenspan wants to bring an end to the notion that our immigration laws are supposed to protect the jobs, wages and working conditions of dedicated and talented American workers.

Next, you have asked my thoughts about the biometric exit system that was mandated by Congress

in 1996 and further mandated by no less a body than the 9/11 Commission.

Billions of dollars and nearly two decades after Congress mandated the creation of a system that would track the entry and departure of aliens into the United States the system known as US-VISIT is still dysfunctional.

It is worth noting that the company that received the bulk of the funding, Accenture, is an offshore company that had previously been headquartered in Hamilton, Bermuda and is now based in Ireland.

The failure to fully and effectively implement this program creates a national security vulnerability for the United States and also fails to provide important information that was to be a part of the certification process for countries that participate in the Visa Waiver Program.

I personally am of the belief that the Visa Waiver Program that currently enables the citizens of 37 countries to seek to enter the United States for up to 90 days, without first applying for and receiving a visa. Taiwan is the most recent country to join this list of countries– having been added in November 2013. This is an ill-conceived program for reasons I will enumerate shortly. Furthermore, the lack of reliable information about the percentage of nonimmigrant aliens who overstay their authorized period of stay in the United States has an adverse impact on the integrity of the Visa Waiver Program because although one of the key requirements that were to have been met by participating countries cannot be determined. That requirement was that the citizens of those countries that participate in the Visa Waiver Program are not prone to overstaying their authorized period of time. The failure of US-VISIT to track that data has a deleterious impact on the certification process for the Visa Waiver Countries.

This failure also make it impossible to know the true number of illegal aliens who have overstayed their authorized period of admission into the United States. Generally this number is estimated to be approximately 5 million, but there is no reliable way of knowing the actual number, but it is likely even higher.

Having raised the issue of the Visa Waiver Program, here is the list of the 6 benefits that I have compiled, that the visa requirement provides to national security and that the Visa Waiver Program denies airline safety and America's intelligence and law enforcement agencies:

1. By requiring that visas aliens who seek to enter the United States, foreign passengers who intend to fly on airliners to travel to the United Stats are, in effect, pre-screened by the visa process. To cite one of several examples, Richard Reid, the so-called "Shoe Bomber" was able to board an airliner to come to the United States although he had no intentions of entering the United States, his apparent goal was to blow up the airliner and its many passengers somewhere over the depths of the Atlantic Ocean by detonating explosives he had concealed in his shoes. Because he is a subject of Great Britain, a country that participates in the Visa Waiver Program, Reid did not obtain a visa before he boarded that airliner.

2. The CBP inspectors are supposed to make a decision in one minute or less as to the admissibility of an alien seeking to enter the United States. The visa requirement helps them to do a more effective job.

Their's is a tough job I can certainly relate to, as you know, I began my career at the former INS as an immigration inspector at John F. Kennedy International Airport in New York and worked there for 4 years before I became a special agent.

3. The application for a nonimmigrant visa contains roughly 40 questions that could provide invaluable information to law enforcement officials should that alien become the target of a criminal or terrorist investigation. The information could provide intelligence as well as investigative leads. Here is the link to the application nonimmigrant tourises must complete in order to receive a visa: https://evisaforms.state.gov/ds156.asp

4. If an alien applicant lies about a material fact on the application for a visa that lie constitutes "visa fraud." The maximum penalty for visa fraud starts out at 10 years in jail for those who commit this crime simply in order to come to the United States, ostensibly to seek unlawful employment or other such purpose. The penalty increases to 15 years in jail for those aliens who obtain a visa to commit a felony. For aliens who engage in visa fraud to traffic in narcotics or commit another narcotics-related crime, the maximum jail sentence that can be imposes rises to 20 years. Finally, when an alien can be proven to have engaged in visa fraud in furtherance of terrorism, the maximum penalty climbs to 25 years in prison. It is important to note that while it may be difficult to prove that an individual is a terrorist, it is usually relatively simple to prove that the alien has committed visa fraud when there is fraud involved in the visa application. Indeed, terror suspects are often charged with visa fraud.

5. The charge of visa fraud can also be extremely helpful to law enforcement authorities who want to take a bad guy off the street without tipping their hand to the other members of a criminal organization or terrorist organization that the individual arrested was being arrested for his involvement with that organization and his co-conspirators. In arresting an alien for visa fraud and not for crimes in which he conspired with others, prevents his cohorts from being tipped off that they may also be targets of an investigation that is targeting their criminal or terrorist organization.

6. Even when an alien applies for a visa and his application is denied, the application he (she) filed remains available for law enforcement and intelligence personnel to review to seek to glean intelligence from that application.

Finally, to wrap up my answers to the first series of questions, the issue of the release of more than 2,000 aliens, among whom we must presume had criminal convictions leaves me speechless. For years the administration has claimed that because of the decision to prioritize the use of limited resources, the ony aliens who would be taken into custody are aliens with serious criminal histories. If we take those statements at face value, this means that the aliens who have been released would have had serious criminal histories.

Thus far, to my knowledge, the names and backgrounds of these aliens has not been made public. I am greatly concerned that some of these criminals may harm more victims now that they have been released. Without knowing the identities of these liberated criminal aliens there will be no way of knowing if criminal aliens who kill or injure people had been among those set free.

On March 5th of this year, Texas Governor Perry referred to this ill-conceived decision as a "Federally sponsored jail-break." I believe he was exactly right in describing it that way.

Every time a law enforcement officer makes an arrest, the potential exists that the officer or others will be injured, or worse. The cost for making arrests can be far higher than a financial cost. I have attended more funerals for law enforcement officers than I wanted to.

By releasing criminals back out onto the street a serious danger is created for public safety and to the safety of law enforcement officers who may encounter that criminal in the future. It makes absolutely no sense to take criminal aliens who are already in custody and then release them.

The ICE (Immigration and Customs Enforcement) website where that agency posts news releases of accomplishments of the valiant enforcement personnel of that agency is replete with a stack of news releases that herald the arrest of criminal aliens. In many, many instances, it is noted that the aliens arrested were fugitives or absconders. The terms "fugitive" and "absconder" implies that the person had been in custody and, in one way or another, was set free.

Sometimes these news releases provide reports on violent crimes that they have committed while they were at large.

They had been in custody and then, somewhere along the way, they came to be released. Each time I read these news releases I am compelled to wonder at the reason that such criminals were released so that weeks, months or years later ICE could mount a field operation, often with a macho name, to try to locate and re-arrest these same criminals. I sincerely doubt that the government needs to make work for these beleaguered law enforcement officers.

2. Because of a Supreme Court ruling, the immigration service can only hold an illegal alien for six months. During this time, the department works with the foreign government to remove the immigrant. Many times, that foreign country puts up barriers and will not provide travel documents. Can you shed light on why a change is needed? Are you aware of any examples where illegal immigrants were released back into the community and committed a violent crime?

Answer:

While there are certainly millions of illegal aliens who are present in the United States because they were able to evade the inspections process by running America's borders or by stowing away on various vehicles or vessels without being detected as those means of conveyance entered the United States, it is estimated that there are at least five million aliens who are currently present in the United States who were admitted via the inspections process and then went on to violate the terms of their admission. While the term "overstayed" is often applied to such aliens, in point of fact, often there is far more involved than aliens who don't simply leave within the authorized period of admission. Many

aliens who are admitted with tourist visas or under the auspices of the Visa Waiver Program overstay their authorized period. Most of these do so in order to accept unlawful employment.

In some instances aliens who were admitted to attend universities either never attend those universities (some of which may well exist only on paper) or they drop out of school but remain in the United States without authorization. In other instances, aliens are admitted so that they can perform authorized temporary work either fail to show up at those work sites altogether or work there for a short period of time and then seek unauthorized employment.

Finally, some aliens who were lawfully admitted, either as immigrants or nonimmigrants commit serious crimes for which they are subsequently found guilty and thus become deportable.

However, an alien who is found deportable and ordered deported or who agrees to return to his (her) home country voluntarily will not be removed from the United States if the alien's country of citizenship refuses to provide that alien with a passport or comparable travel document.

When countries refuse to accept their own citizens who violate the immigration laws of the United States, it is often because the citizens in question have serious criminal histories and their countries of citizenship don't want to have these criminals sent home where they are likely tto continue their criminal "careers."

Because of the six month limit for detention for such criminal aliens, these aliens ultimately are placed back on the streets in American communities where they pose a serious danger to the members of the communities where they live. In almost every instance, these communities are immigrant communities whose residence are of similar or the same ethnicity and nationality as the criminal alien.

While it is true that the United States cannot force such countries to permit their citizens to return home, I believe that the State Department can apply pressure to accomplish this. I know that there have been efforts at enacting legislation that would impact the visa issuance for citizens of those countries. While such legislation has never been enacted, in my judgement, it would be beneficial to the United States if a strategy can be found and implemented that would address this serious problem. Perhaps the State Department could apply pressure where the United States provides financial assistance to those non-compliant countries to help encourage them to become more cooperative.

As for your question about aliens who had been released from custody who subsequently commit crimes, I was involved in the arrest of a native of Cuba, a Chicago-based drug dealer by the name of Jesus Fidel Morales who entered into a criminal conspiracy to commit a murder of a drug courier, Kedric Bell, that took place in Chicago, Illinois on January 16, 1995.

Following the murder Morales fled from Chicago to New York City. I was a part of the Organized Crime, Drug Enforcement Task Force at the time and was contacted by David Kelley, one of the States Attorneys in Chicago who had been assigned to prosecute the case. I worked with members of the Chicago Police Department, the NYPD and DEA to take Morales into custody. In reviewing his immigration file I found that he had entered the United States as a part of the Mariel Boat Lift and that shortly after being paroled into the United States as a Cuban refugee he organized a car theft ring comprised of young men in Florida. He was arrested for crimes relating to his criminal activities and was subsequently taken into custody by the INS. Ultimately he was released and then became involved in the drug trafficking activities which culminated in the murder of Kedric Bell as noted above.

Additionally, under somewhat different circumstances, I was assigned to physically deport Renaldo Rayside, a criminal alien and citizen of Panama who had originally entered the United States as a lawful immigrant but subsequent to legally immigrating to the United States he was convicted of drug

trafficking felonies. Following his deportation he unlawfully reentered the United States and was, as my subsequent investigation determined, apprehended on two occasion by the NYPD. Because of the sanctuary policies of the NYPD the INS was never notified that Rayside had been arrested and he was subsequently set free.

On March 3, 1989 Rayside was encountered by two members of the NYPD's Brooklyn South Task Force, one of whom was Police Officer Robert Machate. At the time of the encounter, according to various accounts, which emanated from a car stop predicated upon a vehicle and traffic law violation, Rayside scuffled with Police Officer Machate and got hold of the police officer's service weapon and shots were fired. Officer Machate was fatally wounded. He was 24 years old at the time and his wife was pregnant with his daughter he would never see or hold.

I testified at the murder trial.

Had the NYPD notified the INS that they had arrested Rayside who, by having unlawfully reentered the United States following his deportation had committed a felony under federal law, it is likely that Rayside would not have been at large on that fateful day in March 1989.

It is unfathomable to me, as a former INS Special Agent, that when cities or states declare themselves to be "Sanctuaries" for illegal aliens that the federal government takes no action.

It is frustrating that when states or cities declare themselves to be "Sanctuaries" for illegal aliens, an apparent violation of Title 8, United States Code, Section 1324, that the federal government takes no substantive action.

Consider that under Title 8, United States Code, Section 1324, a section of law that is comprehended within the Immigration and Nationality Act (INA), it is a felony to aid, abet, encourage or induce aliens to enter our country illegally or remain in our country illegally.

Here is an excerpt from that section of law:

Title 8, U.S.C. § 1324(a) defines several distinct offenses related to aliens.

Subsection 1324(a)(1)(i)-(v) prohibits alien smuggling, domestic transportation of unauthorized aliens, concealing or harboring unauthorized aliens, encouraging or inducing unauthorized aliens to enter the United States, and engaging in a conspiracy or aiding and abetting any of the preceding acts. Subsection 1324(a)(2) prohibits bringing or attempting to bring unauthorized aliens to the United States in any manner whatsoever, even at a designated port of entry. Subsection 1324(a)(3).

Harboring -- Subsection 1324(a)(1)(A)(iii) makes it an offense for any person who -- knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals harbors, shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation.

Encouraging/Inducing -- Subsection 1324(a)(1)(A)(iv) makes it an offense for any person who -- encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law. Conspiracy/Aiding or Abetting -- Subsection 1324(a)(1)(A)(v) expressly makes it an offense to engage in a conspiracy to commit or aid or abet the commission of the foregoing offenses.

Furthermore, On December 18, 2012 the Washington Times published a news report that focused on a DHS Inspector General report that incompetence and ineptitude at USCIS was so rampant that criminals aliens have been able to remain in the United States, obtain jobs in sensitive locations and participate various social welfare programs.

Here is how the report begins:

"The federal governments system of tracking immigrants' status is so broken that it gives a green light to one in eight aliens who have been ordered deported, according to an audit Tuesday that found the government has gone on to approve some of those who slip through for work in sensitive areas of airports and granted them benefits such as Medicaid or food stamps.

Some of those aliens who should have been kicked out had serious criminal records, including for assault and extortion, according to the audit by the Homeland Security Department's inspector general.

All told, some 800,000 immigrants are living in the U.S. who already have been ordered deported but have not yet left — or been removed by the government — from the country."

3. Some of the witnesses have testified that using alternative methods to detention is an efficient allocation of resources and could fix the issue of overcrowding in detention facilities. What is your view on that?

Answer:

In order to assess alternative methods of detention a number of factors must be known. To begin with the potential danger to community safety and the safety of the people with whom these aliens would be staying with must be the number one concern. I have often testified at bail hearings in federal court as well as in state court. Bail hearings focus on two issues- risk of flight and danger to public safety. Any discussion about alternatives to detention should begin with these two factors.

It is also vital that the alien who is not remanded to a detention facility be effectively monitored to make certain that the alien in question does not simply vanish.

Years ago I recall that the Border Patrol engaged in a program known as "Catch and Release" whereby illegal aliens who were apprehended by the Border Patrol were released and sent on their way with a document known as an NTA (Notice To Appear). It is the equivalent of a summons issued to a motorist who violates vehicle and traffic law. Disgusted Border Patrol agents came to refer to those NTA's by a slightly different name, they called them "Notices To Disappear." In those instances the aliens involved were purportedly not criminal aliens. While the "Catch and Release" program of the Border Patrol got lots of attention in the media and at Congressional hearings, what was not generally known is that the special agents of ICE engaged in a similar program. However, criminal aliens were not

supposed to be released.

In the past, aliens who were released rarely appeared for hearings and failed to turn themselves in when they are ordered deported. In fact, in years past,when aliens were sent official notification that they needed to depart the United States they often fled. We came to refer to those notifications as "Run letters" because almost invariably, when an alien was sent such notification he (she) was likely to flee or run.

There was some discussion at the hearing about the use of GPS devices being used to keep track of aliens who would otherwise be detained. I have several concerns about this approach. It would be important to know if all of the aliens being released are required to wear such GPS devices and what happens when a device stops functioning or when an alien apparently leaves the areas to which they are limited.

It would be important to know how many aliens who are released are assigned to each ICE Deportation Officer who serve the equivalent function of a Probation or Parole Officer in the criminal justice system.

Finally, It would also be worth considering if such aliens are being given authority to work. To an unemployed or underemployed American or lawful immigrant worker a job is a valuable commodity. Aliens who are unlawfully present in the United States should not be able to be gainfully employed in the United States. Therefore the obvious question is, who will pay for the housing and related expenses of aliens who are not detained?

4. Under this administration, ICE detainer policy prohibits ICE agents from detaining illegal aliens unless they have committed a criminal offense independent of their illegal status. The administration says enforcement priorities allow law enforcement to focus on dangerous criminals and terrorists making our communities safer. Do you agree with that?

Answer:

Law enforcement has to make appropriate use of honest prosecutorial discretion to create a sort of triage to make certain that we get the most "bang for the buck."

However: while I have been a long-time advocate for prioritizing the use of limited resources to get the greatest impact from efforts and money expended, this should never mean that we wind up convincing those who would violate the laws that their violations might not have ramifications. As I noted in the conclusion of my testimony at the hearing:

Law enforcement is at its best when it creates a climate of deterrence to convince those who might be contemplating violating the law that such an effort is likely to be discovered and that if discovered, adverse consequences will result for the law violators. Current policies and statements by the administration, in my view, encourages aspiring illegal aliens around the world to head for the United

States. In effect the starter's pistol has been fired and for these folks, the finish line to this race is the border of the United States.

It is one thing for enforcement personnel at ICE to seek to apprehend aliens who have criminal histories, for example while not routinely looking to arrest aliens who violate the terms of their nonimmigrant visas. However, when ICE agent encounter illegal aliens who have no criminal histories during the course of their routine work- conducting fraud investigations, seeking to execute criminal and administrative warrants concerning criminal aliens, etc., these aliens need to be taken into custody and processed for deportation. When possible some should be detained. This is essential to maintain the integrity of the immigration system.

For decades the enforcement of America's immigration laws was hobbled by the mindset that if an alien managed to get past the Border Patrol or managed to gain entrance to the United States through the inspections process that it was not important for immigration enforcement personnel operating within the United States to seek to take these aliens into custody. It is an odd way to do business and as a direct consequence convinces people around the world that the United States is not serious about its borders or its laws.

As you may know, I like to use analogies to make a point. Imagine playing baseball and telling your outfielders to sit out the game when they should be playing their respective positions in the outfield. Under such a bizarre situation, any player on the opposing team who could hit the ball over the heads of the infield players would be almost certain to get an "in the park" home run. This would make it all but impossible for your team to win the game.

By not backing up the Border Patrol and the CBP Inspectors at ports of entry by having an adequate number of enforcement personnel dedicated to enforcing the immigration laws from within the interior of the United States, the immigration enforcement program is as hobbled as that mythical baseball team that has no outfielders. The consequence of this is evident in every city and town in the United States- we have unknown millions of illegal aliens present in the United States.

It is not "Anti-Immigrant" to find this situation unacceptable.

First of all, the United States admits more than 1.1 million lawful immigrants into the United States each and every year. These aliens are immediately placed on the pathway to United States citizenship. By not effectively enforcing the immigration laws we are devaluing the worth of lawful immigration and United States citizenship.

The immigration laws, as I noted during my testimony at the hearing, were enacted to protect innocent lives and the jobs of American workers. To substantiate this, just consider the categories of aliens who are deemed excludible under the provisions of the Immigration and Nationality Act.

The inspections process conducted at ports of entry is designed to prevent the entry of aliens whose presence would be detrimental to the United States and its citizens. Title 8, United States Code, Section 1182 enumerates the categories of aliens who are to be excluded. Among these classes are aliens who suffer from dangerous communicable diseases or extreme mental illness. Additionally convicted felons, human rights violators, war criminals, terrorists and spies are

excluded as well as aliens who would seek unlawful employment or become public charges.

Aliens who evade the inspections process apparently have something to hide. This is why they do not comply with the requirements of the Immigration and Nationality Act that they present themselves for inspection at a port of entry but rather sneak into the United States entering surreptitiously. In entering in "stealth mode" they create no record of their entry and there is no way of knowing who they are or why they are truly here.

We are being told that illegal aliens simply want to do the work that Americans won't do. This is not true- it is that while most are desperate and hence vulnerable to exploitation, they do work for wages and under conditions that Americans won't do. However, we know nothing about their true identities and backgrounds. This creates a monumental national security threat to the United States. In a number of Congressional hearings Robert Mueller, the Director of the FBI testified about his concerns about "sleeper agents." A sleeper agent is an foreign national (alien) who enters the United States in whatever method is available and best suits his (her) goals. They maintain a low profile until they are called into action. In point of fact, a day or two before a terrorist particiaptes in a terrorist attack he is likely to hide in plain sight by going to his job which almost always is a job that is nondescript and provides camouflage and mobility.

It is naïve to not understand how we are endangering national security by providing opportunities for terrorists and transnational criminals opportunities to enter the United States, acquire official identity documents in false names and facilitate their efforts to embed themselves in the United States.

By ignoring virtually all aliens who have no criminal convictions we are providing those who would kill innocent victims and undermine America's national security with a clear strategy that would enable them to be successful. All that a terrorist has to do is enter the United States and make his way to the interior of the United States and be careful to not get arrested for committing a felony. The administration's policies have removed a vital layer of national security by removing the immigration laws from the tool box of our law enforcement and intelligence agencies.

Additionally, by not arresting and deporting aliens who have no criminal convictions for serious crimes we are also enabling millions of illegal aliens to find work in the United States, displacing desperate American workers. The added "bonus" is that as might be expected, the vast majority of foreign workers send as much of their illegally earned money out of the United States to their home countries. Each year tens of billions of dollars that are earned by illegal aliens are drained out of the American economy. This is money not earned by American workers of every race, religion, and ethnicity.

This is money that is not spent in America and money that is not invested in America. Meanwhile it has been estimated that one in six Americans is currently receiving food stamps.

In his February 1, 2013 editorial, Mortimer Zuckerman, the chairman of *U.S. News & World Report* wrote:

"Mort Zuckerman: How We Can End Our Modern-Day Depression"

Zuckerman noted that the biggest difference between today's economic crisis and the Great Depression is that in the 1930s there were long lines of starving Americans waiting to be fed at soup kitchens while today's poor are invisible, staying home and receiving Social Security checks and food stamps.

Here is how Zuckerman described the growing American economic crisis:

"Today millions are assisted by checks from Social Security and by food stamps. Food-stamp enrollment has been rising at the rate of 400,000 per month. More than 47 million Americans now depend on that program, an almost incredible record, for it is 15 percent of the population compared with the 7.9 percent who received food stamps from 1970 to 2000.

"Meanwhile, nearly 11 million Americans are now collecting federal disability checks from Social Security, and half have signed on since President Obama came to office. In 1992, there was one person on disability for every 35 workers. Today it is one for every 16. Such an increase simply cannot have been caused by direct disability experienced during employment. This is in effect another unemployment program, one without end. Many of the people on disability would normally be considered unemployed."

With all of the talk about the need to create jobs for unemployed and under-employed American workers, why is the administration not willing to *liberate* jobs by removing millions of illegal aliens from the workforce by simply enforcing the immigration laws that are already on the books?

Creating jobs takes time and money- often lots of both. As an INS agent I have seen numerous instances where we raided a factory and removed a significant percentage of the illegal alien workforce and often within a day or two every job was taken by lawful immigrant and United States citizen workers. No expenditure of time or money was necessary. Only the resolve by the federal government to enforce the immigration laws that are already in place.

Refusing to lodge detainers against illegal aliens unless they have been convicted of committing serious crimes creates further encouragement for still more foreign workers to head for the United States confident that if they don't get arrested for committing felonies that for them, if not for American citizens and lawful immigrants, that America is indeed the "Land of Opportunity."

5. You testified that it is impossible to verify the information contained in applications for participation in any comprehensive immigration reform or the President's deferred action and prosecutorial discretion programs. Can you expand upon that?

Answer:

I provided a bit of information about the shortcomings and vulnerabilities inherent in the way that

USCIS fails to adjudicate the applications to make certain that there is meaningful integrity to the process in my response the the first question. Because of the extreme importance of this I will gladly provide some more information about my concerns which have been troubling me for many years. In fact, on June 22, 2007 the Washington Times published a commentary I had written about my concerns regarding the then pending "Comprehensive Immigration Reform Act" that bore the title, Immigration bill a 'No go.'

Here is the link to my commentary:

http://www.washingtontimes.com/news/2007/jun/22/immigration-bill-a-no-go/

Before we consider that commentary I want to make a few important points.

I have attached a copy of my piece at the end of my response.

One of the greatest challenges in law enforcement is to accurately and completely identify the person that a law enforcement officer comes into contact with during the course of his (her) official duties.

It is taken for granted that when a suspect is arrested that he will be fingerprinted and photographed as a part of the booking process. It is taken for granted that criminals and terrorists will use multiple false identities to disguise who they are. Criminals, terrorists and spies use changes in identity the same way that a chameleon uses changes in coloration as a form of camouflage, enabling them to hide in plain sight. In the parlance of the 9/11 Commission, this is how terrorists embed themselves.

There is a mistaken belief that by taking an individual's fingerprints a definitive identification of the person being fingerprinted can be made. The reality may be far different. When an alien evades the inspections process no record is created of that person's entry into the United States. Consequently there is no way of knowing when, where or how that alien actually entered the United States.

If that person claims to have no identity documents to verify his (her) identity, this is what "undocumented means," it becomes difficult if not impossible to determine that individual's true name or even nationality. This means that the background of the individual in question may never be accurately determined. Under any circumstance this would create grave national security vulnerabilities for the United States. However, in the post 9/11 world in which we live, the potential exists that terrorists would game any massive immigration benefits program such the proposed Comprehensive Immigration Reform program being debated by members of Congress including the "Gang of Eight" as well as the deferred action program created by the administration nder the guise of "prosecutorial discretion" that is referred to as DACA (Deferred Action for Childhood Arrivals) that largely parallels the failed DREAM Act.

What is not widely known is that, according to what I have been told, is that applicants for participation in DACA are not being routinely interviewed in person. Furthermore the lack of resources at USCIS and ICE precludes the possibility of routine field investigations being conducted to determine the accuracy and truthfulness of the information contained in those applications. Essentially the aliens who apply for this program are on the "honor system." As we all know, the honor system only works for honorable people and without the proverbial "scorecard" there is no way of knowing anything about how honorable these applicants are.

It is all well and good to say that it is proper to provide aliens who were brought to the United States by their parents when they were children, however, in order to participate in DACA those who participate had to have been under 31 years of age as of June 15, 2012. It would not be difficult for someone to falsely claim to have entered the United States prior to their 16th birthday, especially if they claim to

have used multiple false names. Remember, there is little or no likelihood that any field investigations will be conducted to determine if fraud has been committed in these applications.

The only thing worse than no security is false security. Background checks that are not able to truly determine the identity and background of alien applicants for lawful status create false security and to make matters worse- the documents that USCIS would provide these aliens would enable the aliens who participate in the program to obtain Social Security cards, driver's licenses, library cards, credit cards and bank accounts- potentially in false names.

These documents would enable these aliens to obtain jobs that even if they don't have national security implications might well have critical infrastructure implications. These documents would enable these aliens to have access to government and corporate office buildings and other such facilities.

To sum it up, these documents would provide millions of illegal aliens with a level of credibility that they are not really entitled to.

Finally I want to make note of something that no one is talking about-

Comprehensive Immigration Reform might involve many millions of applications. In fact, while we are constantly told that there are about 11 or 12 million illegal aliens currently in the United States, the reality is that no one has any real idea as to what the true number is. I previously discussed the Immigration Reform and Control Act of 1986 and how it had been believed that about 1 million illegal aliens would come forward to participate in that amnesty program. The highest estimate we were given at the INS, back then, was that 1.5 million would come forward. Ultimately more than 3.5 million participated. The lesson here is that if our government ultimately enacts Comprehensive Immigration Reform- something I am very much opposed to, if the same sort of thing happens where the estimated numbers are greatly eclipsed by the actual numbers it would mean that between 30 million and 40 million aliens would seek lawful status. They would be eligible to bring in their spouses and children.

How in the world would America's schools, hospitals and infrastructure deal with this? What would this do to the economy of the United States and to America's unemployment rates?

Quality control of any sort would be impossible to maintain. Fraud currently permeates many of the immigration benefits programs, Comprehensive Immigration Reform would cause the bureaucracy at USCIS to implode.

Yet all that is being talked about as a prerequisite to Comprehensive Immigration Reform is to secure the U.S. / Mexican border.

As I noted previously, this lack of integrity to the process by which applications for immigration benefits are adjudicated was the focus of my concerns back in 2007, the last time that Comprehensive Immigration Reform was being proposed.

I had testified before several Congressional hearings back then, on the issue of Comprehensive Immigration Reform and drew the analogy of those hearings with the countdown for the launch of the space shuttle. I made the point that the purpose for the countdown the preceded the launch of the space shuttle was to provide the engineers, scientists and technicians with the opportunity to weigh in as to whether or not it was safe to launch. The hearings at which I and other experts testified were convened to provide the experts in this field with an opportunity to weigh in as to the feasibility and wisdom in passing and enacting legislation that was, at the time, being proposed in the Senate that would have provided millions of illegal aliens with lawful status.

In both situations lives hung in the balance. The shuttle launch involved the safety of the seen valiant

astronauts who sat poised to be hurtled into space while the legislation would have a profound impact on a multitude of issues that went to issue of national security and the safety and well being of 300 million Americans.

I was so concerned about the national security of this legislation that in my article I recommended that it be given a more honest and descriptive name than "Comprehensive Immigration Reform." I suggested that it be referred to as the "Terrorist Assistance and Facilitation Act."

Because the concerns I had back in 2007 are identical with the concerns I have today I have decided to end my response to your question by providing a copy of that commentary, in its entirety here:

Immigration bill a 'No Go'

The Washington Times

Friday, June 22, 2007

Most of us have seen how mission control at Cape Canaveral conducts a countdown before the space shuttle is launched.

Many engineers, scientists and other essential personnel sit before their consoles monitoring various factors that determine if the launch should be made. Generally, they respond with a "Go" or "No Go" response when asked by the flight director if their respective element of the launch is functioning properly. Generally, each of these highly trained personnel is backed up by a staff of many others sitting in a back room along with banks of computers.

In most cases, if any member of the launch team does not give a "thumbs up" indicating satisfaction with his area of responsibility, the launch is postponed. This is done to ensure the safety of crewmembers and space shuttle and to make certain the objectives of the mission will be successfully carried out.

The Senate is poised to begin a debate about an extremely critical mission advocated by the president and the majority of the members of the Senate committee that came up with a proposed immigration reform bill. The implications for the United States, where this bill is concerned, are of the utmost significance for our nation. Immigration impacts so many other aspects of the United States, starting with national security and criminal justice, and including the economy, education, health care and the environment.

We could compare the debate about the wisdom of the proposed legislation with the preflight preparation of scientists and engineers charged with launching the space shuttle who provide their perspectives in determining whether to launch. If I had a seat at that debate, much like a member of a launch team, I would give the legislation an emphatic "No Go."

There are many reasons I adamantly oppose the legislation, but first and foremost is national security. This aspect has not been addressed in any public debate, including the televised debates involving the presidential candidates. No matter which scheme we are to consider concerning the fate of the unknown millions of illegal aliens present in our country, one common factor remains: The United States Citizenship and Immigration Services (USCIS) would have to provide identity documents to those millions of undocumented aliens who have absolutely no documentary evidence to verify their true identities.

Though former New York City Mayor Rudolph Giuliani and Arizona's Sen. John McCain are eager to invoke the recommendations of the September 11 Commission and provide those undocumented illegal aliens with what they describe as "tamper-proof" identity documents, there really is no way to know what name or even what nationality should be imprinted on those millions of supposedly secure identity documents.

There is no way an adjudicator at USCIS can look at an applicant and know who he or she is. The USCIS also would be unable to know when, where or how the applicant entered the U.S. That is what the term "undocumented" means.

Those who advocate for a guest worker amnesty program attempt to gloss over this critical issue by saying that our government would simply use "high-tech" biometric methods. What does that mean? If a person lies about his or her identity and has never been fingerprinted in our country, what will enable the bureaucrats at USCIS to know that person's true identity? If the adjudicators simply run a fictitious identity though a computerized database, they will simply find the name has no known connection to any criminal or terrorist watch lists. What is the value? Remember, we are talking about a false name.

There is absolutely no way this program would have even a shred of integrity and the identity documents that would be given these millions of illegal aliens would enable every one of them to receive a driver's license, Social Security card and other such official identity documents in a false name.

Undoubtedly, terrorists would be among those applying to participate in this ill-conceived program. They would then be able to open bank accounts and obtain credit cards in that same false name. Finally, these cards would enable these aliens to board airliners and trains even if their true names appear on all of the various terrorist watch lists and "no fly" lists. That is why I have come to refer to this legislation as the "Terrorist Assistance and Facilitation Act of 2007."

A final thought. To once again draw an analogy between the debate concerning this legislation and the launch process at Cape Canaveral: On Jan. 28, 1986, members of the launch team warned the flight director and others that the cold weather should cause them to postpone the flight of the space shuttle Challenger. They were ignored and the Challenger and its precious and irreplaceable crew of seven astronauts, including the astronaut-teacher Christa McAuliffe, were obliterated in an explosion 73 seconds after liftoff.

The astronauts paid the ultimate price because management at the National Aeronautics and Space Administration (NASA) refused to listen to the advice of those with legitimate concerns about the safety of the launch procedure that terrible day. I fear if our nation's leaders rush to create a fatally flawed program in the name of "comprehensive immigration reform" that many U.S. citizens will ultimately pay a similar price because our government is failing to take into account the advice of the September 11 Commission and many experts in an effort to please special-interest groups and deep-pocket campaign contributors.

Lead, follow or get out of the way.

Michael Cutler, is a retired U.S. Immigration and Naturalization Service (INS) senior agent who led major INS drug-trafficking investigations for more than two decades.

Responses of Jan C. Ting[1]
To Questions from the Committee on the Judiciary
United States Senate
Regarding Testimony of March 20, 2013, on
"Building an Immigration System Worthy of American Values"

1. In response to Senator Grassley's Question 1 for Professor Jan Ting, regarding the proposal for providing aliens in civil removal proceedings with access to counsel paid for by the American taxpayers:

There is a historic distinction in the law between criminal proceedings which propose to punish a defendant, and civil proceedings such as immigration removal which do not propose to punish anyone, but merely seek to resolve civil disputes.

As someone in the business of training young lawyers preparing to enter a challenging employment market, it would be difficult for me to oppose a properly labeled "Lawyers Full Employment Act of 2013." But if I were sitting as a member of Congress (and I tried once to become one), I would be wary of advocating taxpayer-funded lawyers for foreigners in civil immigration proceedings when no such counsel is offered to United States citizens asked to pay for such counsel, even in high stakes civil litigation over foreclosure on their homes, or removal of their child custody, or wrongful loss of their jobs.

A removal order issued by an immigration judge is normally required to remove an alien from the United States. Immigration judges are required to conduct proceedings to determine whether an alien is removable. During those hearings immigration judges have broad authority to determine and insure that justice is done, including power "to interrogate, examine, and cross-examine the alien and any witnesses."[2] "Immigration judges are obligated to fully develop the record in those circumstances where immigrants appear without counsel..."[3]

2. In response to Senator Grassley's Question 2 for Professor Jan Ting, on whether alternatives to detention weaken enforcement of U.S. immigration law:

[1] Professor of Law, Temple University Beasley School of Law. B.A. Oberlin College, 1970. M.A. University of Hawaii, 1972. J.D. Harvard Law School, 1975. Former Assistant Commissioner (1990-1993), Immigration and Naturalization Service, U.S. Department of Justice.
[2] 8 U.S.C. Sec. 1229(b), I.N.A. Sec. 240(b).
[3] Jacinto v. INS, 208 F.3d 725 (Court of Appeals, 9th Circuit, 2000).

The 1996 immigration reforms, including mandatory detention for certain aliens prior to hearings and removal[4], were enacted by Congress to insure the appearance of aliens for removal hearings and removal. Congress was dissatisfied with the high rate of no-shows from non-detained aliens, and the resulting low rate of actual removals.

Alternatives to detention that result in increased numbers of no-shows for immigration hearings and removal must be rejected if the integrity of the immigration enforcement system as enacted is to be maintained. The burden must be placed on the proponents of proposed alternatives to detention to prove that those proposed alternatives will not delay the enforcement of U.S. immigration law.

****

In conclusion, I again thank Chairman Leahy, Ranking Member Grassley, and the other members of the Committee on the Judiciary of the United States Senate, for the opportunity to offer testimony on the subject of "Building an Immigration System Worthy of American Values."

[4] 8 U.S.C. Sec. 1226(c), I.N.A. Sec. 236(c). The rationale of Congress for enacting this provision was noted by the U.S. Supreme Court in its 2003 opinion rejecting constitutional challenge to it. Demore v. Kim, 503 U.S. 510.

SUBMISSIONS FOR THE RECORD

March 20, 2013

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Bldg.
Washington, DC 20510

The Honorable Chuck Grassley
Ranking Member
Committee on the Judiciary
United States Senate
152 Dirksen Senate Bldg.
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Grassley:

On behalf of the undersigned organizations, we urge Congress on the occasion of the Senate Judiciary Committee's hearing on "Building an Immigration System Worthy of American Values" to address the critical issue of access to counsel for vulnerable people in immigration proceedings, including individuals with mental disabilities. Congress should include language in immigration reform legislation that ensures the appointment of counsel when required for fair adjudication. Legal representation for individuals with mental disabilities and others is essential to guarantee fundamental fairness in immigration proceedings, and it will ensure that the immigration system is more just and efficient.

Individuals with significant mental disabilities – including U.S. citizens and lawful permanent residents – face serious challenges presenting a defense against deportation. The U.S. immigration system is complex and difficult to navigate even for attorneys and other immigration professionals, but it presents particular obstacles for vulnerable people, including those with mental disabilities. People with significant mental disabilities may not be able to communicate to the court the type of information needed to respond to deportation or removal charges, and in some cases even basic information, like their place and date of birth, or contact information for their families, if they have any. Yet, the gravity and complexity of an immigration proceeding may have serious ramifications on the individual – including the deportation of a U.S. citizen or a person's return to a country of origin where their well-being or safety may be threatened.

In the criminal justice system, the Supreme Court has long recognized that the government cannot prosecute someone with mental disabilities so significant that they cannot meaningfully assist in their defense or appreciate the charges against them. Immigration proceedings are civil rather than criminal, so they do not currently implicate the same constitutional right to counsel, but the stakes are enormously high. Although immigration judges have discretion to adopt "safeguards" for persons with mental disabilities in their courtrooms, guidance on that authority is discretionary and vague. It also does not address the need for counsel for people who are not able to represent themselves adequately.

The National Association of Immigration Judges has highlighted "the serious need for reform and resources in this area. . . . [Counsel] level the playing field in our proceedings and help us

assure that justice is served in each and every matter that comes before us." As an example of how important representation is to cases like these, asylum-seekers are three times more likely to win their case if they have representation.

Allowing for the appointment of counsel also saves taxpayers money. The government wastes money each extra day that a detainee with a mental disability spends in jail while judges, social workers, and others look (often in vain) for a lawyer to represent them for free. The annual cost per detainee is $164/day, or about $60,000/year. The cases below are illustrative of the problems faced by persons with mental disabilities in the immigration system.

- *Jose Antonio Franco-Gonzalez, an immigrant from Mexico, was not able to speak until he was six or seven, does not know his birthday or age, has trouble recognizing numbers and counting, and cannot tell time. In 2005, while he was in immigration custody, a government psychiatrist found him incompetent and an immigration judge closed his case because he could not understand the proceedings. Unrepresented by counsel, he was remanded back into immigration custody, where he was promptly forgotten. Despite the lack of removal proceedings or other charges against him, he spent another four years behind bars—at an estimated cost of almost $300,000—before he was found by pro bono attorneys who filed a lawsuit to secure his release.*

- *Mark Lyttle is a native-born U.S. citizen of Puerto Rican descent who was deported to Mexico in 2008. Despite Mr. Lyttle's acknowledged mental disabilities (he had previously spent time in a psychiatric hospital), at his immigration court hearing no attempt was made to assess whether he was able to proceed unrepresented. Mr. Lyttle had never been to Mexico and spoke no Spanish. He endured more than four months of living on the streets and in the shelters and prisons of Mexico, Honduras, Nicaragua, and Guatemala.*

Allowing the most vulnerable immigrants to appear in immigration court alone, "is simply not who we are as a nation. It is not the way in which we do things," Attorney General Eric Holder recently said in testimony before the Senate Judiciary Committee.[1] Former Assistant Secretary of Homeland Security for Immigration and Customs Enforcement, Julie Myers Wood, told the Senate Judiciary Committee in a separate hearing, "To ensure justice is fully done, it is worth considering whether limited appointment of counsel for indigent aliens is appropriate for those most vulnerable in the system, including immigrants who are not mentally competent, certain categories of asylum seekers and unaccompanied minors. These individuals are most likely to be fully disadvantaged without counsel."[2]

---

[1] Testimony before the Senate Judiciary Committee Oversight Hearing, March 6, 2013.

[2] Testimony before the Senate Judiciary Committee hearing, "Improving Efficiency and Ensuring Justice in the Immigration Court System," April 18, 2011; *see also* Julie Myers Wood, Testimony to the House Judiciary Committee (Feb. 5, 2013) ("in any new legislation, Congress should consider taking steps to assist indigent and vulnerable aliens to retain counsel at government expense. This is particularly important for unaccompanied minors and immigrants with competency issues. Although ICE attorneys and immigration judges regularly identify legitimate claims by aliens who are not represented by attorneys, the system should not rely on the

We therefore urge inclusion of language in immigration reform legislation that ensures representation of vulnerable individuals, including people with mental disabilities, by requiring the Department of Justice to appoint counsel when necessary for fundamental fairness. Our country was founded on the basic principles of due process and fairness in our judicial system, and we thank the Committee for holding this important hearing to ensure that our immigration system honors those traditions. Your attention to the importance of counsel in furthering just adjudication of vulnerable individuals' immigration cases is much appreciated. We are happy to provide additional information to the Committee if it would be helpful. Please feel free to contact Jennifer Mathis, Bazelon Center for Mental Health Law, at (202) 467-5730 with any further questions.

Sincerely,

American Association of People with Disabilities

Autistic Self Advocacy Network

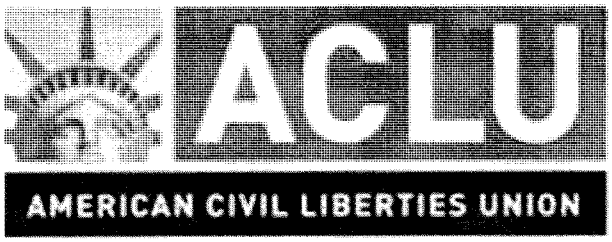
Bazelon Center for Mental Health Law

Disability Rights Education and Defense Fund

National Disability Rights Network

---

ability of opposing counsel or overworked judges to locate valid claims.").



Written Statement of the
American Civil Liberties Union

Ahilan T. Arulanantham
Senior Staff Attorney
American Civil Liberties Union Immigrants' Rights Project;
Deputy Legal Director
American Civil Liberties Union of Southern California

For a Hearing on

"Building an Immigration System Worthy of American Values"

Submitted to the

Senate Judiciary Committee

March 20, 2013

My name is Ahilan T. Arulanantham. I am a Senior Staff Attorney at the ACLU Immigrants' Rights Project and the Deputy Legal Director of the ACLU of Southern California. The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of more than a half-million members, countless additional activists and supporters, and 53 affiliates nationwide dedicated to preserving and defending the fundamental rights of individuals under the Constitution and laws of the United States. The ACLU's Washington Legislative Office (WLO) conducts legislative and administrative advocacy to advance the organization's goal to protect immigrants' rights. The Immigrants' Rights Project (IRP) of the ACLU engages in a nationwide program of litigation, advocacy, and public education to enforce and protect the constitutional and civil rights of immigrants.

I have spent much of the last twelve years advocating on behalf of immigrants defending themselves against deportation while they are locked in our Nation's immigration prisons. During that time I, along with others at the ACLU, have filed cases to challenge many different unlawful practices, but each one has sought to fulfill the same basic constitutional promise that our Nation's founders made over two hundred years ago: that no "person" – not "citizen" – would be deprived of liberty without due process of law. Too often our immigration enforcement system does not live up to that promise, and the results are devastating, not only to the immigrants themselves, but also to their spouses and children - many of whom are American citizens and lawful residents - and to all of us who love this country, our Nation of immigrants.

I. Introduction

The gap between our founders' promise and the reality of our immigration enforcement system begins in our immigration courts. The Supreme Court held more than one hundred years ago that deportation proceedings must be conducted consistently with the principles of fundamental fairness.[1] But that requirement often goes unfulfilled. The failings begin with a pernicious legal fiction: deportation is always considered a civil penalty, and therefore deportation hearings lack virtually all of the protections associated with criminal punishment, despite the potentially life-or-death consequences at stake for many immigrants. As a result, immigrants have no right to a prompt bail hearing, and in many cases no right to a bail hearing at all. They have no right to a speedy trial, and never go before a jury. Their cases are not presided over by a judge as we commonly think of judges – they are adjudicated by administrative law judges who serve at the pleasure of the Attorney General.

[1] *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903) (holding that non-citizen facing deportation was entitled under the Fifth Amendment to "all opportunity to be heard upon the questions involving [their] right to be and remain in the United States").

Perhaps worst of all, the government recognizes no right to an appointed attorney in deportation proceedings for *anyone* – no matter how incapable of understanding the proceedings they are, no matter how complex their case, and no matter how serious the consequences of wrongful deportation may be. The depth of the injustice created by this feature of the system cannot be understated. Every day in our immigration courts trained Department of Homeland Security (DHS) attorneys argue for the deportation of unrepresented people who are unable to defend themselves adequately. Some of them have serious mental disabilities that make it impossible for them to understand the charges against them. They will be deported without the benefit of legal representation even though they may have lived here for decades and face separation from their U.S. citizen family members, the only support system they have ever known.

Every day, people who speak and read no English also present their claims for asylum with no legal representation, even though they have no understanding of our refugee laws, and even though they could face persecution or torture if deported. Even *children* suffer this fate – going before immigration judges on a daily basis with no attorney to assist them, while trained DHS prosecutors argue for their deportation. Surely a fair immigration system that reflected American values would give judges the power to appoint attorneys in cases such as these, rather than allowing 84% of prisoners in immigration jails to go unrepresented.[2]

An immigration system that upholds our values must also give judges the power to consider each potential deportation on an individualized basis, in order to decide if the drastic measure of banishing someone from our shores, sometimes forever, is actually appropriate. Immigration Judges or their equivalent had such authority for much of the twentieth century – and exercised it wisely – but their discretion was undermined by draconian provisions in legislation enacted almost twenty years ago, primarily the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Today, immigrants routinely face *mandatory* deportation as a result of offenses that the criminal justice system does not consider serious enough to justify a prison sentence. Virtually all controlled-substance crimes, minor theft offenses, and other crimes that in a fair system would not result in deportation at all can render individuals subject to mandatory deportation – beyond the reach of a judge's discretion, no matter how compelling their equities.

[2] American Bar Association Commission on Immigration, Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases. (2010), 5-8, available at http://new.abanet.org/immigration/pages/default.aspx

Even people who served in our Nation's military or are the sole caretakers of American citizen children *must* be detained and deported under our harsh immigration laws. As a result, the mandatory detention and deportation regime has had devastating consequences for our families and communities, and in particular on many U.S. citizen children.[3]

The legal fiction by which deportation does not constitute punishment appears even more absurd once an immigrant enters the immigration prison system, where DHS incarcerates people while their immigration cases are presented to the courts.[4] These prisons are technically civil detention centers, rather than criminal incarceration facilities, but that distinction disappears inside their locked walls. Just like other prisoners, immigration detainees sleep in locked cells wearing prison jumpsuits, unable even to hug their loved ones for months or years on end because they are not allowed "contact" visits. As DHS correctional expert Dr. Dora Schriro explained in a report published in October 2009, "[w]ith only a few exceptions, the facilities that [Immigration and Customs Enforcement (ICE)] uses to detain aliens were built, and operate, as jails and prisons to confine pre-trial and sentenced felons."[5]

Members of the public commonly assume that these prisons are reserved for the worst of the worst – violent "criminal aliens" serving long sentences, or perhaps undocumented recent border crossers who will shortly be deported. In fact, nothing could be further from the truth. Over 30,000 people each day, and about 400,000 each year, are locked up in immigration prisons. Many of the inmates are lawful permanent residents or others with a legal status that DHS lawyers are trying, often unsuccessfully, to strip away.

---

[3] American families have been separated in devastating numbers: between July 2010 and September 2012, 23 percent of those deported—204,810 individuals—were parents of U.S. citizen children. From a snapshot survey taken in 2011, at least 5,200 children were in foster care as a result of their parents' deportation. Seth Freed Wessler, Nearly 205K Deportations of Parents of U.S. Citizens in Just Over Two Years, COLORLINES, Dec. 17, 2012, available at http://colorlines.com/archives/2012/12/us_deports_more_than_200k_parents.html; Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System, Applied Research Center, Nov. 2011, http://arc.org/shatteredfamilies

[4] An immigration system that upholds our values must also increase the percentage of deportation cases that go before a neutral judge – now, more than half of those deported never even see a courtroom. Doris Meissner et al., Immigration Enforcement in the United States: The Rise of a Formidable Machinery, Migration Policy Institute, (Jan. 2013), available at http://www.migrationpolicy.org/pubs/enforcementpillars.pdf

[5] In October 2009, correctional expert Dr. Dora Schriro, who served as DHS Secretary Napolitano's Special Advisor on ICE Detention & Removal and as Director of the ICE Office of Detention Policy and Planning (ODPP), presented DHS with her comprehensive report, *Immigration Detention: Overview and Recommendations*, available at http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf, 2-3.

Nearly half the people in immigration prisons have never been convicted of any crime, and all of those who have been convicted finished serving their sentence *before* being transferred to immigration custody. They remain imprisoned only because they are immigrants. Many other immigration prisoners are refugees who have never been charged with any crime, having fled from Sri Lanka, Indonesia, Guatemala, and other countries torn by civil strife, only to be imprisoned upon arrival in our country while we process their asylum applications (even as we hold ourselves out as a beacon of freedom for those fleeing persecution). But our federal government imprisons them in a sprawling network spread across the country, run not only by DHS, but also by a mix of private prison companies and local police and sheriff's departments.

My testimony today expresses the ACLU's strong support for immigration reform that will reflect our Nation's founding promise. Our immigration laws should treat each person who aspires to enter and remain in this country with the dignity, respect, and fairness they deserve and our Constitution requires.

II. Jose, Melida, Raymond, and Warren

Today's hearing is about building an immigration system worthy of our values. I begin by sharing a few stories that exemplify how our system falls short in that regard:

Jose Antonio Franco-Gonzalez is a 32-year-old son of two lawful permanent residents. Eleven of his twelve siblings live in the United States, and all of them either have or are in the process of obtaining legal status. His three eldest brothers are already United States citizens.

Jose has moderate mental retardation; a condition defined by an IQ level of between 35 and 55. He did not learn to speak until he was six or seven years old. He does not know his own birthday or age. He has trouble recognizing numbers and counting, and cannot tell time.

On April 16, 2004, Jose was arrested in conjunction with a fight where he was accused of throwing a rock. Four months later he pled guilty to a charge of assault with a deadly weapon (non-firearm), although his criminal attorney explicitly declined to join in the plea. He was sentenced to 365 days in jail. When his sentence was complete, the government transferred Jose from criminal to immigration custody and began removal proceedings.

A few weeks later, a psychiatrist evaluated Jose and determined that "he had no clue as to what type of court Your Honor presided over, what the possible outcomes might be, or how to defend himself at trial. Diagnostically, he has a Severe Cognitive Disturbance, probably life-long, secondary to development disability. In view of this, it is

impossible for him to stand trial." But this determination did not entitle Jose to the appointment of an attorney. Instead, on June 6, 2005, an immigration judge ordered the administrative closure of Jose's removal proceedings, citing his inability adequately to represent himself, and he was sent back to his detention cell, where he remained for the next *four and a half years*. Despite the fact that there were no open removal proceedings against him, Jose remained incarcerated without an attorney or a release hearing.

Only after his case came to the attention of pro bono attorneys in December 2009 was Jose set for a hearing before a judge. Even then, DHS did not agree to release him. Only after we filed a federal lawsuit challenging his nearly five-year detention was Jose finally able to return to the care of his family.

Jose's deportation case remains pending, but the fundamental defect in our system that produced the horrific miscarriage of justice he suffered remains in place. While Jose now has pro bono representation in his deportation case, our government still lacks any system for ensuring that people who are unable to adequately represent themselves are appointed legal representation. The federal government spent what we estimate, based on ICE detention cost averages, to be nearly $300,000 imprisoning Jose. With that same money, it could have hired more than one lawyer to represent not only Mr. Franco, but dozens of other immigrants who also deserve a fair day in court.

While appointing lawyers for those who obviously need them would drastically improve our immigration justice system, we also must restore the power of judges to consider each individual's case on its own merits. Take, for example, Aaron (a pseudonym), a long-time lawful permanent resident of the United States who faces deportation to Haiti for one conviction from 2005 for selling $20 of marijuana to an undercover policeman. Although he was only required to serve 45 days in jail for the crime, it is deemed an "aggravated felony" under amendments to the immigration laws enacted in 1996, and therefore bars him even from seeking any discretionary relief from removal – including asylum.

As a result, the present immigration law renders Aaron's deportation mandatory, and virtually certain. The law ignores the fact that Aaron has lived in the United States for nearly fifteen years, and that he lived with and supported his long-term U.S. citizen girlfriend, their two-year-old U.S. citizen daughter, and her three U.S. citizen children. Nor does it make any difference that Aaron's girlfriend suffers from sickle-cell anemia and cannot work, or that their young American daughter carries the sickle-cell anemia gene and is in poor health. Every day the children ask their mother "when is Daddy

coming home?" but no one has the heart to tell them the answer under our current immigration laws: never.[6]

The law governing incarceration of immigrants while their cases remain pending in the immigration courts is also extremely harsh and often irrational. Consider the case of Melida Ruiz, a 52-year old grandmother who was imprisoned for seven months at the Monmouth County Jail in New Jersey. Ms. Ruiz is a longtime lawful permanent resident with three U.S. citizen children and two U.S. citizen grandchildren. ICE officers came to her home and arrested her in the spring of 2011. Under the draconian "mandatory detention" provisions enacted in 1996, Ms. Ruiz could not be released from immigration prison because she had a nine-year-old misdemeanor drug possession offense for which she had not even been required to serve any jail time. This drug possession offense was her only conviction during the thirty years she had lived in the United States.

Ms. Ruiz obviously posed no danger to anyone or flight risk, and she was eligible for various forms of discretionary relief from removal. Yet under DHS's interpretation of the immigration detention laws she could not be released while her case remained pending. It did not matter that she was the primary source of support for a number of American citizens, including her mother who suffers from Alzheimer's disease, her 17 and 11-year-old daughters, and her 5-year-old granddaughter.

It took the immigration courts seven months to adjudicate Ms. Ruiz's case, during which she remained in prison. When she finally received her day in court, the Immigration Judge granted her application for cancellation of removal, emphasizing the "substantial equities in [her] favor" including her "work history, tax history and property ownership" as well as the fact that her family "would suffer significant hardship if she were deported." The Immigration Judge also found that, despite the one conviction from 2002 which was "out of character," Ms. Ruiz has been "a law abiding resident of the United States and a stalwart positive force for her family and friends." ICE chose not to appeal the decision. Ms. Ruiz is now reunited with her family, but her story compels us to ask why her family had to endure seven months of hardship before that day could come, and why taxpayers spent approximately $34,650 to keep her locked up.[7]

While just over half of the people in immigration prisons have criminal convictions – many just as minor as Ms. Ruiz's drug possession offense – many others have no criminal history at all. Yet they too spend months, and sometimes years, behind bars.

---

[6] Notes from emails and phone calls with "Aaron's" attorney, Susan Pai, on 3/15 and 3/18, on file with the ACLU.

[7] Case information provided by attorney Leena Khandwala, from the Law Offices of Claudia Slovinsky, on file with the ACLU.

The Reverend Raymond Soeoth is a Christian Minister who in 1999 fled Indonesia with his wife, as they faced persecution for practicing their faith. Reverend Soeoth was initially allowed to work in the U.S. while applying for asylum and eventually became the assistant minister for a church. He also opened a small corner store with his wife. Yet when his asylum application was denied in 2004, the government arrested him at his home and imprisoned him.

Even though Reverend Soeoth posed no danger or flight risk, had never been arrested or convicted of any crime, and had the right to continue litigating his case in both immigration and federal court, he spent over two-and-a-half years in an immigration prison while the courts decided whether or not to reconsider his asylum claim. During that time, he never received a hearing before an Immigration Judge to determine whether his detention was justified. Instead, the decision on whether or not to release him was left to DHS officials who did not even interview him, let alone conduct a hearing. Unsurprisingly, they concluded after each review that he should remain detained, leaving Reverend Soeoth separated from his wife, his community and his congregation. Because his wife could not maintain the store that the couple had jointly run, she was forced to shut it down – all because our government would not give him a 15-minute bond hearing in front of an Immigration Judge.

In February 2007, after we filed a petition in federal court to obtain a bond hearing for Reverend Soeoth, the court ruled in our favor. After two-and-a-half years in detention, he finally received a bond hearing and was ordered released by an Immigration Judge. He has lived in his community – back with his wife and his congregation – ever since, without doing harm to anyone. He ultimately returned to his position as a congregational leader, won the right to reopen his case, and will likely be granted asylum.

Mr. Soeoth is not alone. Warren Joseph is a lawful permanent resident of the United States and a decorated veteran of the first Gulf War. He moved to the United States from Trinidad nearly 22 years ago and has five U.S. citizen children, a U.S. citizen mother and a U.S. citizen sister. A few months after coming to the U.S., when he was 21 years old, Warren enlisted in the U.S. Army. He served in combat positions in the Persian Gulf, was injured in the course of duty, and received numerous awards and commendations recognizing his valiant service. At one point during the conflict, he returned to battle after being injured and successfully rescued fellow soldiers.

Like many Gulf War veterans, Warren returned from the war with symptoms that were only later diagnosed as Post-Traumatic Stress Disorder (PTSD). His sister recalls that she "was shocked to see how much Warren had changed." He was anxious, had

recurring nightmares about killing people, and would wake up in a cold sweat. He became withdrawn and thought about suicide constantly.

In 2001, Warren unlawfully purchased a handgun to sell to individuals to whom he owed money. He fully cooperated with an investigation by the Bureau of Alcohol, Tobacco, and Firearms, and his actions were not deemed sufficiently serious to warrant incarceration. Two years later, however, suffering from partial paralysis and debilitating depression, Warren violated his probation by moving to his mother's house and failing to inform his probation officer. He served six months for the probation violation. Upon his release, in 2004, he was placed in removal proceedings and subjected to mandatory immigration detention.

Warren was imprisoned for more than three years while he fought his deportation. During his entire period of incarceration, he was never granted a bond hearing to determine whether his detention was justified based on flight risk or danger to the community. Even after the U.S. Court of Appeals for the Third Circuit concluded that he was entitled to apply for relief from removal, and remanded his case back to the immigration court, the government continued to subject Warren to mandatory detention. My colleagues at the ACLU filed a habeas petition on Warren's behalf, which was pending when the Immigration Judge granted him relief from removal, and DHS finally released him. Fortunately, DHS chose not to appeal the Immigration Judge's grant of relief. Otherwise, Warren could have spent additional months in jail pending the government's appeal.

Warren has lived a productive life since his release, but has struggled to understand how our country could have locked him up for three years *for no reason* after he served honorably during the Gulf War.

Each of these individuals has suffered injustice at the hands of our immigration enforcement system. Below we describe several easy-to-accomplish legal changes that would bring greater fairness to that system, and should be included in Congress' immigration reform.

III. Legal Principles

Efforts to bring the immigration system into conformity with our Nation's values and constitutional requirements should focus on four areas:

·*First*, we must ensure legal representation for immigrants who are unable to represent themselves adequately in deportation cases, and we must give Immigration Judges authority to appoint counsel whenever necessary to ensure fair proceedings.

·*Second*, we must restore the authority of judges in the system – both Immigration Judges and federal judges – in several ways. We must ensure that more cases go before Immigration Judges before deportations occur, and give those judges authority to consider all the equities – both positive and negative – for each individual facing deportation. We must also ensure robust judicial review of Immigration Judge decisions in federal courts.

·*Third*, we must significantly limit the extent to which we imprison people while the courts process their deportation cases. This will require both an end to irrational mandatory incarceration and the provision of prompt bond hearings before Immigration Judges for people subject to prolonged imprisonment while their deportation cases are pending.

·*Finally*, for those who remain in immigration prisons despite these reforms, we must work to achieve truly civil detention centers by dramatically improving conditions of confinement. No one should be subject to inhumane conditions of detention, regardless of why they remain imprisoned.

a. Ensuring Legal Representation in Immigration Courts

One of the most critical reforms for ensuring fairness in our immigration system is the provision of legal representation to those who are unable adequately to represent themselves. As any immigration lawyer or judge knows all too well, immigration law is notoriously technical and continually changing – comparable to the tax code in its complexity, as federal judges have often observed.[8] Given that DHS is represented by a trained immigration prosecutor at every removal hearing in immigration court, several federal courts have recognized that, in at least some cases, the immigrant must also be represented in order to ensure fair proceedings.[9]

---

[8] *Castro O'Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1987).

[9] *United States v. Campos-Asencio*, 822 F.2d 506, 509 (5th Cir. 1987) (holding that "an alien has a right to counsel if the absence of counsel would violate due process under the fifth amendment" because, in some cases, "the laws and regulations determining [an alien's] deportability [a]re too complex for a pro se alien") (citing *Partible v. INS*, 600 F.2d 1094, 1096 (5th Cir. 1979)); *Aguilera-Enriquez v. INS*, 516 F.2d 565, 568 n.3 (6th Cir. 1975) ("[W]here an unrepresented indigent alien would require counsel to present his position adequately to an immigration judge, he must be provided with a lawyer at the Government's expense. Otherwise 'fundamental fairness' would be violated."); *see also Lin v. Ashcroft*, 377 F.3d 1014, 1034 (9th Cir. 2004) (holding in the context of unaccompanied minors in immigration proceedings that "[a]bsent a minor's knowing, intelligent, and voluntary waiver of the right to counsel, the IJ may have to take an affirmative role in securing representation by competent counsel.")

The appellate court decisions recognizing that legal representation may be required in at least some immigration cases are consistent with basic constitutional principles involving the right to appointed counsel in civil cases. While the Supreme Court has recognized categorical rules requiring appointed counsel in all criminal cases where the defendant is sentenced to prison and, similarly, in the civil context of juvenile delinquency proceedings,[10] in other civil contexts the Court has adopted a case-by-case approach. In those areas, which include parole revocation proceedings, parental termination proceedings, and civil detention as a sanction for contempt of court, judges must determine whether or not appointed counsel is necessary in any given case by balancing several factors, including the interests at stake for the litigants and the complexity of the proceedings.[11]

Despite what common sense and this robust body of precedent tell us the Constitution requires, the immigration courts have no system for providing legal representation to immigrants who cannot afford it, even if their need for assistance is plain as day. I have spent the last three years working to fix this defect in our system just for one particularly vulnerable group – people with serious mental disabilities within the immigration prison system in Washington State, California, and Arizona.[12] DHS detains hundreds such people on any given day, but refuses to provide them attorneys if no pro bono attorney can be found. The human cost of this failure is devastating. People like Mr. Franco and others literally become lost in our immigration prison system, wasting years of their lives because we fail to accommodate their needs.

These cases also undermine the integrity of the immigration court system as a whole. Consider Ever Francisco Martinez-Rivas, a lawful permanent resident of the United States with a long history of schizophrenia and other psychiatric disabilities. He was convicted after a fight with his stepfather, for which DHS now wants to deport him. The Immigration Judge wanted to ensure fairness in his courtroom, so he ordered Mr. Martinez's case dismissed after no lawyer was found to take the case despite months of delay. But DHS appealed, leaving Mr. Martinez to defend by himself the decision finding him unable to proceed. That absurd travesty of justice was resolved only because Mr. Martinez happened to be a plaintiff in our federal lawsuit, and the federal judge ordered the government to find him a lawyer or dismiss its deportation case.

---

[10] *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that appointed counsel is a fundamental right essential to a fair trial under the Sixth and Fourteenth Amendments); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (extending *Gideon* to all cases involving incarceration as punishment); *In re Gault*, 387 U.S. 1, 41 (1967) (requiring appointed counsel in juvenile delinquency proceedings);

[11] *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (parole revocation proceedings); *Lassiter v. Dep't Soc. Serv.*, 452 U.S. 18 (1981) (parental termination proceedings); *Turner v. Rogers*, 131 S. Ct. 2507 (2011) (civil contempt proceedings).

[12] *Franco-Gonzalez v. Holder*, CV 10-2211-DMG (C.D. Cal.).

There should not be serious dispute about the need for appointed legal representation for people with serious mental disabilities in deportation cases. The National Association of Immigration Judges has highlighted "the serious need for reform and resources in this area." As they explained, "[counsel] level the playing field in our proceedings and help us assure that justice is served in each and every matter that comes before us."[13]

Immigration Judges recognize that individuals with severe mental disabilities face insurmountable obstacles in navigating the immigration system without counsel. As judges know, such individuals are often unable to provide the court with even basic information like place and date of birth, or contact information for their family, if they have any. Others have valid claims to remain in the United States, but are unable to articulate those claims due to their disabilities. The need for reform to ensure legal representation for such individuals is obvious and overdue.

Besides the clear harm to these individuals, their families, and the integrity of our immigration justice system, we must also consider the financial cost of the present approach. Information obtained from the government in the *Franco* litigation shows that DHS identified, for the three covered states, approximately 50 people in the last year who Immigration Judges determined to be unable adequately to represent themselves, and therefore in need of lawyers. During that 12-month period, DHS spent over $450,000 detaining those 50 plaintiffs *after* they were identified as unable to represent themselves. In other words, DHS spent nearly half a million dollars to detain people it could not proceed against because they had no lawyers, while the government searched in vain to try to locate lawyers to represent them. A single lawyer's salary – at an annual cost of about $50,000 – could have paid for the representation of *all* of those people.[14]

People with serious mental disabilities are not the only group clearly deserving of legal representation in immigration court. Remarkably, DHS also conducts removal proceedings against *children* without providing them attorneys. Although the government has taken significant steps to try to ensure that all children obtain pro bono counsel, and many do, it remains true that children proceed in immigration court every day without attorneys. A system that reflects America's values would not leave children helpless and alone before the courts while a trained DHS prosecutor argues for their removal. And the same is true for people who assert claims to U.S. citizenship in their deportation proceedings, people who have made credible claims that they will face persecution or torture in their home countries, and others who deserve legal representation given the stakes involved and the complexity of their cases.

---

[13] Letter of January 11, 2012 to the House of Representatives, on file with the ACLU.

[14] This information is based on documentation provided by the government to counsel for the Plaintiffs in *Franco*, on file with the ACLU.

For these and other reasons, the American Bar Association (ABA) concluded that in immigration courts "[t]he lack of adequate representation diminishes the prospects of fair adjudication for the non-citizen, delays and raises the costs of proceedings, calls into question the fairness of a convoluted and complicated process, and exposes non-citizens to the risk of abuse and exploitation by 'immigration consultants' and 'notarios.'"[15] The disparity in justice is particularly apparent in asylum cases. Asylum-seekers who have legal representation are three times as likely to be granted asylum.[16] That grim statistic reflects an obvious truth: in too many cases, asylum-seekers who fled to the United States from far-away lands to escape torture or persecution in their homeland cannot effectively present their claims in immigration court without legal assistance. In expedited removal cases, which truncate proceedings by denying immigrants the opportunity to appear before an immigration judge, the disparity is even starker: only 2 percent of unrepresented asylum claimants were granted relief as opposed to 25 percent of represented claimants.[17]

Just as in the cases of people with serious mental disabilities, the failure to provide legal representation to individuals with strong claims for relief results in a waste of government resources. An Office of Inspector General study concluded that 23% of all case continuances in removal cases were granted by Immigration Judges to allow the immigrant time to find an attorney, while another 21% were granted to allow the immigrant time to prepare. These continuances averaged 53 and 66 days each, respectively. For detained cases, each such continuance cost the taxpayer between $8,745 and $10,890. In other words, just a few continuances in one case cost as much money as a single attorney who could represent dozens of people each year.[18]

---

[15] ABA Commission on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases.* (2010), 5-8, *available at* http://new.abanet.org/immigration/pages/default.aspx. The ABA has used the term "notario fraud" as an umbrella description of a variety of methods by which "[i]ndividuals who represent themselves as qualified to offer legal advice or services concerning immigration or other matters of law, who have no such qualification, routinely victimize members of immigration communities." Notarios have the equivalent of a law license in many Latin American countries and get easily confused with notaries in the United States.

[16] Human Rights First, *U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison* at 8 (2009) *available at* http://www.humanrightsfirst.org/pdf/090429-RP-hrf-asylum-detention-sum-doc.pdf.

[17] *Reforming the Immigration System*, *supra*, at 5-9.

[18] Office of the Inspector General, *Management of Immigration Cases and Appeals by the Executive Office for Immigration Review*, (October 2012) at 30, available at: http://www.justice.gov/oig/reports/2012/e1301.pdf. Further evidence of the cost savings associated with the provision of legal information to pro se detainees comes from the Legal Orientation Program. Funded by the Executive Office for Immigration Review, the program has shown the ability substantially to reduce case processing times, and thereby generate significant savings in detention costs. See EOIR report of April 4, 2012, transmitted on July 2, 2012 by the Department of Justice to the Chairwoman and Ranking Member of the Senate Committee on Appropriations' Subcommittee on Commerce, Justice, Science, and Related Agencies pursuant to the requirements of the Conference Report accompanying the Consolidated and Further Continuing Appropriations Act, 2012 (P.L. 112-55). While not a substitute for appointed counsel, LOP should be expanded to cover all immigration detention facilities.

Immigration Judges should have the authority to decide whether the provision of legal representation is necessary to ensure justice in the cases before them; the Constitution requires no less. Providing such authority would both improve the efficiency of the immigration courts at a time of fiscal restraint and bring our deportation system into line with our values; it should be a top priority in any legislation.

b. Restoring Fairness and Individualized Justice in Deportation Cases

Asking vulnerable immigrants to defend themselves against trained DHS prosecutors is compounded by another fundamental flaw in our immigration court system. Too often, the law imposes categorical penalties that tie the hands of decisionmakers – both prosecutors and judges – making it impossible for them to tailor outcomes to the individual equities of each case. This lack of individualized consideration is a gross injustice in a system designed to determine when a person should be expelled from the United States.

The Supreme Court has repeatedly taken note of the severity of deportation as a sanction, calling it "the equivalent of banishment or exile,"[19] that "may result ... in loss of both property and life, or of all that makes life worth living."[20] As Justice Murphy eloquently explained in 1945, "[t]he impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence. A deported alien may lose his family, his friends and his livelihood forever. Return to his native land may result in poverty, persecution and even death. There is thus no justifiable reason for discarding the democratic and humane tenets of our legal system and descending to the practices of despotism in dealing with deportation."[21] The removal system remains a stark exception to our fundamental constitutional value of proportionality in criminal and civil sanctions. The result has been the deportation of countless long-time U.S. residents for relatively minor offenses or despite compelling and heartbreaking equities, with untold devastation to U.S.-citizen family members and American communities.

Any genuine immigration reform must address this serious defect in how justice is administered in the deportation system, in at least four ways:

First, Congress should reform the extraordinarily overbroad deportability grounds in the Immigration and Nationality Act (INA). A conviction for an "aggravated felony" – a true misnomer if there ever was one because such a conviction need not be aggravated or a felony – leads categorically to removal with only the narrowest of exceptions. Twenty-one subsections of 8 U.S.C. § 1101(a)(43) define the term

[19] Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010)
[20] Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).
[21] *Bridges v. Wixon*, 326 U.S. 135, 164 (1945) (Murphy, J., concurring)

"aggravated felony," which has expanded repeatedly since its creation in 1990. An "aggravated felony" can be a misdemeanor, a conviction for which the defendant served no time in prison or jail, any of a large group of non-violent offenses, or a conviction that is years, or even *decades*, old.

An individual convicted of an "aggravated felony" is ineligible for virtually all relief from deportation, including commonly available forms such as cancellation of removal for lawful permanent residents, which is based on length of residence and a demanding standard of hardship to qualifying relatives. If convicted of an aggravated felony, one cannot even apply for such relief. Thus, for lawful permanent residents charged with deportability based on an aggravated felony, removal is almost always certain, regardless of the individual equities and mitigating circumstances surrounding the crime, the extent of rehabilitation, or the hardship to others that would arise from the deportation. This approach forces ICE attorneys and Immigration Judges alike to close their eyes to critical individual circumstances.[22]

Second, Congress should reform the INA to restore the power of immigration courts to grant relief based on the equities when an individual is determined to be deportable. Prior to the passage of IIRIRA in 1996, lawful permanent residents who were deemed deportable could nonetheless be permitted to remain in the United States through forms of discretionary relief based upon an immigration judge's weighing of the equities. IIRIRA eliminated most such forms of relief for lawful permanent residents with aggravated felony convictions, regardless of any individual equities. For example, IIRIRA replaced the relief formerly available under 8 U.S.C. § 1182(c) ("212(c) relief") with cancellation of removal, 8 U.S.C. § 1229b, which is unavailable to people convicted of aggravated felonies. In IIRIRA, Congress also reduced the discretion of immigration judges to grant discretionary relief to non-LPRs who had resided in the United States and whose removal would cause substantial hardship to themselves or their family members.

Lucia Medina Martinez's case provides a compelling example of how the limitations on Immigration Judges' discretionary authority have produced grave harm that is inconsistent with our Nation's values. Ms. Martinez came to the United States in 1994 when she was 15. She has six U.S. citizen children. In 2004, she married a man and they had four children together. Two years later, Lucia's daughter from a previous relationship told her that her husband had been molesting her. Distraught, Ms. Martinez kicked her husband out and sought the advice of her pastor. Her pastor told her to take her husband back in because "he was the father of four of her children, including a newborn baby, and because he was her husband." She reluctantly accepted this advice

[22] In addition, an aggravated felony conviction renders a noncitizen ineligible for asylum, and in some cases for nondiscretionary relief such as withholding of removal. One can identify at least nineteen distinct immigration consequences of aggravated felonies. *Ledezma-Galicia v. Holder*, 636 F.3d 1059, 1079 n.24 (9th Cir. 2010).

for three weeks, but then sought additional counseling through her church. This time, the counselor, with Ms. Martinez's permission, contacted the police.

Ms. Martinez's husband was arrested and sentenced to 15 years in prison, but authorities also charged Ms. Martinez with child neglect because she failed to report the incident earlier. She pled no contest, believing that would allow her children to return to her care as soon as possible, and was sentenced to two days imprisonment as well as probation and community service.

What Ms. Martinez did not know was that her offense carried grave immigration consequences. ICE began proceedings to deport her based on her unlawful presence, and argued that her conviction for child neglect rendered her ineligible for cancellation of removal for non-LPRs. The immigration courts agreed, and the U.S. Court of Appeals for the Eleventh Circuit upheld the agency's decision.[23] However, the court described its result as "profoundly unfair, inequitable, and harsh" and urged the Attorney General "to closely review the facts of this heartbreaking case once again." The opinion continued: "Simply put, this case calls for mercy than the law permits this Court to provide. . . . Under the peculiar facts of this case, removing Martinez and her six young children to Mexico, a country in which they no longer have any relatives, would work an extreme hardship on a family that has already been forced to endure domestic abuse, the molestation of a child by her step-father, and the incarceration of a father and husband."[24]

Federal judges should not have to rubber-stamp patently unjust deportation orders such as this one. Instead, our immigration laws should restore to judges – both at the administrative level and in the federal courts – the power to consider each individual's equities and to do justice where the circumstances demand it.

Third, another serious defect contributing to the unfairness of immigration court proceedings arises from the government's failure to produce information necessary to the immigrant's case. DHS attorneys routinely take the view that the government bears no obligation to produce discovery in immigration court, and Immigration Judges are largely powerless to impose sanctions for violations of their orders. In addition, despite the plain language of the INA and the clear holding of *Dent v. Holder*, 627 F.3d 365 (9th Cir. 2011), the ACLU has received reports that DHS attorneys refuse to provide immigration files to detainees unless they file a Freedom of Information Act request, and in some cases refuses to provide files at all except where the litigant claims U.S. citizenship. Congress should exercise its oversight function to ensure that immigration court proceedings are not hampered by such tactics, which both create inefficiency and needlessly conceal information from the judge in whose hands a family's future rests.

---

[23] *Martinez v. U.S. Atty. Gen.*, 413 F. App'x. 163 (11th Cir. 2011).
[24] *Id.* at 168.

Finally, restoring individualized justice to the removal system must be accompanied by the constitutional backstop of adequate Article III judicial review. Congress should maintain and restore the power of Article III courts to review removal orders by the Executive Branch, in keeping with the constitutional guarantee of due process, the historic Writ of Habeas Corpus, and separation of powers.

Historically, immigrants facing a loss of liberty have had access to the federal courts to ensure that the government's actions are fair and consistent with the law, and that no one is erroneously detained or deported. In 1996, however, that changed, as Congress drastically restricted judicial review of deportation orders. Although minor improvements were made in 2005, the current laws still severely restrict judicial oversight over the immigration system. A lack of meaningful judicial oversight would be problematic in any area of the law. It is particularly problematic in the immigration sphere, where an individual's liberty is at stake and frequent errors are inevitable due to the lack of counsel, legal complexity, and the overwhelming number of cases handled by each Immigration Judge.

A comprehensive restoration of judicial review would allow the immigration system to be subject once again to the same oversight that exists in other areas of the law – areas where far less is often at stake. Doing so will not only bring our immigration justice system back in line with our history and governing constitutional principles, but will also eliminate unnecessary litigation over the scope of current jurisdictional limitations, which wastes the time and resources of the government and federal courts. Importantly, restoring judicial review would not permit the federal courts to second-guess each decision by an Immigration Judge or the Board of Immigration Appeals. Traditional principles of deference would continue to apply. But under the current system, the federal courts are powerless to correct manifest abuses of the law – even in cases involving longtime lawful permanent residents with U.S. citizen spouses and children. That is unacceptable in a country that prides itself on adhering to the rule of law.

c. Limiting ICE's Prison System

Building an immigration system consistent with our Nation's values also requires that we dramatically limit the inhumane immigration prison system. Most Americans do not realize that DHS runs a vast parallel prison system of its own – known as the immigration detention system – which imprisons hundreds of thousands of people annually in about 250 authorized facilities across the country.

Although immigration detention facilities are generally indistinguishable from prisons,[25] individuals held there are *not* serving criminal sentences. Indeed, 40% or more of immigration detainees have never been convicted of any crime.[26] In most cases, the trigger for immigration detention is not criminal activity at all, but instead some other kind of immigration matter, such as overstaying a visa or entering the country without inspection.[27] And even for those whom ICE seeks to deport because of a previous criminal conviction, the majority of convictions triggering immigration detention are nonviolent or otherwise classified as less serious under the immigration laws.[28]

All immigration detainees facing removal for a criminal offense have already completed serving their criminal sentences; they are detained only because they are immigrants. Indeed, ICE classifies most immigration detainees as "low custody" or having a "low propensity for violence," and views them as posing no threat.[29]

The immigration prison system has exploded over the course of the last two decades. In 2002, the former INS detained 202,000 individuals, already a sizable increase from 85,730 detainees in 1995.[30] By 2011, that number more than doubled again, to 429,000.[31] Whereas detention beds in FY 2003 numbered 18,000,[32] the current

---

[25] The Schriro report noted that "[w]ith only a few exceptions, the facilities that ICE uses to detain aliens were built, and operate, as jails and prisons to confine pre-trial and sentenced felons." Schriro, *supra*, 2-3.

[26] Elise Foley, "No Conviction, No Freedom: Immigration Authorities Locked 13,000 In Limbo." (Jan. 27, 2012) ("Forty percent of those held by ICE on October 3, 2011 had not been convicted of a crime, nor were they awaiting criminal trial."). According to ICE data, only 46 percent of detainees had a criminal record in FY 2011. Doris Meissner et al., Immigration Enforcement in the United States: The Rise of a Formidable Machinery, Migration Policy Institute, (Jan. 2013), 128, available at http://www.migrationpolicy.org/pubs/enforcementpillars.pdf

[27] According to DOJ data, a mere 15.5 percent of deportation proceedings in FY 2012 were made up of "criminal cases"—that is, cases based on criminal activities. In contrast, 81 percent of cases involved immigration law violations such as overstaying a visa or entering the country without inspection. *See* TRAC Immigration, *U.S. Deportation Proceedings in Immigration Courts* (Jan. 31, 2013), *available at* http://trac.syr.edu/phptools/immigration/charges/deport_filing_charge.php

[28] According to DOJ data, only 27.5 percent of crime-based deportation cases in FY 2012 were filed based on offenses charged as "aggravated felonies." *See* TRAC Immigration, *U.S. Deportation Proceedings*, *supra.*

[29] *See* Schriro, *supra*, at 2. According to more recent ICE data, as of May 2, 2011, 41% percent of ICE detainees were classified as Level 1 (lowest-risk) detainees, while only 19 percent of detainees were classified as Level 3 (highest-risk) detainees. Human Rights First, *Jails and Jumpsuits: Transforming the U.S. Immigration Detention System—A Two Year Review* (Human Rights First 2011), 2 (citing data received through a Freedom of Information Act request to ICE, on file with Human Rights First), *available at* www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Jails-and-Jumpsuits-report.pdf

[30] Donald Kerwin and Serena Yi-Ying Lin, *Immigrant Detention: Can ICE Meet Its Legal Imperatives and Case Management Responsibilities*? (Migration Policy Institute, Sept. 2009), 7, available at http://www.migrationpolicy.org/pubs/detentionreportSept1009.pdf ; Doris Meissner et al., *Immigration Enforcement in the United States: The Rise of a Formidable Machinery*, Migration Policy Institute, (Jan. 2013), 126, *available at* http://www.migrationpolicy.org/pubs/enforcementpillars.pdf

[31] DHS Office of Immigration Statistics, *Immigration Enforcement Actions: 2011*. (Sept. 2012), 4, available at http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement_ar_2011.pdf

[32] DHS, Office of Inspector General, *Detention and Removal of Illegal Aliens*. (Apr. 2006), 5.

level of 34,000 is an 89% increase, with nearly half of those beds contracted from private prison companies.[33] Immigrants who do not pose any flight risk or public safety concern are routinely detained despite the enormous cost of $2 billion to U.S. taxpayers annually (up from $864 million eight years ago).[34]

Congress fosters the costly over-use of detention by its inefficient and unnecessary micromanagement of ICE detention beds. FY 2012 DHS appropriations legislation increased the number of beds to their current level of 34,000.[35] This bed mandate—effectively, a detention quota—has no basis in sound detention management and raises serious due process concerns. No other detention system in the United States, criminal or civil, specifies that a minimum number of individuals be incarcerated. Instead, prudent best practices sensibly afford law enforcement officials the discretion to determine, based on an assessment of individual flight risk and danger to the community, who should be detained.

The massive expansion of immigration prisons has been fueled by the assumption that incarceration is necessary to ensure removal. Yet alternative forms of supervision are available that would allow the government to deport detainees who lose their cases, without the same economic and human costs. However, despite the civil, non-punitive purpose of immigration detention and statements by the Administration recognizing that purpose, ICE continues to rely on an overwhelmingly penal model of incarceration, including prolonged and mandatory detention policies at odds with due process, humane treatment, and fiscal responsibility.

d. Ending Prolonged Detention Without Bond Hearings

Under DHS's interpretation of the immigration laws, thousands of individuals like Reverend Soeoth and Warren Joseph face years of imprisonment in the immigration detention system while their cases are pending. Most of them never even receive a bond hearing at which they can *ask* a judge to determine whether they need to be locked up.

---

[33] Detention Watch Network, "The Influence of the Private Prison Industry in the Immigration Detention Business." (May 2011), 1, available at http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/PrivatePrisonPDF-FINAL%205-11-11.pdf

[34] DHS FY 2012 Budget Justification, ICE Salaries and Expenses, 938, available at http://www.dhs.gov/xlibrary/assets/dhs-congressional-budget-justification-fy2012.pdf; *Immigration and Customs Enforcement (ICE) Budget Expenditures FY 2005 - FY 2010*, Transactional Records Access Clearinghouse, Syracuse University (2010), *available at* http://trac.syr.edu/immigration/reports/224/include/3.html By adding 1200 beds to the administration's request, Congress's enacted budget added expenditures of $54 to $72 million.

[35] Consolidated Appropriations Act of 2012, Pub. L. 112-74, 125 Stat. 966 (Dec. 23, 2011), *available at* www.gpo.gov/fdsys/pkg/BILLS-112hr2055enr/pdf/BILLS-112hr2055enr.pdf

The rules governing release from immigration prison while cases are pending are critically important because of the time it can take to resolve an immigration case. While some cases are decided quickly, many others can take years to finish, often because of systemic failures for which DHS and DOJ are largely responsible. The backlog of immigration cases in the immigration court system reached a historic high in September 2012 and is currently more than 23 percent higher than at the end of FY 2010.[36] In FY 2012, cases were pending an average of 531 days on the immigration court docket.[37] Immigration court case receipts that year topped more than 410,000 matters, with 36 percent of completions being detained cases.[38]

While the Constitution requires that there be some judicial review of deportation cases, the time required for judicial review often adds more than a year to the process.[39] Thus, immigrants routinely lose years of their lives waiting for their cases to finish. Even if they win before the Immigration Judge, they can remain imprisoned for years while DHS litigates an appeal. One of my clients was imprisoned for more than four-and-a-half years despite having won twice before the Immigration Judge.

The Supreme Court addressed immigration detention pending completion of removal proceedings several years ago, ruling in *Demore v. Kim* that the detention without bond hearings of immigrants convicted of certain crimes was constitutional where such detention was "brief" and the detainee had conceded deportability.[40] In reaching that conclusion, the Court relied on data establishing that the vast majority of immigration detentions, or 85 percent, lasted an average of 47 days or less, while the remaining 15 percent lasted approximately 5 months because they involved an administrative appeal.[41]

A snapshot look at immigration detentions some eight years later reveals that the amount of time spent in immigration prison has greatly increased. Although the average detention length for FY 2011 was 29 days,[42] as of January 2, 2012, 3,427 individuals in ICE custody had spent more than 90 days behind bars; 2,952 individuals had been

---

[36] TRAC Immigration, Immigration Court Backlog Continues to Inch Upward in January (Feb. 13, 2013), *available at* http://trac.syr.edu/immigration/reports/latest_immcourt/#backlog
[37] TRAC Immigration, Immigration Court Backlog Continues, *supra.*
[38] EOIR FY 2012 Statistical Year Book, A1-A2, *available at* http://www.justice.gov/eoir/statspub/fy12syb.pdf
[39] *See INS v. St. Cyr*, 533 U.S. 289, 300 (2001) (holding that some judicial intervention is "unquestionably" required in deportation cases); Judicial Business of the U.S. Courts, Table B-4C Median Time Intervals for Merit Terminations of Administrative Agency Appeals, (2012), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/B04CSep12.pdf (reporting median time of 13.3 months from filing to final disposition of administrative agency appeals)
[40] *See* 538 U.S. 510, 513 (2003); 8 U.S.C. § 1226(c).
[41] *Demore*, 538 U.S. at 529.
[42] http://www.ice.gov/doclib/foia/reports/ero-facts-and-statistics.pdf

incarcerated for six months or longer, and 844 for one year or more. Some individuals whose cases remained pending had been detained as long as four or five years. In one published Ninth Circuit case, an individual spent *seven years* in immigration detention before he ultimately won his case.[43]

While the Supreme Court has yet to address such prolonged detentions, the lower courts have largely found that due process requires bond hearings for immigrants who face the threat of prolonged detention.[44] These courts have recognized that individuals in DHS custody have a profound liberty interest in avoiding years of incarceration while their immigration cases remain pending. Because of the weighty liberty interest involved, due process requires that civil immigration detention be reasonably related to its purpose of ensuring appearance for removal, and also that such detention be accompanied by adequate procedural safeguards to ensure that this purpose is served in each imprisoned immigrant's case.[45]

The existing immigration detention system fails to satisfy these constitutional requirements. Immigration court proceedings are often delayed because immigrants have no right to appointed counsel, and immigrants are often incarcerated in remote locations where they cannot obtain representation. Many of these individuals pose no flight risk or danger to public safety, yet frequently, like Reverend Soeoth and Warren Joseph, they never receive a bond hearing to determine whether their detention is even necessary. They may well have substantial challenges to removal from the United States — indeed, Reverend Soeoth and Mr. Joseph both won their cases — yet they are forced to endure years of incarceration as the price for pursuing their legal right to live in this country.

---

[43] ICE data obtained through the Freedom of Information Act and on file with the ACLU; *Casas-Castrillon v. DHS*, 535 F.3d 942 (9th Cir. 2008).

[44] *See, e.g., Casas-Castrillon* , 535 F.3d at 950; *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005) (both construing § 1226(c) as only authorizing detention for "expeditious" removal proceedings in order to avoid the serious constitutional problem of prolonged mandatory detention); *Diouf v. Napolitano*, 634 F.3d 1081, 1091 (9th Cir. 2011) (construing § 1231 to require a bond hearing at six months, when detention becomes "prolonged"); *Ly v. Hansen*, 351 F.3d 263, 271-72 (6th Cir. 2003) (construing § 1226(c) as only authorizing mandatory detention for the period of time reasonably needed to conclude proceedings promptly); *Welch v. Ashcroft*, 293 F.3d 213, 224 (4th Cir. 2002) (holding, prior to *Demore*, that "[f]ourteen months of incarceration . . . of a longtime resident alien with extensive community ties, with no chance of release and no speedy adjudication rights" to be impermissible); *Diop v. ICE/Homeland Security*, 656 F.3d 221 (3d Cir. 2011) (holding that Section 1226(c) authorizes detention without a bond hearing for only a reasonable period of time); *Flores-Powell v. Chadbourne*, 677 F. Supp. 2d 455, 468-71 (D. Mass. 2010) (construing § 1226(c) to implicitly require that removal proceedings be completed within a reasonable period of time; if not, detention can only continue after an individualized determination of flight risk and dangerousness);; *Alli v. Decker*, 644 F. Supp. 2d 535, 539 (M.D. Pa. 2009) (noting "the growing consensus . . . throughout the federal courts" that prolonged mandatory detention raises serious constitutional problems).

[45] *Zadvydas v. Davis*, 533 U.S.678, 690-91 (2001); *Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011); *Diouf v. Napolitano*, 634 F.3d 1081, 1092 (9th Cir. 2011).

Indeed, government data recently disclosed to the ACLU through discovery in *Rodriguez v. Robbins*,[46] a class action in the Central District of California, suggests that individuals with the strongest cases are the most vulnerable to prolonged incarceration. An analysis of approximately 1,000 individuals detained six months or longer in the Los Angeles area shows that more than 70% applied for relief, and approximately a third won their cases. The data also confirm that detention length increased for class members who prevailed in their cases. Individuals who won their cases faced an average detention length of 320 days, for those with only immigration court proceedings, and 509 days for those who prevailed before the BIA—periods that stretch far beyond the one-and-a-half to five months the Supreme Court contemplated for removal proceedings in *Demore*.[47]

Currently the government subjects several groups of immigrants to long-term imprisonment while their cases are being decided without providing them the basic due process of a bond hearing. The government takes this position even though nothing in the immigration statutes authorizes long-term detention without immigration judge review in run-of-the-mill immigration cases. Such prolonged incarceration raises serious due process concerns.

Contrary to what many observers assume, the problems arising from extended detention are not limited to immigrants whose criminal records subject them to mandatory custody. DHS also interprets the existing laws to foreclose bond hearings for many people with no criminal history.

For example, I represented a Sri Lankan Tamil torture victim whose first name I share—Ahilan Nadarajah—who managed to escape Sri Lanka and sought asylum in our country. He was stopped at the border and detained for nearly five years despite being granted asylum twice, because the government repeatedly appealed his victories and kept him locked in detention. The prolonged detention of asylum-seekers is particularly tragic, as it leads to the re-traumatization of individuals who have already suffered torture and persecution.[48] Ahilan was released only after the U.S. Court of Appeals for the Ninth Circuit, speaking through a unanimous and ideologically diverse panel, ruled that his detention was unlawful because of its length, and because there was almost no chance the government would remove him in light of the Immigration Judge's rulings in his case.

---

[46] 2:07-cv-03239-TJH-RNB (C.D. Cal.)
[47] *Demore*, 538 U.S. at 529.
[48] *See generally*, Physicians for Human Rights and the NYU/Bellevue Center for Survivors of Torture, *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers* (June 2003); *see also* Human Rights First, *In Liberty's Shadow: U.S. Detention of Asylum Seekers in the Era of Homeland Security*, 33-34 (2004).

We know that asylum-seekers typically have no criminal history, and often have relatives lawfully present in the United States. Yet under current detention policies, even those who win asylum, withholding of removal, or relief under the Convention Against Torture from an Immigration Judge may be detained for years while the government appeals their cases. Similarly, lawful permanent residents (LPRs) often have strong legal claims and deep ties to our country, including U.S. citizen spouses, children, and parents. Nonetheless, Immigration Judges are currently prohibited from granting bond to such asylum-seekers and returning LPRs, thus ensuring that many of them will remain detained for months, or even years, while their cases remain ongoing, even if they present no flight risk or danger to the community.

Another client of mine, a Senegalese computer engineer named Amadou Diouf, spent nearly two years in detention while his case dragged on, even though he was married to a United States citizen and had been convicted of only one crime—possession of less than 30 grams of marijuana, which is not a deportable offense. DHS charged him with overstaying his visa, but their custody review process nonetheless found him unsuitable for release based on his marijuana conviction and lack of family ties. Again, he was released only after a federal judge ordered that he be given a bond hearing. He ultimately won his immigration case.

The Ninth Circuit's opinion in Mr. Diouf's case, issued by another unanimous and ideologically diverse panel of judges, explained clearly why bond hearings before Immigration Judges are an important procedural protection that we must not abandon: "Diouf's own case illustrates why a hearing before an Immigration Judge is a basic safeguard for aliens facing prolonged detention . . . . The government detained Diouf in March 2005. DHS conducted custody reviews . . . in July 2005 and July 2006. In both instances, DHS determined that Diouf should remain in custody pending removal because his 'criminal history and lack of family support' suggested he might flee if released. In February 2007, however, an Immigration Judge determined that Diouf was not a flight risk and released him on bond. If the district court had not ordered the bond hearing on due process grounds, Diouf might have remained in detention until this day."[49] This is but one example of the federal courts' wider recognition that there is "no evidence that Congress intended to authorize the long-term detention of aliens without providing them access to a bond hearing before an immigration judge."[50] Congress should seize the moment of immigration reform to make provision of prompt bond hearings before Immigration Judges an explicit, universal requirement.

e. DHS's Erroneous Interpretation of Mandatory Custody

[49] *Diouf v. Napolitano*, 634 F.3d 1081, 1092 (9th Cir. 2011).
[50] *Casas-Castrillon, supra.*

A majority of people in immigration prisons are subject to the mandatory custody provisions enacted by Congress in 1996, which have been interpreted by DHS to require incarceration without bond for virtually all noncitizens who are removable because of criminal convictions—including nonviolent misdemeanor convictions for which they may have received no jail sentence.[51] Thousands of immigrants—including many longtime LPRs like Warren Joseph—are routinely imprisoned without ever being afforded the basic due process of a bond hearing before an immigration judge.

DHS currently misapplies the mandatory custody laws in three key ways, at great cost to American taxpayers and tremendous hardship to detainees and their families:

·*First*, DHS improperly incarcerates without individualized consideration immigrants with substantial challenges to removal that would ultimately allow them to remain in the country lawfully. Section 1226(c) requires the detention of noncitizens who are "deportable" or "inadmissible" on designated criminal grounds for the pendency of their removal proceedings. In *Matter of Joseph*,[52] the BIA established the standard for this custody determination, holding that an individual is "deportable" or "inadmissible" within the meaning of section 1226(c), and thus subject to mandatory lock-up, merely when the government *charges* removability on a ground triggering the statute. In order to obtain a bond hearing, a noncitizen detained under section 1226(c) must demonstrate that it is "substantially unlikely that the [government] will prevail on a charge of removability specified in" section 1226(c)[53]—effectively, that the charges are frivolous.[54]

This nearly insurmountable standard—which one federal appeals judge has characterized as "egregiously" unconstitutional[55]—has resulted in the unnecessary and costly detention of individuals with substantial challenges to removal (many of whom prevail on those challenges). These include both individuals who have strong challenges to the charges against them, as well as individuals, like Warren Joseph, who have strong claims to discretionary immigration relief that would allow them to keep or obtain lawful permanent residence. As a result, individuals who later prevail in their cases suffer mandatory detention for months, or even years, at enormous cost to taxpayers.

---

[51] 8 U.S.C. § 1226(c). ICE data indicate that, in FY 2011, between 45% and 64% of immigration detainees are designated as "mandatory" on any given day; the remaining 33% to 55% of detainees are detained at the agency's discretion.

[52] 22 I. & N. Dec. 799, 800 (BIA 1999).

[53] *See id.*

[54] *See* Julie Dona, *Making Sense of "Substantially Unlikely": An Empirical Analysis of the Joseph Standard in Mandatory Detention Custody Hearings* 5 (June 1, 2011) (forthcoming in Georgetown Immigration Law Journal), *available at* http://ssrn.com/abstract=1856758 (reviewing *Joseph* decisions between November 2006 through October 2010 and finding that the BIA construes the "substantially unlikely" standard "to require that nearly all legal and evidentiary uncertainties be resolved in favor of the [government]").

[55] *Tijani*, 430 F.3d at 1246 (Tashima, J., concurring).

·*Second*, DHS subjects immigrants to mandatory detention based on old crimes—in some cases, crimes that took place well over a decade ago. Section 1226(c) requires DHS to take custody of noncitizens who are deportable or inadmissible based on certain designated offenses "when the alien is released" from criminal custody for those offenses. The overwhelming majority of federal courts to consider the issue have construed section 1226(c) not to apply where DHS takes custody of individuals months or years after their release from criminal confinement for an offense covered by the statute.[56] However, pursuant to the BIA's decision in *Matter of Rojas*,[57] DHS applies mandatory detention to individuals it arrests *at any time* after their release from criminal custody, vastly expanding the mandatory incarceration of individuals who have been at liberty for years leading productive lives in the community.

·*Third*, DHS takes an overly narrow view of the statute's requirement that immigrants be kept in "custody," guaranteeing the wasteful and unnecessary detention of individuals who pose no flight risk or danger. In contrast to other provisions of the immigration laws that expressly reference the "arrest[] and *det[ention]*" of noncitizens pending removal proceedings, section 1226(c) states that the Attorney General "shall take into *custody*" aliens who are inadmissible or removable as a result of their criminal histories.[58] The term "custody" has traditionally been interpreted by the federal courts to include not only physical incarceration but also alternatives to incarceration, such as electronic or telephonic monitoring, reporting requirements, curfews, and home visits.[59] Congress should make clear that the immigration context is no different.

---

[56] *See, e.g.*, *Kot v. Elwood*, 2012 WL 1565438, at *8 (D.N.J. May 2, 2012) (holding that § 1226(c)(1) applies only to noncitizens detained at the time of their release from criminal custody for their specified removable offense); *Nunez v. Elwood*, 2012 WL 1183701, at *3 (D.N.J., Apr. 9, 2012) (same); *Ortiz v. Holder*, 2012 WL 893154, at *3 (D. Utah Mar. 14, 2012) (same); *Christie v. Elwood*, 2012 WL 266454, at *8 (D.N.J. Jan. 30, 2012) (same); *Rosario v. Prindle*, 2011 WL 6942560, at *3 (E.D.Ky. Nov. 28, 2011), *adopted by* 2012 WL 12920, at *1 (E.D.Ky. Jan. 4, 2012) (same); *Parfait v. Holder*, 2011 WL 4829391, *6 (D.N.J. Oct. 11, 2011) (same); *Rianto v. Holder*, 2011 WL 3489613, at *3 (D. Ariz. Aug. 9, 2011) (same); *Beckford v. Aviles*, 2011 WL 3444125, at *7 (D.N.J. Aug. 5, 2011) (same); *Jean v. Orsino*, No. 11-3682 (LTS) (S.D.N.Y. June 30, 2011) (same); *Sylvain v. Holder*, No. 11-3006 (JAP), 2011 WL 2580506, at *5-6 (D.N.J. June 28, 2011) (same); *Aparicio v. Muller*, No. 11-cv-0437 (RJH) (S.D.N.Y. Apr. 7, 2011) (same); *Louisaire v. Muller*, 758 F. Supp. 2d 229, 236 (S.D.N.Y. 2010) (same); *Gonzalez v. DHS*, 2010 WL 2991396, at *1 (M.D. Pa. July 27, 2010) (same); *Dang v. Lowe*, No. 1:CV-10-0446, 2010 WL 2044634, at *2 (M.D. Pa. May 20, 2010) (same); *Monestime v. Reilly*, 704 F. Supp. 2d 453, 458 (S.D.N.Y. 2010) (same); *Khodr v. Adduci*, 697 F. Supp. 2d 774, 778 (E.D. Mich. 2010) (same); *Scarlett v. DHS.*, 632 F. Supp. 2d 214, 219 (W.D.N.Y. 2009) (same); *Bromfield v. Clark*, 2007 WL 527511, at *4 (W.D. Wash. Feb. 14, 2007) (same); *Zabadi v. Chertoff*, 2005 WL 3157377, at *5 (N.D. Cal. Nov. 22, 2005) (same); *Quezada-Bucio v. Ridge*, 317 F. Supp. 2d 1221, 1228 (W.D. Wash. 2004) (same). *But see Hosh v. Lucero*, 680 F.3d 375 (4th Cir. 2012) (deferring to *Matter of Rojas*).

[57] 23 I. & N. Dec. 117 (BIA 2001).

[58] *Compare* 8 U.S.C. § 1226(a) *with* § 1226(c).

[59] *See, e.g.*, *Reno v. Koray*, 515 U.S. 50, 63-64 (1995) (holding, in sentencing context, that whether an individual is "released" depends on if he remains "subject to [the custodian's] control," and not whether he is still subject to "jail-like conditions").

f. Alternatives to Detention: The Common-Sense Solution When Supervision of Immigrants is Needed

Alternatives to detention are both effective in preventing danger and flight and far less expensive than physical incarceration. ICE should adopt an interpretation of mandatory custody that allows their use for people whom it currently imprisons. ICE's Alternatives to Detention ("ATD") program has been very successful in ensuring that immigrants appear for removal proceedings. BI Incorporated, the company with which ICE contracts for its Intensive Supervision and Appearance Program II ("ISAP II"), has reported 99% attendance rates at immigration court hearings.[60] Earlier pilot programs like the Vera Institute's Appearance Assistance Project (AAP) had similar appearance rates. Even for those with criminal records, ATDs were effective in ensuring a greater than 90% appearance rate.[61]

Alternatives to detention are also widely used by the federal and state pretrial systems.[62] As in the immigration context, ATDs in the pretrial detention setting have proven effective in preventing danger to the community or flight risk pending proceedings. For example, according to Department of Justice ("DOJ") statistics, among federal defendants granted pretrial release during fiscal years 2008-10, only 4% were rearrested for a new offense (felony or misdemeanor) and 1% failed to make their court appearances.[63] State ATD programs report similarly low rates of recidivism and flight. One example involves Harris County, Texas, where the pretrial services program reported only a 5% failure to appear rate and a 3.3% rearrest rate in 2011.[64]

---

[60] *See* ISAP II 2011 Annual Report (in 2011, ICE referred 35,380 participants to ISAP II, ICE's ATD intensive supervision appearance program that in its "full service" option produced a 99.4% attendance rate at all Immigration Judge hearings and a 96.0% attendance rate at the final court decision); ISAP II 2010 Annual Report (in 2010, ICE referred 25,778 participants to ISAP II ; "full service" option had a 99% attendance rate at all Immigration Judge hearings and a 94% attendance rate at the final court decision).

[61] Eileen Sullivan et al., *Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program, Final Report to the Immigration and Naturalization Service.* (Aug. 1, 2000), 6, *available at* www.vera.org/content/testing-community-supervision-ins-evaluation-appearance-assistance-program; see also Alfonso Serrano F., "ICE Slow to Embrace Alternatives to Immigrant Detention." New America Media (Apr. 10, 2012) ("In 2010, for example, government programs that provided alternatives to detention resulted in a 93.8 percent appearance rate for immigration hearings. And in 2009, the government's electronic monitoring programs yielded a 93 percent appearance rate, while its enhanced supervision reporting program resulted in a 96 percent compliance rate.").

[62] *See* 18 U.S.C. § 3142(e), (c)(1)(A); *see also, e.g.*, Cal. Penal Code § 1270(a) (2012); Tex. Code Crim. Proc. Ann. art. 17.40; 725 Ill. Comp. Stat. 5/110-2 (2012); Conn. Gen. Stat. § 54-63b; Ky. R. Crim. Pro. 4.12; Or. Rev. Stat. § 135.245

[63] DOJ, Bureau of Justice Statistics, *Pretrial Release and Misconduct in Federal District Courts, 2008-2010* (Nov. 2012), 13 tbl. 11(Nov. 2012), *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=4535

[64] Pretrial Services of Harris County, Texas, *2011 Annual Report*, 20-21, *available at* http://www.harriscountytx.gov/CmpDocuments/59/Annual%20Reports/2011%20Annual%20Report-0410.pdf. *See also, e.g.*, Partnership for Community Excellence, *Pretrial Detention & Community Supervision: Best Practices and Resources for California Counties* (San Francisco County reported less

Moreover, ATDs save tremendous amounts of taxpayer money. Detention costs $164 per person per day, while alternative methods cost, depending on the form of the alternative, approximately $7 per person per day.[65] Along with causing unnecessary severe hardship to detainees and their families, long-term detention is a huge waste of taxpayer dollars.

DHS understands that its Alternatives to Detention (ATD) program "is a cost-effective alternative to secure detention of aliens in removal proceedings."[66] Indeed, DHS's pilot programs for ATDs achieved an appearance rate of 94%, far in excess of the targeted 58%.[67] Alternatives to incarceration in ICE prisons can ensure appearance at court hearings, and for removal if ordered, at a fraction of the cost of imprisonment.

Experts from across the political spectrum have recommended using ATDs to cut costs while still ensuring high appearance rates. For example, the Council on Foreign Relations' Independent Task Force on U.S. Immigration Policy concluded that alternatives to detention can "ensure that the vast majority of those facing deportation comply with the law, and at much lower costs."[68] The Heritage Foundation also recognized the importance of ATDs to "bring costs down" and recommended that more be done "to identify the proper candidates for ISAP-like programs" and that "[o]ther commonsense programs should be analyzed and, if effective, expanded."[69] One estimate suggests that even if the most expensive ATD program were used to monitor detainees who have no violent criminal histories—the overwhelming majority of ICE detainees—"the agency could save nearly $4.4 million a night, or $1.6 billion annually, an 82% reduction in costs."[70]

---

than a 3% failure to appear rate and a 0% long-term recidivism rate for its pretrial program), *available at* http://caforward.3cdn.net/7a60c47c7329a4abd7_2am6iyh9s.pdf; James Austin et al., The JFA Institute, *Florida Pretrial Risk Assessment Instrument* (2012) (in samples from five Florida counties in 2011, 6.5% failure to appear rate and 8.4% rearrest rate), *available at* http://www.pretrial.org/Setting%20Bail%20Documents/FL%20Pretrial%20Risk%20Assessment%20Report%20(2012).pdf

[65] National Immigration Forum, *The Math of Immigration Detention.* (Aug. 2011), 1, available at http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf; Testimony of John Morton to the House Appropriations Subcommittee on Homeland Security (Mar. 14, 2013).

[66] DHS FY 2012 Budget Justification, supra, 940.

[67] *Id.* at 925.

[68] Jeb Bush, Thomas F. McLarty III, and Edward H. Alden, Council on Foreign Relations, *U.S. Immigration Policy*, Independent Task Force Report No. 63 (2009), 29.

[69] Matt Mayer, Heritage Web Memo 3455, "Administrative Reforms Insufficient to Address Flawed White House Immigration and Border Security Policies." (Jan. 10, 2012), *available at:* http://www.heritage.org/research/reports/2012/01/administrative-reforms-in-immigration-and-border-security-policies

[70] *Math of Immigration Detention, supra*, 2.

In its strategic plan for FY 2010-14, ICE recognized "the value of enforcing removal orders without detaining people" and committed to developing "a cost-effective Alternatives to Detention program that results in high rates of compliance."[71] Moreover, in its FY 2013 Budget Request, DHS sought "flexibility to transfer funding between immigration detention and the ATD program."[72] However, to date, ICE's ATD program is still dwarfed by the immigration detention system.[73] ICE requested only $72 million for ATDs in FY 2012, compared to $1.9 billion for detention operations,[74] and requested $111.6 million for FY 2013, compared to another $2 billion for detention operations.[75] Most importantly, citing its congressionally imposed bed mandate discussed above, ICE has *not* used ATDs to reduce its overall level of detention, but merely as a supplement to its detention practices.

Expansion of alternatives to detention for all immigrants ICE places in removal proceedings is vital to minimizing the need to incarcerate and isolate immigrants who will be harmed by imprisonment, but pose no public safety or flight risk.

g. Conditions of Incarceration: ICE's Recent History of Neglect and Abuse

For all the reasons described above, detention within the immigration prison system should be rare, as it is both extremely costly and serves to deprive those incarcerated of their most precious freedoms. There is however a further reason to minimize the use of immigration prisons: because of what happens inside them. As sustained media exposure has revealed in the last five years, immigrants continue to suffer gross human rights violations in immigration detention centers.[76]

Some of the most serious problems have concerned medical care. At one point, the agency lost track of how many detainees died in its custody.[77] (At least 131 ICE

---

[71] ICE, *ICE Strategic Plan FY 2010-2014* (2010), 7, *available at* www.ice.gov/doclib/news/library/reports/strategic-plan/strategic-plan-2010.pdf

[72] Written testimony of ICE Director John Morton for a House Committee on Appropriations, Subcommittee on Homeland Security hearing on The President's Fiscal Year 2013 budget request for ICE, *available at* http://www.dhs.gov/news/2012/03/08/written-testimony-us-immigration-and-customs-enforcement-ice-director-house

[73] As of January 22, 2011, there were 13,583 participants in the Full Service program, in which contractors provide the equipment and monitoring services along with case management, and 3,871 participants in the Technology-Assisted (TA) program, in which the contractor provides the equipment but ICE continues to supervise the participants. FY 2012 Budget Justification, 43.

[74] DHS, U.S. Department of Homeland Security Annual Performance Report FY 2011-2013, 3-4.

[75] *See id.* at 35, 53.

[76] Nina Bernstein, "Officials Hid Truth of Immigrant Deaths in Jail." New York Times (Jan. 9, 2010), available at http://www.nytimes.com/2010/01/10/us/10detain.html?pagewanted=all

[77] Nina Bernstein, "Officials Say Detainee Fatalities Were Missed." New York Times (Aug. 17, 2009), available at http://www.nytimes.com/2009/08/18/us/18immig.html

detainees have died in custody since October 2003.[78]) The *Washington Post* published a four-part series titled "Careless Detention: Medical Care in Immigrant Prisons," which concluded with an examination of the horrific practice of forcibly drugging detainees for deportation, which appears to have ended only after an ACLU lawsuit.[79] The *Post* collaborated with CBS News's *60 Minutes*, resulting in a broadcast segment featuring extensive "evidence that immigrants are suffering from neglect and some don't survive detention in America."[80] The *Post* noted in 2008 that the leading cause of death is suicide, adding that care for psychiatric disabilities was grossly deficient: "Suicidal detainees can go undetected or unmonitored."[81]

Sexual abuse and assault is also a serious problem in immigration detention facilities. Government documents obtained through an ACLU FOIA request reveal nearly 200 allegations of sexual abuse and assault at detention facilities across the country since 2007.[82] Various reports,[83] documentaries,[84] and complaints[85] point to numerous specific examples of abuse. These reported cases evidence a widespread, systemic problem—particularly in light of the many obstacles immigration detainees face in reporting abuse. In January 2012, 28 House members successfully requested that the

---

[78] *See* ICE, "List of Deaths in ICE Custody." (Dec. 6, 2012), available at http://www.ice.gov/doclib/foia/reports/detaineedeaths2003-present.pdf; "ICE detainee passes away after being rushed to local hospital." (Jan. 18, 2012), available at http://www.ice.gov/news/releases/1201/120118lasvegas.htm; "ICE detainee passes away at Los Angeles-area hospital. Mexican national was being treated for pneumonia." (Mar. 5, 2012), available at http://www.ice.gov/news/releases/1203/120305victorville.htm

[79] Dana Priest and Amy Goldstein (May 11 -14, 2008), available at http://www.washingtonpost.com/wp-srv/nation/specials/immigration/index.html

[80] Scott Pelley, "Detention in America." (Feb. 11, 2009), available at http://www.cbsnews.com/stories/2008/05/09/60minutes/main4083279.shtml

[81] Dana Priest and Amy Goldstein, "Suicides Point to Gaps in Treatment: Errors in Psychiatric Diagnoses and Drugs Plague Strained Immigration System." Washington Post (May 13, 2008), available at http://www.washingtonpost.com/wp-srv/nation/specials/immigration/cwc_d3p1.html

[82] See https://www.aclu.org/maps/sexual-abuse-immigration-detention-facilities

[83] See, e.g., Carrie Johnson, "Immigration Detainees Seek Prison-Rape Protection." (Dec. 13, 2011), available at http://www.npr.org/2011/12/13/143638236/immigration-detainees-seek-prison-rape-protection; David Kaiser and Lovisa Stannow, "Immigrant Detainees: The New Sex Abuse Crisis." New York Review of Books blog (Nov. 23, 2011), available at http://www.nybooks.com/blogs/nyrblog/2011/nov/23/immigrant-detainees-new-sex-abuse-crisis. For editorials on the topic, see "Protect Detainees Too." Los Angeles Times (Dec. 12, 2011), available at http://www.latimes.com/news/opinion/editorials/la-ed-prea-20111212,0,2790539.story?; "A Broken, Dangerous System." New York Times (Dec. 4, 2011), available at http://www.nytimes.com/2011/12/05/opinion/a-broken-dangerous-system.html?; "How committed is the Dept. of Justice to ending rape behind bars?" Washington Post (Nov. 25, 2011), available at http://www.washingtonpost.com/opinions/how-committed-is-justice-dept-to-ending-rape-behind-bars/2011/11/22/gIQAiuz5wN_story.html

[84] *PBS Frontline: Lost in Detention* (Oct. 18, 2011), available at http://www.pbs.org/wgbh/pages/frontline/race-multicultural/lost-in-detention/transcript-11/

[85] National Immigrant Justice Center, "Mass Civil Rights Complaint Details Systemic Abuse of Sexual Minorities in U.S. Immigration Detention ." (Apr. 13, 2011), available at http://www.immigrantjustice.org/issues/stop-sexual-abuse-detained-immigrants

Government Accountability Office (GAO) investigate these incidents.[86] Many others have doubtless gone unreported by detainees who fear speaking out, have language barriers, or are unable without the help of an attorney to navigate the difficult process.

One example of ICE neglect came in the case of Claudia Leiva Deras, a 27-year-old woman who fled domestic violence in Honduras. She was arrested by police after a 911 call reporting domestic violence, and detained in the Cass County, Nebraska, Jail, which contracts with federal authorities to house ICE detainees.[87] During her four months in custody, she alleges suffering extremely violent physical and sexual assaults by another detainee on an almost daily basis, resulting in physical injuries including bleeding, headaches, abdominal pain, and stomach cramps.[88] Frightened that reporting these constant attacks would result in retaliation from her abuser, Ms. Leiva Deras filed written grievances asking for medical attention, hoping she could tell a doctor what was happening. Her pleas for a doctor were refused.[89] When Ms. Leiva Deras did report the assaults and her injuries, she was still denied a medical examination, STD testing, mental health care, or counseling, in spite of her attorney's requests.[90] After learning that she had been repeatedly raped and beaten under their care, the facility staff offered Ms. Deras nothing but a Tylenol; on a medical round, she was told that no doctor's appointment would be scheduled: "Immigration doesn't pay for that. You're not outside."[91]

Ms. Deras, who eventually won her case and became a lawful permanent resident, is not the only woman to escape violence in her home country only to become the victim of sexual assault while in ICE custody.[92] By incarcerating immigrants who need not be kept in prison to ensure public safety or their appearance at removal hearings, ICE is placing them at risk.

Providing appropriate alternatives to detention is particularly important for populations that are vulnerable to physical and sexual abuse in detention. This population includes those who are or are perceived to be lesbian, gay, bisexual,

---

[86] January 4, 2012 letter available at http://polis.house.gov/UploadedFiles/010512_GAO_Detention_Letter.pdf

[87] *Leiva Deras v. Brueggemann*, No. 4:2012cv03000 (D. Neb. Jan. 3, 2012), Complaint at 1-2, available at http://www.aclunebraska.org/images/attachments/Leiva_Deras_Complaint.pdf.

[88] *Id.* at 3-4.

[89] *Id.* at 4.

[90] *Id.* at 4-5.

[91] *Id.*; *see also* Press Release, ACLU of Nebraska, Offered a Tylenol in Response to Rape in Jail (Jan. 23, 2012), available at http://www.aclunebraska.org/index.php/immigrants-rights/137-qoffered-a-tylenolq-in-response-to-rape-in-jail

[92] See Press Release, ACLU of Texas, ACLU of Texas Sues ICE Officials, Williamson County and CCA for Sexual Assault of Immigrant Women (Oct. 19, 2011), available at http://www.aclutx.org/2011/10/19/aclu-of-texas-sues-ice-officials-williamson-county-and-cca-for-sexual-assault-of-immigrant-women/; *Doe v. Neveleff*, No. 1:11-cv-00907 (W.D. Tx. 2011), Complaint, available at http://www.aclutx.org/documents/111019DoevNeveleffFileStampedPublicComplaint.pdf

transgender, intersex (LGBTI) or gender nonconforming. A recent study by the Williams Institute at the UCLA School of Law estimates that 267,000 LGBT adult undocumented immigrants currently live in the United States.[93] For those who end up in immigration detention, the record is sadly replete with examples of serious abuse and isolation.

In December 2011, the ACLU of Arizona filed a federal lawsuit on behalf Tanya Guzman-Martinez, a then-28-year-old transgender woman, who was intimidated, harassed and sexually assaulted while at the Eloy Detention Center.[94] During her eight-month detention at Eloy, Tanya was sexually assaulted twice. The first assault occurred on December 7, 2009 and involved a detention officer who, after repeated harassment, forced Tanya to ingest his ejaculated semen and threatened her with placement in "the hole," longer detention, or being deported back to Mexico if she did not comply with his demands. The second assault took place on April 23, 2010 by a male detainee.

The ACLU of Arizona also reported about Simon, a gay man living with HIV, who was placed in protective custody while detained at Eloy after he told officers that he had been previously assaulted (both in his home country and while detained in the U.S.) and feared for his safety. While housed in protective custody, he was made to wear an orange disciplinary jumpsuit and was shackled any time he was taken to court or for visitation.[95] Not only do LGBTI and gender nonconforming immigrant detainees like Tanya and Simon face the trauma of physical and sexual abuse, but they are also often re-traumatized through placement in punitive administrative segregation and subjected to prolonged periods of isolation from family, counsel, and support structures.

* * *

Any serious attempt to bring our immigration enforcement system into conformity with our Nation's values must address ICE's misuse of detention resources to incarcerate individuals who pose no danger or flight risk, which in turn is the best way to control costs and ameliorate deficient conditions of confinement. By barring ICE from employing flexible, fact-based decision-making about custody, the mandatory 34,000 bed requirement undermines the Administration's commitment to reform the civil immigration detention system. In the context of immigration reform, Congress must address the profligate and inhumane immigration prison system: by ending the mandatory bed quota, requiring individual bond hearings for detainees before Immigration Judges,

---

[93] Gary Gates, *LGBT Adult Immigrants in the United States*, The Williams Institute (2013), http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBTImmigrants-Gates-Mar-2013.pdf

[94] Complaint for Guzman-Martinez v. Corrections Corporation of America, 2:11-cv-02390-NVW (D.Ariz. 2012), available at http://www.acluaz.org/sites/default/files/documents/Guzman%20-%20Complaint.pdf

[95] *Id.* at 25.

particularly in cases of prolonged detention, and acting to ensure that cost-effective yet proven-reliable alternatives to detention are used to the greatest extent possible.

IV. Conclusion

The ACLU commends the Committee for its attention to the discord between American values and the immigration system. To respect the Constitution, reforms are urgently needed to ensure legal representation in immigration court; to restore the discretionary authority of judges; to limit significantly the extent to which people are imprisoned; and to achieve truly civil immigration detention centers by dramatically improving conditions of confinement. Congress' legislative work in this area is imperative to address the failings chronicled here and, above all, to show that the sacrifices made by the immigrants profiled, and countless others they represent, are heard in this august precinct–and acted upon.

APPENDIX

CASE STORIES

The following case stories illustrate the serious civil liberties concerns raised by the immigration enforcement system. The cases below describe the harm to individuals, their families, and the American taxpayer arising from the immigration system's failures to a) ensure legal representation to those who need it, b) provide judges with authority to consider each individual's individual circumstances, and c) limit irrational immigration imprisonment. Unfortunately, every day thousands of noncitizens face injustices similar to those described here because of our draconian immigration enforcement system.

Appointed Counsel

1. ***Jose Antonio Franco-Gonzalez***, an immigrant from Mexico, was not able to speak until he was six or seven, does not know his birthday or age, has trouble recognizing numbers and counting, and cannot tell time. In 2005, while in immigration custody, a government psychiatrist found him incompetent and an Immigration Judge closed his case because he could not understand the proceedings. Unrepresented by counsel, he was remanded back into immigration custody, where he was promptly forgotten. Despite the lack of removal proceedings or other charges against him, he spent another four years behind bars—at a cost of almost $300,000—before he was found by pro bono attorneys who filed a lawsuit to secure his release.

2. ***Maksim Zhalezny*** is a lawful permanent resident who has significant psychiatric disabilities and is not able to represent himself. Department of Homeland Security (DHS) wants to deport him for two non-violent offenses, but his case has been repeatedly delayed because the judge was not willing to proceed against him without a lawyer. He spent 442 days in immigration detention – at a cost of over $70,000 – until a federal court ordered the government to provide him an attorney who could argue for his release.

3. ***Mark Lyttle*** is a native-born U.S. citizen of Puerto Rican descent who was deported to Mexico in 2008. Despite Mr. Lyttle's acknowledged mental disabilities (he had previously spent time in a psychiatric hospital), at his immigration court hearing no attempt was made to assess whether he was able to proceed unrepresented. Mr. Lyttle had never been to Mexico and spoke no Spanish. He endured more than four months of living on the streets and in the shelters and prisons of Mexico, Honduras, Nicaragua, and Guatemala.

4. ***Ever Francisco Martinez-Rivas*** is a lawful permanent resident of the United States with a long history of schizophrenia and other psychiatric disabilities. He was convicted after a fight with his step-father, for which the Department of Homeland Security (DHS) now wants to deport him. Because he had no lawyer in his immigration case, the judge ordered the case closed, but DHS appealed. This left Mr. Martinez having to defend by himself, on appeal, the decision finding him

incompetent. The problem was solved only because a federal court ordered the government to find him a lawyer or allow him to stay.

5. ***David*** (a pseudonym) is a 25-year-old asylee from Nigeria. David fled to the United States after facing extreme religious persecution due to his conversion to Christianity. He witnessed his mother, uncle, aunt, and three young children being burned alive by Muslim gangs in his home country. When he arrived at the U.S. border in March, 2011, David was taken into immigration custody. After two and a half months detained at El Centro, California, David finally had a removal hearing in front of an Immigration Judge where he represented himself without an attorney. David's English was poor and he had a very difficult time detailing his claims. The judge denied David's asylum claim despite the many reports that documented the plight of Christian converts in Nigeria, and despite David's attempts to explain his fear of persecution. In August of 2011, David was able to obtain pro bono counsel from a local law firm, which represented him in his appeal to the Board of Immigration Appeals. Finally, on October 9, 2012, after two remands to the Immigration Judge from the Board of Immigration Appeals, and 19 months in immigration detention, David was granted asylum. The costs the government incurred in vigorously prosecuting David's removal included not only his 19 months of detention (an estimated $98,400) but also the costs of him seeing a psychologist on a regular basis to deal with his post-traumatic stress, the costs of medication to handle his depression and anxiety, and the costs of government attorneys retained for almost two years to fight to deport David back to Nigeria. If David had been represented by an attorney during his first hearing, his immigration proceedings and his detention would likely have ended much sooner. [Source: based on email correspondence with attorney who asked that name be withheld pending authorization from law firm]

6. ***Julia*** (a pseudonym) is an asylum seeker from Ghana. She fled to the United States after being forced to marry a man to pay off her family's debt. The man raped her and abused her. When Julia arrived at the border in May of 2011, she was immediately detained by Immigration and Customs Enforcement (ICE). Even after she passed her credible fear interview, ICE would not release her. ICE demanded proof of her identity but Julia could not obtain any documents from inside detention. In August, 2011, Julia was able to obtain a pro bono lawyer. By this time she had learned that she was pregnant from her rape in Ghana. Within one week, her attorney was able to secure Julia's release from detention. Through phone calls and emails to Julia's family in the United States, her attorney was able to get confirmation of Julia's identity, and ICE agreed to release her. Julia is now continuing to fight her immigration case with the help of her lawyer while she lives with members of her church and her daughter (who was born in January of 2012) in New York. Had Julia been represented by counsel at the commencement of her proceedings, her identity would have been established far sooner and her release earlier, saving the government the cost of several months of detention. Indeed, had she not found counsel when she did, it is unclear how much longer her detention might have been prolonged, at added cost to the government.

7. ***Alejandro*** (a pseudonym) is a Mexican national. He entered the United States with his Cuban wife and infant daughter in late December 2011 to seek asylum. His wife and daughter were paroled into the United States so that they could pursue adjustment of status under the Cuban Adjustment Act. Alejandro's parole was made subject to a substantial parole bond despite the absence of any factors that would warrant a bond requirement (i.e., criminal record, negative immigration history, flight risk, etc.). Unable to pay the bond, he was detained at the Port Isabel Detention Center in Harlingen, Texas. As the Immigration Judge noted at his removal proceeding, had he been paroled with his family, Alejandro would have been eligible to pursue adjustment to lawful permanent residence as the spouse of a Cuban national, under the Cuban Adjustment Act. Instead, following approximately 4 months of detention and a removal hearing in which he appeared pro se, Alejandro was ordered removed in April 2012.

   Alejandro obtained pro bono counsel in August 2012 from the firm of Van Ness Feldman LLP. At that point, he had been detained for approximately eight months and had a pending pro se appeal before the Board of Immigration Appeals (BIA). In addition to filing a brief in support of Alejandro's BIA appeal and seeking administrative closure, his pro bono counsel pursued requests for prosecutorial discretion and parole redetermination through oral and written contacts with the responsible Immigration and Customs Enforcement (ICE) attorney, ICE supervisors, and other ICE officials. The BIA, noting that Alejandro was pro se before the Immigration Judge and that the issue of administrative closure had not been raised below, remanded the case to the Immigration Judge for a decision on the issue. Following the submission of a joint request for administrative closure by Alejandro's counsel and the ICE attorney, the Immigration Judge administratively closed the proceeding in mid-November, 2012. After almost a year behind bars, Alejandro was released from detention in late November, 2012, and is currently pursuing adjustment of status. Had Alejandro been represented by counsel during his initial removal proceeding, a request for administrative closure of the proceeding at that stage would have avoided the cost of more than 9 months of Alejandro's detention and the costs associated with ICE's vigorous prosecution of his removal case, including multiple removal hearings; numerous oral and written responses to Alejandro's counsel's requests for prosecutorial discretion and parole redetermination; and the entire appeals process before the BIA. [source: emails with Kevin Gallagher, associate at Van Ness Feldman, who represented Alejandro pro bono]

Lack of Judicial Discretion

8. ***Lucia Medina Martinez*** came to the United States in 1994 when she was 15. She has six U.S. citizen children. In 2004, Lucia married a man and they had four children together. Two years later, Lucia's daughter from a previous relationship told her that her husband had been molesting her. Distraught, Lucia kicked her husband out of her house and sought the advice of her pastor about what to do next. Her pastor told her

to take her husband back in because "he was the father of four of her children, including a newborn baby, and because he was her husband." Lucia reluctantly accepted this advice and did not report the crime to the police. After three weeks, Lucia continued to feel uneasy and sought additional counseling through her church. This time, the counselor, with Lucia's permission, contacted the police. Her husband was arrested and sentenced to 15 years in prison. Lucia, however, was also arrested under a charge of child neglect for not reporting the incident earlier. She pled no contest believing that would allow her children to return to her care as soon as possible. She was sentenced to two days imprisonment as well as probation and community service.

Although her children were permitted to return home to her, Immigration and Customs Enforcement (ICE) began removal proceedings against Lucia in September of 2007 charging her with unlawful presence. Both the Immigration Judge and the Board of Immigration Appeals (BIA) denied Lucia's cancellation of removal claim solely because of her conviction for child neglect. Lucia appealed the BIA's decision to the U.S. Court of Appeals for the Eleventh Circuit, which upheld the BIA's decision on February 4, 2011, on the grounds that Lucia's conviction for child neglect constituted a conviction of "child abuse" and thus precluded her eligibility for cancellation of removal. *Martinez v. U.S. Atty. Gen.*, 413 Fed.Appx. 163 (11th Cir. 2011). In issuing his decision, however, Judge Marcus described the result as "profoundly unfair, inequitable, and harsh" and urged the Attorney General "to closely review the facts of this heartbreaking case once again." *Id.* at 168. He continued:

> "The entire basis of Martinez's child neglect conviction was that she allowed her husband, and the father of several of her children, to return to their home for a period of three weeks on the unambiguous advice of her pastor. . . . Simply put, this case calls for mercy than the law permits this Court to provide. . . . Under the peculiar facts of this case, removing Martinez and her six young children to Mexico, a country in which they no longer have any relatives, would work an extreme hardship on a family that has already been forced to endure domestic abuse, the molestation of a child by her step-father, and the incarceration of a father and husband." *Id.*

9. ***Aaron*** (a pseudonym), a long-time lawful permanent resident of the United States, is facing deportation back to Haiti for one non-violent conviction from 2005 for selling $20 worth of marijuana to an undercover policeman. Although he was only required to serve 45 days in jail for the crime, it is deemed an aggravated felony under immigration law and therefore bars him from any discretionary relief from removal – including political asylum – effectively making his removal mandatory. Aaron has lived in the United States since 1999. Before his current mandatory immigration detention in Florida, Aaron lived with and supported his long-term U.S. citizen girlfriend, their two-year-old U.S. citizen daughter, and her three U.S. citizen children from previous relationships. Aaron's girlfriend suffers from sickle cell anemia and

cannot work. Their young daughter carries the sickle cell anemia gene and is in poor health. All of Aaron's girlfriend's other children also carry the sickle cell trait. Aaron supported all four children and his girlfriend by working as a maintenance helper for the City of Jacksonville. In February 2013, Aaron was arrested for petty theft – for which he received a sentence of two days. After completing his sentence, Immigration and Customs Enforcement (ICE) commenced removal proceedings against him based on his 2005 conviction and placed him in mandatory immigration detention where he has remained for the last month. During his detention, his family has struggled both financially and emotionally. His girlfriend has had to borrow money in order to pay the household bills and the children ask their mother daily, "When is Daddy coming home?" Recently his girlfriend's oldest daughter wrote on the front of their home in black marker, "I miss my Daddy Aaron and I hope he comes home soon." Aaron and his family will suffer even more if he is deported to Haiti. Yet under current laws, his removal is a virtual certainty as there is no room for discretion to look at his individual equities. [Source: emails and phone calls with Aaron's attorney, Susan Pai, on 3/15 and 3/18]

10. ***Rosa*** (a pseudonym), a long time lawful permanent resident and the widow of a U.S. citizen husband, has lived in the United States for more than 18 years. When her three children were all under the age of two, her husband was shot and killed in front of Rosa and the children. Since that time, Rosa has raised the children on her own and supported the family by working as a pawn broker at a pawn shop in Florida. In 2009, Rosa was convicted of five counts of dealing in stolen property – approximately $1,000.00 worth of items (a television, jewelry, and a laptop). This is her only conviction, and she spent only four days in jail, 92 days of house arrest and eight months of probation, which she successfully completed in 2010. Nonetheless, her conviction will likely be deemed an "aggravated felony" under immigration law, thereby rendering her removal virtually mandatory.

    In November of 2012, upon returning from a vacation out of the country Immigration and Customs Enforcement (ICE) commenced removal proceedings against Rosa on the basis of this one conviction. Although her children desperately need her support and presence, Rosa's conviction is likely deemed an aggravated felony, it renders her ineligible for any discretionary form of relief, and will likely prevent her from ever returning to the U.S. Thus she faces the virtual certainty of removal to Colombia, and permanent separation from her family, solely because of this one crime. [FN: emails and phone calls with Rosa's attorney, Susan Pai, on 3/15 and 3/18]

11. ***Nazry Mustakim***, a longtime lawful permanent resident, was detained for approximately ten months at the Pearsall Detention Center in Texas, even though he posed no danger or flight risk. Nazry entered the United States as a lawful permanent resident from Singapore with his family in 1992. On March 30, 2011, he was arrested at his home by Immigration and Customs Enforcement (ICE) officers and placed in removal proceedings and mandatory detention based on a 2007 drug conviction for which had been sentenced only to probation. The conviction stemmed from several arrests for drug possession during 2005, a period in Nazry's life when he was

struggling with addiction. He subsequently turned his life around, participated in a faith-based recovery program, and became a devout Christian. He also graduated college, volunteered at his church, ran 12-step recovery programs, worked as a sponsor for recovering addicts, and in 2010, fell in love and married a U.S. citizen, Hope Mustakim. However, when Nazry went to court for his 2005 arrests in March of 2007, he was misadvised that his best option was to plead guilty to felony drug possession and accept the plea bargain of 10 years of probation. Unbeknownst to him, this plea not only made him a convicted felon, but virtually insured his mandatory deportation and detention, since the conviction was deemed an "aggravated felony" -- a bar to virtually any form of discretionary relief. Thus, all of his strong equities were irrelevant – including his active participation in programs at a local treatment center and working as a night monitor for 12-hour shifts at the 54-bed homeless shelter run by the center. Solely by virtue of his conviction, the immigration court was without authority to grant him discretionary relief from removal. Faced with this situation, Nazry's attorney filed papers with the criminal court challenging his 2007 plea. However, the District Attorney who had prosecuted his case instead found that there was insufficient evidence to try him and dismissed the charges. Thereafter, on February 7, 2012, after ten long months of mandatory incarceration, an Immigration Judge granted Nazry the relief of "cancellation of removal" and he was released from detention. Nazry hopes to apply for citizenship as soon as he is eligible. However, were it not for not for the fact that the District Attorney allowed him to withdraw his former plea, a judge would have had no choice but to order him removed. [Source: http://www.freenaz.com/welcome] and phone conversation, March 18, 2013, with Hope Mustakim]

12. ***Maria*** (a pseudonym) is a domestic violence survivor with no criminal record, and a ten-year-old U.S. citizen son. She currently faces removal from the United States to Mexico based on a prior removal in 2000, when she attempted to enter the United States with a false U.S. birth certificate her now-estranged U.S. citizen husband/abuser gave her. After her removal, Maria unlawfully reentered the United States and was subjected to years of severe and repeated domestic violence by the same man who had urged her to enter the United States with the false document years before. Maria was never criminally prosecuted for using the false birth certificate, but when she applied for lawful permanent resident status under the Violence Against Women Act (VAWA), her application was denied solely because she had tried to enter the country with a false birth certificate, and she was placed in "reinstated" removal proceedings. Maria has separated from her abuser and is dating another U.S. citizen man who would like to marry her. But even if her estranged husband agrees to a divorce, Maria's use of a false birth certificate thirteen years ago will forever bar her from obtaining lawful permanent resident status. In addition to facing removal, Maria has now lost custody of her son solely because she faces removal, and even though there are reasons to believe that her husband has abused the child in the past. If she is removed, Maria will face permanent separation from her son, as her use of a false U.S. citizen birth certificate prevents her from ever returning to the United States. Furthermore, she fears further violence against her if removed, as she

believes her Mexican-American husband would have his friends in Mexico come after her.

13. ***Saan*** (a pseudonym), a thirty-year lawful permanent resident of the United States and veteran of the United States Army Reserves, came to the United States as a refugee in the early 1980s. He has five U.S. citizen children for whom he has sole custody and for whom he provides for by working as a baker. In 2002, Saan was arrested for a domestic violence incident arising from a disagreement with his wife. Just days after his arrest, and without adequate advice as to the immigration consequences he might face, Saan pled guilty to two felonies because he believed he needed to take responsibility for his actions. Although these convictions were later reduced to misdemeanors under CA state law, under federal immigration law they were deemed "aggravated felonies." This meant that when Immigration and Customs Enforcement (ICE) initiated removal proceedings against Saan in 2008 -- when he went to renew his green card -- the Immigration Judge had no authority to grant him discretionary relief from removal, notwithstanding his long residence in the United States, the fact that this was his single significant brush with the law – his only other criminal history being a misdemeanor conviction for driving without a license -- and the other strong equities in his favor. While his removal proceedings were pending, Saan was placed in mandatory immigration detention and his children had to go live with his U.S. citizen sister. During this period, his children were devastated. They had trouble concentrating in school and his youngest daughter went to bed crying every night and slept with Saan's jacket around her. After approximately five months in detention, the government could not secure travel documents for Saan and in 2009, ICE released him back to his family under conditions of supervision which require regular reporting. Happy as he is to be back home with his family, Saan's immigration status remains in limbo and he is subject to removal at any point. Moreover, removal will mean permanent separation from his family, as just one aggravated felony effectively bars him from returning to the United States. [Source: Raha Jorjani]

14. ***Adnan Asan*** was deported to Macedonia in 2007. Prior to his deportation, Mr. Asan lived in the United States with his wife and children who still remain in this country. In 1984, Mr. Asan pled guilty and was convicted of a narcotics charge. He received three years probation for this crime. Even though he knew of the risks involved, Mr. Asan cooperated with government authorities and testified against the drug conspiracy architects involved in his case. Mr. Asan was assured that he would not be deported for his conviction and he went about rebuilding his life. In 2007, Mr. Asan was picked up by Immigration and Customs Enforcement (ICE) officers and the government initiated removal proceedings against him due to the charge from 1984. Mr. Asan was deported despite his many equities. In 2011, Mr. Asan brought a *coram nobis* petition in the U.S. District Court for Southern District of New York for ineffective assistance of counsel during his case in 1984. Although Judge Haight found himself bound by legal authority to dismiss Mr. Asan's petition he included in his opinion the following strong footnote denouncing the unfairness of Mr. Asan's deportation:

"...I have been the District Judge presiding over the underlying criminal case since its inception, and am familiar with the entire record. The case has passed through the stages of indictment, plea, sentencing, and two *coram nobis* petitions, of which this is the second. It began when the United States Attorneys Office for this District conducted an investigation into a major drug conspiracy whose objective was the importation of heroin and other narcotics from eastern Europe into the United States. Mr. Asan, [a]resident in this country, was one of numerous facilitators of that conspiracy, not an architect. Having agreed to cooperate with the Government and plead to a lesser charge, and at considerable personal risk, Mr. Asan gave trial testimony material to the conviction of a number of principal conspirators. When this Court sentenced Mr. Asan on his guilty plea in 1984, the Government spoke with such force and eloquence about the nature, extent and importance of his cooperation that I sentenced him to three years' probation.

Mr. Asan completed his probation without adverse incident. He continued to live in the United States with his wife and children, leading from all indications a law-abiding and honorable life. In 2007, the Secretary decided to deport Mr. Asan to Macedonia, where a number of drug traffickers against whom he had testified, having served their sentences in this country, were now residing. That decision to deport was based solely upon Mr. Asan's guilty plea to the lesser narcotics charge in 1983, in compliance with his cooperation agreement. The Secretary decided to deport Mr.Asan after (and notwithstanding) his crucial cooperation with Government prosecutors in a major narcotics case, and after 23 years of law-abiding and productive life in this country as the head of a family. The United States Attorney, in fulfillment of the Government's promise in the cooperation agreement, wrote to officers in ICE, again describing, praising and emphasizing the value of Mr.Asan's cooperation with the Government in the underlying case. The Secretary, or those acting in her behalf, replied in substance to the United States Attorney: "We have your letter. It doesn't make any difference." This Court, rejecting the first *coram nobis* petition, held that the decision to deport rested with the Secretary and was not subject to judicial review. Mr. Asan was deported.

The Secretary has never sought to justify the agency's decision to deport Mr. Asan. That is not surprising, since no justification is discernible, given the circumstances of the case. However, the Secretary retains the power she can exercise now. Even amid the multiple demands and responsibilities of her vital office, this case presents an opportunity for the Secretary to pause, choose not to pass by on the other side of the road, and take the executive steps necessary to allow Mr. Asan to rejoin his family in the United States. With all due respect, this Court hopes that these words may come to the attention of the Secretary or other responsible officers in the Executive Branch, who will act upon them and thereby fulfill the hallowed maxim "Fiat justitia ruat coelum": "Let justice be

done, though the heavens fall." If in the name of justice Mr. Asan is now permitted to return to this country and his family, there is no reason to suppose that the heavens would then fall, or (to focus upon the Secretary's particular responsibility) that the security of the Nation would be compromised." *Asan v. United States*, 2012 WL 5587454, *20 (S.D.N.Y. Nov. 14, 2012).

Prolonged, Mandatory, and Irrational Detention

15. ***Melida Ruiz***, a 52-year-old grandmother, was detained for seven months at Monmouth County Jail in New Jersey before she was finally released after winning her case. A long time lawful permanent resident of the United States, with 3 U.S. citizen children and 2 U.S. citizen grandchildren, she was arrested by Immigration and Customs Enforcement (ICE) officers at her home in the spring of 2011. She was placed into mandatory immigration detention based on a misdemeanor drug possession offense from nine years before for which she had not even been required to serve any jail time, and which was her sole conviction during thirty years of living in the United States. Although Ms. Ruiz was eligible for various forms of discretionary release from removal, and posed no danger or flight risk, and although she was the primary support for her U.S. citizen mother who suffers from Alzheimer's disease, her 17-year-old and 11-year-old daughters, and her 5-year-old granddaughter, she was nevertheless forced to endure seven months of immigration detention. While she was in detention, her 17-year-old daughter gave birth to a boy.

    Prior to her incarceration by ICE, Ms. Ruiz had worked full-time as a roofer with the United Union of Waterproofers and Allied Workers from 1996 until an accident in 2009, which left her with severe back and neck pain, pain which was aggravated to such extent while she was in detention that at one point her doctor feared she would require surgery to avoid paralysis. In granting her application for cancellation of removal, the Immigration Judge emphasized the "substantial equities in [her] favor" including her "work history, tax history and property ownership" as well as the fact that her family "would suffer significant hardship if she were deported." The Immigration Judge also found that, despite the one conviction from 2002 which was "out of character," Ms. Ruiz has been "a law abiding resident of the United States and a stalwart positive force for her family and friends." ICE chose not to appeal the decision. Ms. Ruiz is now once again reunited with her family but at considerable emotional and financial cost, including the approximately $28,595 that the taxpayers spent for her detention. **[Source: Claudia Slovinsky, atty]**

16. ***Errol Barrington Scarlett*** is a longtime lawful permanent resident from Jamaica who has lived in the United States for over thirty years. After his release from incarceration for a drug possession offense, Mr. Scarlett returned to his family and found employment with his brother's real estate business. He did not commit any additional crimes, and was enrolled in a drug treatment program for over a year. A year-and-a-half following his release from incarceration, Mr. Scarlett received a letter from the Department of Homeland Security (DHS) summoning him to their New

York office. At that appointment, he was charged with removability based on his drug possession conviction, and was summarily detained without a bond hearing. Mr. Scarlett remained in mandatory detention for the next five years. In 2009, Mr. Scarlett filed a pro se habeas petition, seeking a bond hearing. Concluding that his mandatory detention was contrary to congressional intent and that Mr. Scarlett's prolonged detention raised serious constitutional concerns, the district court granted his petition and ordered a bond hearing, where Mr. Scarlett ultimately won his release. *See Scarlett v. DHS*, 632 F. Supp. 2d 214 (W.D.N.Y. 2009).

17. A domestic violence survivor, ***Dolores*** (a pseudonym) is an asylum applicant who had been imprisoned at the Sherburne County Jail in Elk River, Minnesota for nearly two years. She had one conviction for criminal reentry – the result of her fleeing Honduras to escape an abusive boyfriend. Although she posed no danger and was an ideal candidate for release, she languished in immigration detention and suffered immense hardships, unable to maintain contact with her three children and or to get the psychiatric care she desperately needed to deal with the post-traumatic stress resulting from her abuse. During this period, Dolores was deprived of all sunlight (apart from the times she was transferred to and from immigration court) and lost one-third of her hair due to anxiety. Meanwhile, her asylum case, based on the domestic violence she suffered, has been pending at the Board of Immigration Appeals for approximately a year.

    On February 26, 2013, she was released by Immigration and Customs Enforcement (ICE) on conditions of supervision, including wearing an ankle monitor and regular reporting. According to her attorney, she is now living in a women's shelter. ICE would have paid an estimated average of $80 per day to the Sherburne County Jail for Dolores's detention. Thus, her two-year detention cost taxpayers approximately $58,400.

18. ***Victoria*** (a pseudonym), a domestic violence survivor from Mexico who has lived in the United States since 2000, was detained at the Eloy Detention Center in Arizona for two years and four months, even though she poses no danger or flight risk and is pursuing relief from removal in the form of both asylum from domestic violence and cancellation of removal due to her nine-year-old U.S. citizen daughter. Her case is pending on appeal before the U.S. Court of Appeals for the Ninth Circuit, which issued a stay of removal until its decision. Prior to her detention, Victoria worked steadily and took care of her U.S. citizen daughter. She has two convictions for nonviolent offenses, for which she received probation and no jail time. On August 7, 2012 – at which point Victoria had already been in immigration detention for nearly two years without a bond hearing – she finally appeared before an Immigration Judge who granted her release on a $6,000 bond. Her family was unable to raise the money, so she remained imprisoned another seven months until March 2, 2013, when she was released by Immigration and Customs Enforcement (ICE) under conditions requiring her to wear an ankle monitor and check-in weekly. She is now home living with her daughter and lawful permanent resident husband. Figures from 2010 show that the

cost of detention per day at Eloy was $65.[96] Victoria's two years and two months of detention therefore cost taxpayers at least $55,000.

In Florida, ***nine female asylum-seekers***, six of whom are domestic violence survivors, were recently released from Broward Transitional Center in Pompano Beach, Florida. One had been detained for nine months, the others for between five months and six days. None had any criminal convictions apart from one who had a conviction for driving without a license. All were released on conditions of supervision, including reporting and, in some cases, ankle monitors. Immigration and Customs Enforcement paid GEO Group to detain these women; taxpayers spent an estimated $127,592.[97]

19. ***Amadou Diouf*** has lived in this country for approximately seventeen years. He entered the United States on a student visa, obtaining a degree in information systems from a university in Southern California. The government initiated removal proceedings against him for overstaying his student visa after he was arrested and charged with possession of a small quantity of marijuana—an offense that did not render him deportable. Nevertheless, Mr. Diouf was detained for over 20 months during the pendency of his removal proceedings, even though he was prima facie eligible for adjustment of status to lawful permanent residence through his marriage and had not been convicted of a removable offense. Notably, the only process Mr. Diouf received during his prolonged imprisonment were two perfunctory reviews of his administrative file in which Immigration and Customs Enforcement (ICE) summarily continued his detention. Ultimately, a federal district court ordered that Mr. Diouf receive a bond hearing before an Immigration Judge where the government was required to show that his detention was still justified. Upon conducting a hearing, the Immigration Judge found that Mr. Diouf did not present a flight risk or danger sufficient to justify detention and ordered his release on bond. Despite this decision and the fact that Mr. Diouf was living on conditions of supervised release without incident since being released, the government continued to argue that he should be detained without a bond hearing. Mr. Diouf subsequently won his removal case and now resides in Southern California.

20. ***Warren Joseph*** is a lawful permanent resident of the United States and a decorated veteran of the first Gulf War. He moved to the United States from Trinidad nearly 22 years ago and has five U.S. citizen children, a U.S. citizen mother and a U.S. citizen sister.

    A few months after coming to the U.S., when he was 21 years old, Warren enlisted in the U.S. Army. He served in combat positions in the Persian Gulf, was injured in the course of duty and received numerous awards and commendations recognizing his

---

[96] ACLU of Arizona, *Immigration Detention in Arizona* (Feb. 24, 2010), *available at* http://www.acluaz.org/sites/default/files/documents/Detention%20in%20Arizona%20One-Pager%202-24-10.pdf, 2.

[97] All of these women were helped by Americans for Immigrant Justice.

valiant service in that war, including returning to battle after being injured and successfully rescuing his fellow soldiers.

Like many Gulf War veterans, Warren returned from the war with symptoms that were only later diagnosed as Post Traumatic Stress Disorder. His sister recalls that she "was shocked to see how much Warren had changed." He was anxious, had recurring nightmares about killing people, and would wake up in a cold sweat. He became withdrawn and thought about suicide constantly. In 2003, he drank rust remover and had to be hospitalized.
In 2001, Warren unlawfully purchased a handgun to sell to individuals to whom he owed money. He fully cooperated with an investigation by the Bureau of Alcohol, Tobacco, and Firearms, and his actions were not deemed sufficiently serious to warrant incarceration. Two years later, however, suffering from partial paralysis and debilitating depression, Warren violated his probation by moving to his mother's house and failing to inform his probation officer. He served six months for the probation violation. Upon his release, in 2004, he was placed in removal proceedings and subjected to mandatory immigration detention.

Warren remained in immigration detention for more than three years while he fought his deportation. During his entire period of incarceration, Warren was never granted a hearing to determine whether his detention was justified. Indeed, even after the U.S. Court of Appeals for the Third Circuit found that he was entitled to apply for relief from removal, and remanded his case back to the immigration court, the government continued to subject him to mandatory detention. He was not released until he finally prevailed on his application for relief before the Immigration Judge, which conclusively resolved his deportation case in his favor.

Commenting on his ordeal, Mr. Joseph said: "I joined the Army because I love the United States; I am very disappointed that I have been treated this way, but I still love this country."

21. ***Ahilan Nadarajah***, an ethnic Tamil farmer who was tortured in his native Sri Lanka, was detained for nearly five years while seeking asylum in the United States. From the age of 17, Mr. Nadarajah was brutally and repeatedly tortured by soldiers in the Sri Lankan Army who arrested him and accused him of belonging to the insurgent group, the Liberation Tigers of Tamil Eelam (LTTE). Over the course of several arrests, soldiers beat him, hung him upside down, pricked his toenails, burned him with cigarettes, held his head inside a bag full of gasoline until he lost consciousness, and beat him with plastic bags full of sand. Eventually, Mr. Nadarajah fled to the United States in October 2001, where he was immediately arrested at the border. Immigration and Customs Enforcement (ICE) then held Mr. Nadarajah in detention for nearly five years while he fought his case, despite an Immigration Judge twice holding that he was entitled to asylum and rejecting the government's claims, based on false and secret evidence, that he was in fact a member of the LTTE. The Board of Immigration Appeals (BIA) affirmed the grant of asylum, and the Attorney General declined further review, giving Mr. Nadarajah refugee status.

Although Mr. Nadarajah was initially granted parole with bond, ICE subsequently rejected his attempt to tender money for the bond years later on the grounds that the bond order was "stale." ICE also denied Mr. Nadarajah's further parole requests after he won relief from the Immigration Judge and BIA. At no point during his lengthy detention did Mr. Nadarajah receive an opportunity to contest his detention before an Immigration Judge. Ultimately, in March 2006, Mr. Nadarajah was ordered released from detention by the U.S. Court of Appeals for the Ninth Circuit, which held that the immigration laws did not authorize his detention where his removal was not reasonably foreseeable, and that the government lacked any facially legitimate or bona fide ground for denying his parole request.

Mr. Nadarajah presently lives and works in Southern California as a lawful permanent resident. He intends to apply for citizenship shortly.

22. ***Alejandro Rodriguez***, a Mexican national who has been in the United States since he was a baby, was detained for more than three years without a meaningful hearing on the propriety of his prolonged detention in light of the non-violent nature of his convictions and his strong community ties. Prior to his detention, Mr. Rodriguez lived near his extended family in Los Angeles, working as a dental assistant to support his two U.S. citizen children. His claim against removal hinged on whether he could be deported for two non-violent convictions—joyriding when he was 19, and a misdemeanor drug possession when he was 24. Mr. Rodriguez was denied release by. Immigration and Customs Enforcement (ICE) on the basis of administrative file custody reviews in which ICE rejected his requests for release based entirely on a written questionnaire, without even interviewing him. After Mr. Rodriguez filed a habeas petition in district court—but before the petition was adjudicated—ICE released him on his own recognizance, revealing that the agency had never considered him a flight risk or danger to the community. He remained released on conditions of supervision without incident until he won his immigration case. He presently resides in Los Angeles.

23. ***Raymond Soeoth*** is a Christian minister from Indonesia. In 1999, when Reverend Soeoth and his wife fled Indonesia to escape persecution for practicing their faith, they could not have anticipated the treatment they would receive in the United States. Initially, Reverend Soeoth was allowed to work in the United States while applying for asylum and eventually became the assistant minister for a church. He and his wife also opened a small corner store. Yet when his asylum application was denied in 2004, the government arrested him at his home and took him into detention. Even though Reverend Soeoth posed no danger or flight risk, had never been arrested or convicted of any crime, and had the right to seek reopening of his case before both the immigration courts and federal courts, Immigration and Customs Enforcement (ICE) insisted on keeping him in detention. He spent over two and a half years in an immigration detention center while the court decided whether or not to reconsider his asylum claim. During that time, he never received a hearing to determine whether his detention was justified.

While in detention, Reverend Soeoth was isolated from his family and community as well as his congregation. His wife was unable to maintain the store that the couple had jointly run and she was forced to shut it down. In February 2007, Reverend Soeoth finally received a bond hearing as a result of a successful habeas corpus petition filed by the ACLU. Following that hearing Reverend Soeoth was released on a $7,500 bond. Although his asylum case was subsequently denied, the government granted him "deferred action" status, a temporary form of relief that can be renewed annually on a discretionary basis, as part of a settlement reached because the government had subjected him to illegal forcible drugging during his detention. He and his wife subsequently won their motion to reopen their asylum case.

Commenting on his ordeal, Reverend Soeoth stated that "I can't understand why in America I must choose between two evils: going back to Indonesia to face persecution or being detained while I fight for asylum."

24. ***Saluja Thangaraja***, who was released from immigration detention on her 26th birthday, fled Sri Lanka in October 2001 after being tortured, beaten and held captive there. She was detained on the United States-Mexico border later that month, on her way to reunite with relatives in Canada, and was imprisoned in a federal detention center near San Diego for over four and a half years, until March 2006.

During years of civil unrest and turmoil, Saluja and her family were displaced from their home and forced to live in a police camp after conflict broke out in their small town between the Sri Lankan Army and the separatist group, the Liberation Tigers of Tamil Eelam. After finally returning to her home, Saluja was twice abducted, beaten and tortured by the Sri Lankan army. Saluja went into hiding after her second abduction, and soon after the family decided she needed to leave the country to protect her life.

Despite finding that she had a credible fear of persecution, the government refused to release her from detention while she sought asylum before the immigration court, the Board of Immigration Appeals (BIA), and ultimately the U.S. Court of Appeals for the Ninth Circuit. In August 2004, after almost three years in detention, the Ninth Circuit found that Saluja faced a well-founded fear of persecution if she were returned to Sri Lanka and granted her withholding of removal—a form of relief that prohibits the government from returning her to that country. In addition, the Court found Saluja eligible for asylum, concluding that the Immigration Judge and the BIA's previous rejection of her claims lacked a reasonable basis in law and fact.

Despite this stinging rebuke, the government continued to doggedly pursue Saluja's removal and to insist on her detention. Indeed, even after the Immigration Judge granted Saluja asylum in June 2005, the government appealed that decision to the BIA and refused to release Saluja during this process.

Saluja finally gained her freedom in March 2006, but only after the ACLU petitioned the district court for her release. Upon her release, she was finally able to reunite with her family in Canada, where she has now married and had a child.

Written Statement of
The Advocates for Human Rights

Submitted to the United States Senate
Committee on the Judiciary

For the March 20, 2013 Hearing on
"Building an Immigration System Worthy of American Values"

The Advocates for Human Rights is a non-governmental, nonprofit organization dedicated to the promotion and protection of internationally recognized human rights. With the help of hundreds of volunteers each year, The Advocates investigates and exposes human rights violations; represents immigrants and refugees in our community who are victims of human rights abuses; trains and assists groups that protect human rights; and works through education and advocacy to engage the public, policy makers, and children about human rights. The Advocates holds Special Consultative Status with the United Nations. For nearly 30 years The Advocates has provided immigration legal assistance to asylum seekers in the Upper Midwest. Today The Advocates provides free legal services to asylum seekers who fear persecution if forced to return to their countries of origin and immigrant detainees who would otherwise be left without any access to counsel during removal proceedings.

The United States is a nation of values, founded on the idea that all men and women are created equal and that all people have rights, no matter what they look like or where they came from. These values are echoed in our obligation to respect the fundamental rights of all persons without discrimination, regardless of national origin, citizenship, or immigration status.

Today the United States has the opportunity to create an immigration system that reflects our most deeply held values and respect for fundamental human rights. While the United States has the power and obligation to control immigration, its authority is rightly balanced by the obligation to respect the fundamental human rights of all persons. In designing and in enforcing our immigration laws, the rights to due process and fair deportation procedures; to seek and enjoy asylum from persecution; to freedom from discrimination based on race, religion, or national origin; to freedom from arbitrary detention; to family unity; and to freedom from inhumane conditions of detention must be considered, protected, and upheld.

The past twenty years of immigration policy have put enforcement first, without consideration of the impact of these policies on the fundamental rights of every person. Immigration reform today has the opportunity to create a cohesive system that respects the rights of individuals, as opposed to the existing patchwork of laws, policies and practices which led to the current broken immigration system. As it considers reform of our immigration laws, Congress should take the

330 Second Avenue South • Suite 800 • Minneapolis, MN 55401 • USA
Tel: 612.341.3302 • Fax: 612.341.2971 • Email: hrights@advrights.org • www.theadvocatesforhumanrights.org

opportunity to align our immigration policies with our values: inherent dignity and equal and inalienable rights of all members of the human family.

The inherent dignity and equal and inalienable rights of all people should be at the foundation of United States immigration law and policy.

The legal immigration system and enforcement mechanisms should respect the inherent dignity and equality of all people. Human rights apply to all persons, whether on a path to citizenship or not. The immigration system should ensure the basic human rights of all people within and on our borders, regardless of their race, religion, gender, age, sexual orientation, socio-economic status, contact with the criminal justice system, country of origin, or current immigration status. Immigration reform should seek to restore our commitment to refugee protection, to the protection of the unity of the family, and to fundamental due process in immigration proceedings.

Immigration law and policy should promote the protection of refugees and other vulnerable migrants.

Changes to immigration law should respect our commitment to the protection of refugees and to other vulnerable immigrants. In recent decades, the protection of refugees has been undermined in numerous ways: the arbitrary one-year filing deadline for asylum claims which has resulted in the denial of 15% of asylum seekers' claims, solely for failure to file within a year of arrival in the United States; the mandatory detention of arriving asylum seekers in contravention of U.S. obligations toward asylum seekers; in the broadening category of individuals who face denial of refugee protection because of criminal convictions as the definition of "aggravated felony" continues to grow; and the overly broad definition of Tier III terrorism-related inadmissibility grounds that have resulted in lengthy delays of adjudication of asylum claims and permanent resident status applications. Reform should eliminate these barriers and avoid creating new barriers to refugee protection.

Immigration law should also ensure that the victims of domestic violence, trafficking, and other serious crimes are protected. Effective protection of these victims begins with ensuring that they have access to the protection of law enforcement. Immigration laws, policies, and practices that inhibit crime victims from seeking the protection of local police because of fear of deportation should be ended.

Immigration law and policy should protect both individual rights to security of person as well as the fundamental rights to liberty and freedom from arbitrary detention.

Immigration enforcement should be judged on whether it effectively promotes the safety and security of all persons in the United States, rather than on the number of people apprehended, detained, and deported. Immigrant communities should be treated as partners in ensuring safety and security of all persons. The patchwork of programs and policies targeting non-citizens in recent years, including the Criminal Alien Program, Secure Communities, National Fugitive Operations Program and the 287(g) program has greatly expanded the number of foreign nationals encountered by ICE and simultaneously eroded trust between law enforcement and immigrant communities, in part due to racial profiling. Programs such as these should be examined as to whether they truly protect the right to safety and security of all persons.

330 Second Avenue South • Suite 800 • Minneapolis, MN 55401 • USA
Tel: 612.341.3302 • Fax: 612.341.2971 • Email: hrights@advrights.org • www.theadvocatesforhumanrights.org

Meaningful immigration reform must protect the fundamental right to liberty by reducing reliance on detention and ensuring access to constitutionally adequate bond hearings for everyone in detention. In 2011 approximately 429,000 foreign nationals were detained in the custody of Immigration and Customs Enforcement. People detained on civil immigration status violations are held in over 250 jails, prisons, and secure detention centers around the United States, operated variously by ICE, state and local governments, and private prison corporations. Mandatory detention laws enacted in 1996 have contributed to the skyrocketing growth of detention as an immigration enforcement tool. At the same time, ICE fails to exercise discretion to release those people not subject to mandatory detention laws and immigration judges lack the legal authority to change mandatory detention determinations. Reform must acknowledge the incredible growth in both detention and removal over the past ten years and ensure the rights of all persons in the system are respected.

Reform must ensure due process by restoring judicial discretion, judicial review and a fair day in court.

Reform should create an immigration system which ensures the constitutional guarantees of due process of law, rather than on categorical expulsion of non-citizens without judicial discretion or review. Currently immigration judges lack discretion in considering individual equities, including family unity, in many cases. Despite facing often permanent removal from the U.S., only 15% of detained immigrants currently have representation in removal proceedings. Access to counsel is an important factor to ensure a fair immigration system. Federal courts' judicial review of immigration cases has been severely limited on many issues, including the one-year filing deadline in asylum cases. Meaningful immigration reform must protect due process by guaranteeing effective oversight through judicial review.

United States immigration policy should promote and protect the unity of the family.

United States immigration reform should be based on respect for the fundamental right to protection of the family. In the last four years 1.5 million people have been deported, leaving hundreds of thousands of U.S. citizen children without parents and thousands in foster care. Thousands of family members languish in line for visas or with little hope of reunification following deportation. Enforcement actions too often fail to protect children or uphold parents' rights. Protecting the unity of the family must be at the heart of immigration policy. Reform should restore judicial discretion to immigration judges; provide a meaningful opportunity for parents to make care-giving decisions and participate in child custody proceedings; provide waivers to allow for family reunification for people following deportation; and a sensibly revise the family-based immigration system to reduce long backlogs. A roadmap to citizenship, like all parts of our immigration law, should aim to keep families together, including those family members who have had past contact with law enforcement.

Immigration laws should ensure equality and be free from discrimination

The road to citizenship should be just, fair, and accessible to every person without discrimination. Requirements should be realistic and exclusions narrow. Reform policies should create systems which ensure equal protection for all, including people of color, women, members

of certain religious communities, LGBT communities, the elderly, and the disabled. The current immigration enforcement regimen has resulted in complaints of racial profiling and has amplified concerns about racial disparities in the criminal justice system due to the immigration implications of criminal convictions. Protections against racial and religious profiling should be included in reform.

Conclusion

The United States is a nation of values, founded on the idea that all men and women are created equal and that all people have rights, no matter what they look like or where they came from. These values are echoed in our obligation to respect the fundamental rights of all persons without discrimination, regardless of national origin, citizenship, or immigration status. These values must be reflected in our immigration laws. Today's patchwork of laws, policies, and practices that comprise America's broken immigration system has evolved largely without consideration of the impact they may have on the fundamental rights belonging to every person. This failure has resulted in border and interior enforcement that has compromised due process, infringed on civil liberties, and violated our most basic principles.

It is time to align our immigration policies with our values: inherent dignity and equal and inalienable rights of all members of the human family. Our immigration laws must be based on the principles that all people enjoy, without discrimination, the fundamental rights to security of the person, to be subject to transparent and accountable law enforcement, to due process and a fair day in court, to liberty of the person and freedom from arbitrary detention, and to the protection of refugees, the unity of the family, and privacy. Immigration law and policy must be developed with the participation of and accountable to those who will be affected by their enforcement.

The United States has the opportunity to create an immigration system that reflects our most deeply held values and respect for fundamental human rights. We urge you to take action to reform United States immigration laws this session.

330 Second Avenue South • Suite 800 • Minneapolis, MN 55401 • USA
Tel: 612.341.3302 • Fax: 612.341.2971 • Email: hrights@advrights.org • www.theadvocatesforhumanrights.org

AMERICAN
IMMIGRATION
COUNCIL

COMMUNITY OUTLOOK CENTER · IMMIGRATION POLICY CENTER · INTERNATIONAL EXCHANGE CENTER · LEGAL ACTION CENTER

TWO SYSTEMS OF JUSTICE

The current immigration removal system—from arrest to hearing to deportation and beyond—does not reflect American values of due process and fundamental fairness. In fact, the immigration removal system lacks nearly all of the due process protections that come into play in the U.S. criminal justice system. Immigrants facing deportation have neither a right to appointed counsel, nor a right to a speedy trial. Harsh immigration laws may apply retroactively, unlawfully obtained evidence is often admissible to prove the government's case, and advisals of fundamental rights are given too late to be meaningful. Moreover, after receiving an order of removal, immigrants have limited ability to challenge their deportation in court. Violations of due process that could not occur or would not be tolerated in the criminal justice system abound in the immigration system.

Given the potentially severe consequences of removal—which can range from permanent separation from family in the United States to being returned to a country where a person fears for his or her life—the lack of procedural safeguards deprives countless individuals of a fair judicial process. A new report from the American Immigration Council, *Two Systems of Justice: How the Immigration System Falls Short of American Ideals of Justice*, discusses these issues in more detail and offers a series of recommendations for creating a more balanced system. Key recommendations include:

- **Guarantee access to counsel at every stage of the removal process.**

Problem: Given the high stakes in removal proceedings and the complexity of immigration law, access to counsel is integral to ensuring that immigrants facing removal receive fair treatment. Currently, the government is not obligated to advise an immigrant of the right to counsel (at no expense to the government) in immigration proceedings until *after* questioning and the initiation of an immigration court case. At the hearing stage, nearly half of all immigrants in removal proceedings are forced to represent themselves. As studies have shown, immigrants who are represented by lawyers are much more likely to prevail in their removal cases than those who are not, particularly if they are detained while their removal proceedings are pending.

Recommendation: Immigrants should have access to counsel at every stage of the removal process, including at the time of arrest for an immigration violation. The government should appoint counsel to immigrants in removal proceedings who would otherwise be unrepresented, when it is deemed necessary to ensure a fair hearing. As a first step, counsel must be appointed for minors, persons with mental disabilities, and other particularly vulnerable individuals.

- **End disproportionate penalties for immigration violations.**

Problem: In many cases, the penalty for violating an immigration law is so severe that it amounts to permanent exile from the United States, without any consideration of the actual violation committed. Under our current laws, immigrants may be placed in removal proceedings for conduct that did not make them deportable at the time it took place. Additionally, immigration laws impose no statutes of limitations on the various grounds of deportability. As a result, the government can—and frequently does—initiate removal proceedings against lawful permanent residents for relatively minor convictions that occurred decades earlier. Despite the drastic effect removal may have on a long time resident and his or her family, neither the amount of time since the conviction nor subsequent rehabilitation may be taken into account in adjudicating a removal case.

Recommendation: To mitigate the harsh consequences of certain violations, Congress should amend the law to prevent retroactive application of new penalties, apply statutes of limitations to most grounds of deportability, and adopt broad waivers for humanitarian purposes, to ensure family unity, or where such waivers are otherwise in the public interest.

- **Ensure that immigrants get their day in court.**

Problem: One of the hallmarks of the U.S. justice system is the right to have a day in court before an impartial decision-maker. In the current system, many immigrants who are removed never see the inside of a courtroom. Rather, the vast majority of removals occur following an expedited process in which an immigration officer issues the final order of removal without any judicial oversight. Even immigrants who are put into the immigration court process may not make it to court if they "stipulate" to deportation before their first hearing. The stipulation may occur quickly and without the assistance of an attorney.

Recommendation: To ensure that immigrants understand the consequences of stipulating to removal—and that they have not been coerced into signing the stipulation—they should be brought before an immigration judge, who can ensure that they waive their right to a hearing knowingly and voluntarily.

- **Implement additional procedural safeguards to equalize the playing field.**

Problem: During the course of immigration proceedings, immigrants do not routinely have access to their immigration records nor are they given a chance to examine any evidence the government may have against them. In many cases, evidence obtained in violation of a person's constitutional right to "unreasonable searches and seizures" is admissible in immigration court, even though it would not be in a criminal setting. Finally, immigration court proceedings have only limited appeal procedures, meaning that many decisions are never reviewed by federal judges.

Recommendation: Statutory and regulatory procedural safeguards should be put in place to ensure automatic access to immigration records and any evidence that might be used by the

government in a hearing; evidence obtained in violation of constitutional protections should never be admissible in immigration court; and all immigration decisions should be subject to appeal in federal court.

- **Treat detention like the deprivation of liberty that it is.**

Problem: Given the gravity of pre-trial detention, criminal suspects are entitled to a hearing where they can argue that they should receive bail. But under a law passed in 1996, large classes of immigrants are subject to "mandatory detention" while their removal proceedings are pending. This means that they are ineligible to receive bond—or even a bond hearing—regardless of whether they pose a risk of flight or a danger to the community.

Recommendation: Any use of detention should be in the least restrictive setting possible, and the decision to detain must be subject to administrative and judicial review at periodic intervals. Congress should limit the use of mandatory detention and require the use of alternatives to detention whenever possible.

AILA National Office
Suite 300
1331 G Street, NW
Washington, DC
20005-3142

Tel: 202.507.7600
Fax: 202.783.7853

www.aila.org

Crystal Williams
Executive Director

Susan D. Quarles
Deputy Executive Director

Testimony of the American Immigration Lawyers Association

Submitted to the
Committee on the Judiciary of the U.S. Senate

Hearing on March 20, 2013

"Building an Immigration System Worthy of American Values"

The American Immigration Lawyers Association (AILA) submits the following testimony to the Committee on the Judiciary. AILA is the national association of immigration lawyers established to promote justice and advocate for fair and reasonable immigration law and policy. AILA has over 12,000 attorney and law professor members.

AILA's mission is "to promote justice, to advocate for fair and reasonable immigration law and policy, [and] to advance the quality of immigration and nationality law and practice." These principles inform AILA's belief that America's immigration laws and the enforcement of our laws should uphold civil and human rights and ensure due process, equal treatment, and fairness. As Congress considers passage of immigration reform legislation AILA urges lawmakers to improve the integrity of the immigration judicial system, in particular by restoring authority to grant discretionary relief from removal and adjustment of status in compelling cases. In addition, immigration legislation should reduce the use of institutional detention, ensure that all persons in removal proceedings are represented by counsel, and re-establish the primacy of the federal government in the enforcement of immigration law.

Due Process and Judicial Discretion in Removal Proceedings

The revisions to immigration law enacted in the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) restricted the authority and jurisdiction of immigration courts to review removal charges involving many categories of noncitizens. First, Congress widened the scope of summary, administrative removal procedures, thereby authorizing DHS to bypass normal removal proceedings before an immigration judge for many noncitizens including those with minor or old criminal convictions. Second, for those noncitizens who *do* make it into proceedings before an immigration judge, Congress increased the number and scope of grounds for removal while it limited the opportunities for noncitizens to offer evidence of extenuating circumstances or compelling equities. The impact of IIRAIRA was to categorically deny certain noncitizens – including long-time lawful permanent residents (LPRs) – the opportunity to plead their cases to an immigration judge before they are deported.

Judicial authority to engage in a careful consideration of the specific facts in each case has been curtailed. In its place, immigration officials have been empowered to act as judge and jury, with no meaningful independent oversight, and federal courts have been stripped of the authority to review most discretionary determinations made by agencies under the Immigration and Nationality Act.

The system as it currently operates is neither equitable nor fair. Every noncitizen should have the opportunity to go before a neutral adjudicator for an individualized, fact-based determination before the extraordinary consequence of deportation is imposed.

Congress can restore fairness and flexibility to our system by expanding the authority of immigration judges to consider an individual's unique circumstances and make case-by-case assessments before deportation. By permitting judges to consider the facts presented by both parties and then to grant relief based on merit, Congress will give the American people a legal immigration system that is more efficient and just, one that will serve our nation well in the 21st century.

Cancellation of Removal
Current law gives immigration judges authority to grant relief from removal in a few limited circumstances, one of which is Cancellation of Removal (Cancellation). Cancellation has stiff requirements that bar individuals, including long-time residents, from obtaining relief despite significant equities.

In the case of someone who does not have lawful permanent resident status, the alien must establish 10 years of continuous presence in the United States, the absence of a serious criminal record, and that the he or she has a U.S. citizen or LPR child, spouse, or parent who will suffer "exceptional and extremely unusual hardship" if the alien is deported. Certain acts or events can stop the "clock" counting continuous physical presence, such as DHS issuing a document charging the alien with a ground of removal, but never following-up on or executing the charge, or where the alien commits a criminal act, which, though minor, subjects the alien to a ground of deportation.

The following examples involving clients currently represented by AILA members demonstrate the inflexibility of these standards, which tie the hands of judges even in the face of compelling circumstances.

Case 1: Janelle Ngo Chin
Janelle Ngo Chin has lived in the U.S. for over 25 years, since she was 10 years-old. She attended elementary, middle, and high school here. She now has 3 U.S. citizen children. Her only criminal history is a single minor conviction from 17 years ago – when she was 19 years old, she was convicted for petty theft, but served no jail time.

As the mother of three and common-law wife to a hardworking noncitizen with Temporary Protected Status (TPS), Janelle now also takes care of her aging and ailing parents (who are both lawful permanent residents), who live with her. Her father has already had two heart attacks and suffers from coronary heart disease and many other health problems that interfere with his ability to accomplish everyday tasks. Janelle's mother has diabetes, a history of cancer, and debilitating psychological problems. All of this was thoroughly documented before the immigration judge, when Janelle was placed in removal proceeding. She asked the judge to exercise his discretion and allow her to stay in the U.S. with her family.

The immigration judge denied Janelle's request for discretion, finding that her evidence of hardship, though compelling, was insufficient to meet the incredibly high "exceptional and extremely unusual hardship" standard required by the statute. She appealed the judge's decision, but lost. Then her circumstances got much worse. Her parents' health deteriorated, additional familial assistance evaporated, and her children were suffering at school. She asked

DHS to exercise Prosecutorial Discretion (PD) to choose not to deport her, given that she is not a high priority for enforcement and has compelling equities. Unfortunately, DHS felt that Janelle's case did not merit PD. Finally, an appeals court intervened. Janelle is now back before the immigration judge, trying desperately to make her case for discretionary relief from deportation.

Case 2: Brenda Gutierrez
Brenda Gutierrez is the mother of three children. Two of her children are U.S. citizens and the third recently qualified for a temporary reprieve from deportation through the President's Deferred Action for Childhood Arrivals (DACA) initiative. One of her U.S. citizen children has a rare blood disorder that requires constant medical attention. Ms. Gutierrez and her husband, Jose, have both been trained by their doctors to give their child injections when needed.

Mr. Gutierrez is a lawful permanent resident after having been granted Cancellation of Removal. Ms. Gutierrez was not so fortunate. Many years ago, shortly after she arrived in the U.S., she came out of the shadows to apply for asylum but missed the tight statutory deadline. The government immediately tried to deport her and issued a charging document. She then renewed her asylum claim before the courts and appealed her denial, but that was ultimately unsuccessful.

That charging document, issued so many years ago, now disqualifies Ms. Gutierrez for the same discretionary relief her husband had been able to get (under the stop-time rule). None of the equities she accumulated over the many years she has been living in the U.S. since that document was issued – even with no criminal history whatsoever – can even be considered by the judge. ICE finally granted her a temporary stay of removal that may be renewed, at ICE's discretion, each year. But she never knows whether this year will be the year ICE decides to deport her. She lives in fear of being torn apart from her family and the child who needs her.

The "Aggravated Felony" Definition Excludes Many Deserving People from Relief
The category of "aggravated felonies" was introduced into the immigration law in 1988, and encompassed murder and trafficking in drugs or weapons. However, the enumeration of offenses that are considered aggravated felonies was expanded tremendously with the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and with IIRAIRA. Now, even some offenses that are considered misdemeanors fall within the statutory definition of "aggravated felony."

An alien who has been convicted of a crime categorized as an "aggravated felony" is deportable and is ineligible for any form of relief from deportation, including a waiver, adjustment of status, cancellation of removal, or asylum.

These stringent requirements restrict a judge's ability to look at the totality of circumstances in a case and grant appropriate relief. Tying the hands of immigration judges by denying them the ability to consider all of the facts of a case has led to substantial inequities, especially for individuals with minor or old disqualifying criminal conduct. Expanding judicial discretion to grant relief for those individuals with minor convictions on their record, including non-violent drug offenses, will bring fairness back to our immigration system.

Immigration Detention
As currently applied by ICE, our mandatory custody or detention laws prevent the release of entire categories of aliens charged with immigration violations. The restraint of an individual's

liberty is one of the most consequential government powers. No one should be deprived of their liberty except as a last resort. But every day, thousands of people – including asylum seekers and those with no criminal convictions – are detained by Immigration and Customs Enforcement (ICE) though they pose no flight risk or threat to public safety. According to recent ICE data, as of May 2, 2011, 41 percent of immigrants in detention were classified at the lowest possible risk level. Categorical laws that mandate prolonged deprivations of liberty without permitting – or without sufficiently ensuring – the availability of release under the least restrictive conditions run afoul of basic principles of fairness and due process.

In the last several years, Congress has increased funding for ICE detention beds, from 20,800 beds per day in FY 2006 to 34,000 beds per day in FY 2012. The appropriations law has been interpreted by ICE to mandate detention of a minimum average daily number of noncitizens. This "mandate" puts pressure on ICE to detain more people, even if the agency determines that reducing detention is a smarter, more effective approach.

ICE has a range of tools other than institutional detention at its disposal and should be encouraged to use them more often. Spending on detention has increased exponentially from $864 million seven years ago to $2.02 billion today. Spending billions of taxpayer dollars to needlessly detain immigrants who could successfully and safely be released is a poor use of limited resources. Immigration detention costs U.S. taxpayers between $122 and $164 per day; however, proven alternatives to detention cost between 30 cents and $14 per day and have an over 90 percent success rate.

Immigration officers and judges must have the authority in all cases to consider alternatives to detention for individuals who are vulnerable or pose little risk to communities and to consider in each case whether continued detention is necessary and lawful. Further, ICE should be required to place each individual in the least restrictive setting available.

Bond hearings also must occur in a timely fashion. Detainees often languish in detention with no hearings scheduled in their cases because charging documents have not been served on them or filed with the immigration court. Finally, detention conditions fall well below appropriate standards for civil confinement. Clear standards that mandate humane conditions of civil detention under which aliens may be housed must be adopted, and there needs to be meaningful oversight and penalties for non-compliant facilities.

Interior Enforcement and Collaboration with Local Police

America's immigration laws are literally tearing families apart, including those with U.S. citizen members, and are hurting people who know America as their only home. Although effective enforcement is essential to a functioning immigration system, it should be conducted in a smart and effective manner that ensures public safety and also protects American values of fairness and justice.

Past immigration reform bills have proposed dramatic increases in interior enforcement in response to the perception that the U.S. government is not doing enough to enforce immigration laws. But immigration enforcement efforts of the past decade, under both President Bush and President Obama, have been aggressive, resulting in record annual deportations: 409,849 in FY 2012 alone and about 1.5 million in the last four years.

Key to this Administration's immigration enforcement strategy has been programs that partner with local law enforcement, such as Secure Communities, the Criminal Alien Program, and 287(g) programs. These programs have come under attack for their negative impact on community policing, susceptibility to racial profiling, lack of transparency, and indiscriminate approach to immigration enforcement.

Compounding the problem is the inappropriate use of immigration detainers – requests by ICE to local law enforcement authorities to continue to hold in custody individuals without probable cause sufficient for arrest. In fact, ICE data shows that, in roughly the last four years, over 800 detainers were placed on U.S. citizens. ICE's use of detainers—nearly one million of which were placed during this period—continue to pose substantial legal and constitutional problems and lack transparency.

These and other informal partnerships between ICE and the police have sharply eroded accountability and transparency. More Congressional oversight, a functioning complaint process, clear reporting requirements and other accountability mechanisms are needed. It is time to reassess how federal immigration enforcement interacts with local criminal justice systems.

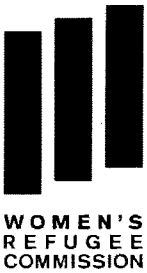
Immigration Court System

Ensuring the due process rights of immigrants in removal proceedings is of the utmost importance. The lack of adequate legal representation for respondents in removal proceedings greatly erodes due process and fundamental fairness in immigration court. Six out of ten respondents, including asylum seekers, children, and mentally ill respondents, appear before the immigration court without legal counsel, an appallingly low rate of representation for matters that deeply impact people's lives and sometimes can make the difference between life and death. For respondents in detention, 83 percent are unrepresented. Until a system is established to ensure counsel, the immigration court system will not be able to dispense justice in a fair and meaningful way for all who appear before it.

Another critical problem with the immigration court system is the growing number of cases before the immigration courts, leading to extremely high caseloads for individual immigration judges, and the growing backlog of immigration cases. The lack of adequate financial and other resources has resulted in overworked judges and staff, and has compromised the system's ability to assure timely and proper review of every case.

Ensuring the due process rights of immigrants in removal proceedings is of the utmost importance. Yet the lack of adequate legal representation for respondents in removal proceedings greatly erodes due process and fundamental fairness in immigration court. Six out of ten respondents, including asylum seekers, children, and mentally ill respondents, appear before the immigration court without legal counsel, an appallingly low rate of representation for matters that deeply impact people's lives and sometimes can make the difference between life and death. For those in detention, 83 percent of respondents are unrepresented. Until a system is established to ensure counsel, the immigration court system will not be able to dispense justice in a fair and meaningful way for all who appear before it.

Finally the immigration court system suffers from extremely high caseloads of immigration judges and the growing backlog of immigration cases. The lack of adequate financial and other resources has resulted in overworked judges and staff and has compromised the system's ability to assure proper review of every case.



STATEMENT FOR THE RECORD

On

"Building an Immigration System Worthy of American Values"

Submitted to the

Senate Judiciary Committee

March 20, 2013

By Americans for Immigrant Justice and Women's Refugee Commission

Americans for Immigrant Justice[1] and the Women's Refugee Commission[2] welcome the Senate Judiciary Committee's hearing "Building an Immigration System Worthy of American Values." Commitment to due process of law is a fundamental principle of the United States. We are a fair people who believe that everyone has the right to a fair trial, and that all individuals are innocent until proven guilty. Over the last 25 years, the immigration system has slowly eroded these principles. As Congress considers how to build a new system, it is critical that we ensure that due process is reinvigorated into the system. In particular, Americans for Immigrant Justice and the Women's Refugee Commission, encourage Congress to limit the use of stipulated orders, to increase protections during screening at the border, to ensure that all immigrants have access to counsel and to vigilantly protect the rights of parents to remain with their children.

---

[1] AI Justice is an award winning, nationally recognized pro bono law firm that protects the basic right of America's immigrants. Since its founding in 1996, AI Justice lawyers have closed over 80,000 cases of vulnerable immigrants from Central and South America, Africa, Europe and Asia.

[2] The Migrant Rights and Justice Program of the Women's Refugee Commission protects migrants' human rights and their ability to access justice and due process through research and advocacy, offering solutions to ensure vulnerable migrants rights are respected.

Stipulated Orders of Removal

Stipulated Orders of Removal are a legal procedure that allows the removal or deportation of a noncitizen without a hearing before an Immigration Judge.[3] Immigrants who sign stipulated orders of removal waive their rights to hearings and agree to have a removal order entered against them, regardless of whether they are eligible to remain in the United States. According to Immigration Court procedures, before an Immigration Judge approves a stipulated order, he or she must determine that a detainee has waived his or her rights in a "voluntary, intelligent and knowing" manner.[4] From 1999 to 2009, the United States deported over 160,000 immigrants who had signed stipulated orders.[5]

Unfortunately, many detainees encountered by Americans for Immigrant Justice in South Florida immigration detention centers, and the Women's Refugee Commission at the southwest border and throughout the United States, do not know their rights. Most of these individuals have not had the opportunity to consult with an attorney and do not understand the consequences of signing stipulated orders. Worse, some detainees have reported feeling bullied or tricked into signing such orders. Some detainees have said they were erroneously told by immigration officials that they had no immigration relief. One study found that the federal government has used stipulated removal *primarily on noncitizens in immigration detention who lack lawyers and are facing deportation due to minor immigration violations.*[6]

The Women's Refugee Commission has received an alarmingly high number of reports of asylum seekers forced to sign stipulated orders of removal despite stating their fear of return. Legal service providers on the southwest border also reported to the Women's Commission that children who were not represented by attorneys were asked to sign stipulated orders.

Although there have been efforts by the Department of Justice to improve the stipulated orders process, serious concerns with abuse of this procedure persist.

In order to prevent further abuse of the stipulated order process, any comprehensive immigration law passed by Congress should direct the Executive Office for Immigration Review (EOIR) to require Immigration Judges to hold in-person, individualized hearings to determine whether noncitizens understand the consequences of signing a stipulated removal order. EOIR and ICE should also institute a 72 hour waiting period from the time a detainee signs a stipulated order to when a judge considers whether to approve it. ICE should give notice of the 72 hour period and provide the detainee with a list of pro bono and low-cost legal services

---

[3] See 8 U.S.C. section §240(d) of the Immigration and Nationality Act; 8 C.F.R. 1003.25(b).

[4] 8 C.F.R. § 1003.25(b).

[5] http://blogs.law.stanford.edu/stipulatedremoval.

[6] Jennifer Lee Koh, Jayashri Srikantiah, Karen C. Tumlin, Deportation Without Due Process: The U.S. Has Used Its "Stipulated Removal" Program to Deport More than 160,000 Noncitizens Without Hearings Before Immigration Judges, Fullerton, Calif.: Western State University College of Law; Stanford, Calif.: Mills Legal Clinic, Stanford Law School; Los Angeles, Calif.: National Immigration Law Center, 2011 ("Deported without Due Process").

providers before obtaining the detainees' signature. Alternatively, judges should not approve stipulated orders for respondents who are not represented.

Border Screening

The U.S. has rapidly expanded its forces on the border, with thousands of border patrol officers patrolling ports of entry and surrounding areas. But, U.S. migration policies are outdated and Customs and Border Protection (CBP) officers are in many ways unequipped to handle the new migrants. They use an "enforcement with consequences" policy that seeks to deter the single person looking for better economic opportunities; this policy is inappropriate for women, children and families who are seeking protection in the United States.

After visiting the border and interviewing many migrants who are now detained, Women's Refugee Commission staff found that the rights of many to seek asylum were not being met. According to the Trafficking Victims Protection Reauthorization Act and asylum law, migrants should be screened to determine whether they have a fear of returning to their country, and Mexican children must be screened to ensure they are not a victim of human trafficking and feel safe to be returned to their home country after apprehension. Our interviews show that many who are eligible for protection are instead being repatriated against their will to dangerous and exploitative situation.

Americans for Immigrant Justice is currently representing one woman, Amelia, who was apprehended by Texas CBP officers in early 2013. She is a twenty-eight year old mother of three, who, after suffering sexual violence, fled to the United States with her two sisters and five year-old niece. Shortly after arriving in the U.S., they were arrested by CBP officers who told them they were being taken to a "hielera" which means "freezer" or "icebox" in Spanish.

The hielera turned out to be a freezing cold cell where Amelia and her family were locked up along with many other immigrant women. The hielera had no beds, no chairs, and a single sink and toilet sitting in plain view in the cell. The temperature in the hielera was so cold that Amelia's lips chapped and split, her face hurt and peeled. Her sisters' and her niece's lips and fingertips turned blue. They were forced to sleep on the concrete floor without even a blanket. They huddled together on the floor at night for warmth, but slept very little.

They had no access to a bath or shower. They were not provided with even the most basic personal hygiene products like toothbrushes, toothpaste, combs, or soap. Nor were they ever provided with a change of clothing. They were fed only once or twice a day, and received no more than a single sandwich. They were constantly hungry and suffered headaches as a result. The only water available to them and the other women in the cell was provided in a single thermos shared by all the detainees. There were no cups to drink the water. The water smelled like bleach and burned Amelia's throat when she drank it.

Amelia was incarcerated in the hielera for six days. AI Justice and the Women's Refugee Commission have spoken to women and children kept in the "hieleras" for as long as two

weeks. To escape the hieleras, many of these women ultimately agreed to sign documents they could neither read nor understand. The documents they signed turned out to be orders for their expedited removal from the United States.

Amelia is just one of many migrants who report such atrocious conditions in border holding facilities and mistreatment by border officials.[7] Despite numerous reports of rights violations in these facilities, there is currently no procedure for regular oversight or monitoring by non-governmental organizations that is crucial to ensure migrants' rights are respected and that the U.S. is meeting its international obligations.

Any Immigration Reform must include measures to ensure that the Customs and Border Protection agency:

- implements meaningful screening practices for vulnerable populations
- enacts a zero tolerance policy towards agents who violate international law or commit human rights abuses
- provides independent monitoring, transparency and access to facilities by NGOs and international organizations

Access to Counsel

U.S. immigration law is one of the most complex and complicated area of U.S. law. In addition to its complicated laws and regulations, immigration court is an adversarial proceeding involving a DHS trial attorney who acts as a prosecutor and an Immigration Judge who presides over the formal proceedings. The consequences of losing an Immigration case include immigration detention, removal from the United States and long-term or permanent separation from family. Yet, despite its similarity to a criminal trial, only half of respondents in immigration proceedings are represented by counsel.[8] This is due in part to the fact that immigration law is considered to be civil in nature. Thus, while immigrants have a *right* to counsel in removal proceedings, the law states that it is at "no expense to the government." This provision does not necessarily preclude government-funded counsel; it merely provides that counsel need not be provided as a matter of right.[9] Thus, under the current system, for those who cannot afford (or find) an attorney, one will not be provided for them by the government. Not surprisingly,

---

[7] *Culture of Cruelty, Abuse and Impunity in Short-Term U.S. Border Patrol Custody*, No More Deaths, 2011. *Forced from Home, the Lost Boys and Girls of Central America*, The Women's Refugee Commission October 2012.

[8] In the landmark Supreme Court decision addressing the right to government-appointed counsel in criminal proceedings, the Court noted that America's criminal justice system is "adversarial," meaning that the state assumes and uses its resources to establish the defendant's guilt before the defendant is proven guilty in a court of law. Gideon v. Wainwright, 372 US (1963). Because, in this adversarial system, "even the intelligent and educated layman has small and sometimes no skill in the science of law," the Court concluded that the presence of defense counsel is "fundamental and essential to fair trials" in the United States.

[9] In further extending these rights, the Supreme Court recognized that, in a society of profoundly unequal resources, adversarial criminal justice, and ignorance of complex law, justice can only prevail if the state provides an indigent defendant with an attorney. See, http://www.pbs.org/wnet/supremecourt/rights/landmark_gideon.html

studies have demonstrated that asylum-seekers and others who are represented at their hearings, have a higher chance of receiving relief from removal.

Currently, 84 percent of detained immigrants appear before an immigration judge without counsel.[10] These unrepresented individuals include mentally ill respondents who may not recognize their surroundings or the nature of the proceedings. They also include children, as young as two years old, who are unaccompanied in the United States and appear before Immigration Judges alone, unable to speak for themselves. These two populations are often unable to articulate their claims for legal relief without the assistance of an attorney, and are often unable to secure the resources needed to acquire representation on their own. For such an individual to appear in any court without counsel is surely a denial of their due process.

Tatiana was a long-term lawful permanent resident who suffered from schizophrenia. When AI Justice took her case, she was detained and had been placed in removal proceedings based on several arrests for petty crimes all related to her illness. She was so incompetent that she was not communicating with her United States citizen daughter who had no idea that her mother had a removal hearing. With the assistance of her AI Justice attorney, she applied for and was granted cancellation of removal and released from detention to her daughter's care. The client was stateless (with no recognized right to live in any country). Without the assistance of an attorney, she likely would have remained detained indefinitely because she would not have been granted relief from removal, DHS would not have felt comfortable releasing her and no country would take her on account of her stateless status.

Current law calls for the government to ensure that unaccompanied children have legal representation in immigration proceedings and other matters, but only "to the extent practicable." Despite heroic efforts by both the government and non-governmental organizations, it is estimated that currently half of unaccompanied children are not represented in immigration court. The number for mentally ill individuals is not known. Fundamental principles of fairness and due process require that these vulnerable persons receive legal representation and guardians to represent their interests throughout the immigration process. While pro bono representation should be encouraged and utilized to the maximum extent possible, it cannot meet the need in all cases, particularly for those who are detained in remote border areas.

One of the ways that detained immigrants can be provided with appropriate legal information is through the Legal Orientation Programs (LOP). The LOP program is administered by the Executive Office for Immigration Review (EOIR), which contracts with nonprofit organizations to provide LOP services at 25 detention facilities around the country. Under this program, an attorney or paralegal meets with the detainees who are scheduled for immigration court

---

[10] American Bar Association Commission on Immigration, "Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency and Professionalism in the Adjudication of Removal Cases," at ES-28 (February 2010), available at http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/ReformingtheImmigrationSystemExecutiveSummary.authcheckdam.pdf

hearings to educate them on the law and to explain the removal process. Based on the orientation, the detainee can decide whether he or she potentially qualifies for relief from removal. Persons with no hope of obtaining relief – the overwhelming majority – typically submit to removal. Currently only detained persons are eligible for LOP services.[11]

EOIR has expressed "great concern" about the large number of individuals appearing in immigration court without representation, and has also noted that "[n]on- represented cases are more difficult to conduct." According to EOIR, LOPs improve the administration of justice, save the government money by expediting case completions which leads to shorter detention stays, improves appearance rates in court and deters frivolous claims. Most importantly, it helps to ensure that immigrants in immigrant proceedings receive due process of law.

The Attorney General should be given executive authority to pay for counsel in cases where the Attorney General deems the fair resolution or effective adjudication of proceedings would be served by such appointment. Counsel should be appointed for minors, those incompetent to represent themselves due to a mental disability and those deemed particularly vulnerable.

Parental Rights

The Women's Refugee Commission works to protect the rights of families impacted by immigration enforcement. Many of AI Justice's clients have been separated from their children. Both organizations focus on the thousands of undocumented, immigrant women and men whose parental rights are violated, and sometimes terminated, when they are detained or deported. We regularly speak with parents who do not know what happened to their children when they were detained by immigration officials. We have met women who have lost permanent custody of their children because they are deported or are either unaware of or unable to attend family court proceedings while in detention. In other cases, women are deported without seeing their children and without the opportunity to arrange their care prior to deportation.[12] U.S. Immigration and Customs Enforcement (ICE) does occasionally release parents from detention, or places them in an "alternatives to detention" program. But at this time, there is no clear set of regulations for cases where children are involved.

The Department of Homeland Security must institutionalize sufficient protections to keep families together. Moreover, the government must create policies and procedures that guarantee child welfare practices do not discriminate against parents on the basis of their immigration status or cultural background.

---

[11] http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/immigration/lop_immigrationdetainees.authcheckdam.pdf

[12] *Torn Apart by Immigration Enforcement: Parental Rights and Immigration Detention*, Women's Refugee Commission, December 2010.

Conclusion

Due process is a fundamental American value that cannot be compromised. In considering any reform to our immigration system, we must make sure due process, and the right to a fair and accessible judicial process is at the forefront of any reform. Providing attorneys to Respondents, particularly those deemed especially vulnerable, in an adversarial proceeding who may not speak English and have no knowledge of U.S. law is essential to efficient and fair adjudications. Ensuring those eligible for humanitarian protections such as asylum are appropriately identified and treated with dignity complies with our international obligations and own American values. Finally, adopting procedures and policies that ensure families can be kept together and parents have the freedom to make decisions regarding the care of their children will ensure strong and healthy communities.

March 20, 2013

The Honorable Patrick Leahy
Chairman
Senate Committee on the Judiciary
U.S. Senate
Washington, D.C. 20510

The Honorable Chuck Grassley
Ranking Member
Senate Committee on the Judiciary
U.S. Senate
Washington, D.C. 20510

Re: The Senate Committee on the Judiciary hearing on "Building an Immigration System Worthy of American Values"

On behalf of the Asian American Justice Center (AAJC) and the other affiliate members of the Asian American Center for Advancing Justice, a non-profit, non-partisan affiliation representing the Asian American and Pacific Islander community on civil and human rights issues, we write concerning today's Senate Committee on the Judiciary Hearing: "Building an Immigration System Worthy of American Values." AAJC and our other affiliates[1] have extensive collective experience working on immigration enforcement, detention and deportation issues, including providing free immigration legal services to immigrant detainees facing deportation.

We commend the leadership of both parties in Congress for addressing our broken immigration system. In the coming months, we look forward to working with Congress in creating an immigration system that is fair, equitable, and embodies American values. Based on our decades of expertise on immigration enforcement, we believe that a comprehensive immigration reform bill should include:

- Rolling back unprecedented levels of immigration enforcement over the past decade;
- Ensuring family unity for long term permanent residents facing deportation; and
- Guaranteeing every immigrant facing deportation gets a fair day in court

A Decade of Enforcement

In the past decade, we have deported more people than in the preceding century.[2] Expenditures on immigration enforcement have also swelled, eclipsing the budgets of all other federal law enforcement agencies combined.[3] The unprecedented rise in deportations has come with a parallel rise in the size of our immigration detention system. The Illegal Immigration Reform and Responsibility Act (IIRIRA) of 1996 subjected many people to mandatory detention, stripping immigration judges of authority to release immigrants from detention or place them in alternatives to detention, even if they are determined not to be a danger to the community or a

[1] In addition to AAJC, the other members of the Asian American Center for Advancing Justice are Asian American Institute in Chicago, Asian Law Caucus in San Francisco, and Asian Pacific American Legal Center in Los Angeles.
[2] *A Decade of Rising Immigration Enforcement*, IMMIGRATION POLICY CENTER – AMERICAN IMMIGRATION COUNCIL at n.2 (Jan. 2013), http://www.immigrationpolicy.org/sites/default/files/docs/enforcementstatsfactsheet.pdf.
[3] *Immigration Enforcement in the United States*, MIGRATION POLICY INSTITUTE at 12 (Jan. 2013), http://www.migrationpolicy.org/pubs/pillars-reportinbrief.pdf.

flight risk. Currently, there over 32,000 people in immigration detention, nearly a 1700% increase from 1986.[4] *More than half* of those in immigration detention have never been convicted of a crime.[5] In 2009, a Department of Homeland Security report found that only 11% of detainees had committed a violent crime and the majority of detainees posed no threat to the general public.[6] The immigration detention system is a massive waste of taxpayer dollars, costing $164 per day to house a detainee, or $2 billion per year.[7]

The growth of our detention and deportation system also has been fueled by the Secure Communities Program. Launched in 2008, this program shares fingerprints between local police and ICE at the point of arrest. Although the program's purpose was to identify and deport individuals with serious or violent felony convictions, about 7 out of 10 individuals deported either do not have criminal convictions or were convicted of lesser offenses.

Immigration Enforcement Separating Families

Over 204,000 people deported between 2010 and 2012 left behind U.S. citizen children.[8] In the decade following IIRIRA, 217,068 people lost an immediate permanent resident family member to deportation.[9] Over 5,000 children have been placed in foster care too often without the consultation or permission of their deported parents.[10] Estimates are that an additional 15,000 children will enter the foster care system in the next five years because of deportations, at a cost of $26,000 per child per year.[11] Studies have shown high rates of depression and post-traumatic stress disorder among children who lost a parent to deportation.[12]

Deportations of Asian Americans and Pacific Islanders

Asian American and Pacific Islander communities are disproportionately impacted by IIRIRA. One and a half million refugees from Cambodia, Vietnam, and Laos came to the United States as refugees during the 1980s. Their children were very young when they arrived and grew up as Americans. Refugees face a number of hurdles in the United States, including being resettled in neighborhoods with high crime and unemployment rates, language barriers, and

---

[4] *The Math of Immigration Detention: Runaway Costs for Immigration Detention Do Not Add Up to Sensible Policies*, NATIONAL IMMIGRATION FORUM, (Aug. 2012), http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf.
[5] Donald Kerwin and Serena Yi-Ying Lin, *Immigrant Detention: Can ICE Meet Its Legal Imperatives and Case Management Responsibilities?*, MIGRATION POLICY INSTITUTE (Sept. 2009), http://www.migrationpolicy.org/pubs/detentionreportSept1009.pdf (reporting that 58% of the detainees held on January 25, 2009 did not have criminal convictions).
[6] Dora Schriro, *Immigration Detention Overview and Recommendations*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT at 2 (Oct. 2009), http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf.
[7] NATIONAL IMMIGRATION FORUM, *supra* note 3, at 2.
[8] Seth Wessler, *Nearly 205K Deportations of Parents of U.S. Citizens in Just Over Two Years*, COLORLINES: NEWS FOR ACTION (Dec. 17, 2012), http://colorlines.com/archives/2012/12/us_deports_more_than_200k_parents.html.
[9] *In the Child's Best Interest?: The Consequences of Losing a Lawful Immigrant Parent to Deportation*, INTERNATIONAL HUMAN RIGHTS LAW CLINIC, EARL WARREN INSTITUTE ON RACE, ETHNICITY AND DIVERSITY, AND IMMIGRATION LAW CLINIC (March 2010), http://www.law.berkeley.edu/files/Human_Rights_report.pdf.
[10] *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System*, APPLIED RESEARCH CENTER: RACIAL JUSTICE THROUGH MEDIA, RESEARCH AND ACTIVISM (Nov. 2011), http://arc.org/shatteredfamilies.
[11] *How Today's Immigration Enforcement Policies Impact Children, Families, and Communities*, CENTER FOR AMERICAN PROGRESS (Aug. 20, 2012), http://www.americanprogress.org/issues/immigration/report/2012/08/20/27082/how-todays-immigration-enforcement-policies-impact-children-families-and-communities/.
[12] Urban Institute, *Paying the Price: Impact of Immigration Raids on America's Children*, THE NATIONAL COUNCIL OF LA RAZA (2007), http://www.urban.org/UploadedPDF/411566_immigration_raids.pdf.

mental health needs stemming from the war.

Adjustment was particularly difficult for Cambodian refugees who fled a genocide in which one third of the country was killed. Ninety-nine percent of Cambodian refugees faced starvation, 90 percent lost a close relative in the genocide, and 70 percent continue to suffer from depression.[13] Faced with these difficulties, many of the younger refugees who had grown up in the United States turned to gangs as surrogate families.

Today, Southeast Asians and Pacific-Islanders are deported at a rate three times higher than other immigrants.[14] Many are deported to countries in which they have never set foot. Under IIRIRA, immigration judges are not allowed to consider their rehabilitation, hardship to children, or lack of ties to their home countries. Upon deportation, deportees face high levels of homelessness, depression, and suicide due to difficulties in acclimating to a foreign country and separation from family.

Immigrants who have rehabilitated and become contributing members of society should be given an opportunity to remain with their families. For example, Som Narith was born in a refugee camp in Thailand after his family fled the genocide in Cambodia.[15] He immigrated to the United States in the 1980s when he was two years old. In 1997, as a teenager, he was convicted of burglary. After serving several years in prison, he turned his life around, trained as a welder, married a United States citizen, and had two children. In 2011, ICE officers arrested him at home even though he had not reoffended and deported him to Cambodia. He is barred for life from returning to the United States even to visit his wife and children.[16]

Restore A Fair Day in Court

IIRIRA stripped judges in many cases from considering hardship to family members and rehabilitation. Judges are required to order deportations without the ability to consider any positive equities. An example of one of these cases is that of Mr. Robert Lucena.[17]

Mr. Robert Lucena, a native of the Philippines, became a Lawful Permanent Resident in the 1960s, and after voluntarily enlisting, he honorably served in the U.S. Marine Corps during the Vietnam War. Like many veterans, Mr. Lucena developed substance abuse issues after his service. His conviction for possession of three capsules of methamphetamine stripped the judge of authority to consider his service, rehabilitation, marriage to a U.S. citizen, U.S. citizen children, or lengthy residence. Mr. Lucena's situation was similar to that presented in *Padilla v. Kentucky*, 130 S.Ct 1473 (2010). There, Mr. Padilla, a long term resident and Vietnam veteran, was being deported due to ineffective assistance by his criminal defense counsel in advising him on the immigration consequences of his plea. However, unlike Mr. Padilla, Mr. Lucena was unable to appeal his case to the Supreme Court and was ordered removed.

---

[13] Grant N. Marshall et al., *Mental Health of Cambodian Refugees 2 Decades After Resettlement in the United States*, 294(5) JAMA 571 (2005); J. Kroll et al., *Depression and posttraumatic stress disorder in Southeast Asian refugees*, 146(12) AM J. PSYCHIATRY 1592 (1989).
[14] Office of Immigration Statistics, *2010 Yearbook of Immigration Statistics*, U.S. DEPARTMENT OF HOMELAND SECURITY (2010).
[15] Names and identifying details have been changed to protect the confidentiality of clients.
[16] 8 U.S.C. § 1182(a)(9)(A)(ii).
[17] Names and identifying details have been changed to protect the confidentiality of clients.

As a result, long term permanent residents are deported daily for misdemeanor convictions or decades old convictions without receiving a fair day in court. Immigration Judges must be given the power to grant a second chance to immigrants after considering their criminal convictions as well as their rehabilitation, family ties, and length of time in the United States. In a country that values second chances, immigrants should not be judged based solely on their worst acts.

Thank you again for holding this critical and timely hearing and for the opportunity to express the views of Advancing Justice. We welcome the opportunity for further dialogue and discussion about these important issues.

Sincerely,

Mee Moua
President & Executive Director
Asian American Justice Center

On behalf of:
Asian Pacific American Legal Center
Asian Law Caucus
Asian American Institute

APIAHF
ASIAN & PACIFIC ISLANDER
AMERICAN HEALTH FORUM

TESTIMONY BEFORE THE UNITED STATES SENATE COMMITTEE ON THE JUDICIARY

FOR THE HEARING ENTITLED "BUILDING AN IMMIGRATION SYSTEM WORTHY OF AMERICAN VALUES"

March 20, 2013

BY THE

ASIAN & PACIFIC ISLANDER AMERICAN HEALTH FORUM

The Asian & Pacific Islander American Health Forum (APIAHF) submits this written testimony for the record for the March 20, 2013 hearing before the Senate Committee on the Judiciary entitled "Building an Immigration System Worthy of American Values." APIAHF is a national health justice organization that influences policy, mobilizes communities, and strengthens programs and organizations to improve the health of Asian Americans, Native Hawaiians, and Pacific Islanders (AAs and NHPIs). For 27 years, APIAHF has dedicated itself to improving the health and well-being of AA and NHPI communities living in the United States and its jurisdictions. We work at the federal, state, and local levels to advance sensible policies that decrease health disparities and promote health equity.

There is an overwhelming need and desire among Americans to quickly move forward with immigration system reforms that work for both Americans and aspiring Americans alike. As numerous members of Congress have stated, we must promptly align our immigration policies with our American values. For far too long, our immigration policies have done a disservice to many immigrants, kept families apart, stood in the way of full integration and threatened our nation's future and health.

Immigration policies must improve the lives of aspiring citizens, not make it more difficult. Our laws must carry a theme of American values of shared responsibility, fairness and unity. The guiding principle behind any improvements to our immigration laws must be unity for immigrants, unity for families and unity for the entire nation.

The following testimony addresses one of the most critical areas of disparity in this country: access to health care. The issue is significant, because as this Committee works to better

understand the nation's needs and craft solutions to our immigration system, federal agencies and states are rapidly implementing the Affordable Care Act and other initiatives to combat uninsurance and mitigate the massive toll that uninsurance takes on the nation. While these initiatives have the potential to drastically reduce uninsurance, current federal policies and proposals being debated in the Senate and House will undermine these efforts and threaten the nation's long term health.

I. Barriers to Health Care and Resulting Health Disparities are One of the Most Egregious Forms of Inequality

Every American must have the opportunity to grow up healthy, see the doctor when they are sick, and have a chance at reaching their optimal health and well-being. Being healthy is a basic need and right. Individuals with health coverage, including Medicaid, report better physical and mental health.[1] They are more likely to have routine access to medical care, less likely to rely on expensive emergency room visits and have better access to essential preventive services, reducing the incidence of chronic diseases that take a major toll on the U.S. health care system. In contrast, research shows that the uninsured have significantly worse health outcomes across a number of chronic diseases including cancer and diabetes.[2]

Racial and ethnic minorities and other underserved populations pay a high price. Asian Americans and Pacific Islanders, for example, are overwhelmingly immigrant and account for 40% of recent immigrants to the United States. As of 2011, there are over 17.6 million Asian Americans living in the United States, and over 1.2 million Native Hawaiians and Pacific Islanders. These communities, like many other racial and ethnic minorities, are disproportionately uninsured for a number of reasons, including cost, challenges navigating enrollment and eligibility processes, and importantly for this Committee—the intersection of immigration-based eligibility restrictions on access to health insurance and health programs.

II. Immigrants Want the Same Opportunity to take Responsibility for their Health as All Americans, and a Majority of Americans Agree

Immigration reform proponents often argue that immigrants must be responsible for their actions. The primary reason most immigrants come to the U.S. is to better their lives and that of their children through hard work and sacrifice. Those two principles are one of the many reasons the U.S. is seen as a nation built by immigrants.

---

[1] "What is the link between having health insurance and enjoying better health and finance?" Robert Wood Johnson Foundation, January 2012, *available at* http://www.rwjf.org/content/dam/farm/reports/issue_briefs/2012/rwjf72145.

[2] "American's Uninsured Crisis: Consequences for Health and Health Care," Institute of Medicine, February 2009, *available at* http://www.iom.edu/~/media/Files/Report%20Files/2009/Americas-Uninsured-Crisis-Consequences-for-Health-and-Health-Care/Americas%20Uninsured%20Crisis%202009%20Report%20Brief.pdf.

Yet, America's laws do not match these principles. While the Affordable Care Act offers the most significant opportunity to advance the nation's health in the last 50 years by drastically reducing the number of uninsured, improving access to preventive care and putting the nation on a more sustainable path to health, current federal policies threaten to undercut this advance. The ACA maintains existing immigration-based restrictions and goes even further and affirmatively bars many immigrants from the new coverage options. Undocumented immigrants are completely prohibited from purchasing private health insurance coverage in the newly created insurance marketplaces, even at full price and with their own funds.

In addition, the Department of Health and Human Services (HHS) recently created new exclusions on a population of lawfully present immigrants, a move that undermines the goals and values of the ACA. An Interim Final Rule issued last August excludes youth and young adults granted deferred status under the Deferred Action for Childhood Arrivals (DACA) program from key features of the health reform law and prevents children and pregnant women approved for DACA from enrolling in health insurance under the state option available in Medicaid and the Children's Health Insurance Program (CHIP). These are young immigrants, commonly known as DREAMers, who are finishing their education or serving in the military and trying to better their lives and communities, and yet are barred from the new affordable health insurance options their citizen counterparts have access to.

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA, also known as the "welfare reform" law), created arbitrary and inhumane time limits and other restrictions for lawfully present immigrants to become eligible for federal means-tested public programs. As a result, these aspiring citizens are barred from critical safety net programs for five years and longer, a barrier their native-born counterparts do not have to face.

PRWORA also bars citizens from the freely associated states of Micronesia, Republic of the Marshall Islands and Republic of Palau from the Medicaid program. These individuals, known as COFA (Compact of Free Association) migrants, are persons who are free to enter and work in the U.S. without restriction under long-standing agreements between the U.S. and pacific jurisdictions. COFA migrants suffer from a number of serious health disparities caused by America's militarization of the pacific islands, nuclear test bombing and lack of economic supports, including high rates of cervical cancer and other chronic diseases. The 1996 law revoked Medicaid coverage for COFA migrants, and, coupled with existing disparities and failure on the part of the U.S. to provide required supports, has created serious economic consequences for states like Hawaii and the territory of Guam, who have shouldered the burden of providing health care to this population.

These federal policies undermine America's values, further health disparities and put the entire nation's health at risk. These disparities will only worsen in 2014, when the ACA is fully implemented and the gap between the health of immigrants and those who qualify for new coverage options widens. As a result, immigration status will become one of the leading social determinants of health—affecting everything from whether or not a person can buy health insurance, whether a sick child can see the doctor, and whether a low-income worker can afford the treatment they need.

Despite the politicization of health reform, recent polling conducted by the Kaiser Family Foundation found that most Americans support offering the same opportunities for accessing affordable health care and insurance to aspiring Americans.[3] The poll found that six out of ten Americans surveyed believed that immigrants on the path to legalization should be able to fully participate in health reform and qualify for Medicaid coverage. Overwhelming majorities of Blacks and Latinos surveyed agreed with providing equal access to health care.

While the Kaiser survey did not provide disaggregated data on the views of Asian Americans surveyed, the 2012 National Asian American Survey found that one in six Asian American voters placed health care as a top issue and Asian Americans overwhelmingly supported the Affordable Care Act.[4] These numbers are telling as Asian Americans and Latinos supported progressive policies during the 2012 election by substantial margins. As Asian Americans continue to be the fastest growing racial group in the nation, Asian American voters will continue to demand policies that serve their communities.

III. Access to Health Care for All is an Economic Imperative.

The U.S. cannot afford to continue the unsustainable health care path the nation is currently on. This was one of the reasons lawmakers and President Obama prioritized the Affordable Care Act (ACA). While the ACA provides new, affordable insurance options for many of the currently 50 million uninsured individuals in the U.S., America will continue to have a population of uninsured workers, children and families even after full implementation of the law.

Uninsurance leads to poor health outcomes. The nonpartisan Institute of Medicine (IOM) has studied the issue extensively and their report, *America's Uninsured Crisis: Consequences for Health and Health Care*, outlines the resulting lack of access to routine preventive care. In

[3] "Kaiser Health Tracking Poll: Public Opinion on Health Care Issues," Kaiser Family Foundation, February 2013, *available at* http://www.kff.org/kaiserpolls/upload/8418-F.pdf.
[4] "The Policy Priorities and Issue Preferences of Asian Americans and Pacific Islanders," National Asian American Survey, September 2012, *available at* http://www.naasurvey.com/.

addition to the physical toll, there are major economic costs. Shorter lifespans and worse health outcomes result in a loss of $65 - 130 billion annually[5] and translate into lost economic productivity and threaten economic security as families live in fear of what might happen if they get sick.

The consequences are not limited to the individual, but impact communities and state economics and put America's security at risk. Expanding access to affordable health insurance would help to relieve overburdened safety net hospitals and clinics and reduce uncompensated care costs, which often falls to states and the federal government to pick up the tab. In total, eighty-five percent of the costs for uncompensated care fall on the government.[6]

IV. Offering Immigrants the Same Opportunities for Affordable Health Care and Coverage is Fiscally Responsible and Promotes Full Integration

Providing equal access to affordable, quality care and insurance for immigrants is sound fiscal policy. Immigrants are often younger, healthier and have lower health care expenses than native-born Americans.[7] A recent report by leading health researcher Leighton Ku and Brian Bruen found that, analyzing the Census Bureau's March 2012 Current Population Survey, immigrants have lower utilization rates for public benefits and the value of those benefits received is less than that for native-born individuals.[8] In addition, the report found that analysis of the 2010 Medical Expenditure Panel Survey (MEPS), costs for immigrants under Medicaid were substantially lower compared to native-born adults and for immigrant children, costs were less than half that of native-born children. Prior analysis has conclusively shown that immigrants as a whole underutilize health care compared to the U.S. born and, when they participate in federal and state funded health programs; use fewer resources.[9]

---

[5] "Hidden Costs, Value Lost: Uninsurance in America," National Academies Press, 2003, *available at* http://www.nap.edu/openbook.php?record_id=10719&page=1.

[6] "The Cost of Care for the Uninsured: What do We Spend, Who Pays and What Would Full Coverage Add to Medical Spending?" Kaiser Family Foundation, May 2004, *available at* http://www.kff.org/uninsured/upload/the-cost-of-care-for-the-uninsured-what-do-we-spend-who-pays-and-what-would-full-coverage-add-to-medical-spending.pdf.

[7] "Health Insurance Coverage and Medical Expenditures of Immigrants and Native-Born Citizens in the United States," Am J Public Health, Leighton Ku, 2009 July; 99(7):1322-1328, *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2696660/.

[8] "The Use of Public Assistance Benefits by Citizens and Non-Citizen Immigrants in the United States," CATO Institute, Leighton Ku and Brian Bruen, February 2013, *available at* http://www.cato.org/sites/cato.org/files/pubs/pdf/workingpaper-13_1.pdf.

[9] "Health Insurance Coverage and Medical Expenditures of Immigrants and Native-Born Citizens in the United States," Am J Public Health, Leighton Ku, 2009 July; 99(7):1322-1328, *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2696660/.

America needs commonsense immigration policies that align with our values, protect all families and communities, and put the nation on a path to a better, healthier future. Our laws should make health care more affordable and accessible for both Americans and aspiring Americans alike. Immigrants already feel the pain when archaic eligibility laws, language barriers and access challenges converge. We cannot afford to create new barriers to good health for anyone.

APIAHF recommends the following four reforms to ensure that immigration policies support the full integration of immigrants and encourage all Americans to take responsibility for their health.

a. Young Adults Granted Deferred Action Must be Allowed Access to Health Reform

Including DACA-eligible youth and young adults in health reform is sound policy and fiscally responsible. DACA-eligible youth, commonly known as DREAMers, are a sizable population, with recent estimates suggesting that as many as 1.76 million young adults could be eligible for administrative relief.[10] An estimated 9% of these youth come from Asian countries, comprising over 170,000 individuals. These young adults are already part of America's fabric, having lived in the country for years, and share the same hopes and aspirations as all young Americans.

There is no principled reason to treat young people who receive deferred action through DACA differently from any other person who has received deferred action. In fact, until HHS decided to carve out DACA beneficiaries, they were covered by the ACA like all other persons who have been granted deferred action. Restoring eligibility for DACA-eligible young adults in health reform would allow these individuals to purchase coverage in the new health insurance marketplaces, pay their fair share of health care costs and see a doctor on a regular basis, instead of remaining uninsured. Including this population of overall younger and healthier individuals in the marketplace creates a more sustainable and robust risk pool and ensures that these young people are able to continue to work, pay taxes and build the nation's economy.

Shutting them out could increase costs for everyone. Excluding a large population of relatively healthy young adults from the insurance marketplaces increases the risk of adverse selection and ultimately drives up premiums for everyone. Even more worrisome is the fact that if premiums rise, citizens and lawfully present individuals alike may find it too costly to purchase coverage through the marketplace and instead choose to remain uninsured, further reducing the marketplace population and in turn driving up costs.

---

[10] "Relief from Deportation: Demographic Profile of the DREAMers Eligible Under the Deferred Action Policy," Migration Policy Institute, August 2012, *available at* http://www.migrationpolicy.org/pubs/fs24_deferredaction.pdf.

Finally, including DACA-eligible youth and young adults in health reform supports administrative efficiency. As states develop processes to facilitate seamless eligibility determinations and enrollment for individuals in private insurance plans, Medicaid and CHIP, they are faced with yet another complicated process. Treating DACA-eligible youth like all other immigrants granted deferred status would ease this process.

b. All Immigrants Must be Allowed the Same Opportunity to Take Responsibility for their Health by Being Able to Purchase Coverage in the Insurance Marketplaces

Federal law currently excludes undocumented immigrants from purchasing private health insurance in the newly created insurance marketplaces. This policy undermines our country's efforts to reduce the number of uninsured and prevents a large population of mostly healthy, working adults from being included in state insurance risk pools. It is also the first known statutory prohibition on a private market transaction based on an individual's immigration status. It's good fiscal policy to offer health coverage to the largest number of people. Allowing everyone to pay in increases competition and spreads risks and costs across a larger population. As these immigrants continue to contribute to the U.S. economy, support their families and work toward a path of obtaining legal status, they must be able to take responsibility for their health by having the same opportunity to purchase affordable insurance.

c. End Arbitrary and Inhumane Time Limits that Put Legal Aspiring Citizens at Risk

Congress should remove the arbitrary time limits imposed on lawfully present immigrants whose taxes help support the social safety net programs they are barred from participating in. The arbitrary time limits currently in place create substantial barriers for low-income immigrants from being able to benefit from the same support systems critical to preventing needy individuals and families from slipping into poverty. As a result, eligible immigrants have lower rates of enrollment in federally supported programs than their citizen counterparts. This disparity is also true among citizen children living in immigrant households, putting these low-income children at risk of food insecurity and poor health outcomes.

States already recognize the importance of keeping women, children and families healthy. Four states and the District of Columbia use their own funds to provide health care for children regardless of their immigration status, and twenty states use the option under the Children's Health Insurance Program Reauthorization Act of 2009 to provide health coverage for lawfully present children subject to the five-year bar. Fourteen states and the District of Columbia provide CHIP or other medical coverage for pregnant immigrant women, regardless of

immigration status, and an additional thirteen states provide Medicaid coverage for lawfully present pregnant women through the CHIPRA option.

We urge Congress to act again to permanently eliminate this arbitrary restriction for all lawfully present immigrants.

a. America Must Uphold its Commitment to the Freely Associated States and Provide Parity in Health Care

Migrants from the Compact territories should be able to access the federal health programs they pay into. COFA migrants are part of the fabric of America and share a complex relationship with the U.S. government, one in which the U.S. government has certain responsibilities. They contribute to the economy and pay taxes and therefore should be eligible for state funded programs. Lifting the current bar on eligibility will provide needed fiscal relief for states like Hawaii and the territory of Guam, which, as a result of the federal government's failure to provide economic supports for this population, have shouldered a disproportionate burden of this population's health care expenses.

V. Conclusion

Every individual, regardless of immigration status, should have a fair opportunity to attain optimal health and well-being. Any fix to the nation's immigration system must include access to health care. The alternative risks putting recent reforms and advances at risk, potentially shifts costs to states and safety net providers, and could create generations of health disparities.

For more information or questions, please contact Priscilla Huang, APIAHF Policy Director at phuang@apiahf.org or (202) 466-3550.

c/o Hector Barajas
Banished Veterans
2500 Elizabeth Street
Pueblo, CO 81003
(626) 569-5491
banishedveterans@yahoo.com

March 19, 2013

Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Members of the Senate Judiciary Committee:

We write to express our grave concern about the deportation of veterans of the United States military. In many cases, these deportations result from 1996 changes to our immigration laws that eliminated the ability of immigration judges to consider individual circumstances in deciding whether to order someone deported. We urge you to take action and restore discretion to immigration judges so that veterans are not needlessly and unjustly banished from the country for which they were willing to risk their lives.

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA),[1] which significantly expanded the grounds that subject individuals to automatic deportation. These changes have affected hundreds of thousands of legal immigrants, including veterans of the U.S. military, who have been banished even for single, non-violent offenses committed many years ago. Under these laws, veterans have routinely been deported from the United States and separated from their U.S. citizen family members without any consideration of their past military service or other circumstances.

Each year, approximately 6,000 to 8,000 noncitizens enlist in the United States military.[2] As of February 2008, more than 65,000 immigrants were serving on active duty in the United States.[3] Noncitizen service members constitute an important part of our military. They have been identified by the Center for Naval Analysis as "a valuable enlisted recruiting resource" and "a source of greater diversity . . . both . . . in the traditional sense . . . and in terms of diversity of skills that are of strategic interest to the U.S. military."[4] The same study found substantially lower rates of attrition among immigrants than

[1] Pub. L. 104-208, 110 Stat 3009-546, enacted September 30, 1996.
[2] *See* Center for Naval Analysis Report, *Non-Citizens in the Enlisted U.S. Military* (November 2011) [hereinafter CNA Report] at 24.
[3] One America, Immigrants in the Military Fact Sheet, *available at* http://www.weareoneamerica.org/immigrants-military-fact-sheet.
[4] CNA Report at 5; *see also id.* at 13-18.

among citizens.[5] Yet despite the important role immigrants play and have the potential to play in the U.S. military, they are regularly deported and are not given any additional consideration for their service.

Headquartered in Mexico, Banished Veterans is an organization that offers support and advocacy to veterans of the United States military who are facing deportation or who have been deported. Although Immigration and Customs Enforcement (ICE) recently indicated that the United States government does not track how many veterans of its armed services have been deported, we estimate that number to be in the several thousands. Banished Veterans has specifically identified over one hundred deported veterans by word of mouth alone.

Most of the deported service members Banished Veterans tracks moved to the United States as children and identified so strongly with the United States that they enlisted in the military to serve their adopted country. They are veterans of the Vietnam War, the Gulf War, Kosovo, Iraq, Afghanistan, and countless other conflicts. Although they were born in other countries, these men and women adopted the United States as their own. Many risked their lives alongside their U.S. citizen counterparts, never imagining that the country for which they fought would eventually banish them from its borders.

Many have been deported because they were convicted of crimes categorized as "aggravated felonies" under the INA. However, many of these convictions are misdemeanors, or are otherwise nonviolent convictions. For example, Fabian Rebolledo, a decorated combat veteran who served in Kosovo, was deported from the United States due to a conviction for passing a bad check in the amount of $750. He is now separated from his 12-year-old U.S. citizen son who cries on the phone, asking his father to "come home."

The criminal convictions that triggered their deportation are often related to mental health issues veterans suffer as a result of their service. Hector Barrios-Reyes, who served in Vietnam, explains, "I was injured in combat. I saw many fellow soldiers injured. It changes everything. I came back crazy." He was deported years later for transporting marijuana in a vehicle. His children are all U.S. citizens and live in the United States, while Mr. Barrios lives alone in Tijuana, Mexico. Whereas U.S. citizen veterans may participate in drug treatment or rehabilitative mental health programs if they are convicted of crimes, noncitizen veterans often face deportation and permanent banishment from the country. Yet they serve and die together in the battlefields to protect our country from harm.

Many veterans have permanently been banished from the United States as a result of nonviolent drug convictions. Louie Alvarez, who lived in California since he was four years old, enlisted in the U.S. Marine Corps during the Vietnam War. He was seventeen years old. He developed a drug addiction after he left the service and got into trouble with the law. After serving a sixteen-month prison sentence for possession of a controlled

[5] *Id.* at 26.

substance in 2007, Mr. Alvarez was transferred to the custody of the Department of Homeland Security. He was released on bond more than one year later, and he is currently facing deportation.

Veterans who are deported are often separated from their U.S. citizen family members in the United States. Many have left behind U.S. citizen children who suffer as a result of their separation from their parent. Hector Barajas, Board Member of Banished Veterans & Founder of the Deported Veterans Support House, has a seven-year-old daughter with whom he tries to maintain contact through video chats over the Internet every evening. While she is sometimes able to visit him in Mexico, that is no substitute for growing up with her father. Her mother has been diagnosed with Multiple Sclerosis, and Mr. Barajas worries about who will take care of his daughter when her mother no longer can. Recent studies indicate that children whose parents are deported suffer from a range of mental health issues as a result of their separation. Many children of veterans are suffering because of their parents' deportation.

When U.S. citizens leave the United States in order to keep their families together after the deportation of a family member, they also suffer as a result. Giovanni Gaez, who moved to the United States when he was thirteen, was deported due to a criminal conviction years after he was honorably discharged from the military. His wife and two children, all of whom are U.S. citizens, moved to Panama to be with him. "When I was deported," he said, "ICE also deported three Americans." He reports that his wife and children are "trying to adjust to this new life," but they miss their home and country.

Veterans are deported even when they pose no ongoing public safety threat to the United States. Many of their convictions occurred ten or twenty years ago, often as a result of mental health and economic challenges, such as Post-Traumatic Stress Disorder, inability to find employment, and homelessness. In the intervening years, they will often have led law-abiding lives. With no consideration for their service or the circumstances surrounding their convictions, our government continues to deport them anyway. Ironically, their deportation may itself result in threats to national security. Veterans in Mexico, for example, report being recruited by drug cartels anxious for information about U.S. military tactics.

Once deported, veterans face difficult conditions in countries that in many respects are foreign to them. As Gulf War veteran Howard Dean Bailey, who was deported to Jamaica after having lived in the United States for over twenty years, explains, "I live in a country that I am not familiar with. I have no family members or friends here. I have to depend on money from other people to buy food. I have no home. I am scared for my safety in this country because people like me who are sent here are not treated fairly by the citizens or police. I miss my family—my children especially. My heart breaks because my family was torn apart."

We urge you to consider the struggles of deported veterans and of their U.S. citizen family members. The solution is simple: restore individualized justice to the immigration system. Reinstate the discretion of immigration judges so that they are able to consider

each case on its own merits. The decision to deport an individual, particularly one who has served and been willing to die for this country, is a drastic measure and should not be made without full consideration of the individual's particular circumstances.

Thank you in advance for your consideration.

Sincerely,
Banished Veterans

Prepared Testimony of Michael W. Cutler, Senior Special Agent, INS (Ret.) for Senate Judiciary Committee Hearing on March 20, 2013 on the topic:

"Building an Immigration System Worthy of American Values"

Good afternoon Chairman Leahy, Senator Coons, Ranking Member Grassley, other members of the Judiciary Committee, fellow witnesses, ladies and gentlemen.

I greatly appreciate the opportunity to provide my perspectives at this important hearing concerning how America's immigration system be made reflective and worthy of American values. For me personally, immigration is the story of my own family and it has virtually been my life's work. As you may know, I was sworn in as an Immigration Inspector in October 1971 at the New York District Office of the former Immigration and Naturalization Service. Thus began my career with the INS that would span some 30 years. At the end of my career with the INS I was a Senior Special Agent assigned to the Organized Crime, Drug Enforcement Task Force.

My career provided me with a unique front row seat to the true importance of America's immigration laws to nearly every challenge and threat confronting America and Americans.

Rather than simply being a single issue, immigration is a *singular* issue that impacts everything from national security, criminal justice and community safety to the economy, unemployment, healthcare and public health, education and the environment to name the most prominent.

America's immigration laws were enacted to achieve two critical goals- protect innocent lives and protect the jobs of American workers.

A review of Title 8, United States Code, Section 1182 will make the purpose and intentions of our immigration laws clear. This section of the Immigration and Nationality Act enumerates the categories of aliens who are ineligible to enter the United States. Among these categories are aliens who have dangerous communicable diseases, suffer extreme mental illness and are prone to violence or are sex offenders. Criminals who have committed serious crimes are also excludible as are spies, terrorists, human rights violators and war criminals. Finally, aliens who would work in violation of law or become public charges are also deemed excludible.

It is vital to note that there is nothing in our immigration laws that would exclude aliens because of race, religion or ethnicity.

Our valiant members of the armed forces are charged with keeping our enemies as far from our borders as possible while the DHS is charged with securing our borders from within. While mentioning our borders it is vital to understand that any state that has an international airport or has access to a seaport is as much a border state as are those states that are found along America's northern and southern borders.

We are constantly told that the immigration system is broken. What is never discussed is the fact that for decades the federal government has failed to effectively secure America's borders and enforce and administer the immigration laws. These failures convinced desperate people from around the world that the United States is not serious about it borders or its laws. This impression was further

exacerbated by the Amnesty created by IRCA in 1986 which enabled more than 3.5 million illegal aliens to acquire lawful status and a pathway to United States citizenship.

This supposed one-time program that was to finally restore integrity to the immigration system was an abysmal failure. It could be argued that the failures to effectively enforce the immigration laws especially where the employer sanctions provisions of IRCA was concerned, to balance the amnesty provisions, provided a huge incentive for aliens to enter the United States in violation of America's borders and laws and consequently, the United States witnessed the largest influx of illegal aliens in history.

Respect for America's immigration laws have been further eroded by other factors such as the advocacy by the administration, and some Congressional leaders, for the creation of a program under the aegis of "Comprehensive Immigration Reform" that, if enacted, would provide unknown millions of illegal aliens, whose true identities and entry data are unverifiable, with pathways to citizenship. There are many reasons that programs such as these are problematic, but first and foremost is the undeniable fact that there is no way to determine the true identities of these aliens nor any way to verify how or when they entered the United States. This lack of integrity also plagues the program known as DACA (Deferred Action for Childhood Arrivals) that the administration created under the guise of "prosecutorial discretion" to provide illegal aliens who claim to have entered the United States as teenagers with temporary lawful status and employment authorization. It has been estimated that this program may ultimately provide between one million and two million such illegal aliens with official identity documents and employment authorization. The identity documents enable those to whom these documents are issued to obtain Social Security cards, driver's licenses and other such official identity documents even though it is virtually impossible to be certain of the true identities of the aliens to whom these documents are issued.

These are essentially the same aliens who would have been eligible for lawful status under the failed legislation known as the DREAM Act. As a former INS special agent I can tell you that there is no magical way to verify the information contained in the applications for participation in Comprehensive Immigration Reform or DACA is accurate or honest. The best chance to to do this would be to conduct full field investigations- investigations that ICE and USCIS do not have the resources to conduct. Time and again the GAO and OIG have pointed to a lack of integrity to the immigration benefits program. Fraud undermines the immigration system and national security as well.

Here is are two important excerpts from the 9/11 Commission Staff Report on Terrorist Travel.

First of all, here is the first paragraph from the preface of that report:

"It is perhaps obvious to state that terrorists cannot plan and carry out attacks in the United States if they are unable to enter the country. Yet prior to September 11, while there were efforts to enhance border security, no agency of the U.S. government thought of border security as a tool in the counterterrorism arsenal. Indeed, even after 19 hijackers demonstrated the relative ease of obtaining a U.S. visa and gaining admission into the United States, border security still is not considered a cornerstone of national security policy. We believe, for reasons we discuss in the following pages, that it must be made one."

Here is a paragraph under the title "Immigration Benefits" found on page 98:

"Terrorists in the 1990s, as well as the September 11 hijackers, needed to find a way to stay in or embed themselves in the United States if their operational plans were to come to fruition. As already discussed, this could be accomplished legally by marrying an American citizen, achieving temporary worker status, or applying for asylum after entering. In many cases, the act of filing for an immigration benefit sufficed to permit the alien to remain in the country until the petition was adjudicated. Terrorists were free to conduct surveillance, coordinate operations, obtain and receive funding, go to school and learn English, make contacts in the United States, acquire necessary materials, and execute an attack."

On December 7, 2012 the DHS OIG issued a report that was entitled:

"Improvements Needed for SAVE To Accurately Determine Immigration Status of Individuals Ordered Deported"

In conducting its investigation and preparing the report, the OIG examined the SAVE (Systematic Alien Verification for Entitlements) program. The results of the review were disconcerting, to say the least. The report noted that failures to update the data in the system could potentially affect the more than 800,000 individuals who have been ordered deported, removed, and excluded but who are still in the United States. That report went on to note that a random statistical sample tests of individuals who had been ordered deported but still remained in the United States identified a 12 percent error rate in immigration status verification. In other words, these individuals had no status, but were erroneously identified as having lawful immigration status.

Adding this to the clearly stated policies of the administration which invoked "Prosecutorial Discretion" to not arrest or seek the removal of illegal aliens unless the aliens in question have been convicted of committing serious crimes.

Most recently the administration has engaged in a program to release thousands of illegal aliens from custody who have criminal histories. This program undermines any vestiges of integrity that the immigration law enforcement program might have had. I cannot imagine how a clearer message could be sent to people around the world that our nation is not only willing to ignore violations of law but reward violations of laws that were enacted to protect innocent lives and the jobs of American workers.

Meanwhile leaders of some cities and states openly demonstrate their disdain and contempt for our immigration laws by declaring that they have created "sanctuaries" for illegal aliens; yet the federal government refuses to take action against them.

Each of these actions, or lack of action, has served to encourage, induce, aid or abet aliens to violate our immigration laws. Sanctuary cities and states also serve to shield illegal aliens from detection by the federal government. It is important to note that this all represents violations of Title 8, United States Code, Section 1324 that addresses alien smuggling, harboring, inducing and, in general facilitating the entry of illegal aliens into the United States.

This would be wrong at any time but my concern is that today our nation is threatened by international terrorist organizations and transnational criminals from the four corners of our planet, and the pernicious gangs and criminal organizations that they often belong to.

Notwithstanding these threats and the fact that the American economy is hobbled by extraordinarily

high unemployment and underemployment rates, the immigration component of these challenges has been ignored. Each month the United States lawfully admits tens of thousands of foreign workers who are authorized to work in the United States, while failures to effectively secure our borders and enforce the immigration laws from within the interior of the United States provides unfair competition for American workers desperate to find decent jobs. By not routinely enforcing the immigration laws and by its latest decision to release thousands of criminal aliens, the entire immigration system has come to lack integrity and fails to provide the deterrence against foreign nationals who would enter the United States intent on working illegally or, perhaps, with far more nefarious goals in mind.

Law enforcement is at its best when it creates a climate of deterrence to convince those who might be contemplating violating the law that such an effort is likely to be discovered and that if discovered, adverse consequences will result for the law violators. Current policies and statements by the administration, in my view, encourages aspiring illegal aliens around the world to head for the United States. In effect the starter's pistol has been fired and for these folks, the finish line to this race is the border of the United States.

Back when I was an INS special agent I recall that Doris Meissner who was, at the time, the commissioner of the INS, said that the agency needed to be "customer oriented." Unfortunately, while I agree about the need to be customer oriented what Ms Meissner and too many politicians today seem to have forgotten is that the "customers" of the INS and of our government in general, are the citizens of the United States of America.

I look forward to your questions.

Closing Statement of Michael W. Cutler, Senior Special Agent, INS (Ret.) for Senate Judiciary Committee Hearing on March 20, 2013 on the topic:

"Building an Immigration System Worthy of American Values"

Having listened to the testimony of all of the witnesses who testified at the hearing and the questions that they were asked along with the responses that they provided, I believe it is critical to provide my perspectives that I did not have the opportunity to provide at the hearing- I therefore thank Senator Coons for providing me with this opportunity.

In his opening remarks, Senator Coons, who acted as chairman of the hearing, noted how much money has been spent on DHS to enforce the immigration laws and that there are high numbers of aliens currently being removed from the United States. It is important to note that simply throwing lots of money a problem will not solve the problem. It is estimated that well over one billion dollars has been spent on the implementation of US-VISIT a program that was essentially mandated by the 9/11 Commission to track the entry and departure of aliens in the United States and yet, nearly a decade later, this important system is still dysfunctional. The goal of government should not be to spend as much money on an issue as possible but to spend money wisely.

As for the removal of aliens from the United States, I believe it is of critical importance to point out that there is a bit of semantics involved in deciphering the statistics. There is a world of difference between an alien who voluntarily departs from the United States as compared with an alien who is formally ordered deported and is subsequently removed. Prior to the current use of jargon, there was a clear distinction in the language that described these situations. Today, any alien who leaves the United States, whether voluntarily or as the result of an order of deportation being imposed by an Immigration Judge are both considered to have been "removed."

An alien who is formally deported and then unlawfully reenters the United States is, in that act of unlawful reentry committing a felony. If the alien has no criminal convictions that violation of law carries a maximum of 2 years in prison while aliens who have serious criminal convictions may face up to 20 years in prison for that crime of unlawful reentry (as an aggravated felon).

However, an alien who voluntarily departs from the United States would face no criminal charges for unlawful reentry. The artful use of language has muddied the waters in terms of assessing the circumstances under which aliens who violate the provisions of the Immigration and Nationality Act ultimately leave the United States.

It was evident from some of the testimony and ensuing questions, that there are serious concerns about instances where aliens who had been taken into custody for violations of the provisions of the Immigration and Nationality Act and through a lack of proper representation were remanded into custody and in some instances, deported to their home countries where they faced life threatening situations. The impression conveyed by some of the testimony was that there are instances where such aliens might have properly applied for and received political asylum.

As someone whose family suffered greatly because of anti-semitism during the Holocaust at the hands of the Nazi regime during the Second World War, I was, in fact, named for my mother's mother (my grandmother) who was killed during the Holocaust in Poland, I am certainly very concerned about the

issue of people facing life threatening situations because of similar situations today. However, what was not discussed during the hearing is the process by which enforcement personnel of the INS, when I worked for that agency and now ICE and CBP question aliens who are taken into custody to make certain that reasonable efforts are made to rule out the removal or deportation of aliens who would face such situations were they to be returned to their native countries.

In point of fact, when I was an INS special agent I was required to not simply look to arrest aliens suspected of being illegally present in the United States or subject to deportation from the United States, but to ask appropriate questions to determine whether the aliens we arrested were eligible for relief from deportation. What must be understood is that enforcement personnel are law enforcement officers who are charged with enforcing the laws, in their entirety, as they exist. It would be as appropriate to release an alien from custody who is eligible for relief from deportation as it would be to detain an alien who had no such eligibility.

While a couple of the witnesses testified about a few cases where they believed that justice was not served, I believe that these examples are not representative of how decisions are generally made. While it is unfortunate when such situations arise, law and policy should never be made on the basis of non-representative exceptional cases. Measures should certainly be taken to try to eliminate such cases but most likely the best way of achieving this goal should be focused on the way that enforcement personnel are trained and instructed as to how to best carry out their official duties especially when interviewing aliens that they arrest.

It should be noted that there have been significant instances where terrorists and criminals have managed to defraud the immigration benefits program, in general, and the process by which political asylum applications are adjudicated in particular as an embedding tactic.

I will provide a few examples where this did, in fact, occur. These examples can be found in Table 4 that was provided in a USDOJ-OIG Report that was entitled:
The Immigration and Naturalization Service's Removal of Aliens Issued Final Orders

Report Number I-2003-004
February 2003

Table 4
Terrorists Who Applied for Asylum

Ahmad Ajjaj and Ramzi Yousef - These individuals entered the United States seeking asylum in 1991 and 1992, respectively. In 1993, they helped commit the first World Trade Center bombing which killed six people. Ajjaj left the country and returned in 1992 with a fraudulent passport. He was convicted of passport fraud and did not complete the asylum process prior to his conviction. Yousef completed the required INS paperwork and was given a date and time for his asylum hearing; however, his application was pending when the World Trade Center was bombed.

Sheik Umar Abd ar-Rahman - Abd ar-Rahman sought asylum to avoid being deported to Egypt. He helped plan a "day of terror" for June 1993 in which New York City landmarks such as the United Nations' building, the FBI's Headquarters

in lower Manhattan, and the Lincoln and Holland Tunnels were to be bombed.

Hesham Mohamed Hadayet - Hadayet applied for asylum in 1992, telling the INS that Egyptian authorities falsely accused and arrested him for being a member of the Islamic Group Gama'a al-Islamiyya, which is on the U.S. Department of State's Foreign Terrorist Organizations list. The INS denied his asylum request and Hadayet was placed in removal proceedings. After Hadayet did not receive the notice of his immigration hearing date due to an incorrect mailing address, the EOIR terminated the proceeding. On July 4, 2002, Hadayet shot and killed two people at the Los Angeles airport before he was killed by an El Al Airlines security guard.

Mir Aimal Kansi - Kansi entered the United States in 1991 and applied for political asylum in 1992. The INS Asylum office did not interview him or schedule an immigration court date since his application was in the pending backlog. On January 25, 1993, Kansi murdered two and wounded two CIA employees.

Gazi Ibrahim Abu Mezer - The INS voluntary returned Mezer to Canada after he was apprehended twice in June 1996. After Mezer's third apprehension in January 1997, the INS began formal removal proceedings because Canada refused to accept him a third time. In April 1997, Mezer filed for asylum, in which he claimed that he suffered a fear of persecution if he returned to Israel. In June 1997, Mezer withdrew his application and told his attorney that he had returned to Canada. Subsequently, Mezer was convicted and sentenced to life in prison for planning to bomb the New York City subway system.

This is the link to that USDOJ/OIG report:

http://www.justice.gov/oig/reports/INS/c0304/results.htm

The 9/11 Commission Staff Report on Terrorist Travel detailed numerous examples of instances where terrorists not only made use of visa and immigration benefit fraud to enter the United States but to also embed themselves in the United States.

To cite an example, page 47 of the above-noted report contained the following paragraph:

"Once terrorists had entered the United States, their next challenge was to find a way to remain here. Their primary method was immigration fraud. For example, Yousef and Ajaj concocted bogus political asylum stories when they arrived in the United States. Mahmoud Abouhalima, involved in both the World Trade Center and landmarks plots, received temporary residence under the ***Seasonal Agricultural Workers (SAW) program****, after falsely claiming that he picked beans in Florida.*

"Mohammed Salameh, who rented the truck used in the bombing, overstayed his tourist visa. He then applied for permanent residency under the agricultural workers program, but was rejected.

"Eyad Mahmoud Ismail, who drove the van containing the bomb, took English-language classes at Wichita State University in Kansas on a student visa; after he dropped out, he remained in the United States out of status."

Although I made note of this in my prepared testimony, for purposes of placing emphasis on this highly significant vulnerability, especially as political pressure appears to be building for the enactment of "Comprehensive Immigration Reform," a massive amnesty program for unknown millions of illegal aliens present in the United States where there are no resources to routinely conduct face-to-face, in person interviews with these aliens. These aliens seek various immigration benefits that would include providing "undocumented" aliens with official identity documents even though there is no realistic way of determining their true identities or backgrounds or true intentions for entering the United States in violation of law.

In my prepared testimony I quoted from the 9/11 Commission Staff Report on Terrorist Travel and I am compelled to provide these two brief quotes once again:

First of all, here is the first paragraph from the preface of that report:

"It is perhaps obvious to state that terrorists cannot plan and carry out attacks in the United States if they are unable to enter the country. Yet prior to September 11, while there were efforts to enhance border security, no agency of the U.S. government thought of border security as a tool in the counterterrorism arsenal. Indeed, even after 19 hijackers demonstrated the relative ease of obtaining a U.S. visa and gaining admission into the United States, border security still is not considered a cornerstone of national security policy. We believe, for reasons we discuss in the following pages, that it must be made one."

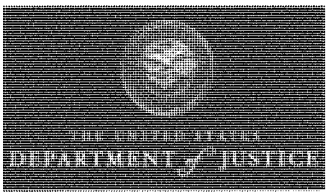
Here is a paragraph under the title "Immigration Benefits" found on page 98:

"Terrorists in the 1990s, as well as the September 11 hijackers, needed to find a way to stay in or embed themselves in the United States if their operational plans were to come to fruition. As already discussed, this could be accomplished legally by marrying an American citizen, achieving temporary worker status, or applying for asylum after entering. In many cases, the act of filing for an immigration benefit sufficed to permit the alien to remain in the country until the petition was adjudicated. Terrorists were free to conduct surveillance, coordinate operations, obtain and receive funding, go to school and learn English, make contacts in the United States, acquire necessary materials, and execute an attack."

To those who might be skeptical about the relevance of a DOJ/OIG report that is a decade old, I would offer DOJ News Release 1 have copied below. Here is the link to the news release which was issued on March 30, 2010:

http://www.justice.gov/opa/pr/2010/March/10-crm-343.html

I will provide comments beneath the copy of the press release.



JUSTICE NEWS

Department of Justice
Office of Public Affairs
FOR IMMEDIATE RELEASE
Tuesday, March 30, 2010

Eritrean Man Pleads Guilty to Alien Smuggling

WASHINGTON - Samuel Abrahaley Fessahazion, 23, an Eritrean national, has pleaded guilty to helping smuggle illegal aliens to the United States for private financial gain, announced Assistant Attorney General Lanny A. Breuer of the Criminal Division, U.S. Attorney José Angel Moreno of the Southern District of Texas and U.S. Immigration and Customs Enforcement (ICE) Assistant Secretary John Morton.

Fessahazion, aka "Sami," aka "Sammy," aka "Alex" and aka "Alex Williams" pleaded guilty yesterday in Houston before U.S. District Court Judge Nancy A. Atlas to one count of conspiracy, and two counts of encouraging and inducing aliens to come to, enter or reside in the United States in violation of law for the purpose of private financial gain.

"By bringing this smuggler to justice, we have broken a chain that runs from Africa to South and Central America, directly into the United States," said Assistant Attorney General Lanny A. Breuer. "We will not allow these dangerous smuggling organizations to profit from bringing people illegally into the United States."

"This prosecution strikes a significant blow to a criminal organization engaged in a sophisticated international alien smuggling operation," said U.S. Attorney José Angel Moreno of the Southern District of Texas, "and highlights the continuing cooperation and success of multiple law enforcement agencies in interdicting such activities."

"Breaking this global alien smuggling network puts smugglers on notice that we are coming after them and we will shut them down," said ICE Assistant Secretary John Morton. "ICE will continue to identify the most dangerous international human smuggling organizations for investigation and prosecution."

According to plea documents, from at least June 2007 until approximately January 2008, Fessahazion was the Guatemalan link of an alien smuggling network that spans East Africa, Central and South America. Specifically, according to the court documents, Fessahazion illegally entered the United States at McAllen, Texas, on March 20, 2008. He applied for asylum on Sept. 30, 2008, claiming in his application that he was traveling across Africa in 2007 and 2008, fleeing persecution in Eritrea. However, according to court documents, Fessahazion was actually in Guatemala during that period facilitating the smuggling of East African aliens to the United States. Fessahazion was granted asylum by the United States on Nov. 13, 2008.

Fessahazion admitted that for profit, he encouraged or induced at least six and up to 24 illegal aliens, primarily East Africans, to come to, enter, or reside in the United States knowing that they were not authorized to do so. Fessahazion admitted he moved aliens from Honduras through Guatemala and into Mexico illegally, at which point he referred aliens to a smuggler who brought the aliens into the United States.

In one instance, according to court documents, Fessahazion and his co-conspirators moved two illegal aliens from South Africa to Sao Paulo, Brazil, then through Venezuela to Honduras where they were instructed to contact Fessahazion. Once in contact, Fessahazion sent a driver to pick up the two aliens and bring them to Guatemala City, Guatemala. In exchange for $800, Fessahazion took the two aliens by bus to a house bordering Guatemala and Mexico. There, working with a co-conspirator, Fessahazion provided information to the couple on how to cross the border into Mexico illegally and how to proceed once in Mexico to the United States border. Fessahazion and the co-conspirator provided the couple with a guide who physically took them into Mexico and provided contact information for an unidentified smuggler known only by the alias "Matamoros," who would in turn take the two aliens to the United States from Reynosa, Mexico. In February 2008, the couple was illegally brought to the United States by guides working for "Matamoros." According to court documents, the guides carried guns and ferried the couple across the river on the Mexico/U.S. border in inner tubes.

In another example, an alien was moved from Dubai to Brazil, then to Honduras via Colombia and Costa Rica. According to court documents, a co-conspirator told the alien he could get him from Dubai to Brazil, at which point others would assist the alien each step of the way to the United States in a "chain like" fashion.

According to court documents, once the alien arrived in Honduras, Fessahazion sent a driver to retrieve him and bring him to Guatemala City. In exchange for $700, Fessahazion took the alien to the Guatemala/Mexico border and, along with a co-conspirator, gave the alien information on how to cross the border into Mexico illegally and how to proceed once in Mexico to the United States border, including contact information for "Matamoros." The alien then traveled into Mexico, contacted "Matamoros" and traveled to Reynosa as "Matamoros" instructed. In December 2007, according to court documents, guides working for "Matamoros" took the alien and others to the United States illegally by ferrying them across the river on the Mexican/U.S. border in inner tubes. Shortly after crossing the border into the United States, the alien and others were apprehended.
At sentencing, scheduled for June 14, 2010, Fessahazion faces a maximum penalty of 10 years in prison and a $250,000 fine.

The case was prosecuted by Trial Attorney Pragna Soni of the Criminal Division's Domestic Security

Section, with the assistance of Assistant U.S. Attorneys Edward Gallagher and Douglas Davis of the Southern District of Texas.

The investigation was conducted by the ICE Special Agent in Charge (SAC) Washington, with the assistance of SAC San Francisco, the ICE Human Smuggling and Trafficking Unit, ICE Office of Intelligence, ICE Office of International Affairs and U.S. Custom and Border Protection's Office of Alien Smuggling Interdiction.

10-343
Criminal Division

First of all, as the title of the press release notes, a citizen of Eritrea (defendant Samuel Fessahazion) pleaded guilty to smuggling illegal aliens into the United States. The aliens came from a wide variety of countries and all were ultimately brought into the United States by circumventing the inspections process along the border that is *supposed* to separate the United States from Mexico.

In order to get these aliens into the United States from as far away as South Africa and East Africa via Latin America and, finally, into the United States in Texas. His sophisticated and circuitous route, on some smuggling runs, included passing through Brazil and Venezuela, the latter, a nation certainly not considered a friend of the United States. It causes me to wonder if the government of Venezuela offered any assistance to the smuggler, Samuel Abrahaley Fessahazion, aka "Sami," aka "Sammy," aka "Alex" and aka "Alex Williams."

This is of particular concern because it has been widely reported that Iran has been flying members of their Qudz Forces (Shock Troops) directly into Caracas, Venezuela.

However, the news release made no mention of any efforts to properly identify, locate and arrest the smuggled aliens whose illegal entry was facilitated by Fessahazion.

What is of further concern to me, is the fact that Fessahazion was able to game the immigration system and successfully commit immigration fraud by obtaining political asylum by making a false statements in conjunction with his application for political asylum.

Consider this passage from the press release:

According to plea documents, from at least June 2007 until approximately January 2008, Fessahazion was the Guatemalan link of an alien smuggling network that spans East Africa, Central and South America. Specifically, Fessahazion illegally entered the United States at McAllen, Texas, on March 20, 2008. He applied for asylum on Sept. 30, 2008, claiming in his application that he was traveling across Africa in 2007 and 2008, fleeing persecution in Eritrea. However, Fessahazion was actually in Guatemala during that period facilitating the smuggling of East African aliens to the United States.

Fessahazion was granted asylum by the United States on Nov. 13, 2008.

Fessahazion used his obvious false claim of "credible fear" to acquire political asylum by fraud. Had not been able to con the bureaucracy at USCIS (United States Citizenship and Immigration Services) he would not have been able to remain in the United States or travel freely across our borders, an ability he gained when the agency charged with maintaining the integrity of the immigration benefits program failed, as it has on so many previous occasions, yet again.

According to the press release, Fessahazion, himself, ran our nation's border on March 20, 2008 and then he applied for political asylum roughly 6 months later. He had either studied our immigration "system" or had been well coached. In any event, in under six weeks he was granted political asylum!

Incredibly, Fessahazion was granted political asylum just 6 weeks after he applied for asylum even though he claimed to have been facing persecution in Eritrea, nearly half way around the world!

Meanwhile the investigation disclosed that while he claimed he was fleeing persecution in Eritrea, he was apparently dodging law enforcement in Guatemala as he smuggled East African aliens through that country en route to the United States!

It is clear that he committed fraud on his application for political asylum, yet there was not a word in the press release about any consideration being given to prosecuting him for committing immigration fraud in his application for political asylum, nor is there any indication that efforts will be made to strip him of his lawful status based on his fraudulent application for political asylum. This is extremely important because as an individual who had been granted political asylum, it is unlikely that any efforts will be made to deport him from the United States after he serves his prison sentence for alien smuggling (presuming he is sentenced to serve jail time.)

Considering that Fessahzion lied on his application for political asylum, there would be no reason to not deport (remove him) from the United States if he lost his status as an alien who had been granted asylum. Therefore I am deeply concerned that inasmuch as there was no mention in the news release that he had been prosecuted for committing fraud in his application for political asylum, that this significant crime went unpunished. Consequently, if this is the case, he will likely not be deported when he completes his prison sentence- enjoying the protection afforded by political asylum, even though he is not truly eligible for this relief from deportation.

Two factors to be considered are how his application for political asylum was adjudicated in the first place and then, why apparently no action is being taken to strip him of the protection that his status as an alien who has been granted political asylum provides him.

It must be presumed that his is not an isolated case- just one that was well documented in, of all things, a USDOJ news release.

Once again, I thank you for this opportunity to address additional issues that arose during the hearing but were among issues I did not have the immediate opportunity to respond to at the hearing.

February 8, 2013

Re: Recommendations on the U.S. Asylum System for Immigration Reform Legislation

Dear Member of Congress,

This country has a long history of global leadership in protecting persecuted refugees and displaced persons. We believe that immigration reform legislation must include key changes to the U.S. asylum system to better ensure that refugees who seek the protection of the United States are afforded meaningful access to a fair, effective and timely asylum adjudication process. Together, as 162 faith-based groups, refugee protection organizations, and legal experts on the U.S. asylum system, we urge the U.S. to take steps to ensure that the U.S. asylum system reflects U.S. values and commitments to protecting the persecuted. We support the recommendations listed below for inclusion in immigration reform legislation, many of which were proposed in the Refugee Protection Act (RPA) of 2011 (S. 1202 and H.R. 2185).

Congress should support inclusion of the following changes in immigration reform legislation to repair the U.S. asylum system:

1. **Eliminate the wasteful and unfair asylum filing deadline** that is barring refugees with well-founded fears of persecution from asylum and diverting overstretched adjudication resources.[1] This change is included in RPA Section 3. In connection with this legislative change, permit individuals who, due to the filing deadline, were granted withholding of removal but not asylum, to adjust their status to lawful permanent resident and petition to bring their spouses and children to safety.

2. **Require and support a fair and efficient adjudication process** authorizing legal representation in particularly vulnerable and complex cases, including for children, persons with mental disabilities and vulnerable immigrants in immigration detention, authorizing increased Immigration Judges and other staffing at immigration courts, requiring all asylum claims to be initially adjudicated at the asylum office level, and mandating that EOIR's Legal Orientation Program is provided in all facilities that detain immigrants for ICE for more than 72 hours. Related proposed changes are included in RPA 2011 Sections 10 and 13.

3. **Protect refugees from inappropriate exclusion and free up administrative resources** by amending INA §212(a)(3)(B) so that it targets actual terrorism and does not exclude bona fide refugees. Specifically, the "terrorist activity" definition should be limited to the use of armed force against civilians and non-combatants, as proposed in RPA 2011 Section 4, and

[1] DHS confirmed that it concluded that the asylum filing deadline should be eliminated, confirming that it expends resources without helping uncover or deter fraud (UNHCR Washington Office, Reaffirming Protection, October 2011, Summary Report, p. 18, at http://www.unhcrwashington.org/att/cf/%7BC07EDA5EAC71-4340-8570-194D98BDC139%7D/georgetown.pdf). The Administration has publicly pledged to work with Congress to eliminate the deadline (U.S. Department of State, PRM, *Fact Sheet: U.S. Commemorations Pledges*, 7 December 2011, available at http://www.state.gov/j/prm/releases/factsheets/2011/181020.htm). Several studies underscore this issue including Human Rights First, The Asylum Filing Deadline, (New York: 2010) available at http://www.humanrightsfirst.org/wpcontent/uploads/pdf/afd.pdf and P. Schrag, A. Schoenholtz, J. Ramji-Nogales, and J.P. Dombach, Rejecting Refugees: Homeland Security's Administration of the One-Year Bar to Asylum, William and Mary Law Review, (2010), available at http://wmlawreview.org/files/Schrag.pdf.

the definition of a "Tier III" organization should be eliminated. The definition of "material support" should be revised to specify that the term applies only to support that is quantitatively significant and qualitatively of a nature to further terrorism.

4. **Implement lasting immigration detention reforms to protect detained individuals, including asylum seekers, and reduce unnecessary costs** through expanding cost-effective alternatives to detention, immigration court review of detention decisions, strengthened oversight and compliance mechanisms, and standards and conditions in line with the American Bar Association's proposed civil immigration detention standards.[2] Congress should also mandate a study on the expanded use of the expedited removal process to ensure that refugees are being not returned to persecution. Related proposed changes are included in RPA 2011 Sections 10 and 13.

5. **Ensure adequate substantive and procedural safeguards for all child asylum seekers**, given their vulnerability. Measures should include giving the Asylum Office initial jurisdiction over applications of principal child asylum seekers, employing a child centered analysis to their claims, and – as proposed in the RPA 2011 Section 15 - exempting them from such bars as Safe Third Country, previous denial of asylum, and the one year filing deadline (provisions already enjoyed by unaccompanied children).

6. **Ensure that gender-based asylum claims are properly recognized** by supporting legislative clarifications proposed in the RPA 2011, Section 5, especially the provisions clarifying what can constitute a "particular social group" (the statutory ground under which many women's asylum claims are brought), what kinds of evidence can support such claims, and other clarifications needed to remove obstacles currently posed to gender-based claims.

7. **Ensure that asylum-seekers interdicted in international or U.S. waters are not subjected to refoulement** by requiring that all U.S. authorities taking control of irregular maritime vessels in international or U.S. waters make available to irregular boat migrants the opportunity to apply for asylum or to express a fear of persecution and shall refer any such asylum-seeker to a U.S. asylum officer for an interview according to INA 235(b)(B); and requiring that all authorities patrolling the U.S. borders, including the U.S. Coast Guard, receive effective training from UNHCR on international human and refugee rights and on U.S. domestic asylum law and other forms of protection. Related proposed changes are included in RPA 2011 Section 24.

We look forward to working with you and your staff and would like to respectfully request a meeting with you at your earliest convenience to discuss these recommendations further. Sara Jane Ibrahim, Advocacy Counsel at Human Rights First, is our focal point and can be reached at ibrahims@humanrightsfirst.org; 202-370-3318. Thank you for your attention to our views.

Sincerely,

---

[2] American Bar Association, ABA Civil Immigration Detention Standards, available at http://www.americanbar.org/groups/public_services/immigration/civilimmdetstandards.html.

National/International Organizations

American Civil Liberties Union
New York, NY/Washington, DC

Americans for Immigrant Justice
Miami, FL/Washington, DC

American Immigration Lawyers Association (AILA)
Washington, DC

American Jewish Committee
Washington, DC

Blacks in Law Enforcement of America
Washington, DC

Breakthrough
New York, NY

Center for Gender and Refugee Studies (CGRS)
San Francisco, CA

Civil Liberties and Public Policy
Amherst, MA

Ethiopian Community Development Council, Inc.
Arlington, VA

Fahamu Refugee Programme
International

Family Equality Council
Washington, DC

Franciscan Action Network
Washington, DC

Gay & Lesbian Advocates & Defenders
Boston, MA

HIAS (Hebrew Immigrant Aid Society)
New York, NY/Washington, DC

Human Rights Advocates International (HRAI)
Elizabeth, NJ

Human Rights First
New York, NY/Washington, DC

Human Rights Watch
New York, NY

Immigration Equality
New York, NY/Washington, DC

International Foundation for Gender Education
Waltham, MA

Jesuit Refugee Service/USA
Washington, DC

Kids in Need of Defense (KIND)
Washington, DC

Lambda Legal
New York, NY

Leadership Conference of Women Religious
Silver Spring, MD

Lutheran Immigration and Refugee Service
Baltimore, MD/Washington, DC

Muslim Legal Fund of America (MLFA)
Richardson, TX

National Center for Transgender Equality
Washington, DC

National Council of Jewish Women (NCJW)
New York, NY

National Gay and Lesbian Task Force Action Fund
Washington, DC

National Immigrant Justice Center
Chicago, IL

National Immigration Law Center
Los Angeles, CA/Washington, DC

National Latina Institute for Reproductive Health
New York, NY/Washington, DC

NETWORK, a National Catholic Social Justice Lobby
Washington, DC

Organization for Refuge, Asylum & Migration (ORAM)
San Francisco, CA

Physicians for Human Rights (PHR)
Cambridge, MA

Refugee Women's Network, Inc.
Decatur, GA

Survivors of Torture, International
San Diego, CA

Tahirih Justice Center
Falls Church, VA/Houston, TX

The Center for Victims of Torture
St. Paul, MN

The Episcopal Church
Washington, DC

Unid@s, The National Latin@ LGBT Human Rights Organization
Washington, DC

US Committee for Refugees and Immigrants
Arlington, VA

Women's Refugee Commission
Washington, DC

State/Local Organizations

Advocacy for Justice and Peace Committee of the Sisters of St. Francis of Philadelphia
Philadelphia, PA

Advocates for Survivors of Torture and Trauma (ASTT)
Baltimore, MD

American Gateways
Austin, TX

Capital Area Immigrants' Rights Coalition
Washington, DC

Casa Esperanza
Plainfield & Bound Brook, NJ

Casa Latina
Seattle, WA

Cleveland Immigrant Support Network
Cleveland, OH

Coalition for Humane Immigrant Rights of Los Angeles (CHIRLA)
Los Angeles, CA

Community Immigration Law Center (CILC)
Madison, WI

Congregation of St. Joseph
Cleveland, OH

DRUM - Desis Rising Up & Moving
Jackson Heights, NY

Georgia Women's Action for New Directions (WAND)
Atlanta, GA

HIAS Pennsylvania
Philadelphia, PA

Holy Cross Ministries of Utah
Salt Lake City, UT

Human Rights Initiative of North Texas
Dallas, TX

Immigrant Legal Advocacy Project
Portland, ME

IRATE & First Friends
Elizabeth, NJ

Jesuit Social Research Institute/Loyola University New Orleans
New Orleans, LA

L.A. Community Center Legal & Educational
Los Angeles, CA

La Raza Centro Legal
San Francisco, CA

Las Americas Immigrant Advocacy Center
El Paso, TX

Lutheran Social Services of New England
Worcester, MA

Nebraska Appleseed
Lincoln, NE

Pangea Legal Services
San Francisco, CA

Political Asylum/Immigration Representation Project (PAIR Project)
Boston, MA

Program for Torture Victims
Los Angeles, CA

Reformed Church of Highland Park, NJ
Highland Park, NJ

Refugee and Immigrant Center for Education and Legal Services (RAICES)
San Antonio, TX

Sisters' Home Visitors of Mary
Detroit, MI

Sisters of Mercy West Midwest Justice Team
Omaha, NE

Sisters of Saint Joseph of Chestnut Hill, Philadelphia
Philadelphia, PA

Sisters of St. Francis of Philadelphia
Aston, PA

Sisters of St. Joseph of Rochester
Rochester, NY

The Advocates for Human Rights
Minneapolis, MN

The Florence Immigrant & Refugee Rights Project
Florence, AZ

The IHM Justice, Peace and Sustainability Office
Monroe, MI

UnLocal, Inc.
New York, NY

Who Is My Neighbor? Inc.
Highland Park, NJ

Law Professors*
** Institutional affiliations of individual signatories are for identification purposes only.*

Wendi Adelson
Clinical Professor
Florida State University College of Law

Susan M. Akram
Clinical Professor and Supervising Attorney,
Asylum and Human Rights Program
Boston University School of Law

Deborah Anker
Clinical Professor of Law and Director of
the Harvard Law School Immigration and
Refugee Clinical Program
Harvard Law School

Sabi Ardalan
Lecturer on Law, Harvard Immigration &
Refugee Clinical Program
Harvard Law School

Elizabeth Badger
Visiting Assistant Professor
Boston University School of Law

David C. Baluarte
Practitioner in Residence & Arbenz Fellow,
International Human Rights Law Clinic
American University - Washington College
of Law

Melynda Barnhart
Associate Professor
New York Law School

Jon Bauer
Clinical Professor of Law, Richard Tulisano
'69 Human Rights Scholar and Director,
Asylum and Human Rights Clinic
University of Connecticut School of Law

Richard Boswell
Professor of Law
University of California, Hastings College
of the Law

Stacy Caplow
Professor of Law and Director of Clinical
Education
Brooklyn Law School

Bridgette Carr
Clinical Assistant Professor, Human
Trafficking Clinic
University of Michigan Law School

Michael J. Churgin
Raybourne Thompson Centennial Professor
in Law
The University of Texas at Austin

Fernando Colon-Navarro
Professor
Thurgood Marshall School of Law (Texas)

Erin B. Corcoran
Professor of Law and Director, Social
Justice
University of New Hampshire School of
Law

** Institutional affiliations of individual signatories are for identification purposes only.*

Ericka Curran
Associate Professor
Florida Coastal Immigrant Rights Clinic

Judith Diamond
Associate Professor
Boston University School of Law

Marsha A. Freeman
Senior Fellow, University of Minnesota Human Rights Center
University of Minnesota Law School

Niels W. Frenzen
Clinical Professor of Law
Gould School of Law, University of Southern California

Paula Galowitz
Clinical Professor of Law
New York University School of Law

Lauren Gilbert
Professor of Law
St. Thomas University School of Law
(Miami Gardens, FL)

Denise Gilman
Clinical Professor and Co-Director, Immigration Clinic
University of Texas School of Law

Joanne Gottesman
Clinical Professor and Director, Immigrant Justice Clinic
Rutgers School of Law – Camden
Florida Coastal School of Law

Anjum Gupta
Assistant Professor of Law, Director, Immigrant Rights Clinic
Rutgers School of Law – Newark

Michael G. Heyman
Professor
The John Marshall Law School

Barbara Hines
Clinical Professor of Law, Immigration Clinic
University of Texas School of Law

Kit Johnson
Associate Professor of Law
University of Oklahoma, School of Law

Won Kidane
Associate Professor of Law
Seattle University School of Law

David Koelsch
Associate Professor, Immigration Law Clinic
University of Detroit Mercy School of Law

Hiroko Kusuda
Assistant Clinic Professor, Stuart H. Smith Law Clinic & Center for Social Justice
Loyola New Orleans College of Law

Nancy K. D. Lemon
Lecturer
Berkeley School of Law, UC Berkeley

Emily Leung
Albert M. Sacks Clinical & Advocacy Fellow, Harvard Immigration & Refugee Clinical Program
Harvard Law School

Miriam H. Marton
William R. Davis Clinical Teaching Fellow, Asylum and Human Rights Clinic
University of Connecticut School of Law

** Institutional affiliations of individual signatories are for identification purposes only.*

Elizabeth McCormick
Associate Clinical Professor of Law and Director, Immigrant Rights Project
University of Tulsa College of Law

Michelle McKinley
Associate Professor and Associate Dean for Research and Faculty Development
University of Oregon School of Law

M. Isabel Medina
Ferris Family Distinguished Professor of Law
Loyola University New Orleans College of Law

Stephen Meili
Professor
University of Minnesota Law School

Jennifer Moore
Professor of Law
University of New Mexico School of Law

Rev. Craig B. Mousin
University Ombudsman
DePaul University College of Law

Laura Murray-Tjan
Interim Director, Immigration & Asylum Clinic and Director, Federal Appeals Clinic
Boston College Law School

Karen Musalo
Clinical Professor of Law & Director, Center for Gender & Refugee Studies
U.C. Hastings College of the Law (San Francisco, CA)

Lori A. Nessel, Esq.
Professor of Law and Director, Center for Social Justice
Seton Hall University School of Law (South Orange, NJ)

Mark Noferi
Instructor of Legal Writing
Brooklyn Law School

Michael A. Olivas
William B. Bates Distinguished Chair in Law and Director, Institute for Higher Education Law and Governance
University of Houston Law Center

Sarah Paoletti
Practice Associate Professor and Director, Transnational Legal Clinic
University of Pennsylvania Law School

Jason Parkin
Assistant Professor of Law
Pace Law School

Michele R. Pistone
Professor of Law
Villanova University School of Law

Nina Rabin
Associate Clinical Professor of Law and Director, Bacon Immigration Law and Policy Program
James E. Rogers College of Law, University of Arizona

Jaya Ramji-Nogales
Associate Professor of Law
Temple University, Beasley School of Law

Maritza Reyes
Associate Professor of Law
Florida A&M University College of Law

Nicholas J. Rine
Clinical Professor of Law
University of Michigan Law School

* *Institutional affiliations of individual signatories are for identification purposes only.*

Sarah Rogerson
Assistant Clinical Professor of Law and
Director, Family Violence Litigation Clinic
& Immigration Project
Albany Law School

Ediberto Roman
Professor of Law & Director Citizenship and
Immigration Initiatives
Florida International University

Victor Romero
Maureen B. Cavanaugh Distinguished
Faculty Scholar & Professor of Law
The Pennsylvania State University,
Dickinson School of Law

Rachel E. Rosenbloom
Associate Professor of Law
Northeastern University School of Law
(Boston, MA)

Heather Scavone
Clinical Practitioner in Residence,
Humanitarian Immigration Law Clinic
Elon University School of Law

Irene Scharf
Professor
University of Massachusetts School of Law

Malinda Schmiechen
Adjunct Professor, Immigration and
Nationality Law
William Mitchell College of Law

Andrew I. Schoenholtz, J.D., Ph.D.
Visiting Professor of Law
Georgetown University Law Center

Philip G. Schrag
Delaney Family Professor of Public Interest
Law
Georgetown University Law Center

Monica Schurtman
Associate Professor and Supervising
Attorney, Immigration Law Clinic
University of Idaho College of Law

Barbara Schwartz
Clinical Professor of Law
University of Iowa College of Law

Careen B. Shannon
Adjunct Professor of Immigration Law
Benjamin N. Cardozo School of Law,
Yeshiva University

Claudia Slovinsky
Adjunct Professor of Law
New York Law School

Dan R. Smulian
Associate Professor of Clinical Law, Safe
Harbor Project, BLS Legal Services
Corporation
Brooklyn Law School

Gemma Solimene
Clinical Associate Professor of Law
Fordham University School of Law

Melysa Sperber
Adjunct Professor
George Washington University School of
Law

Maureen A. Sweeney
Clinical Instructor, Immigration Clinic
University of Maryland Carey School of
Law

Stacy Taeuber
Clinical Assistant Professor, Immigrant
Justice Clinic
University of Wisconsin Law School

** Institutional affiliations of individual signatories are for identification purposes only.*

Margaret Taylor
Professor of Law
Wake Forest University School of Law

Phil Torrey
Clinical instructor, Harvard Immigration & Refugee Clinical Program
Harvard Law School

Enid Trucios-Haynes
Professor of Law & University Faculty Grievance Officer
Brandeis School of Law, University of Louisville

Diane K. Uchimiya
Professor of Law
University of La Verne College of Law (Ontario, CA)

Gloria Valencia-Weber
Professor
University of New Mexico School of Law

Michael S. Vastine
Associate Professor of Law and Director, Immigration Clinic
St. Thomas University School of Law (Miami Gardens, FL)

Rose Cuison Villazor
Professor of Law
University of California at Davis School of Law

Shoba Sivaprasad Wadhia
Clinical Professor and Director, Center for Immigrants' Rights
The Dickinson School of Law, Pennsylvania State University

Jonathan Weinberg
Professor of Law
Wayne State University

Deborah M. Weissman
Reef C. Ivey II Distinguished Professor of Law
School of Law, University of North Carolina at Chapel Hill

Virgil Wiebe
Professor of Law and Director, Immigration Law Practice Group
University of St. Thomas School of Law (Minneapolis, MN)

Michael J. Wishnie
William O. Douglas Clinical Professor of Law and Deputy Dean for Experiential Education
Yale Law School

Teresa Woods
Visiting Instructor and International Human Rights Clinical Teaching Fellow, Human Rights and Genocide Clinic
Benjamin N. Cardozo School of Law

Elizabeth L. Young
Associate Professor of Law, Immigration Law Clinic
University of Arkansas School of Law

cc: Cecilia Muñoz, Director, White House Domestic Policy Council
Felicia Escobar, Senior Policy Advisor, White House Domestic Policy Council
Tyler Moran, Deputy Policy Director, Immigration, White House Domestic Policy Council
Julie Rodriguez, Associate Director for Latino Affairs and Immigration, White House Office of Public Engagement
Vincent Cochetel, Regional Representative for the United States of America and the Caribbean, United Nations High Commissioner for Refugees

"Building an Immigration System Worthy of American Values"
U.S. Senate
Committee on the Judiciary
Wednesday, March 20, 2013
Statement of Paul Grussendorf

Thank you Chairman Coons, Ranking Member Grassley, and distinguished members of this Committee. It is my honor to appear before you today.

I've spent a total of twenty eight years working in the area of immigration law. I've been the director of a law school immigration clinic, an immigration judge appointed by the Attorney General to make the tough calls involving deportation and immigration benefits, and a DHS adjudicator of refugee applications with U.S. Citizenship and Immigration Services (USCIS).

For four years I was the sole immigration judge responsible in Philadelphia for the Institutional Hearing Program, in which immigrants who are convicted of federal offenses receive accelerated removal hearings while serving their sentences. I conducted hearings in the Allenwood Federal Correctional Institute in Allenwood, Pennsylvania. Later I was responsible, in San Francisco immigration court, along with my excellent colleague Judge Michael Yamaguchi, for the detention docket, presiding over the cases of all migrants who were detained by Immigration and Customs Enforcement (ICE) in northern California and placed in removal proceedings. These included those who were detained on the street by ICE, those who were taken into custody by ICE after completing prison sentences and being released from state and county jails, and those who were detained at San Francisco International Airport due to document irregularities and other issues of suspected fraud. These also included the tragic cases of unaccompanied minors who were detained pending a resolution of their cases. I adjudicated a total of over 8000 cases. These experiences have tempered my remarks today relative to the state of immigration detention and the issue of judicial discretion.

As a judge I presided over scores of cases involving immigrants detained by ICE, who were deported after months or even years of unnecessary detention. Typically migrant workers, construction laborers, hotel and restaurant employees would be detained during an ICE sweep of an immigrant community or factory raid. They would usually already have spent several weeks in jail before making it to court. I would inform such "respondents" (responding to charges of removability from the U.S.) at their initial court hearing, of their right to counsel, though not at the expense of the government, and whether or not, given their individual circumstances, they had the right to a bond determination. Many respondents would finally accept deportation rather than seeking relief from removal in court because of the frustration of having been detained for so long –either because they were deemed ineligible for bond under the law, or they could not afford to pay a bond even though they were eligible for release. Some of them would have qualified for refugee status, and others would have had other legal means to remain in the country. The vast majority of such detained migrants posed no danger to the community or public safety, and often had no criminal convictions that would mandate their detention. Nevertheless, they would ask me to sign a deportation order rather than enduring additional time

in detention while fighting their case. Sound policy would have encouraged their release to their families so that they could continue as wage earners, sustaining their families (often consisting of U.S. citizens), and so they could continue contributing to the U.S. economy.

RESTORING JUDICIAL DISCRETION

Restore due process and judicial review over immigration cases.

Over the past two decades, Congress has severely curtailed the discretion of immigration judges to evaluate cases on an individual basis and grant relief to deserving immigrants and their families. Moreover, under current law, the federal courts have also been stripped of their jurisdiction to review most deportation and agency decisions. It is the great frustration of the immigration bar as well as my former colleagues on the bench that the immigration judges' discretion has been so whittled away. Congress should restore judicial review and ensure due process to all people who are facing deportation

Our system, amended in 1996 by harsh provisions of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA), often blocks individuals subject to removal from presenting evidence of their equities to an immigration judge. Instead, low-level immigration officials are empowered to act as judge and jury, and federal courts have been denied the power to review most agency decisions.

Congress should restore fairness and flexibility to our system by expanding the authority of immigration judges to consider the circumstances of each case. Judges are drawn from the ranks of immigration professionals, those who have spent their careers working in government as well as those who have advocated on the side of immigrants. They should be trusted to make the correct calls. The numbers bear out their approval ratings. In fiscal year 2012, immigration judges completed 382,675 cases. Of those decisions, only a total of 26,099 were appealed to the Board of Immigration Appeals. It appears that most parties to the proceedings come away satisfied with the judges' decisions.

Cancellation of Removal

One of the few remaining opportunities for an immigration judge to grant relief from deportation based on a person's specific circumstances is called "Cancellation of Removal." Cancellation relief is available for noncitizens who have been in the U.S. for a long time, a minimum of seven years for lawful permanent residents, and ten years for non-LPRs. But Cancellation has very stiff requirements that often bar people – including long-time LPRs – from relief despite significant equities. The hardship bar, that one must show "exceptional and extremely unusual hardship" to a qualifying relative, that is a U.S. citizen spouse, child or parent, is set too high. Congress, when enacting this provision, did not inform the adjudicators how to interpret that language. Nowadays, a successful Cancellation case largely comes down to showing that the respondent's children suffer from some grave disease for which they could not receive medical care in the prospective country of removal. A very senior judge with whom I spoke last week

lamented that Cancellation has become the "sick kid" provision. These requirements restrict a judge's ability to look at the totality of circumstances in a case and grant appropriate relief.

A case that illustrates the point about judges needing more discretion and how the hardship bar is too high for Cancellation: the case of Janelle Ngo Chin, a 35 year old woman from the Philippines had a Cancellation hearing. She is the mother of three U.S. citizen children. She was convicted seventeen years ago, at the age of nineteen, for petty theft. She is the sole caregiver of her aging parents, who are not U.S. citizens, both of whom have multiple health problems, including the father suffering several heart attacks and the mother battling both diabetes and cancer. The immigration judge felt compelled to deny the Cancellation application, finding that the hardship presented did not rise to the level of "exceptional and extremely unusual." The Board of Immigration Appeals initially upheld the judge's decision and the case was appealed to the 9th Circuit Court of Appeals, but during this time the parents' health has continued to deteriorate and the children have been suffering emotionally at school. ICE opposed requests for Prosecutorial Discretion, but the BIA recently granted a motion to reopen and remand to the judge based upon the new evidence of hardship in the family. The case is now pending further deliberations. This long journey of several years litigation and appeals could have all been avoided if the judge had initially had the discretion to grant the case based upon a lower hardship bar, one of "extreme hardship."

Among the bigger challenges for LPRs is that any "aggravated felony" conviction automatically bars relief, despite the fact that this category now includes many misdemeanor offenses and crimes involving no violence. Additionally, the barriers to cancellation relief are retroactive, meaning that someone who pled guilty to a disqualifying offense *before the criteria were even enacted* is still penalized. Furthermore, the cancellation rules require an applicant to have been present in the U.S. continuously for a minimum period of years. But this "continuous presence" period is cut off when DHS issues a charging document or when a disqualifying criminal offense is committed, whichever is earlier. (this is called the "stop-time rule"). This means that individuals may be barred from relief by something that happened a very lont time ago, even if they can demonstrate rehabilitation or substantial hardship to qualifying family members in the U.S.

Legislation should fix these problems and return to those who have deep roots in our communities and have not committed a serious offense the right to apply for Cancellation of Removal. Immigration judges should have discretion to grant relief in deserving cases by looking at the hardship to the respondent in proceedings, as well as the hardship to family members, and judges should also be encouraged to evaluate the contributions to society that an individual has made over the years.

Discretionary Waiver of General Applicability

Currently, immigration law provides only narrow and specific waivers for some noncitizens in some circumstances. Each waiver has a different (often complex) standard, and each applies to only *one segment* of immigration adjudications – either when one is technically seeking "admission" to the U.S. or when one is about to be deported from the U.S. A universally-applicable, simple and generous waiver could be proposed to provide judges the authority to grant relief. For those with prior criminal offenses, there is a waiver in the "admission" context, but it is far too narrow, does not apply to any minor convictions, and ironically punishes some

long-time lawful permanent residents (LPR) more harshly than other noncitizens. In the deportation context, many minor, old convictions categorically bar even long-time LPRs from relief.

In most cases it makes no sense to place individuals into removal proceedings because of criminal violations that are remote in time. Sometimes incarceration **does** work, either as a rehabilitative or preventive measure. As a judge I saw over the years scores of individuals who, many years earlier, had been convicted of an offense, had served their time, and had gone on to form families, create small businesses, buy houses and pay mortgages, even become "model citizens" of their communities. I personally felt in many such cases that a couple of years in the slammer had brought home to such offenders the serious consequences, including deportation and banishment from our great nation and destruction of their families, of their actions. Yet, years and even decades later, ICE would come knocking, and often, because of the categorization of "aggravated felony" of their offense, they were left with no legal means to remain in the U.S. Current immigration law provides only limited waivers for those with convictions. The lack of more generous waivers has resulted in deportations of people with extremely compelling life circumstances.

Expand Time Frame of Voluntary Departure Often, when a migrant is apprehended and placed in removal proceedings, all that is desired is a reasonable amount of time to put affairs in order, perhaps sell a house or a business, before voluntarily returning to the home country. Voluntary Departure is a statutory remedy by which an individual can avoid an order of removal, as long as one is capable and willing to pay for the means of departure. Unfortunately, the period of voluntary departure has been reduced to a mere 120 days, thus again impinging upon the discretion of the judge to evaluate the circumstances and act according to the best interests of the community. Perhaps in many cases all an individual needs is a maximum of 120 days to depart. But several circumstances come to mind: a family is facing removal and would opt for voluntary departure, but the teenage child needs six more months to finish high school. Or, a wife is facing a serious operation which will, including period of convalescence, necessitate several months of bed stay beyond the period of 120 days. Under today's law, the respondent facing such a dilemma might opt for a costly and lengthy battle in court, rather than accepting the first opportunity for a grant of Voluntary Departure, because the stakes for the family member are so high. Judges should be afforded the discretion to use their judgment and grant lengthier periods of Voluntary Departure.

The above proposals would allow our immigration judges to more effectively do their job. Permitting judges to consider the facts presented by both parties and then to grant relief based on merit will give the American people a legal immigration system that is efficient and just, one that will serve our nation well in the 21st century.

REFORM OF IMMIGRATION DETENTION SYSTEM

The use of detention for immigration enforcement has grown dramatically in recent years. In fiscal year (FY) 2011, the Department of Homeland Security's Immigration and Customs Enforcement (ICE) **detained an all-time high number of 429,000 individuals** at a cost of about

$166 per person per day. For context, in FY 1994 the federal government detained fewer than 82,000 migrants. Immigration detention is a civil authority, despite the use of penal institutions. The sole purpose of immigration detention is to ensure compliance with immigration court proceedings and judicial orders.

For many migrants in ICE custody, detention is not legally required. In these cases, ICE has the discretion to decide whether a person should be detained, released, or placed into an alternative to detention (ATD) program. Historically, ICE has not always exercised this discretion, resulting in the needless detention of hundreds of thousands of people, and costing taxpayers billions of dollars. Recently, ICE developed and deployed a risk assessment tool to make informed detention decisions based on individual circumstances. However, because current appropriations language requires ICE to maintain 34,000 daily detention beds, individualized detention decisions may be overridden by the requirement to meet a detention quota.

At a time of unprecedented pressure to cut government spending, we should be reducing detention costs and should not be detaining people who pose no significant risk of flight or danger to the community. The total price tag to the American taxpayer is $2 billion annually. Effective alternatives to detention have proven overwhelmingly successful at a cost of a few dollars a day per person.

End mandatory spending on a fixed number of detention beds.
Homeland Security appropriations language has been interpreted as mandating a daily detention level of 34,000 people, an approach that does not exist in any other law enforcement context. The bed "mandate" distorts agency priorities and results in the unnecessary use of jail detention on people who do not need to be detained, and it makes any meaningful discretion and prioritization in immigration enforcement impossible. The bed mandate should be eliminated from future appropriations bills. Eliminating the bed mandate would enable DHS to increase the use of alternatives to detention and reduce spending on detention and custody.

Detention is a costly way for the government to ensure appearances at immigration proceedings and protect public safety. Legislation should permit judges to consider alternatives to detention for individuals who are vulnerable or pose little risk to communities, and to consider in each case whether continued detention is necessary and lawful. Legislation should also specify a clear timeframe within which ICE must make its decision whether to formally charge a noncitizen after arrest. Detainees often languish in detention with no hearings scheduled in their cases because charging documents have not been served on them or filed with the immigration court.

I propose that in the routine case of a migrant laborer or mother of U.S. citizen children who is detained at a traffic stop or community sweep, the migrant should be processed, issued charging documents, given a court date and sent home. Let them continue to provide for the family and continue to strengthen the community and the economy.

Eliminate mandatory detention except for serious offenders.

Each year mandatory detention results in the jailing of tens of thousands of people who pose no danger to their communities and are not a flight risk. Feeding this detention system is the mandatory detention provision of Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), requiring that most people in deportation proceedings, based on their past offenses, no matter how remote in time, are held in custody, even if they are non-violent and the criminal system has determined they are not a risk to the community. Such a system cannot differentiate between a terrorist and a single mother of U.S. children or a green card holder who's lived here his whole life. The respondent remains in custody until completion of the immigration court case, and pending any appeals to the Board of Immigration Appeals and federal circuit courts, which can easily amount to years of detention.

Section 236(c) of the Immigration and Nationality Act provides a laundry list of types of crimes that make an individual subject to mandatory detention, most of them non-violent in nature. A term of imprisonment of one year makes one subject to mandatory detention. In many cases the sentence will be suspended, meaning the person does not even serve the time. For example, a college student who steals a candy bar from a convenience store and receives a one year suspended sentence will remain in ICE custody pending the outcome of his removal case. A case I presided over in San Francisco illustrates the problem:

> A mother from El Salvador who had received a suspended sentence for shoplifting baby diapers for her U.S. citizen child came before me on the custody docket, and I had to inform her that I could not even consider bond in her case. She chose deportation so as not to be separated from her infant, although she may even have been eligible for a green card.

Another case I heard comes to mind:

> An Iranian woman, lawful permanent resident who was married to a U.S. citizen and had two U.S. citizen children, was diagnosed with schizophrenia. She had picked up a couple of shoplifting convictions. She had already been granted asylum from Iran, and we heard her asylum application again. ICE insisted she remain detained during a protracted hearing which, including appeal lasted over a year. A female Iranian psychiatric expert testified to the horrible fate awaiting someone in the respondent's condition in Iran, and yet ICE kept her detained until the Board of Immigration Appeals finally upheld my grant of asylum. During this time she was separated from her very supportive family and medical professionals whose assistance she desperately needed.

Do we really want to be paying for "three hots and a cot" for such individuals when thye could be out working and helping to sustain their families and the economy?

According to 2009 ICE data, 66 percent of detained immigrants were subject to mandatory detention but only 11 percent had committed violent crimes (for which they had already served their time). Mandatory detention also sweeps up primary caretakers, leading to complications with family structure and child custody. Mandatory detention laws should be repealed for all but

violent offenders. In addition, Congress should establish criteria to ensure that DHS uses detention only as a last resort.

Alternatives to Detention (ATD):
ATDs are a proven and highly cost-effective approach for ensuring that individuals appear at immigration proceedings. There are a range of options that ICE can utilize to encourage compliance. Some options, like release on recognizance or bond, carry little to no cost. More intense forms of supervision and monitoring, such as enrollment in an ATD program, cost around **$22 per person per day.** Compared to the billions spent each year on detention operations, ATDs represent a smarter, cheaper, and more humane way to ensure compliance with U.S. immigration laws. ATDs may also be more appropriate for detainees with certain vulnerabilities. Of particular concern are asylum seekers, torture survivors, the elderly, individuals with medical and mental health needs, and other vulnerable groups.

Policy Recommendations
Congress should require any restriction of liberty to be the least restrictive form of custody necessary and proportionate to meet government interests. All individuals in detention, including those subject to mandatory custody, should be screened for eligibility for alternatives to detention and placed in such programs unless they pose a flight risk or threat to public safety. Congress should also direct additional funding for ICE to contract with non-profit organizations to create a broader spectrum of ATD programs. Community-based non-profits are best suited to build trust with migrant participants, identify the needs of individuals, address those needs with available resources, and build resilience in the individuals to face the range of potential outcomes in their legal cases. Non-governmental organizations are mission-driven and generate more community resources because of their ability to attract volunteers and donations of goods and services.

Access to Counsel

Respondents in immigration proceedings, especially those who are unrepresented, face one of the most complex legal systems, yet they are not guaranteed representation if they are unable to afford one. Having immigration counsel directly correlates to successful outcomes for noncitizens pursuing claims to relief ranging from persecution abroad or family separation from U.S. citizen relatives.

The immigration court system is struggling to meet the demands of rapidly increasing caseloads, including record-breaking backlogs of about 1.5 years. The high numbers of respondents appearing in proceedings without counsel is a major contributing factor to this large backlog.

When the immigration system fairly and accurately processes cases, it reduces court delays and obviates the need for costly appeals, helping overburdened immigration courts and federal courts. Adequate process aided by competent counsel is more efficient for the system as a whole.

EOIR has stated that "[n]on-represented cases are more difficult to conduct. They require far more effort on the part of the judge."[1] If noncitizens lack lawyers, immigration judges must guide them through the proceedings, often through an interpreter. Judges frequently continue cases to give noncitizens time to try to find counsel. The Administrative Conference of the United States recently advised that "funding legal representation for . . . non-citizens in removal proceedings, especially those in detention, will produce efficiencies and net cost savings."[2] The American Bar Association also concluded that in immigration courts "[t]he lack of adequate representation diminishes the prospects of fair adjudication for the noncitizen, delays and raises the costs of proceedings, calls into question the fairness of a convoluted and complicated process, and exposes noncitizens to the risk of abuse and exploitation by 'immigration consultants' and 'notarios.'"[3]

Every individual in immigration removal should have the right to counsel, and if that person cannot afford counsel, the government should provide counsel – especially if the person is detained. **It is un-American to detain someone, send them to a remote facility where they have no contact with family, place them in legal proceedings they are often unable to comprehend, and not to provide counsel for them.**

In Conclusion

Congress does not have an easy task before it given the present heated debate and emotional demands for immigration reform. But from the perspective of the bench, I am confidant that if some of the foregoing proposals are considered and enacted, we will have a more fair, more rational, and more economic immigration system that ensures due process and is worthy of American values.

---

[1] Charles H. Kuck, Legal Assistance for Asylum Seekers in Expedited Removal: A Survey of Alternative Practices (Dec. 2004), 8, available at http://www.uscirf.gov/images/stories/pdf/asylum_seekers/legalAssist.pdf

[2] Administrative Conference Recommendation 2012-3: Immigration Removal Adjudication (adopted June 15, 2012), 3, available at http://www.acus.gov/wp-content/uploads/downloads/2012/06/Recommendation-2012-3-Immigration-Removal-Adjudication.pdf

[3] American Bar Association Commission on Immigration, Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases. (2010), 5-8.

The Leadership Conference
on Civil and Human Rights

1629 K Street, NW
10th Floor
Washington, DC
20006

202.466.3311 voice
202.466.3435 fax
www.civilrights.org

The Leadership Conference

STATEMENT OF WADE HENDERSON, PRESIDENT & CEO
THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS

HEARING BEFORE THE
SENATE COMMITTEE ON THE JUDICIARY
ON

"BUILDING AN IMMIGRATION SYSTEM WORTHY OF AMERICAN VALUES"

WEDNESDAY, MARCH 20, 2013

Chairman Coons, Ranking Member Grassley, and members of the Committee: thank you for holding today's hearing on the importance of preserving due process and constitutional values in our nation's immigration system. On behalf of The Leadership Conference on Civil and Human Rights, I am pleased to provide this written statement for inclusion in the record.

The Leadership Conference on Civil and Human Rights is the nation's oldest and most diverse coalition of civil and human rights organizations. Founded in 1950 by Arnold Aronson, A. Philip Randolph, and Roy Wilkins, The Leadership Conference seeks to further the goal of equality under law through legislative advocacy and public education. The Leadership Conference consists of more than 200 national organizations representing persons of color, women, children, organized labor, persons with disabilities, the elderly, gays and lesbians, and major religious groups.

Immigration is an extraordinarily complex issue, particularly in a coalition as large as ours, and a statement explaining all of our views relating to comprehensive legislation would be staggering in its scope. In previous hearings before the House and Senate Committees on the Judiciary, The Leadership Conference has urged Congress to: 1) establish a path to citizenship for the estimated 11 million unauthorized immigrants who are contributing to our economy and our culture; 2) ensure that our borders are firmly but fairly enforced; 3) fix longstanding problems in our family visa system, including the discriminatory barriers facing LGBT individuals; 4) adopt policies that protect immigrant and native-born workers alike; and 5) better protect the civil rights of workers subject to the employer verification requirements of the Immigration Reform and Control Act of 1986. Despite the narrow focus of today's statement, the above reforms remain important priorities for us.

Laws of Unintended Consequences

The Leadership Conference has long been concerned about the erosion of due process in our nation's immigration policies, particularly the imposition of "mandatory" detention and deportation and the elimination of judicial oversight. Our concerns have been heightened by the enactment of the sweeping changes included in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).

What we have observed is extremely troubling. While the immigration enforcement policies we have today may have been motivated by a desire to reduce unauthorized immigration, fight crime, and protect

national security, the combined effects of AEDPA and IIRIRA have been a case study in the law of unintended consequences, as countless numbers of immigrants – many of them long-term, legal residents – have been ensnared by a harsh enforcement dragnet even though they posed no threat to the public or to our way of life.

Our sister organization, The Leadership Conference Education Fund, in conjunction with the American Bar Association, documented many of our findings in an extensive 2004 report, *American Justice Through Immigrants' Eyes*.[1] In this nearly 150-page analysis, we thoroughly explained how AEDPA and IIRIRA had changed immigration policy for the worse, and provided detailed examples of how immigrants and their families had been unjustly treated by an overzealous enforcement regime. The following is a summary of what we found:

- *Expanded grounds for deportation have created a dual system of justice in the United States, with far tougher penalties for those born outside its borders than for those born within.* Long-term, legal immigrants convicted of minor first offenses are labeled "aggravated felons" under immigration law – even without such offenses being "aggravated" or even felonies – and penalized just as harshly as more serious offenders; and face much more severe consequences than the native-born. By adopting a "zero tolerance" approach toward immigrants who have committed even minor crimes, the 1996 laws all but ignore the principle that "the punishment should fit the crime."

- *The option of discretionary relief has been eliminated, meaning that factors that weigh against an individual's deportation are now ignored.* In the vast majority of cases, immigration judges can no longer consider equities such as long U.S. residence, hardships to U.S. citizen spouses and children, employment history, military service, community ties, or evidence of rehabilitation. Without such discretion, immigration judges must deport immigrants who deserve a second chance. While deportation is an appropriate remedy in cases where immigrants have committed serious crimes, the "one size fits all" approach taken by current laws – which is in many respects similar to mandatory minimum sentencing in the criminal justice context – has led to countless deportations that simply were not necessary.

- *Many recent provisions of immigration enforcement laws have been applied retroactively, meaning that lawful permanent residents have been detained and deported for activities that occurred years ago, even if their acts were not deportable offenses when they occurred.* Many longtime immigrants have been permanently banished for youthful run-ins with the law, long after they had moved on with their lives and became contributing members of society. Such *ex post facto*, or after-the-fact, laws are unconstitutional under U.S. criminal law, but they have been tolerated under immigration law because of the legal fiction that deportation does not constitute "punishment."

- *Immigration laws are exceptionally complex, yet more often than not, people facing detention and deportation do not have the help of a lawyer.* Immigration court is an adversarial setting, presided over by an immigration judge and prosecuted by experienced government trial lawyers with the Department of Homeland Security. Despite the high stakes, asylum seekers, children, and lawful permanent residents facing deportation do not have the same Sixth Amendment right to government appointed counsel as individuals facing criminal charges.

---

[1] Available at http://www.civilrights.org/publications/american-justice/.

- *Mandatory detention costs U.S. taxpayers massive amounts of money, and disrupts the lives of American families.* Immigrants and refugees are routinely incarcerated even if they do not present a flight risk or danger, are not charged with any crime, have lived in the United States for many years, have U.S. families to support, or have strong defenses to their immigration cases. These individuals often are locked up with criminals in state and local jails or private for-profit detention facilities, and often at great distances from their homes and families, where their rights may not be adequately protected and where it is difficult for them to obtain proper legal assistance.

- *Low-level immigration officers frequently make what can be life-and-death decisions, with no minimal standards of due process, and no oversight by an immigration judge.* In procedures such as "expedited removal," life-altering decisions that were previously made only by immigration judges are now made by enforcement officers in the Department of Homeland Security, who frequently do not have the qualifications or factual information on which to render individual decisions. Eligible asylum seekers and even U.S. citizens have erroneously been turned away.

- *The laws have severely curtailed administrative and federal court review, further increasing the possibility of erroneous and disastrous outcomes.* The 1996 restrictions on judicial review are exceptional in scope and incompatible with the basic principles on which the nation's legal system was founded. Without judicial oversight, laws are applied inconsistently and sometimes incorrectly, with serious consequences for immigrants and their families. Reforms to the administrative appeals system beginning in 2002, coupled with the high number of individuals in proceedings without lawyers, have further reduced the chances that mistakes will be detected and corrected.

- *Overzealous immigration enforcement compounds the dangerous inadequacy of the nation's confusing and conflicting immigration laws and administrative practices, at great risk to citizens' and legal immigrants' civil rights.* State and local police, including in states such as Arizona and Alabama, have been drawn into enforcing complex federal laws without proper authority or training. Experience has shown that the involvement of state and local police in immigration enforcement strains police-community relations and undermines public safety.

- *Protecting national security, in the aftermath of September 11, has often come at immigrants' expense and has deprived populations of their basic civil rights and liberties.* Policy changes both before and after the passage of the USA PATRIOT Act resulted in extended precharge immigration detention, closed hearings, special registration programs, and severe consequences for technical violations of law that previously were routinely waived or forgiven. The measures have focused on members of Arab and Muslim communities and created a climate in which suspicion, discrimination, and hate crimes flourish.

Unfortunately, we have observed only marginal improvements since we began documenting the impact of the 1996 laws in our report. In 2001, the Supreme Court ruled in *INS v. St. Cyr*[2] that some long-term legal residents could seek a discretionary waiver of deportation, formerly known as "212(c) relief" (referring to a provision in the Immigration and Nationality Act prior to its repeal), if they had pled guilty to a deportable offense that would have maintained their eligibility for relief. While *St. Cyr* has been helpful to

[2] 533 U.S. 289 (2001).

many immigrants, the rule implementing the decision expressly left out any immigrant who had already been wrongly deported under a retroactive application of the 1996 laws. The rule also excluded any immigrant from seeking 212(c) relief if he or she had been convicted at trial, as opposed to having pled guilty, in effect penalizing immigrants for having exercised their right to a jury trial.[3]

In addition, as the unintended consequences of the 1996 laws became clear, federal immigration authorities – partly in response to significant pressure from Congress – issued guidelines in late 2000 to encourage the greater use of prosecutorial discretion in cases where low-level offenses did not warrant deportation. The so-called "Meissner Memo"[4] has, to varying degrees, been followed by the Bush and Obama administrations, and has resulted in some deserving immigrants being allowed to remain in the United States.

Yet the reliance on prosecutorial discretion alone is a poor substitute for legislative reform of the 1996 laws. First, there are some instances in which the Immigration and Nationality Act does not allow for the exercise of discretion. Second, the use of prosecutorial discretion is, of course, highly controversial – indeed, some of the very members of Congress who urged the Clinton administration to adopt prosecutorial discretion guidelines have reversed their position.[5] Finally, because immigration laws do not have applicable statutes of limitations, the exercise of prosecutorial discretion does not provide any finality or closure to immigrants or their families. Cases can be reinstated at any time, leaving immigrants in a legal limbo and unable to fully move on with their lives, even decades after paying their debts to society.

One immigrant whose life might have been saved by the use of prosecutorial discretion – but it was not, because it was never exercised – was Joao Herbert:

> Nancy Saunders and James Herbert always had thought that their son Joao Herbert was a U.S. citizen. They had adopted him at the age of eight from an orphanage in San Paulo, Brazil. He grew up in Wadsworth, Ohio, playing soccer and basketball alongside his Medina County classmates. When Joao was seventeen, his parents learned that he was not a citizen, and that his naturalization process needed to be completed before he turned eighteen. The INS accepted his application and the fee, but the application was not processed on time.

---

[3] Executive Office for Immigration Review; *Section 212(c) Relief for Aliens With Certain Criminal Convictions Before April 1, 1997*, 69 Fed. Reg. 57826 (Sept. 28, 2004).

[4] Memorandum from Doris Meissner, Commissioner of Immigration and Naturalization Service, to Regional Directors, District Directors, Chief Patrol Agents, and Regional and District Counsel, Exercising Prosecutorial Discretion (Nov. 17, 2000).

[5] Rep. Lamar Smith (R-TX), for instance, who chaired the House Subcommittee on Immigration in 1999, helped organize a bipartisan letter to former INS Commissioner Doris Meissner urging her to implement guidelines to encourage the use of prosecutorial discretion. *Letter from Lamar Smith and 27 other U.S. Representatives to Janet Reno, Attorney General, U.S. Department of Justice, and Doris Meissner, Commissioner, Immigration and Naturalization Service* (Nov. 4, 1999) (available at bit.ly/kndJKX). In 2003, however, Rep. Smith attacked the memo as "yet another disturbing example of the INS' refusal to enforce the law . . . The Meissner memo only encourages more illegal aliens to cross our borders. Our country will not be safe from terrorists and our borders will not be secure unless our immigration laws are enforced." Terrence A. Jeffrey, A Gift to Criminal Aliens, Washington Times (Feb. 1, 2003) (available at bit.ly/144JqCF).

> Shortly after his 18th birthday, Joao was arrested for selling 7.5 ounces of marijuana to a police informant. He pleaded guilty and was sentenced to probation and participation in a drug treatment program. Because he was not a citizen, the INS was alerted and placed him in removal proceedings. Although it was his first and only offense, and he did not receive any jail time, the INS charged him with having an aggravated felony conviction for which no relief was available. Therefore, the fact that his father was a quadriplegic, that Joao had lived his entire life in the United States, and that he neither knew any one in Brazil nor spoke Portuguese were irrelevant in immigration court. After 20 months in INS detention, Joao was deported back to Brazil. His father, who could not make the trip to Brazil due to his physical condition, feared he would never see his son again. Several years after returning to Brazil, Joao was murdered at the age of 26.[6]

Joao might also have been spared this tragic outcome if he had pled guilty to a lesser offense that would not have resulted in him facing deportation for an "aggravated felony" conviction. In 2010, the Supreme Court held in *Padilla v. Kentucky* that due to "the severity of deportation—'the equivalent of banishment or exile,'"[7] defense attorneys must properly advise their non-citizen clients about the potential immigration consequences of a guilty plea. *Padilla* involved a legal resident who had lived in the United States for more than forty years, and had served honorably in the U.S. Army during the Vietnam War, but who had been wrongly advised by his defense counsel that pleading guilty in 2002 to a marijuana trafficking charge would not result in his deportation. The ruling is particularly important in instances in which a plea might trigger mandatory detention and deportation proceedings. Last month, however, the Court placed some limitation the impact of its encouraging ruling in *Padilla*, when it held that it did not apply retroactively to deportation cases that were already final on direct review.[8]

Deportations – particularly those that could be avoided – take a devastating toll not only on those who are deported, but also on those who are left behind. A study found that between April 1997 and August 2007, the United States deported 87,884 legal permanent residents for criminal convictions. Of these, 53 percent had at least one child living with them prior to deportation, resulting in an estimated 103,055 children under age 18 – and 44,422 children under the age of 5 – affected by the deportation of one of their parents. While there is little data regarding the impact on the children of a deported parent, there is ample evidence of the impact on the children of an incarcerated parent. Children of incarcerated parents are much more likely to experience psychological disorders, develop behavioral problems, and perform far more poorly in school.[9] Even if there are no reliable statistics indicating how many legal immigrants have been deported for "minor" crimes, because this is an inherently subjective call, the existing statistics on children left behind by deported parents do show that there are serious consequences to deportation that call for a far more individualized, case-by-case approach than we have today.

---

[6] *See* Susan Levine, *On the Verge of Exile: For children Adopted From Abroad, Lawbreaking Brings Deportation*, Wash. Post, Mar. 5, 2000, at A1; *see also* Terry Oblander, *Parents Say Son May Agree To Deportation*, The Plain Dealer, Aug. 29, 2000, at 1B; *see generally* Stephen Buckley and Susan Levine, *A Young Man's Homecoming to a Brazil He Does not Know*, Wash. Post, Nov. 29, 2000, at A01; Kevin G. Hall, *After Arrest, U.S. Sent Ohio Man To Brazil And Death*, Orlando Sentinel, May 30, 2004.

[7] Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010) (quoting Delgadillo v. Carmichael, 332 U.S. 388, 390-391 (1947)).

[8] Chaidez v. United States, 133 S. Ct. 1103 (2013).

[9] International Human Rights Clinic, University of California, Berkeley School of Law, *et al.*, *In the Child's Best Interest? The Consequences of Losing a Lawful Immigrant Parent to Deportation* (March 2010), at 4-5.

Mandatory detention and deportation, and other arbitrary provisions in our immigration laws, have also had devastating consequences in another respect: they have betrayed the values that make our nation's system of justice such a compelling model for the rest of the world. One of the most fundamental principles underlying our system of justice is that important decisions are made following a fair process. The concept of due process of law is so central to our national identity that we have long invoked it to distinguish our government from authoritarian regimes, and it has proven essential in developing the rule of law in emerging democracies around the world.

Consistent with this philosophy, the guarantees of fairness and due process have long been important features of U.S. immigration policy, in the same way that they have been crucial to the respect and protection of civil rights. Throughout most of our history, these guarantees have also ensured a certain baseline of protections when deportation is at stake: the right to be notified of charges; timely, impartial, and individualized consideration of one's case; the right to examine and rebut evidence; the right to legal representation and confidential conversations with counsel; the right to appeal an adverse decision; and federal court review of the implementation of the law by the Executive Branch.

Since the enactment of AEDPA and IIRIRA, these rights – and the values behind them – have been severely compromised. The Leadership Conference believes that we all, citizens and immigrants alike, have lost something as a result, as the manner in which we treat the least powerful, and least popular groups among us ultimately serves as the yardstick by which we measure our commitment to the rights of all individuals.

Bringing Immigration Reform in Line with American Values

As Congress continues its efforts to craft legislation that would overhaul our immigration policies, we could not be more grateful for the Committee's interest in examining the devastating impact of the 1996 immigration reforms, and in considering ways to ensure due process and fairness throughout the system. In the remainder of our statement, we would like to outline our recommendations.

Some of the reforms we suggest have been included in the draft legislation that was leaked from the White House last month. The administration's provisions allowing the use of judicial discretion in deportation cases involving legal residents are extraordinarily welcome, and would help address one of the most troubling aspects of existing law. Equally importantly, because these provisions are being floated by the administration, they also serve as an important acknowledgement that the use of prosecutorial discretion, alone, is simply not sufficient to prevent extreme hardships. We do note, however, that the administration's draft could be improved in some respects, and some other aspects of the bill are troubling.

These recommendations are not exhaustive, but taken together, they would greatly improve any comprehensive immigration reform legislation. As legislative proposals emerge from the bipartisan negotiations taking place in the House and Senate, we would be pleased to offer more detailed analysis.

1. Ensure due process and judicial discretion in immigration cases.
Congress should provide immigration judges with the authority to examine the circumstances of a person's case and to grant relief from inadmissibility and deportability grounds, if warranted, and the decisions of immigration judges should be subject to judicial review in order to provide a backstop

against abuse of discretion. Sections 122 through 124 of the leaked White House bill make a number of laudable improvements in this respect. The provisions could be improved by ensuring the 1996 provisions are not applied retroactively.

- Congress should affirm that the Attorney General may appoint and pay for counsel in cases where the interest in fair resolution or effective adjudication would be served by it. The appointment of counsel should be required in cases involving unaccompanied minors, individuals with mental disabilities, and others deemed vulnerable.
- Any attempt to restrict judicial review or access to the courts must be rejected, however, including the expansion of expedited removal, as well as revisions to fee-shifting in immigration cases under the Equal Access to Justice Act and other civil rights statutes.
- Our badly overburdened immigration courts need significantly more resources to hire more immigration judges and staff, invest in additional training for court personnel, and improve access to legal information for immigrants.

2. End "mandatory detention."

Each year, mandatory custody laws result in the jailing of tens of thousands of people who pose no danger to their communities and are not a flight risk. According to 2009 ICE data, 66 percent of detained immigrants were subject to mandatory detention, but only 11 percent had committed violent crimes (for which they had already served out their sentences). Such practices also sweep up primary caretakers, thus harming the families and children of those detained.

- Mandatory custody laws should be repealed. DHS and DOJ should have the discretion to determine when it is necessary to detain an individual based on an assessment of flight risk and threat to public safety.
- Those subject to mandatory custody should be screened for eligibility for Alternatives to Detention programs and placed in such programs.

3. Improve the Alternatives to Detention (ATD) programs.

ATD programs bear great promise, but frequently, DHS improperly uses ATD programs on individuals who should be released without any supervision. ATD programs that retain custody over the person, such as electronic monitoring, should be reserved for individuals who do not meet the requirements for other less restrictive release options but who can otherwise be released from jail. Substantial cost-savings can be achieved by improving the custody determinations process and ensuring that individuals are not kept in institutional detention any longer than is necessary to achieve the government's legitimate interest in ensuring public safety and appearances at court hearings.

- The White House bill section on alternatives to detention, Sec. 160, codifies the ATD program, but otherwise does little to correct problems with ATD because it does not: 1) designate ATD use for those subject to mandatory custody; 2) restrict the use of ATD supervision to situations where such methods are shown to be necessary; or 3) provide for community-based pilot programs.
- Section 160 could also do harm, as it includes the term "is subject to mandatory detention by law" instead of "mandatory custody." As a result, the section could foreclose the use of non-jail alternatives to detention for those subject to mandatory custody.

4. Ensure timely bond hearings.

Detention without a bond hearing is contrary to basic due process and U.S. human rights commitments, yet individuals awaiting civil immigration proceedings are frequently detained for weeks without a

hearing or never receive one. Prompt bond hearings by immigration judges should be guaranteed for everyone in immigration detention.

5. Ensure that only serious, violent offenses preclude eligibility for legalization.
The most vital imperative in immigration reform is to encourage as many aspiring citizens as possible to come forward, from their current vulnerability, and embrace American citizenship. Only the most serious, violent convictions – and only those recent enough to be reasonable proxies for a current public safety threat – should bar someone from the possibility of legalization.

- Misdemeanors must not be disqualifying, because these include minor offenses like status, driving, and drug crimes that are unsuitable as permanent barriers to family unity and American citizenship.
- A meaningful waiver must be provided for any crime-related eligibility criteria as well as for the inadmissibility criteria, to allow for individualized attention to cases in which hardship would arise from exclusion.

6. Racial profiling should be prohibited.
We are grateful that the Senate "Gang of 8" principles' include a commitment to "strengthen prohibitions against racial profiling." As the Department of Justice's vital investigations of jurisdictions like Maricopa County, AZ, and Alamance County, NC, demonstrate, racial profiling has become troublingly intertwined with immigration and border enforcement. Congress should build on the DOJ's strong and worthy litigation stands against Arizona S.B. 1070-type state racial profiling laws by advocating for a broad profiling prohibition, building on the substance of DOJ's important consent decrees with law enforcement agencies such as the New Orleans Police Department. Legislation should also include provisions guaranteeing non-discrimination based on immigration and citizenship status, along with a private right of action, protection which is missing from existing civil rights statutes. Irrespective of legislation, it is vital that the DOJ move forward with its revision of the 2003 guidance on the use of racial profiling.

7. Operation Streamline should not be expanded.
The "zero-tolerance" prosecution of border-crossers apprehended at the Southwest border has distorted federal court caseloads and strained the Bureau of Prisons. It has also caused a humanitarian crisis, characterized by an unacceptable assembly-line model of prosecution and sentencing for persons who are not public safety threats. Especially because Customs and Border Protection does not want more resources to be allocated to Operation Streamline prosecutions, Congress should oppose any attempts to expand the program as part of immigration reform. We encourage legislators to visit border courts for a personal inspection of immigration court hearings, and to observe how U.S. Attorneys and Marshals are implementing Operation Streamline and other enforcement programs that contribute to mass incarceration.

Thank you again for holding today's hearing, and for giving us the opportunity to share our views. We look forward to working with the Committee in this and many other aspects of immigration policy as the debate over comprehensive reform moves forward.

STATEMENT OF

MARGARET HUANG, EXECUTIVE DIRECTOR
RIGHTS WORKING GROUP

FOR THE HEARING ON
BUILDING AN IMMIGRATION SYSTEM WORTHY OF AMERICAN VALUES

SENATE JUDICIARY COMMITTEE

MARCH 20, 2013

Senator Coons, Chairman Leahy, Ranking Member Grassley, and members of the Committee: I am Margaret Huang, Executive Director of Rights Working Group. Thank you for the opportunity to submit testimony for inclusion in the record of today's hearing.

Rights Working Group (RWG) was formed in the aftermath of September 11th to promote and protect the human rights of all people in the United States. A coalition of more than 350 local, state and national organizations, RWG works collaboratively to advocate for the civil liberties and human rights of everyone regardless of race, ethnicity, religion, national origin, citizenship or immigration status. Currently, RWG leads the *Racial Profiling: Face the Truth* campaign, which seeks to end racial and religious profiling.

RWG welcomes the 113th Congress' efforts towards reforming the United States' immigration and border enforcement policies. We applaud the bi-partisan group of Senators' decision to endorse a path to citizenship for undocumented people living in the United States, and believe that such reform is crucial to bringing millions out of the shadows and into the fabric of society. We also believe that such a path must be inclusive, accessible, and fair, allowing all families, including those with same sex partners, to pursue a path to citizenship. It must not be so expensive and onerous that it leaves millions in limbo for lengthy periods of time. It should also address the due process concerns of potential citizenship candidates who have been labeled "criminal aliens" for minor violations or for charges related to their immigration status, and should restore judicial discretion to enable judges to consider the individual circumstances of each case, including family ties and work history.

In addition to a path to citizenship, however, any immigration reform effort must uphold our Constitution and protect due process and human rights for all people in the United States, as

Senators Coons, Leahy, Blumenthal, and Hirono asserted in their recent "Dear Colleagues" letter.[1] Years of "enforcement first" or "enforcement only" policies have led to record numbers of detentions and deportations, excessive use of force, and rampant racial profiling. This approach has eroded due process and human rights for those detained and threatened the rights and freedoms of citizens and non-citizens alike. Indeed, though the federal government now prosecutes and detains more people for immigration-related crimes than for all other crimes combined,[2] many of the fundamental rights afforded to those in criminal proceedings are nonexistent in immigration proceedings. Immigration enforcement must be brought into line with our nation's values.

Examples of disproportionate and unnecessarily punitive treatment of immigrants abound. Immigrants have been criminalized for minor offenses and funneled into the criminal justice system, often punished twice for the same crime. Immigrant detention centers have expanded their capacity to meet a Congressionally-set Immigration and Customs Enforcement (ICE) bed mandate of 34,000, the only prison-bed mandate in all of U.S. law enforcement.[3] Immigrant detention centers, many of the worst of them operated by private prison companies, continue to provide substandard medical care and to subject detainees to physical, verbal, and sexual abuse.[4] Detainees are routinely denied access to counsel and their Constitutional rights to a fair day in court. Heightened enforcement measures—including expansion of Customs and Border Protection (CBP) and collaborations between local, state, and federal law enforcement agencies on immigration—have led to a spike in racial profiling in policing and a distrust of law enforcement in communities of color. Such developments are unacceptable in a nation founded on a commitment to democratic values, individual freedom, and equal protection of rights.

A Fair Day in Court

The evolution of immigration laws has seen a marked decrease in judicial discretion and the ability of immigrants to have their individual merits and circumstances considered in court. This trend is due in part to the expansion of the "aggravated felony" definition that was adopted by Congress in 1996. An aggravated felony is a breach of the law that causes non-citizens—including legal permanent residents and other immigrants legally present in the country—to be categorized as "criminal aliens" and made automatically deportable. When it was created, in 1988, the "aggravated felony" category included only very serious crimes, such as murder, rape, and sexual abuse of a minor. However, since the 1996 Illegal Immigration Reform and

---

[1] Coons, Christopher, Patrick Leahy, Richard Blumenthal, and Mazie Hirono, "Dear Colleagues," February 5, 2013

[2] Meissner, Doris, Donald M. Kerwin, Muzaffar Chishti, and Claire Bergeron, 2013, *Immigration Enforcement in the United States: The Rise of a Formidable Machinery,* Washington, DC: Migration Policy Institute, p. 94

[3] The Honorable John Morton, statement at March 19, 2013 Hearing in the United States House of Representatives Committee on the Judiciary titled "The Release of Criminal Detainees by U.S. Immigration and Customs Enforcement: Policy or Politics?"

[4] Letter from advocates; Judith Green and Alexis Mazón, Justice Strategies, "Privately Operated Federal Prisons for Immigrants: Expensive, Unsafe, Unnecessary," September 13, 2012, available at http://www.justicestrategies.org/sites/default/files/publications/Privately%20Operated%20Federal%20Prisons%20for%20Immigrants%209-13-12%20FNL.pdf.

Immigrant Responsibility Act (IIRIRA), the category has included minor misdemeanors, including theft of $10 worth of merchandise, writing a bad check, possession of small quantities of marijuana, or pulling the hair of another during a fight. Non-citizens can be deported even for very old crimes committed before the passage of IIRIRA, for which sentences have already been served. This system has resulted in harsh double punishments for trivial crimes and in deportations of hundreds of thousands of non-citizens, many of them with legal status, deep ties to communities in the U.S., and even records of U.S. military service.[5] The majority of these are deported without a hearing, with low-level government clerks, not judges, deciding their fates. Even those who are afforded a hearing before a judge are subject to mandatory sentences and deportation, as immigration judges are unable to take individual circumstances into account and have no alternative but to order detention and/or deportation.

Any immigration initiative should restore due process to the system, expanding judicial discretion to consider individual circumstances so that each immigration case can be evaluated on its own merits. Mandatory detention categories and grounds for removal should be reduced, not expanded. To ensure that all individuals receive their fair day in court, legislation should restore meaningful judicial and administrative review and appropriations for the immigration courts should be increased to ease the backlog of cases.

Current immigration laws allow more than half of those removed to be deported without seeing an immigration judge, and the vast majority are unrepresented by legal counsel.[6] Low-level government agents are able to order removal without any higher review. Current law also contains many provisions that require immigrants to be mandatorily detained without any opportunity to see a judge, at times being transferred far from their families as well as any available witnesses in their immigration cases. Immigration reforms should protect the fundamental U.S. Constitutional principle of due process and ensure that everyone has access to courts to argue their case and ask for their freedom outside of the coercive conditions of detention.

Immigration Detention and Human Rights

The past few years have seen record numbers of people in immigration detention and the development of privately-owned and operated Criminal Alien Requirement (CARs) facilities to house those labeled "criminal aliens" by the variety of state laws and federal policies that have co-opted state and local police into immigration enforcement duties. Federal agencies, based on Congressional appropriations language, have been operating on the premise that all 34,000+ immigration detention beds in the United States must be filled at all times. Detention quotas are antithetical to criminal law enforcement policy, and do not belong in immigration enforcement—in every area of law enforcement, detention should be used only as a last resort. This is especially true in light of the fact that countless families are being torn apart, and thousands of U.S. citizen children placed in foster care, due to unnecessary detention.

---

[5] Immigrant Legal Resource Center, *Principles for Immigration Reform that Promote Fairness for All Immigrants*
[6] Meissner et. al, p. 137

Reducing detention is also particularly urgent in light of the inhumane conditions found in many detention centers, especially the CAR facilities operated by private prison companies. Though conditions have improved in some locations, problems persist. The detained are frequently subjected to physical and sexual abuse, inadequate nutrition, race-based discrimination, and medical negligence so serious that numerous detainees have died of treatable illnesses. Detainees in several facilities have organized uprisings in response to such abusive conditions.[7] Additionally, immigrant detainees are frequently transferred to facilities far from their families, communities, and legal resources, placing unnecessary burdens on them and their access to resources and counsel.

Any immigration reform initiative should refocus resources away from costly, unnecessary detentions to more cost effective and humane community-based alternatives to detention. The sole legal purpose of immigration detention is to ensure that individuals appear for their court proceedings and comply with final deportation orders, and alternatives have been highly successful in achieving these ends, at a fraction of the cost of detention (approximately $122 per day per individual). ICE's Alternatives to Detention program has resulted in an estimated 93% appearance rate for immigration hearings, and costs as little as $12 a day.[8]

State-Federal Collaboration in Immigration Enforcement and Criminalization

The devolution of immigration enforcement to state and local law enforcement has exacerbated profiling based on race, ethnicity, religion, gender, national origin, language and perceived immigration status. Federal programs like the Criminal Alien Program, the 287(g) program and Secure Communities along with state laws like Arizona's SB 1070 have created incentives for the police to make pre- textual arrests based on racial profiling and other impermissible bases so that immigration status can be checked.[9] It has served to criminalize the immigrant and particularly the Latino community, allowing people to be labeled "criminal aliens" for such minor infractions as traffic violations and driving without a license. Current practices that involve state and local police in immigration enforcement have also allowed for the unlawful detention and deportation of individuals with valid claims to remain in the United States—including lawful permanent residents and even U. S. citizens. It has also interfered with long-established community policing practices. These policies have alienated immigrant communities, making

---

[7] Letter from advocates; Judith Green and Alexis Mazón, Justice Strategies, "Privately Operated Federal Prisons for Immigrants: Expensive, Unsafe, Unnecessary," September 13, 2012, available at http://www.justicestrategies.org/sites/default/files/publications/Privately%20Operated%20Federal%20Prisons%20for%20Immigrants%209-13-12%20FNL.pdf.

[8] Detention Watch Network, "About the U.S. Detention and Deportation System," available at http://www.detentionwatchnetwork.org/aboutdetention

[9] See generally "The C.A.P. Effect : Racial Profiling in the ICE Criminal Alien Program," The Warren Institute, September 2009, found at http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf, "Secure Communities by the Numbers: An Analysis of Demographics and Due Process," The Warren Institute, October 2011, found at http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf, and "Local Democracy on ICE: Why State and Local Governments Have No Business in Federal Immigration Law Enforcement," Justice Strategies, February 2009, found at http://www.justicestrategies.org/sites/default/files/publications/JS-Democracy-On-Ice.pdf.

them less likely to cooperate with police investigations or come forward when they are victims or witnesses of crime.

Operation Streamline, active in several of the sectors on the Southwest border, has mandated the prosecution of border crossers in federal courts. The prosecutions, which do not resemble traditional criminal proceedings, result in groups of 75-90 people being informed of their rights and asked to plead guilty to illegal entry or illegal re-entry en masse. Such trials raise serious due process concerns. Those convicted are then routed toward privately run CARs facilities[10], making Latinos the largest growing segment of the federal prison population. Furthermore, the program has not proven to be a deterrent to those crossing the border as many of those funneled through the process do not fully understand the ramifications of the process and often have strong ties to the U.S. and are willing to risk the threat of prosecution to return.

Immigration reform efforts should dismantle laws and policies that transfer the responsibility of immigration enforcement to state and local authorities and put the federal government squarely back in charge of immigration enforcement efforts. Enforcement of immigration law should be smart and targeted, conducted in a way that does not violate the civil and human rights of those targeted by such efforts. Operation Streamline should be reconsidered and the trend of criminalizing immigrant communities should be reversed.

Racial Profiling

Racial profiling is defined as the use of race, ethnicity, religion, gender, and/or national origin by law enforcement agents in deciding whom to investigate, arrest, or detain, in the absence of specific suspect description. Its use by law enforcement agencies has increased at an alarming rate in communities across the country, fueled in part by the extraordinary escalation of immigration enforcement measures spearheaded by federal, and state and local governments over the past decade.

As described above, partnerships between the Department of Homeland Security and local law enforcement, as well as state-based anti-immigrant laws, encourage and incentivize racial profiling by local law enforcement and have led to documented increases in pre-textual stops of Latinos and other people of color. Additionally, Border Patrol agents have been known to target communities of color throughout the 100-mile jurisdictions on the Northern and Southern borders that they patrol, responding inappropriately to 911 calls,[11] patrolling public roads, and boarding trains and buses that cross no international border, all while interrogating or

---

[10] See generally "Dollars and Detainees The Growth of For-Profit Detention," The Sentencing Project, July 2012, found at http://sentencingproject.org/doc/publications/inc_Dollars_and_Detainees.pdf and "Privately Operated Federal Prisons for Immigrants: Expensive. Unsafe. Unnecessary," Justice Strategies, September 2012, found at http://www.justicestrategies.org/sites/default/files/publications/Privately%20Operated%20Federal%20Prisons%20for%20Immigrants%209-13-12%20FNL.pdf.

[11] For example see Rights Working Group, "Jesus Martinez's Story of Racial Profiling and Border Abuse," available at http://rightsworkinggroup.org/FacesofRP.

demanding detailed immigration papers from people of color.[12] Customs and Border Protection also racially profiles people of color, especially Muslims and people of Arab, Middle Eastern, and South Asian descent—including many U.S. citizens—when patrolling border crossings, airports, and other ports of entry.[13] These programs, and especially Operation Streamline and programs targeting removal of noncitizens convicted of minor crimes, are funneling unprecedented numbers of people of color into the criminal justice and prison systems. People of color have a long history of overrepresentation in U.S. federal courts and prisons, and immigration policies are exacerbating this injustice.[14]

Recommendations

To create a U.S. immigration system truly reflective of American values, Congress must enact legislation that upholds civil and human rights in immigration court proceedings, in detention, and in all areas of law enforcement.

With regard to the courts, Congress must:

- Restore judicial discretion, allowing judges to hear an immigration case and waive deportation or inadmissibility after considering individual circumstances;
- Narrow the "aggravated felony" definition under immigration law, which currently includes minor and trivial crimes, to include only very serious violent crimes and reflect common sense and proportionality;
- End disproportionate double punishments for past convictions;
- End Operation Streamline and programs targeting the removal of noncitizens convicted of minor crimes; and
- Provide effective counsel to those in immigration proceedings.

With respect to detention, Congress must:

- Eliminate the detention bed quota;
- Reduce the detention budget and increase funding for community-based alternatives to detention;
- Repeal all mandatory detention laws and restore discretion over custody; and
- Improve oversight and standards of health, safety, and human rights in those detention centers that continue to operate.

With respect to enforcement, Congress must:

---

[12] Families for Freedom and New York University School of Law Immigrant Rights Clinic, "Uncovering USBP: Bonus Programs for United States Border Patrol Agents and the Arrest of Lawfully Present Individuals," January 2013, available at http://familiesforfreedom.org/sites/default/files/resources/Uncovering%20USBP-FFF%20Report%202013.pdf.

[13] Todd Miller, "US Quietly Ramps Up Security Along the Canadian Border," *Mother Jones*, February 7, 2013

[14] See Rights Working Group, *Ban Racial Profiling in Immigration Enforcement,* http://rightsworkinggroup.org/sites/default/files/Ban%20Racial%20Profiling%20Immigration%20Enforcement.pdf

- Dismantle state-federal collaboration in immigration enforcement; and
- Include a strong and enforceable prohibition of racial profiling in any immigration reform legislation, one that applies to all law enforcement agencies and is coupled with effective accountability and oversight measures.

human rights *first*

STATEMENT FOR THE RECORD

On

"Building an Immigration System Worthy of American Values"

Submitted to the

Senate Judiciary Committee

March 20, 2013

ABOUT HUMAN RIGHTS FIRST

Human Rights First is an independent advocacy and action organization that challenges America to live up to its ideals. We believe American leadership is essential in the struggle for human rights so we press the U.S. government and private companies to respect human rights and the rule of law. When they don't, we step in to demand reform, accountability and justice. Around the world, we work where we can best harness American influence to secure core freedoms.

We know that it is not enough to expose and protest injustice, so we create the political environment and policy solutions necessary to ensure consistent respect for human rights. Whether we are protecting refugees, combating torture, or defending persecuted minorities, we focus not on making a point, but on making a difference. For over 30 years, we've built bipartisan coalitions and teamed up with frontline activists and lawyers to tackle issues that demand American leadership.

Human Rights First oversees one of the largest pro bono legal representation programs for asylum seekers and refugees in the country, working in partnership with and training volunteer attorneys at top U.S. law firms. Together we have helped thousands of persecuted refugees gain the protection they deserve and begin new lives in safety and freedom, winning about 90 percent of our cases.

Based on the experience of our Pro Bono Asylum Legal Representation Program, we advocate for access to asylum, for fair asylum and immigration procedures, and for U.S. compliance with international refugee and human rights law. Every year, thousands of asylum seekers including survivors of torture and genocide; women escaping the threat of "honor killings"; and people persecuted because of race, religion, political views, or sexual orientation seek protection in the United States. But all too often they end up behind bars in immigration detention, left to navigate an immigration system that is daunting even for native English speakers. Human Rights First's extensive research on U.S. detention of asylum seekers and recommendations includes: *How to Repair the U.S. Immigration Detention System: Blueprint for the Next Administration* (2012), *Jails and Jumpsuits: Transforming the U.S. Immigration Detention System – a Two-Year Review* (2011), *U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison* (2009), *In Liberty's Shadow: U.S. Detention of Asylum Seekers in the Era of Homeland Security* (2004), and *Refugees Behind Bars: The Imprisonment of Asylum Seekers in the Wake of the 1996 Immigration Act* (1999). In fall 2012, we convened a series of public events across the country, "Dialogues on Detention: Applying Lessons from Criminal Justice Reform to the Immigration Detention System," to identify best practices in criminal justice that could help bring needed improvements to U.S. immigration detention policy and practice.[1]

[1] See http://www.humanrightsfirst.org/our-work/refugee-protection/dialogues-on-detention/.

U.S. Protection of Asylum Seekers: A Core American Value and Commitment

The United States has a long history of providing refuge to victims of religious, political, ethnic and other forms of persecution. This tradition reflects a core component of this country's identity as a nation committed to freedom and respect for human dignity. Over thirty years ago, when Congress—with strong bipartisan support—passed the Refugee Act of 1980, the United States enshrined into domestic law its commitment to protect the persecuted, creating the legal status of asylum and a formal framework for resettling refugees from around the world. The United States is the world leader in resettling refugees, working in partnership with faith groups, civil society, and communities across the country.

U.S. leadership in the protection of refugees is also about how this country treats refugees who seek asylum here in the United States, and about whether this country's policies and programs – including its approach to immigration law enforcement – live up to the same standards we call on the rest of the world to respect. In the wake of World War II, the United States played a leading role in drafting the 1951 Convention Relating to the Status of Refugees and committed to comply with its core provisions by signing on to the Convention's Protocol.

How the U.S. Commitment to Asylum Seekers Has Faltered

The United States has faltered on its commitment to those who seek protection—imposing a flawed one-year filing deadline and other barriers that prevent refugees from receiving asylum; interdicting asylum seekers and migrants at sea without adequate protection safeguards; detaining asylum seekers in jails and jail-like facilities without prompt court review of detention; mislabeling victims of armed groups as supporters of "terrorism"; and leaving many refugees separated from their families for years and struggling to feed, house, and support themselves due to extensive delays in the underfunded and overstretched immigration court system.

These deficiencies not only have domestic consequences, but they also lower the global standard. As the Council of Foreign Relations' Independent Task Force on U.S. Immigration Policy—co-chaired by former White House chief of staff Thomas "Mack" McLarty and former Florida governor Jeb Bush—pointed out, the U.S. commitment to protect refugees from persecution "is enshrined in international treaties and domestic U.S. laws that set the standard for the rest of the world; when American standards erode, refugees face greater risks everywhere."[2]

How to Repair the U.S. Asylum System in Immigration Reform Legislation[3]

A range of barriers in current immigration law limits access to asylum or other protection for many refugees and other vulnerable persons. Immigration reform initiatives should honor our history as a nation of immigrants and a global leader in the protection of refugees. We welcome

[2] Council on Foreign Relations, Independent Task Force Report No. 63, U.S. Immigration Policy, p. 31 available at http://www.cfr.org/immigration/usimmigration-policy/p20030.

[3] For a full set of recommendations, see Human Rights First's 2012 Blueprints, *How to Repair the U.S. Asylum and Resettlement Systems*, at http://www.humanrightsfirst.org/wp-content/uploads/pdf/blueprints2012/HRF_Asylum_blueprint.pdf, and *How to Repair the U.S. Immigration Detention System*, at http://www.humanrightsfirst.org/wpcontent/uploads/pdf/blueprints2012/HRF_Immigration_Detention_blueprint.pdf

the call by leaders on both sides of the aisle to prioritize immigration reform, fix existing visa programs, and provide a pathway to citizenship. As these proposals take shape over the coming months, Congress and the president should commit to measures that will strengthen basic due process, fix the nation's flawed approach to immigration detention, and eliminate barriers to asylum that are inconsistent with America's commitment to protecting refugees. In letters sent to the Administration and Congress on February 8, 2013, 162 national refugee protection organizations, faith-based groups, state and local organizations, and legal experts on the U.S. asylum system supported these principles.[4]

1. Eliminate the unfair and wasteful asylum filing deadline from immigration law

Through pro bono legal representation and research, Human Rights First has documented that many bona fide refugees are unable to file for asylum within one year of arrival, due to challenges such as trauma, inability to speak English, and lack of knowledge about the U.S. asylum system. Many refugees have been barred from asylum in this country due to the filing deadline. This technicality diverts limited governmental resources that could be more efficiently spent addressing the merits of cases.

Specifically, Human Rights First's 2010 report, *The Asylum Filing Deadline: Denying Protection to the Persecuted and Undermining Governmental Efficiency,* found that the filing deadline has not only barred refugees who face religious, political, and other forms of persecution from receiving asylum in the United States, but has also delayed the resolution of asylum cases and led thousands of cases that could have been resolved at the asylum office level to be shifted to the increasingly backlogged and delayed immigration court system. An independent academic analysis of DHS data concluded that, between 1998 and 2009, if not for the filing deadline, more than 15,000 asylum applications—representing more than 21,000 refugees—would have been granted asylum by DHS without the need for further litigation in the immigration courts. [5]

For example, as detailed in Human Rights First's report:[6]

- An Eritrean woman, who was tortured and sexually assaulted due to her Christian religion, was denied asylum in the United States based on the filing deadline even though an immigration judge found her testimony credible and compelling.

---

[4] Human Rights First, 162 Sign Immigration Reform Letter Urging Congress, Administration to Protect Those Fleeing Persecution, at http://www.humanrightsfirst.org/2013/02/08/162-sign-immigration-reform-letter-urging-administration-congress-to-protect-those-fleeing-persecution. (Letters with signatories at http://www.humanrightsfirst.org/wp-content/uploads/AWGCIRSignOnLetter-Administration.pdf and http://www.humanrightsfirst.org/wp-content/uploads/AWGCIRSignOnLetter-Congress.pdf).

[5] See Human Rights First, *The Asylum Filing Deadline: Denying Protection to the Persecuted and Undermining Governmental Efficiency* (New York: 2010), at http://www.humanrightsfirst.org/wp-content/uploads/pdf/afd.pdf, P. Schrag, A. Schoenholtz, J. Ramji-Nogales, and J.P. Dombach, "Rejecting Refugees: Homeland Security's Administration of the One-Year Bar to Asylum," *William and Mary Law Review,* (2010), at http://wmlawreview.org/files/Schrag.pdf.

[6] Ibid.

- A student who was jailed by the Burmese military regime for his pro-democracy activities was denied asylum by the United States based on the filing deadline despite his isolation in the U.S. and lack of English.

- A Chinese woman who feared persecution and torture in China for her assistance to North Korean refugees was determined by the immigration judge to face a clear probability of torture but was denied asylum based on the filing deadline and ordered removed by the U.S. Board of Immigration Appeals.

- A man from Togo who was tortured because of his pro-democracy activities had his asylum request rejected based on the filing deadline, and the request was only granted – three years after his initial filing – after subsequent immigration court litigation.

- A Congolese nurse who was persecuted and tortured due to her human rights advocacy and her Catholic faith was denied asylum based on the filing deadline even though the immigration court found her to be a credible refugee who faced a clear probability of persecution.

- A teenager who was battered, kidnapped, and raped in Albania while plans were made to traffic her into prostitution was denied asylum after her application was ruled untimely.

The exceptions to the filing deadline – for changed or extraordinary circumstances – have not prevented genuine refugees from being denied asylum in the United States. Indeed, as detailed in Human Rights First's report on the filing deadline, many refugees with well-founded fears of persecution have been denied asylum by U.S. adjudicators despite the fact that there are exceptions to the filing deadline. The lack of federal court review on the issue in most circuits also means that refugees in many parts of the country cannot get mistaken filing deadline denials corrected by the federal courts.

While proponents of the filing deadline were, at the time it was created, concerned about the abuse of the asylum system by individuals filing fraudulent claims, this procedural impediment has actually prevented refugees with credible non-fraudulent asylum cases from receiving asylum in the United States. Moreover, as detailed in the report, U.S. immigration authorities implemented a series of major reforms to the asylum system beginning in 1995. These reforms targeted incentives for filing fraudulent applications, increased staffing at the asylum office, and improved the pace of adjudications so that individuals who did not have credible cases were put into the deportation process much more quickly. In the intervening years, additional controls to counter abuse have also been added to the system. As detailed in the Human Rights First report, there are numerous mechanisms in place that are actually designed to combat abuse and fraud.[7]

In addition, the filing deadline wastes government resources in the immigration courts and at the Board of Immigration Appeals. When a case is rejected by the asylum office based on the filing deadline, it is referred into the removal process and placed into immigration court removal proceedings. The court process – which is an adversarial process – involves a significantly greater use of government resources. Since the filing deadline went into effect, over 53,400

[7] Ibid., pp. 26-7.

asylum seekers have had their requests for asylum rejected by the asylum office based on the deadline and not on the merits of their cases.[8] As a result, thousands of asylum cases have been put into the overloaded immigration court system. Some (though not all) of those cases could have been – and would have been – resolved at the asylum office level through a grant of asylum if the filing deadline did not exist, thus saving a tremendous amount of government resources.

In 2011, DHS confirmed that it concluded that the one-year asylum filing deadline should be eliminated, confirming that it expends resources without helping uncover or deter fraud.[9] In connection with the 60th anniversary of 1951 Refugee Convention, the Administration pledged to work with Congress to eliminate the deadline.[10]

Recommendations

- Eliminate the asylum filing deadline contained in INA §208(a)(2)(B); and
- Address the plight of refugees who have been denied asylum due to the deadline by adding a provision in the INA to permit refugees who were granted withholding of removal, but not asylum, due to the filing deadline to adjust their status to lawful permanent resident and petition to bring their spouses and children to safety.

2. **Reduce unnecessary immigration detention costs and implement lasting reforms**

DHS and ICE detain up to 34,000 immigrants and asylum seekers each day—an all-time high of over 429,247 in fiscal year 2012 alone. At an average price of $164 per person, per day, the U.S. immigration detention system costs taxpayers $2 billion annually, despite the availability of less costly, less restrictive, and highly successful alternative to detention programs.[11] Alternatives to detention—which can include a range of monitoring mechanisms, case-management, and in some cases electronic monitoring—can save more than $150 per day per immigration detainee—millions annually.[12] While ICE has expanded alternatives to detention, it has not used these cost-effective alternatives to reduce unnecessary detention and detention costs—citing to language in DHS appropriations legislation that ICE has viewed as mandating that it maintain and fill a specific number of detention beds (34,000 for fiscal year 2012). This type of "mandate" does not exist in other law enforcement contexts and prevents the agency from saving taxpayer dollars by using more appropriate alternatives when detention is not necessary.

Alternatives to Detention (ATD) programs generally provide for release from immigration detention with additional supervision measures intended to ensure appearance and compliance. Several successful ATD programs have been tested in the United States over the years, including

[8] Filing deadline data provided to NGOs, including Human Rights First, by the USCIS Asylum Division on Dec. 16, 2009.
[9] UNHCR Washington Office, Reaffirming Protection, October 2011, Summary Report, p. 18, at http://www.unhcrwashington.org/atf/cf/%7BC07EDA5EAC71-4340-8570-194D98BDC139%7D/georgetown.pdf
[10] U.S. Department of State, PRM, *Fact Sheet: U.S. Commemorations Pledges*, 7 December 2011, available at http://www.state.gov/j/prm/releases/factsheets/2011/181020.htm.
[11] National Immigration Forum, "Math of Immigration Detention" (August 2012) available at http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf.
[12] Ibid.

programs run by the Vera Institute of Justice and by Lutheran Immigration and Refugee Service. These programs documented high appearance rates, and saved government funds by allowing for the release of individuals from more costly immigration detention.

ICE's Alternatives to Detention program is currently provided by BI Incorporated, a private company owned by the publicly traded prison company GEO Group. A full-service program provides "intensive case management, supervision, electronic monitoring, and individual service plans," and a technology-only program uses GPS tracking and phone reporting. BI says its programs help "mitigate flight risk and guide the participant through the immigration court process."[13] According to BI's annual report to the U.S. government, in 2010, 93 percent of individuals actively enrolled in ATDs attended their final court hearings, and 84 percent complied with removal orders.[14]

In the criminal justice system, individuals whose cases are pending are routinely put on supervised release programs, or released on bail or recognizance, following individualized assessments of the need to detain. Tim Murray, executive director of the Pretrial Justice Institute, the nation's leading pretrial services organization since 1976, has said "[i]n criminal justice systems across the country, a dramatically growing number of jurisdictions are using scientifically validated risk assessments to identify low risk individuals who can be released pending trial without unduly endangering the community or court processes. Over the past decades, communities served by evidenced-based pretrial services programs have experienced reductions in needless pretrial detention and its staggering fiscal and social costs without a corresponding increase in failure to appear or re-arrest while on release."[15] Steve J. Martin, former General Counsel of the Texas prison system, has stated, "The individuals detained by ICE are exactly the type of folks who should be considered for supervised release, or for release on bail or recognizance. When we deal with pretrial individuals in the criminal context, best practice is to utilize the lowest restrictions possible that will ensure court appearance. It saves money and reserves jail space for those who actually need to be jailed."[16]

During Human Rights First's 2012 Dialogues on Detention, the director of the Santa Clara Office of Pretrial Services reported that independent auditors found that pretrial services saved $26 million for Santa Clara County over the course of six months in 2011.[17] The director of New Orleans new comprehensive pretrial services program reported that it could potentially save Orleans Parish $1.4 million per year.[18] Indeed, pretrial services and other alternatives to detention have been endorsed as cost-savers by a diverse range of groups including the Council on Foreign Relations Independent Task Force on U.S. Immigration Policy, Heritage Foundation,

---

[13] BI Incorporated, Intensive Supervision Appearance Program II: An Alternatives to Detention Program for the U.S. Department of Homeland Security, (BI Incorporated, CY 2010), pp. 4-5, 17, 21. BI and ICE have named the full-service and technology-only programs together "ISAP II"—a new version of the Intensive Supervision Appearance Program that began as a pilot in 2004.
[14] BI Incorporated, pp. 4, 5, 17, 21.
[15] See http://www.humanrightsfirst.org/2013/03/01/sequestration-presents-opportunity-to-reduce-unnecessary-immigration-detention-costs/.
[16] See http://www.humanrightsfirst.org/2013/03/04/napolitano-sets-record-straight-on-icc-detainee-releases-paves-way-for-national-dialogue-about-alternatives/
[17] See http://www.sccgov.org/sites/bos/Management%20Audit/Documents/PTSFinalReport.pdf.
[18] See http://www.humanrightsfirst.org/wp-content/uploads/pdf/nola_dod_fact_sheet.pdf.

Texas Public Policy Foundation, Pretrial Justice Institute, Vera Institute of Justice, International Association of Chiefs of Police, and the National Conference of Chief Justices.

ICE should bring its practices into line with human rights standards and incorporate best practice in criminal justice systems and bipartisan reform recommendations by shifting its enforcement resources from detention to alternatives. To realize actual cost-savings for taxpayers, alternatives should be used in place of detention that is unnecessary rather than primarily as a supplement to existing levels of detention.

Under current U.S. policies, many asylum seekers and immigrants do not have access to prompt court review of their immigration detention, contrary to U.S. commitments to human rights, refugee protection, and basic fairness. For example, the initial decision to detain an asylum seeker or other "arriving alien" at a U.S. airport or border is "mandatory" under the expedited removal provisions of the 1996 immigration law. The decision to release an asylum seeker on parole—or to continue his or her detention for longer—is entrusted to local officials with ICE, which is the detaining authority, rather than to an independent authority or at least an immigration court. Several other categories of immigrants—including lawful permanent residents convicted of a broad range of crimes, including simple drug possession and certain misdemeanors, as well as more serious crimes, and who have already completed their sentences—are also subjected to "mandatory" detention, and deprived of access to immigration court custody hearings.[19]

ICE detains immigrants in approximately 250 jails and jail-like facilities nationwide. In these facilities, they wear prison uniforms and are typically locked in one large room for up to 23 hours a day, they have limited or essentially no outdoor access, and they visit with family through a Plexiglas barrier. The U.S. Commission on International Religious Freedom concluded that these kinds of facilities "are structured and operated much like standardized correctional facilities" and are inappropriate for asylum seekers.[20] A 2009 DHS-ICE report confirmed that "all but a few of the facilities that ICE uses to detain aliens were built as jails and prisons."[21]

In 2009, DHS and ICE committed to shift the immigration detention system away from its longtime reliance on jails and jail-like facilities to facilities with conditions more appropriate for civil immigration law detainees.[22] Since then, ICE has opened two facilities with less-penal

[19] See INA § 236(c); 8 CFR § 208.30, 212.5, 235.3, and 1003.19.

[20] USCIRF, Asylum Seekers in Expedited Removal Volume II, p. 189, at http://www.uscirf.gov/images/stories/pdf/asylum_seekers/ERS_RptVolII.pdf; USCIRF, Expedited Removal Study Report Card (2007), p. 5.

[21] Dr. Dora Schriro, Immigration Detention Overview and Recommendations (Washington, DC: Immigration and Customs Enforcement, 2009), p. 21, available at http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf.

[22] Human Rights First, *Jails and Jumpsuits: Transforming the U.S. Immigration Detention System – A Two-Year Review* (New York: Human Rights First, 2011), pp. 4-6, at http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Jails-and-Jumpsuits-report.pdf, citing ICE, "Fact Sheet: 2009 Immigration Detention Reforms," at http://www.ice.gov/news/library/factsheets/reform-2009reform.htm; ICE Strategic Plan FY 2010-2014 (Washington, DC: ICE, 2010), p. 6;
ICE, "Fact Sheet: ICE Detention Reform Principles and Next Steps," news release, October 6, 2009, at http://www.dhs.gov/xlibrary/assets/press_ice_detention_reform_fact_sheet.pdf; DHS press conference, October 6, 2009, video recording, http://www.c-spanvideo.org/program/289313-1; and 2009 DHS/ICE Report, pp. 2-3.

conditions and made progress on some other aspects of detention reform. ICE continues, however, to hold the overwhelming majority of its daily detention population in jails and jail-like facilities, with a full 50 percent held in actual jails.

The United Nations High Commissioner for Refugees, in its 2012 guidelines on detention, as well as other international human rights authorities, have confirmed that asylum seekers and other immigration detainees should not be detained in facilities that are essentially penal facilities, nor should they be made to wear prison uniforms but should instead be permitted to wear their own civilian clothing.[23] As documented in Human Rights First's 2011 report *Jails and Jumpsuits: Transforming the U.S. Detention System—A Two-Year Review*, and discussed during Human Rights First's 2012 Detention Dialogues, many criminal correctional facilities actually offer less restrictive conditions than those typically found in immigration detention facilities, and corrections experts have confirmed that a normalized environment helps to ensure the safety and security of any detention facility. The American Bar Association, at its annual meeting in August 2012, adopted civil immigration detention standards that outline the conditions that should be required in connection with detention of civil immigration detainees.[24]

Recommendations

- Direct DHS to use alternatives in place of more costly detention when it is not necessary, resorting to detention only when threat to public safety or risk of flight cannot be addressed through less restrictive measures;
- Direct DOJ and DHS to revise regulatory language to provide immigration court custody hearings for "arriving aliens," and amend INA §235 and §236 to provide that all detention decisions be made on an individual basis, reviewable by an immigration court; and
- Require DHS to implement standards and conditions in line with the American Bar Association's proposed civil immigration detention standards.

3. Require and support a fair and efficient adjudication process

U.S. immigration courts are over-stretched and underfunded, leading many cases to be delayed for two years or more and prolonging the separation of many refugee families. 84 percent of detained immigrants – including many asylum seekers – have no legal counsel, left to navigate complex removal proceedings unrepresented. The DOJ Executive Office for Immigration Review (EOIR) has explained that "[n]on-represented cases are more difficult to conduct. They require far more effort on the part of the judge." Another obstacle that exacerbates the difficulty of securing legal representation for immigration detainees is the remote location of many detention facilities. USCIRF has found that many of the facilities used to detain asylum seekers are "located in rural parts of the United States, where few lawyers visit and even fewer maintain

[23] UNHCR, *Detention Guidelines: guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention* (2012) at http://www.unhcr.org/505b10ee9.html.
[24] See ABA Civil Immigration Detention Standards at http://www.americanbar.org/content/dam/aba/administrative/immigration/abaimmdetstds.authcheckdam.pdf.

a practice." The Commission concluded that "[t]he practical effect of detention in remote locations...is to restrict asylum seekers' legally authorized right to counsel."[25]

The immigration court system within EOIR is in a state of crisis and is not adequately serving the interests of the U.S. government or the applicants appearing before it. While resources for immigration enforcement have increased steeply or remained high in recent years, the resources for the immigration court system have lagged far behind. The immigration court backlog, as of the end of February 2013, was at 325,296 cases, with pending cases already waiting an average of nearly a year and a half (553 days).[26] As the Administrative Conference of the United States (ACUS) confirmed in June 2012, the immigration court backlog and "the limited resources to deal with the caseload" present significant challenges. [27] The American Bar Association's Commission on Immigration, in its comprehensive report on the immigration courts, concluded that "the EOIR is underfunded and this resource deficiency has resulted in too few judges and insufficient support staff to competently handle the caseload of the immigration courts."[28]

Through our partnership with law firms representing asylum seekers through our pro bono program, Human Rights First sees firsthand the hardship that court backlogs and extended processing times create for our refugee clients—many of whom are currently being given court dates two years away. While they wait for their claims to be heard, many remain separated from spouses and children who may be in grave danger in their home countries. Lengthy court delays also increase the difficulty of recruiting pro bono counsel.

Recommendations

- Provide DOJ/EOIR with adequate resources to conduct timely and fair proceedings, including to increase staffing at the immigration courts and the Board of Immigration Appeals and to provide mandatory initial training and ongoing professional development for all BIA members, immigration judges, and legal support staff;
- Mandate that EOIR's Legal Orientation Program, lauded for promoting efficiency and effectiveness, is provided in all facilities that detain immigrants for ICE;
- Support legal representation in cases where justice requires, including for children, persons with mental disabilities, and other vulnerable immigrants; and
- Support elimination of asylum filing deadline, which, as detailed above, would reduce the number of asylum cases referred to the immigration courts.

4. **Protect refugees from inappropriate exclusion and free up administrative resources**

[25] USCIRF, *Asylum Seekers in Expedited Removal*, p. 240.
[26] TRAC, *Latest Immigration Court Numbers, as of* February 2013 at http://trac.syr.edu/immigration/reports/latest_immcourt/#backlog
[27] Administrative Conference of the United States (ACUS), "Immigration Removal Adjudication, Committee on Adjudication, Proposed Recommendation, June 14-15, 2012," p. 1, available at http://www.acus.gov/wp-content/uploads/downloads/2012/05/Proposed-Immigration-Rem.-Adj.-Recommendation-for-Plenary-5-22-12.pdf.
[28] American Bar Association, *Reforming the Immigration Detention System* (2010), pp. 2-16 at http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report.authcheckdam.pdf

U.S. immigration laws have for many years barred from the United States people who pose a danger to our communities or threaten our national security, even if they would otherwise qualify for refugee protection. Bars to refugee protection also exclude people who have engaged in or supported acts of violence that are inherently wrongful and condemned under U.S. and international law. These important and legitimate goals are consistent with the U.S. commitment under the Refugee Convention and its Protocol, which exclude from refugee protection perpetrators of heinous acts and serious crimes, and provide that refugees who threaten the safety of the community in their host countries can be removed. However, as detailed in two reports issued by Human Rights First, for a number of years now, overbroad definitions and interpretations of the terms "terrorist organization" and "terrorist activity" in U.S. immigration law have ensnared people with no real connection to terrorism. Consequently, thousands of refugees seeking safety—including those with family already in the United States—have been barred from entering or receiving protection in the United States, and many refugees and asylees already granted protection and living in this country have been barred from obtaining green cards and reuniting with family members.[29]

Recommendation

- Amend the definitions of "terrorist activity" and "terrorist organization" in INA §212(a)(3)(B) so that they target actual terrorism. Currently, these definitions are being applied to anyone who at any time used armed force as a non-state actor or gave support to those who did. These have included Iraqis who supported the overthrow of Saddam Hussein, Sudanese who fought against the armed forces of President Omar Al-Bashir, and Eritreans who fought for independence from Ethiopia. These definitions are also being applied to persons whose supported armed groups under duress, and to individuals who were kidnapped or conscripted as child soldiers. Specifically, the very expansive sub-section of the "terrorist activity" definition at INA § 212(a)(3)(B)(V)(b) should be limited to the use of armed force against civilians and non-combatants, and the definition of a "Tier III" organization at INA § 212(a)(3)(B)(vi)(III) should be eliminated.

Thank you again for your consideration of Human Rights First's views.

Attachments:

- Sign-on Letter to Congress, Re: Recommendations on the U.S. Asylum System for Immigration Reform Legislation, also at http://www.humanrightsfirst.org/wp-content/uploads/AWGCIRSignOnLetter-Congress.pdf.
- Human Rights First, Blueprint for the Next Administration, December 2012, *How to Repair the U.S. Asylum and Resettlement Systems*, also at http://www.humanrightsfirst.org/wp-content/uploads/pdf/blueprints2012/HRF_Asylum_blueprint.pdf
- Human Rights First, Blueprint for the Next Administration, December 2012, *How to Repair the U.S. Immigration Detention System*, also at http://www.humanrightsfirst.org/wp-content/uploads/pdf/blueprints2012/HRF_Immigration_Detention_blueprint.pdf.

[29] *See* Human Rights First, *Is This America? The Denial of Due Process to Asylum Seekers in the United States* (New York: Human Rights First, 2000), at http://www.humanrightsfirst.org/our-work/refugee-protection/due-process-is-this-america/.

Statement of Chairman Patrick Leahy
"Building an Immigration System Worthy of American Values"
Hearing Before the Senate Judiciary Committee
March 20, 2013

Since the beginning of this Congress, I have tried to make comprehensive immigration reform our top legislative priority in the Senate Judiciary Committee. In January at Georgetown University Law Center, I outlined my expectation that comprehensive immigration reform would be the matter to which the Judiciary Committee would devote itself this spring and announced an early hearing to highlight the national discussion. I followed through with that important hearing, at which Secretary Napolitano testified, more than a month ago. This week, Senator Hirono and Senator Coons are chairing two more hearings regarding comprehensive immigration reform.

For months I have urged the President to send his proposal for comprehensive immigration reform to the Senate. I understand he has delayed releasing it at the request of a few Senators who are engaged in secret, closed door discussions on their own proposal and who committed to completing it by the beginning of March. That deadline and others have come and gone.

I have said since the beginning of the year that I was looking forward to seeing principles turned into legislation. I am encouraged that after two resounding presidential defeats, some Republican politicians are concerned enough about the growing Hispanic voting population that they are abandoning their former demagoguery and coming to the table. In what is being called its "autopsy" of the last election, the Republican National Committee wrote that "Hispanic voters tell us our Party's position on immigration has become a litmus test, measuring whether we are meeting them with a welcome mat or a closed door." After slamming the door on our efforts for comprehensive immigration reform during the Bush administration, I welcome Republicans to this effort. While I still worry that too many continue to oppose a straightforward pathway to citizenship, that is a discussion we need to have out in the open, in front of the American people.

Without legislative language, there is nothing for the Judiciary Committee to consider this week at our mark up. The upcoming recess period would have allowed all Members of the Committee and the American people to review the legislation. Now that process and our work will be delayed at least a month.

I have favored an open and transparent process during which all 18 Senators serving on the Senate Judiciary Committee will have the opportunity to participate and to propose or oppose ideas for reform. The Majority Leader has agreed that we need regular order in the consideration of comprehensive immigration reform. This process will take time. It will not be easy. There will be strongly-held, differing points of view. Because we do not yet have legislative language to debate, the Senate Judiciary Committee will not be able to report a comprehensive immigration bill by the end of April, which was my goal.

Few topics are more fundamental to who and what we are as a Nation than immigration. Immigration throughout our history has been an ongoing source of renewal of our spirit, our creativity and our economic strength. Today's immigration hearing is focused on the

existing immigration system and how, too often, it fails to ensure the due process rights of those seeking to come to our country. Almost two years ago, I chaired a related hearing entitled "Improving Efficiency and Ensuring Justice in the Immigration Court System." I continue to believe that the challenges facing the immigration courts are not partisan or ideological. We all want courts to operate fairly and efficiently and serve the interests of justice. So any comprehensive reform to our immigration system must address the backlog and injustices occurring in our immigration courts.

I thank Senator Coons for chairing today's hearing.

#####

Lutheran Immigration
and Refugee Service

www.lirs.org

Statement of Lutheran Immigration and Refugee Service

Senate Committee on the Judiciary

March 20, 2012 Hearing: "Building an Immigration System Worthy of American Values"

Lutheran Immigration and Refugee Service (LIRS), the national organization established by Lutheran churches in the United States to serve uprooted people, is pleased by Congressional and Administrative efforts to draft and enact comprehensive immigration reform. LIRS is grateful for the Senate Judiciary Committee's decision to hold a public hearing regarding the need for due process, fairness, and justice in our immigration system within the context of immigration reform.

"LIRS and our broad network of social ministry organizations, churches and church leaders are committed to ensuring that U.S. immigration policies are consistent with our country's fundamental values and afford justice to all," says Linda Hartke, LIRS President and CEO.

Three essential steps towards a just immigration court system are providing the Department of Justice's Executive Office for Immigration Review (EOIR) with funding for robust and efficient case adjudication and custody determinations, and expanding funding for EOIR's Legal Orientation Program to reach all facilities that detain immigrants on behalf of the Department of Homeland Security, Immigration and Customs Enforcement (ICE). Additionally, appointment of government funded counsel for unrepresented and vulnerable migrants and refugees in removal proceedings promotes both justice and efficiencies.

Finally, provisions of law that require mandatory detention should be replaced with individualized assessments and the asylum filing deadline should be eliminated.

Limited Funding for EOIR Limits Access to Fair Process in Immigration Proceedings
With approximately 84% of detained immigrants appearing before the courts without an attorney, immigration judges are increasingly presiding over cases presented by respondents who are ill-informed and unprepared to make educated decisions about their cases.[1] These factors make the court process less efficient and more prone to reaching improper conclusions. Dana L. Marks, an immigration judge in San Francisco and the president of the National Association of

[1] American Bar Association Commission on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases,* Feb. 2010, http://www.americanbar.org/content/dam/aba/migrated/media/nosearch/immigration_reform_executive_summary_012510.authcheckdam.pdf; Vera Institute for Justice, *Improving Efficiency and Promoting Justice in the Immigration System: Lessons from the Legal Orientation Program,* May 2008, http://www.vera.org/sites/default/files/resources/downloads/LOP_evalution_updated_5-20-08.pdf

National Headquarters: 700 Light Street, Baltimore, Maryland 21230 • 410-230-2700 • fax: 410-230-2890 • lirs@lirs.org
Legislative Affairs Office: 122 C Street, NW, Suite 125, Washington, D.C. 20001 • 202-783-7509 • fax: 202-783-7502 • dc@lirs.org

Immigration Judges, has stated that immigration judges often feel that asylum hearings are "like holding death penalty cases in traffic court."[2]

Increased Immigration Enforcement, Yet Limited Funding Support for Courts
Despite generous congressional support for Department of Homeland Security's (DHS) immigration enforcement initiatives, EOIR has not received sufficient support to keep pace with the number of DHS-initiated removal cases. From FY 2004 to 2010, DHS's budget for border and interior enforcement grew by over $6 billion. During this time period, EOIR's budget increased by just over $100 million. The discrepancy in funding between DHS and EOIR remains a challenge.

Between FY 2001 and 2011, the number of immigrants detained by the federal government increased from 209,000 to 429,000. The dramatic growth in detention has contributed to the overwhelming caseloads for EOIR's immigration judges, as the detained docket has faster case completion timelines and fewer detained individuals are represented by counsel. The summer of 2012 ended with a new record backlog in immigration courts of 322,681 cases, 23 percent higher than two years earlier. The backlog in January 2013 remains 23.2 percent higher than at the end of September 2010.[3]

EOIR's Legal Orientation Program Improves Immigration Court Efficiencies, But Its Reach is Limited
The vast majority of detained immigrants are unrepresented by legal counsel in their legal proceedings before the court. EOIR's Legal Orientation Program (LOP), operational only 25 of the approximately 250 detention facilities nationwide, helps to fill in important gaps. Funding LOP at additional facilities would increase the cost savings, improve efficiencies, and lead to more just outcomes in immigration courts.

LOP improves the efficiency and effectiveness of the immigration court process, producing significant cost saving benefits to the government. According to an April 2012 EOIR report to the Senate Committee on Appropriations, LOP reduced case processing times by an average of 12 days when compared to detainees who did not receive LOP. A reduced duration of immigration court proceedings leads to a reduction in detention time, which is significant as detention costs ICE on average $164 per detainee per day. The report also found that after deducting the cost of providing LOP services, the net savings to the government in FY 2011 were more than $17.8 million.[4]

The impact of LOP on the federal immigration system has been widely praised:
- EOIR's immigration judges have praised LOP for better preparing immigrants to identify forms of relief and to recognize when no forms of relief are available.[5]

---

[2] "*Lawyers Back Creating New Immigration Courts,*" The New York Times, February 8, 2010, http://www.nytimes.com/2010/02/09/us/09immig.html.
[3] TRAC Immigration, "Latest Immigration Court Numbers, as of August 2012,"; "Latest Immigration Court Numbers, as of January 2013"; http://trac.syr.edu/immigration/reports/latest_immcourt/ .
[4] April 4, 2012 EOIR report transmitted on July 2, 2012 by the Department of Justice to the Chairwoman and Ranking Member of the Senate Committee on Appropriations' Subcommittee on Commerce, Justice, Science, and Related Agencies.
[5] Vera Institute for Justice, *Improving Efficiency and Promoting Justice in the Immigration System: Lessons from the Legal Orientation Program,* May 2008,
http://www.vera.org/sites/default/files/resources/downloads/LOP_evalution_updated_5-20-08.pdf

- Detention facility staff observed a reduction in behavioral problems when detainees have access to legal information.[6]
- LOP participants who are released on bond or their own recognizance are more likely to appear for future court hearings than those who did not participate in the program.[7]
- Attorney General Holder has described LOP as a "great success story" and a "critical tool for saving precious taxpayer dollars" based on savings to immigration courts and the immigration detention system.[8]

For individuals, LOP educates detained immigrants so that they can, at the very least, understand their legal options and responsibilities and make more informed decisions about their immigration cases. Immigrants in detention are often housed in areas that are far from their family, attorneys, and other social services providers. LOP helps to mitigate the isolation of detention by providing detainees with basic information on forms of relief from removal, how to accelerate repatriation through the removal process, how to represent themselves without an attorney, and how to obtain legal representation.

Vulnerable Individuals Require Counsel for Just and Efficient Court Proceedings
Immigration proceedings are a daunting labyrinth for any individual to navigate alone – especially as the consequence of deportation is tremendous – and the challenges are exacerbated in detention. Yet 84 percent of detained immigrants go through the process without counsel.

At a minimum, the government should provide counsel for the most vulnerable individuals in detention, including children and individuals with mental disabilities. Providing counsel to the most vulnerable individuals in removal proceedings will save court resources as well as promote fairness. EOIR has expressed "great concern" about the large number of individuals appearing in immigration court without representation, and has also noted that "[n]on- represented cases are more difficult to conduct," and that they require additional effort and time from immigration judges. Legal representation is vital to ensure the immigration courts serve immigrants with mental disabilities and other vulnerable poplations, including juveniles, fairly and efficiently.

Individualized and informed detention determinations and removal decisions are preferable to arbitrary and overbroad mandates.

Federal enforcement laws and policies should not use a blanket approach for reaching detention determinations. Such one-size-fits-all enforcement methods have led to more migrants being detained than is necessary to meet the goal of immigration detention—compliance with immigration processes. Congress should allow Immigration Officials to utilize discretion based on individual cirucumstances when making detention determinations, and Immigration Judges to use discretion when holding custody redeterminations.

ICE has recently developed and implemented nationwide use of a risk assessment tool to reach consistent and informed determinations of when detention is truly necessary and when low-risk migrants should be released or placed in a less-restrictive program.[9] This tool should enable the government to identify which individuals present genuine risks of flight or threats to public

[6] Id.
[7] Id.
[8] Address to Pro Bono Institute, Mar. 19, 2010.
[9] *Unlocking Liberty: A Way Forward for U.S. Immigration Detention Policy*, Lutheran Immigration and Refugee Service, www.lirs.org/dignity (October 2011).

safety as well as people who may be negatively impacted by detention, such as survivors of torture, domestic abuse victims, and other victims of violence.

An effective risk assessment should also inform the government about the level of risk in individual cases and how to mitigate any risk in the most cost-effective and least restrictive manner, including the use of alternatives to detention. Equipped with relevant information, the government would be empowered to facilitate the safe release of vulnerable migrants who pose no risks of flight or danger, but whose applications are pending in the immigration courts or on appeal. A system of informed decision-making, a continuum of effective alternatives to detention, and a process of release that promotes safety will foster long-term security and model efficient and just governance that is consistent with the spirit of welcome the United States is known to embody.

ICE should continue to monitor the results of this important assessment tool and make adjustments as necessary to best tailor detention determinations to the mission of the agency while maximizing cost-effective release and supervision options.

Finally, Congress should restore discretion to immigration judges to consider all equities in removal decisions. Immigration judges should be given authority to ameliorate hardship faced by families who might otherwise be forced apart by detention or removal from the United States.

Elimination of One-Year Filing Deadline for Asylum Applications

The existing one-year filing deadline for those seeking asylum in the United States should be repealed. The filing deadline has barred individuals fleeing persecution from receiving asylum. It has also delayed the resolution of asylum cases and required thousands of cases that could have been resolved at the DHS Asylum Office to be shifted to an already bursting immigration court docket. Asylum seekers presenting their claims before an immigration court face an adversarial process that can be retraumatizing for survivors of torture and other forms of persecution. Many asylum seekers are pro se and struggle to navigate the complexities of our immigration legal system.

LIRS recommendations to Congress regarding the Department of Justice's Executive Office for Immigration Review:

- **Direct the government to appoint legal counsel for extremely vulnerable populations, such as mentally incompetent individuals or children.** Providing counsel will save court resources and promote fairness.
- **Eliminate the one-year filing deadline for asylum seekers.** U.S. laws must be changed to ensure the efficient use of EOIR and DHS resources and the protection of bona fide refugees.
- **Extend initial jurisdiction of all asylum cases filed by children under the age of 21 to DHS's Asylum Office.** A change in law is needed to best utilize the expertise and strengths of DHS Asylum Officers, reduce the burdens on immigration courts and prevent vulnerable children from having to face adversarial asylum proceedings.
- **Provide EOIR with robust funding.** U.S. immigration courts need more staff and resources to address the overwhelming number of cases being referred by DHS and to allow them the time and legal support to carefully consider each case.

- **Expand LOP funding to reach all facilities that detain individuals on behalf of ICE.** Increased LOP funding would improve immigration court efficiencies and ensure that individuals in detention receive basic information.
- **Restore discretion to immigration judges** to consider all equities in removal decisions. The government should be given authority to ameliorate hardship faced by families who might otherwise be forced apart by detention or removal from the United States.

LIRS recommendations to Congress regarding the Department of Homeland Security:

- **Oppose restricting the liberty of migrants based on arbitrary determinations** that do not evaluate individual risk factors or demonstrate the need to detain.
- **Repeal federal statutes that mandate detention without an individualized assessment** of the need for detention, i.e., a real public safety threat or a demonstrated risk of flight that cannot otherwise be mitigated.
- **Ensure access to judicial review** of any decision to restrict liberty, including but not limited to the use of detention.
- **Require any restriction of liberty to be the least restrictive form** of custody necessary and proportionate to meet government interests.
- **Eliminate the one-year filing deadline for asylum seekers.** U.S. laws must be changed to ensure the efficient use of EOIR and DHS resources and the protection of bona fide refugees.
- **Amend overly-broad anti-terrorism provisions** that define "material support" too broadly and define victims of terrorists as terrorists for purposes of admissibility to the United States.

LIRS is nationally recognized for its leadership advocating with and on behalf of refugees, asylum seekers, unaccompanied children, immigrants in detention, families fractured by migration and other vulnerable populations, and for providing services to migrants through over 60 grassroots legal and social service partners across the United States.

If you have any questions about this statement, please feel free to contact Brittney Nystrom, Director for Advocacy at (202) 626-7943 or via email at bnystrom@lirs.org.

Additional LIRS Resources

- The March 14, 2012 LIRS statement for the House Appropriation Committee, Homeland Security Subcommittee hearing on immigration detention releases may be read here: http://lirs.org/press-inquiries/press-room/031413statement/
- The March 19, 2012 LIRS statement for the House Judiciary Committee hearing on immigration detention releases may be read here: http://lirs.org/wp-content/uploads/2013/03/LIRS-Statement-for-Hearing-3-19-13-final.pdf
- The October 2011 report, *Unlocking Liberty: A Way Forward for U.S. Immigration Detention Policy,* may be read here: www.bit.ly/VwrNFE
- The May 18, 2011 LIRS statement for the hearing on improving efficiency and ensuring justice in the immigration court system may be read here: http://lirs.org/press-inquiries/press-room/051811statement/

NATIONAL
IMMIGRANT
JUSTICE CENTER
A HEARTLAND ALLIANCE PROGRAM

Statement of Mary Meg McCarthy, Executive Director
Heartland Alliance's National Immigrant Justice Center

Submitted to the Senate Judiciary Committee
Hearing on Building an Immigration System Worthy of American Values

March 20, 2013

Chairman Coons, Ranking Member Grassley, and members of the Committee, thank you for the opportunity to submit testimony for today's hearing.

Heartland Alliance's National Immigrant Justice Center (NIJC) is a nongovernmental organization dedicated to ensuring human rights protections and access to justice for immigrants, refugees, and asylum seekers, through direct legal representation, advocacy, impact litigation, and education. Since its founding 30 years ago, NIJC has safeguarded the rights of non-citizens, particularly low-income individuals and families and those held in immigration detention. Each year, NIJC and its network of 1,500 *pro bono* attorneys provide legal counsel and representation to nearly 10,000 individuals, making it the largest legal service provider for non-citizens.

As co-chair of the Department of Homeland Security (DHS)/Nongovernmental Organization (NGO) Enforcement Working Group, which includes 100 immigrant rights organizations, legal aid providers, and academics, NIJC facilitates ongoing dialogue on issues of immigration enforcement and detention. NIJC is also a leading voice within the Midwest Coalition for Human Rights, a network of 56 organizations that promotes and protects human rights in America's heartland, and Detention Watch Network, a coalition of 80 religious, civil, immigrant, and human rights organizations that educates the public and policy makers about the immigration detention system. In these and other coalitions, NIJC shares its on-the-ground experience to advocate for policy changes.

The importance of today's hearing cannot be overstated, and I thank Senator Coons for his leadership. Each day, NIJC attorneys see how the system is failing non-citizens: men and women who come from a broad range of backgrounds, including immigrants who recently entered the country without authorization, asylum seekers, and long-time lawful permanent residents. They are the main witnesses to a system that denies due process to thousands each year. Seventy percent (70%) of the people deported from this country last year never saw a judge.[1] Eighty-four percent (84%) of detained immigrants will never have access to an attorney, resulting in many deportations even if the individuals are eligible for legal relief.[2] Others are disproportionately punished for crimes committed in their youth and minor crimes. In short, our current system does not reflect American values of justice and fairness.

In previous statements submitted to this Committee, NIJC has outlined steps Congress can take to create an immigration system that keeps immigrant families together, protects people fleeing

[1] A study by the Immigration Policy Center reveals that in 70 percent of removals in FY2011, non-citizens did not appear before a judge. See http://www.immigrationpolicy.org/just-facts/decade-rising-immigration-enforcement.
[2] Sam Dolnick, *As Barriers to Lawyers Persist, Immigrant Advocates Ponder Solutions*, New York Times, (March 3, 2011) available at: http://www.nytimes.com/2011/05/04/nyregion/barriers-to-lawyers-persist-for-immigrants.html; Vera Institute of Justice, Improving Efficiency and Promoting Justice in the Immigration System: Lesson from the Legal Orientation Program (2008).

persecution, and eliminates bars for those who want to obtain legal status. Today I will focus on two themes. First, this Committee must ensure due process protections for individuals in removal proceedings. Individuals must have access to counsel and information about their rights and legal options. DHS officers should not be given sole authority to removal individuals; instead judges must be given back the authority to review "automatic deportations." Congress must also require DHS to establish legally enforceable detention standards. Second, this Committee must adopt proportionate penalties for those who violate immigration law. Immigrants who have committed minor offenses, have completed their criminal sentences, or have been sentenced only to probation should not face excessive punishment in the immigration system – including prolonged detention, deportation, and permanent separation from family members.

Due Process Protections

I. Ensure Access to Counsel

Under immigration law, non-citizens who are placed in removal proceedings are entitled to counsel at their own expense. However, many are unable to access attorneys because of a lack of financial resources, lack of providers in remote areas, lack of available *pro bono* assistance, and/or lack of information about available resources.

Access to counsel is of particular concern in the immigration detention context. Immigration detention is civil custody, where individuals are being held for immigration violations. They are not being punished for criminal conduct, and according to Immigration and Customs Enforcement (ICE), more than half of immigration detainees have never been convicted of a crime.[3] Of those with criminal convictions, most offences are nonviolent and/or minor crimes, and individuals have already served their sentences by the time they are in immigration detention.[4] These individuals are held in jail-like settings, and often in county jails. But because they are not being charged with crimes, they are denied procedural protections such as access to counsel if they cannot afford an attorney.

> *A mother of three, Maleah[5] lived in the United States for nearly 20 years when she was detained and almost deported to the Philippines following two minor convictions. Suffering from severe depression exacerbated by her time in detention, and unable to fully understand the proceedings against her, she appeared for a hearing before an immigration judge without a lawyer. Her mental illness prevented her from effectively advocating on her own behalf and she did not know what evidence she should present in her defense. Even though she told the judge that she sometimes hears voices, the court and DHS failed to acknowledge that Maleah was not competent to represent herself in removal proceedings. She was subsequently ordered removed. Soon after the decision, Maleah met NIJC attorneys during a Know Your Rights presentation at a jail in Illinois. They agreed to represent her at no cost, but a few days later, she was transferred to El Paso, Texas in preparation for deportation. NIJC attorneys convinced a judge to stay the deportation and allow Maleah to reopen her case. Over the next six months, attorneys helped Maleah gather evidence to demonstrate her eligibility to remain in the United States. Maleah's permanent resident status was reinstated, and she was released from*

[3] ICE "ERO Facts and Statistics" available at: http://www.ice.gov/doclib/foia/reports/ero-facts-and-statistics.pdf. See Migration Policy Institute, *Immigration Enforcement in the United States*, 128, available at: http://www.migrationpolicy.org/pubs/enforcementpillars.pdf.

[4] TRAC, U.S. Deportation Proceedings in Immigration Courts available at: http://trac.syr.edu/phptools/immigration/charges/deport_filing_charge.php.

[5] All clients' names have been changed to protect their identity.

detention. She reunited with her family and is now helping to raise her infant granddaughter.

For its report, *Isolated in Detention: Limited Access to Legal Counsel in Immigration Detention Facilities Jeopardizes a Fair Day in Court*, NIJC conducted a comprehensive national survey measuring access to counsel and found that 80 percent of detainees were held in facilities that are severely underserved by legal aid organizations.[6] More than a quarter of detainees were in facilities where the ratio of detainees to an NGO attorney was 500:1. A full 10 percent of detainees were held in facilities in which they had no access to NGO attorneys whatsoever.

Access to legal information is also critical. Government-funded Legal Orientation Programs are only available in 24 facilities, none of which are in the Midwest. These programs are designed to educate detainees about their rights, provide basic information on forms of relief, and inform them on how to obtain legal representation or move forward without an attorney. Organizations like NIJC conduct "Know Your Rights" presentations without government support, but because of limited financial and human resources, these presentations occur much less frequently. Yet studies show that these programs move participants through the courts at a faster rate and effectively prepare detained respondents to proceed *pro se*, often resulting in voluntary departures of individuals who have no legal relief.[7]

II. Restore and Expand Judicial Review

The rising number of "automatic" deportations, where individuals are not given a hearing before an immigration judge, demonstrates a growing and alarming denial of immigrants' due process rights. The legislative overhaul of 1996 stripped immigration judges of jurisdiction over many types of removal and handed that power over to immigration officers – who are neither lawyers nor judges and who lack the authority to consider or grant requests for relief from removal. The result has been a massive increase in the number of erroneous determinations of removal of non-citizens, who are left with no mechanism for appeal or judicial review. Before 1996, immigration judges held reinstatement proceedings in which they could entertain defenses to removal for individuals who were eligible for relief. Since then, prior orders of removal are subject to automatic reinstatement without review should an individual reenter the country. Federal regulations interpreting the reinstatement statute provide that an individual may not challenge reinstatement on the basis of an erroneously issued prior order and may not seek review before a judge.[8] The net result is that while more removal orders are faulty, fewer avenues exist to challenge those orders and seek relief. This situation is exacerbated by the severe consequences of removal, which in turn, lead many individuals who believe they have no other choice to seek to reenter the U.S. without permission.

Sabrina entered the U.S at the age of 9 months and became a lawful permanent resident when she was 11. She is the wife of a U.S. citizen and mother of 4 U.S. citizen children. Sabrina went through a troubled period in her life during which she used drugs. In 2005, she faced deportation from the United States on the basis of a controlled substance violation. She was encouraged by deportation officers, who told her she had

---

[6] National Immigrant Justice Center, *Isolated in Detention: Limited Access to Legal Counsel in Immigration Detention Facilities Jeopardizes a Fair Day in Court* (September 2010) available at: http://immigrantjustice.org/isolatedindetention.
[7] Vera Institute of Justice, *Legal Orientation Program Evaluation and Performance and Outcome Measurement Report, Phase II*, (May 2008) available at: http://www.justice.gov/eoir/reports/LOPEvaluation-final.pdf. The evaluation revealed that case processing times were an average of 13 days shorter than for cases for detainees who did not participate.
[8] The regulations provide that an individual may only challenge a reinstatement order by contesting (1) whether the individual in fact was subject to a prior removal order, (2) whether the individual's identity has been established, and (3) whether the individual unlawfully reentered. 8 C.F.R. § 241.8.

no chance of winning her case, to sign a "stipulated" request for removal, whereby she waived her rights to a hearing before an immigration judge as well as any appeal of her deportation order. What Sabrina did not know was that the issue of whether a drug possession offense would bar her from seeking a waiver was being actively fought in the federal courts at that time. Just months after she was deported, the federal court for the district in which she was detained in (7th Circuit) deemed an offense like Sabrina's to not be an aggravated felony, thereby permitting lawful permanent residents (LPRs) like Sabrina to seek a waiver. Although the U.S. Supreme Court agreed a few months later, Sabrina had already been deported. Sabrina returned to the U.S. to reunite with her family, and has since turned her life around. She has become a born again Christian, and her kids are excellent students and chess champions. Almost five years later, an anonymous tip alerted authorities to her presence in the U.S.., and she was sent back to Mexico. Her family moved their home and business to a border town, but Sabrina's husband is worried about the increased expenses. The children, who don't speak Spanish, are trying to adjust to school in Texas, but their grades are slipping. Fearing that their bi-national life was ruining her kids' chances at a bright future, Sabrina again attempted to cross the border, where she was detained. She is currently undergoing a motion to reopen.

To protect due process and ensure that DHS does not waste money to detain individuals who can be placed into alternatives to detention programs, immigration judges should also be given the authority and resources to review all detention decisions. Currently, immigration judges can only review bond determination for certain categories of immigrants. Immigration officers, who often are ill-equipped to make this judgment, decide the vast majority of bond determinations. As a result, immigrants are detained for months — and sometimes for years — at great financial cost without ever knowing when they will be released.

Danush fled from Iran after participating in a protest against Iran's president that was secretly filmed and later broadcast on television. Like many asylum seekers desperate to the get to the United States, he traveled to the United States on a false European passport. Once arriving in the U.S., Danush was placed in federal custody and prosecuted for using the false passport. A few months later, he was transferred to immigration custody. Although Danush had a strong asylum claim, as an arriving asylum seeker, Danush was not eligible for a bond hearing before a judge; his release was completely in the hands of ICE. NIJC and its pro bono partners sought Danush's release and were ultimately successful a few months later. Subsequent to his release, Danush was granted asylum. As an arriving asylum seeker whose only offense was to use a false passport to seek protection from persecution, Danush should have been eligible to seek immediate release from a judge.

Other detainees are subject to mandatory custody pursuant to provisions of the Immigration and Nationality Act (INA), in particular INA § 236(c), 8 U.S.C. § 1226(c). Under that provision, DHS is required to take into custody non-citizens who have been convicted of certain criminal offenses. While the statutory provision calls for mandatory custody, DHS has interpreted "custody" to mean mandatory, physical detention. Providing judges with the legal authority to review the decision to detain individuals would greatly reduce the number of detained immigrants and instead allow them to access available resources to present their cases.

Anatoly, a citizen of the former Soviet Union, was brought to the United States as a refugee in 1993 at the age of 4. He became a legal permanent resident of the United States the following year. Anatoly has no family in his home country, does not speak Russian, and has never returned. Anatoly is from the current country of Belarus. DHS

has consistently had difficulty removing individuals who were born in countries like Belarus that formed part of the former Soviet Union because such countries have no records of them as citizens. Anatoly was placed in immigration proceedings and mandatory detention under INA § 236(c) after he was convicted of stealing four packs of cigarettes from a Walgreens pharmacy. Anatoly spent 103 days in ICE detention, at a cost of more than $15,000 to taxpayers, until NIJC secured cancellation of removal for him to remain in the United States with his family.

III. Adopt Legally Enforceable Detention Standards

Over the past ten years, NIJC has monitored and documented immigration detention complaints across the country. But in spite of promises to fix the system, complaints of human rights violations persist. We continue to see vulnerable populations, including those suffering from medical and mental health conditions, asylum seekers, and sexual minorities, subjected to extreme abuse in immigration custody.

In April 2011, NIJC filed a mass complaint with the DHS Office of Civil Rights and Civil Liberties on behalf of 13 men and women who were targeted for physical, sexual, and emotional abuse in immigration detention based on their identification as lesbian, gay, bisexual, and/or transgender. In October 2011, four additional DHS detainees joined the civil rights complaint.

Among the complainants was Ariel, who came to the United States seeking asylum after she fled persecution in Mexico because she is transgender. She was arrested by DHS and detained for more than a year at county jails in Illinois and Wisconsin. She describes her experiences in DHS custody as "living in hell." She was physically assaulted, placed in solitary confinement, and called degrading names. Even after she was released and granted lawful status, she had visible scars of the physical abuse she suffered at the hands of jail guards. She continues to suffer emotional trauma.

In September 2012, NIJC and Physicians for Human Rights released *Invisible in Isolation: The Use of Segregation and Solitary Confinement in Immigration Detention*, the first report of its kind.[9] Investigators found that solitary confinement in immigration detention facilities is often arbitrarily applied, significantly overused, harmful to detainees' health, and inadequately monitored. Moreover, the use of solitary confinement places enormous pressure on immigrants attempting to stay in the United States to abandon their options for legal relief, their families, their communities, and often the only country they have ever known.

While the 2012 release of DHS's Performance-Based National Detention Standards (PBNDS) acknowledges the need for improved detention conditions, Congress can only ensure humane and fair treatment through legally enforceable detention standards. We cannot continue to allow sub-standard detention conditions to sway individuals' decisions to move forward with their cases.

Proportionality in the Immigration System

Immigrants who have committed minor offenses, have completed their criminal sentences, or have been sentenced only to probation face excessive punishment in the immigration system – including prolonged detention, deportation, and excessive or permanent separation from family members. The definition of "conviction" in immigration law varies greatly from that in the criminal justice

[9] National Immigrant Justice Center, *Invisible in Isolation: The Use of Segregation and Solitary Confinement in Immigration Detention*, (September 2012) available at: www.immigrantjustice.org/invisibleinisolation.

system. Certain situations that would not be considered "convictions" in the criminal context are deemed such in the immigration world. For example, a judge or prosecutor might take certain sympathetic circumstances into account to avoid a deeply damaging conviction of guilt. Instead of serving time in jail and having a conviction on his/her record, an individual can be given the chance to comply with certain provisions. In the immigration definition, a conviction counts as "imprisonment" even when a criminal judge, for example, suspends a sentence to imprisonment to permit an individual to comply with probation instead. Thus, even though an individual may never serve any time in jail, the INA can treat his offense as though he did.

Amending the immigration definition of a conviction would promote consistency in the criminal justice and immigration systems, ensure proportionate immigration punishments for those with criminal records, and create a more efficient and fair removal system. A refined definition would also recognize and respect determinations by criminal judges and prosecutors, who are often in the best position to assess the seriousness (or lack thereof) of an individual's offense.

> *Pablo lived in the United States since 1989 and became a lawful permanent resident in 2001. In 2007, Pablo made a bad decision and stole items from a thrift store. The incident was caught on video tape, and when a sheriff came to his home, Pablo admitted what he did and returned the items. He was then arrested. The information filed in his criminal case states that Pablo "did knowingly or intentionally exert unauthorized control over the property of St. Vincent DePaul Store, to-wit: a television and/or a bookcase and/or a dresser and/or and end table and/or a vacuum cleaner and/or a fish tank." The judge presiding over his criminal case deemed him ineligible for court-appointed counsel and Pablo was basically advised by the interpreter in his case. Pablo was subsequently convicted of theft and received a suspended sentence of one year imprisonment. In 2011, Pablo attempted to naturalize. Instead, DHS arrested him at his home and held him in mandatory detention. Under the INA's definition of a conviction, Pablo was deemed to have been sentenced to one year in jail, and thus, to have been convicted of an aggravated felony (theft offense with sentence of one year in prison). He tried to reopen his criminal case to modify his sentence, but the county prosecutor refused. Despite the fact that this was Pablo's sole offense, that he had a long work history, and that his three minor U.S. citizen children rely on his financial support, Pablo was ordered deported by an immigration judge.*

Congress has long recognized that LPRs have special rights and protections in the United States. For these reasons, LPRs are subject to unique grounds of removal and – where such grounds are triggered – to unique forms of relief from removal that reflect their strong ties and contributions to the United States. Before 1996, Congress permitted LPRs with certain types of prior convictions to seek a waiver of removal if they met stringent residency requirements and they did not necessitate prolonged punishment by sentencing courts. The 1996 curtailment of this form of relief has resulted in the disproportionately harsh consequence of removal for thousands of long-time LPRs, permanently fragmenting immediate families and destabilizing communities.

> *Sonia is a lawful permanent resident who has been in the United States since 1977. She is the backbone and matriarch of a large extended family and community. A native of Belize, Sonia is a breast cancer survivor, the guardian and sole provider for her U.S. citizen grandson, and the mother of lawfully residing children. Sonia's daughter is mentally disabled and was deemed unfit to care for her son after he was born. Without notice, Sonia was placed in removal proceedings in 2010 because of a nearly 20-year-old criminal offense, which is the sole aberration in her otherwise spotless criminal record. She was convicted of possession with intent to deliver cannabis, but even the judge determined that "the penitentiary ... [would] be cruel and unusual punishment,"*

sentencing her instead to probation. Sonia is deeply ashamed of her conviction and has set out to be a model member of her family and community ever since. She was ordered removed in absentia in February 2011 and arrested in her home in June 2011 because of her outstanding order. Sonia has no immediate family in Belize and has not returned to the country in more than 17 years. She considers the United States to be her home. Sonia's request for prosecutorial discretion has been denied, and her removal proceedings are pending.

Time has demonstrated that the 1996 changes have led to unnecessarily harsh consequences for many families, and the uneven results of litigation have led to unfair retroactive consequences for decades-old offenses. Those old rules could be combined with new mechanisms, such as a period of testing or "probation," which would better achieve our national goals.

Conclusion

As Americans, we are defined by our values, especially respect for the rule of law and equality for all men and women, regardless of what we look like or where we came from. As such, access to attorneys and courts and a basic set of rules for how we're all treated in the justice system are central tenants of our country's values. Our current laws are badly broken, but disregarding our values is not the solution. This Committee has an opportunity to create an immigration system that honors due process protections and protects these beliefs for years to come. Any legislative reform must ensure due process protections and adopt proportionate punishments for individuals who violate immigration law.

I thank you for the opportunity to present this testimony on the urgent need to create an immigration system that respects our values as a nation. Should you have any questions, please feel free to contact me at mmccarthy@heartlandalliance.org or at 312.660.1351.

Statement of National Immigration Law Center

Senate Judiciary Committee

Hearing: Building an Immigration System Worthy of American Values

March 20, 2013

The National Immigration Law Center (NILC) is a nonpartisan organization exclusively dedicated to defending and advancing the rights of low-income immigrants and their families. We conduct policy analysis, advocacy, and impact litigation, as well as provide training, publications, and technical assistance for a broad range of groups throughout the U.S.

NILC is pleased to submit this statement to the U.S. Senate Committee on the Judiciary for the March 20, 2013 hearing entitled "Building an Immigration System Worthy of American Values." We applaud the Committee for conducting this important hearing about core constitutional values that should be reflected in our immigration system. Since 1979, NILC has defended the fundamental and constitutional rights of all Americans through advocacy and impact litigation. We know firsthand how low-income immigrants are harmed by our current immigration laws and policies that deny them basic due process protections. Below we outline some of the key deficiencies with current law that should be addressed in an immigration reform bill.

Removal Processes Do Not Comport with Due Process

Immigrants fighting to stay with their families do not have a fair day in court. This is most notable in DHS's use of reinstatement of removals. This provision was part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 which contained a number of overly punitive provisions. Under reinstatement, ICE can remove an individual without a hearing if he re-entered unlawfully after having been previously subject to an order or removal. This provision applies even to individuals who might qualify for relief based on a family relationship to a U.S. citizen or Legal Permanent Resident. In 2011, reinstatements accounted for 33% of

annual removals[1] indicating that these individuals did not have a hearing before an immigration judge before they were deported from the United States. We urge Congress to eliminate the use of reinstatements of removal in immigration reform legislation as they do not comport with our promise of a 'fair day in court' to all who are in the U.S.

Even individuals who receive a hearing in immigration court face severe challenges. The immigration adjudication system is purportedly a civil system, however it functions like the criminal justice system without many of the protections afforded those in criminal custody. Hundreds of thousands of individuals are subject to detention in jail-like conditions and deported away from their loved ones every year. Even the Supreme Court recognized in 2010 that that "the 'drastic measure' of deportation or removal... is now virtually inevitable for a vast number of noncitizens convicted of crimes."[2]

Notably, immigrants who want to fight their deportation do not present evidence to a jury, do not have the right to a speedy trial and do not have access to court-appointed counsel and, as a result, the majority are unrepresented. Thus it is all the more important that immigration judges when faced with petitioners with limited understanding of the law have the ability to wield discretion in their decision-making. Currently numerous provisions in the Immigration and Nationality Act limit the ability of the immigration judge to exercise discretion because they require mandatory detention and deportation or limit the judge's ability to waive bars to inadmissibility. We urge Congress to insert greater discretion into the administrative and judicial immigration system. A clear, broad uniform waiver provision would allow adjudicators to balance the equities and determine whether an individual merits relief.

Interior Enforcement

Since 2006 there has been an unprecedented increase in individuals who are sent to the Immigration and Customs Enforcement (ICE) agency from state and local jails due to interior enforcement programs. Ostensibly these people are labeled as criminals although the government's own data indicates that many of these individuals have

---

[1] DHS Office of Immigration Statistics. *Immigration Enforcement Actions: 2011*, available at http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement_ar_2011.pdf

[2] *Padilla v. Kentucky*, 130 S. Ct. at 1478.

been charged with low-level offenses and approximately 25% have no criminal charges whatsoever.[3] Secure Communities is the most recent and largest program and has targeted more than 1 million people as potentially deportable since it began in late 2008. This federal program is active in more than 90% of the jails nationwide and is projected to be in every jail and prison in the country by the end of 2013.[4]

Congress Should Affirm that Immigration Detainers Are Voluntary

Under Secure Communities fingerprints taken at local county jails are sent to the Department of Homeland Security (DHS) for an immigration check in addition to the usual criminal background checks with the FBI. For those individuals it believes to be deportable, the DHS then sends a request to local law enforcement to hold the individual for 48 hours until ICE officials can interview the person. There is much confusion amongst local law enforcement and other public officials whether these requests, also known as "detainers" are mandatory federal orders or voluntary requests. DHS issued new guidelines for local law enforcement in December 2012.[5] These guidelines ostensibly identify the categories of people who should be held for immigration authorities. Yet, the guidelines contain vague and broad categories of crimes as well as a list of immigration violations such as illegal entry that would continue to send low-level or non-criminals to federal authorities for detention and deportation

Numerous legal scholars have asserted that Constitutional prohibitions against commandeering state resources to further federal purposes dictate that detainers must be voluntary. Localities incur the cost of holding individuals for ICE and are subject to civil liability when they wrongfully imprison US citizens based on faulty information from federal authorities, which has been known to happen on numerous occasions. Additionally, many local law enforcement officers have worked hard to build trust with immigrant communities only to have it be eroded when they are

---

[3] U.S. Immigration and Customs Enforcement, *Nationwide IDENT/IAFIS Interoperability Report 2008-2012 available at* http://www.ice.gov/doclib/foia/sc-stats/nationwide_interoperability_stats-fy2012-to-date.pdf

[4] U.S. Immigration & Customs Enforcement, *Secure Communities*, ICE website, http://www.ice.gov/secure_communities/ (last visited March 19, 2013).

[5] Memorandum from John Morton, U.S. Immigration and Customs Enforcement Agency, *Civil Immigration Enforcement: Guidance on the Use of Detainers in the Federal, State, Local, and Tribal Criminal Justice Systems* (Dec. 2012) available at http://www.ice.gov/doclib/detention-reform/pdf/detainer-policy.pdf

perceived as immigration agents. Therefore, reform legislation should confirm that local jurisdictions and states should be able to exercise discretion when ICE sends a detainer request.

The Limited Role of State and Local Authorities in Immigration Enforcement

Immigration reform legislation should also reaffirm the limited role of state and local law enforcement in federal immigration enforcement. The Supreme Court in *Arizona v. U.S.* held that federal authority preempts states and localities which are attempting to regulate immigration. Specifically, the Court held that state and local governments cannot enact provisions which create additional penalties for federal immigration violations. Nor can state and local law enforcement make warrantless arrests for suspected immigration violations. Even where the Court allowed police to investigate immigration status, it stated that this inquiry could only occur in the course of a criminal investigation based on probable cause. Reform legislation should require the DHS and the Department of Justice to closely monitor arrest data from jurisdictions with state immigration laws or who are the subject of racial profiling allegations to ensure that police are not engaging in pre-textual arrests in order to investigate immigration status.

Congress should stop DHS from using Stipulated Removals

As greater pressure is placed on the immigration system from the large increases in immigration arrests due to programs like Secure Communities, the system has become increasingly dysfunctional. One example of this dysfunction is the rampant use of stipulated removals by immigration officers. As the name suggests, a stipulated removal occurs when immigrants facing deportation sign paperwork agreeing to a speedy deportation in exchange for not asserting their rights to a hearing in immigration court and agreeing to having a formal removal order entered against them. Individuals who are desperate to be released from immigration detention have been pressured to sign stipulated removals despite substantial ties to the U.S. that may have allowed them to adjust their status. A 2011 study reported that over 160,000 individuals have signed stipulated removals since the program was implemented.[6]

---

[6] Koh, Jennifer Lee, Jayashri Srikantiah, and Karen C. Tumlin. *Deportation Without Due Process: The US Has Used Its" stipulated Removal" Program to Deport More Than 160,000 Noncitizens Without Hearings Before Immigration Judges*. 2011.

NILC is currently working with a college student who had lived in the U.S. from the age of 13 till he was placed in immigration custody at the age of 20. While in custody, he was never even informed that he was signing a stipulated removal order, rather the immigration officer suggested that he was signing a document that would allow him to voluntarily depart and reapply for admission. Further, the individual's initials were forged on the stipulated removal order. These egregious actions indicate the lack of oversight and due process protections for immigrants who are subject to inordinate pressure to sign stipulated removal orders.[7] We urge Congress to limit DHS's authority to use stipulated removals and, at the very least, Congress should conduct oversight to ensure that DHS implements procedures so that individuals' rights are not being compromised by incentives to fill more detention bedspace.

The Aggravated Felony Provision Should Be Repealed

One of the more severe provisions in current law is the aggravated felony provision which requires mandatory detention and deportation. Aggravated felonies first came to being in the Anti-Drug Abuse Act (ADAA) of 1988 and were narrowly defined to include murder, arms trafficking and high-level drug trafficking.[8] However, subsequent pieces of legislation substantially expanded the definition of aggravated felonies so that currently many crimes that are neither felonies nor accompanied by aggravating criminal factors fall into the bucket of aggravated felonies. For example writing a bad check, jumping a subway turnstile, and pulling someone's hair (a battery in some states) have led to noncitizens being placed in deportation proceedings as aggravated felons.[9] Even those who have received suspended sentences or were convicted many years prior are subject to mandatory detention and deportation under the aggravated felony provision. We urge Congress to remove the aggravated felony provision or narrow it significantly to target those convicted of high-level violent crimes.

NILC appreciates the opportunity to provide a statement for the record and looks forward to engaging further as Congress considers reform that will help create a just and transparent immigration adjudication system.

---

[7] *Id.*

[8] Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690 § 7342, 102 Stat. 4181, 4469 (1988).

[9] Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1939-41 (2000).

Without Evidence of a Systemic Problem, Harmful Proposals Would Make Radical Changes that Undermine VAWA Protections for Immigrant Victims

Current System Saves Thousands of Lives Each Year; but Changes Will Jeopardize Victims and Empower Abusers

Opponents of VAWA's protections for immigrant survivors often cite unsubstantiated and seemingly isolated accounts of fraud, or ones that predate current fraud-prevention measures, to support proposals to restrict victims' access.[1] However, a recent government report by the Congressional Research Service (CRS), found empirical evidence for these assertions lacking.[2] In addition, as highlighted in the CRS report, the current system already has numerous gatekeepers, checkpoints, and roadblocks that immigrant survivors must pass in order to access VAWA protections.

In fact, if anything, advocates are concerned that the current requirements and process are already so stringent that they can deter battered immigrant women who would qualify for VAWA protections from applying in the first place, or prevent those with legitimate cases from having their applications approved.[3]

Increasing those barriers, as these latest harmful proposals do, would jeopardize immigrant victims and their children and empower abusers to block victims' access to justice and safety.

Why Special Protections for Immigrant Victims Are Necessary

Since its enactment in 1994, VAWA has always included vital protections for immigrant survivors of domestic violence and sexual assault. **Congress recognized that the abusers of immigrant victims often use their victims' lack of immigration status as a tool of abuse, leaving the victim afraid to seek services or report the abuse to law enforcement.** Congress sought to remedy that in VAWA to ensure that all victims have access to safety and protection and that all perpetrators can be held accountable.

VAWA "self-petitioning" was created in 1994 to assist victims married to abusive spouses who are U.S. citizen or lawful permanent residents and who use their control over the victims' immigration status as a tool of abuse (e.g., by failing to petition for them and thus intentionally leaving victims without legal status). In the 2000 reauthorization of VAWA, the U visa was created as a law enforcement tool, to encourage immigrant victims of certain serious crimes listed by statute (including domestic violence and sexual assault) to report those crimes and cooperate with police and prosecutors without fearing they could face deportation (e.g., if they had no legal status, or depended on the perpetrator for status). To be eligible for a U visa, victims must obtain a law enforcement certification demonstrating that they have assisted or are willing to assist in the investigation or prosecution of the crime. The 2005 VAWA reauthorization continued bipartisan support for all these protections.

The Current System Already Has Numerous Mechanisms to Ferret Out Fraud While Prioritizing Victim Safety

All VAWA self-petitions and U visa applications are handled by a centralized, specially trained expert unit of the U.S. Citizenship and Immigration Services (USCIS) (the "VAWA Unit" at the Vermont Service Center) – with expertise and specialized training not only in domestic violence dynamics and VAWA laws and regulations, but also in detecting and preventing fraud.[4] In addition:

- The VAWA self-petition application process requires supporting evidence that is carefully scrutinized to ensure that applications that are approved have clear merit.

Created by the Immigration Committee of the National Task Force to End Sexual and Domestic Violence.

For more information, please contact Grace Huang, Washington State Coalition Against Domestic Violence at Grace@wscadv.org; Rosie Hidalgo, Casa de Esperanza: National Latin@ Network for Healthy Families and Communities at rhidalgo@casadeesperanza.org; or Jeanne Smoot, Tahirih Justice Center at jeanne@tahirih.org.

- **VAWA Self-Petitions rank #1 for RFEs** (requests for further evidence). On average, RFEs are issued in 68% of VAWA self-petitions, compared with 19% for all types of petitions handled by USCIS.[5]

- **Approval rates for VAWA Self-Petitions are also relatively low – ranking 58th out of 73 different kinds of petitions handled by USCIS.**

    - **Over 25% of VAWA Self-Petitions, on average, are denied.**[6]

    - **The number of cases approved annually is small** – only 4,285 in FY 2011. VAWA self-petitions for abused family members of US citizens and permanent residents account for less than 1 percent of all family petitions approved by USCIS.[7]

    - **The VAWA self-petition is only the first step for an immigrant victim** – once approved, it provides only "deferred action" status. Before Lawful Permanent Resident (LPR) status (a "green card") is granted, current law requires that the victim has to have a face-to-face interview at the local USCIS office.[8]

The U visa application process also requires supporting evidence that is carefully scrutinized.

- To be eligible, a victim must demonstrate that she/he suffered "substantial injury" as a result of a limited list of serious crimes.

- A U visa can only be granted if a law enforcement officer (department head or authorized supervisor) or other investigative agency certifies that the victim is, has been, or will be helpful in the investigation or prosecution of the crime. This requirement acts as a built-in fraud prevention mechanism.

- As in VAWA self-petition cases, USCIS' VAWA Unit may request further evidence from the petitioner. USCIS may also reach out to the law enforcement agency for further information.[9]

- **The average denial rate for U visa applications is 22%.**[10] The total number of U visas that can be granted in a year is also subject to a maximum annual cap (currently 10,000).

- **There are also no government studies or reports indicating a problem with U visa fraud.**[11] Members of USCIS' Fraud Detection and National Security (FDNS) Directorate recently stated that they had not seen cases of benefit fraud using the U visa.[12]

---

[1] While some individuals' allegations regarding fraudulent claims in their specific case may prove true, still, they tell us little about whether there is any systemic problem, nor whether the current system is best positioned to defend against such attempts while also protecting victim safety. Additionally, at least one often-cited case (see testimony of Julie Poner, Senate Judiciary Hearing on VAWA (July 13, 2011)) was from 1997-98.The specialized USCIS VAWA Unit was not fully operational until 1998 and its expertise in adjudicating VAWA self-petitions and detecting fraudulent cases has grown significantly since then.

More importantly, when the changes being proposed compromise victim safety, it is especially critical to question the motivations of the advocacy organizations that so loudly demand them. For example, "SAVE" has been shown to be linked to a mail order bride company found in federal court to have engaged in egregious practices. See "Mail Order Bride Company President Lobbying To Weaken Protections For Abused Immigrants", http://www.huffingtonpost.com/2012/05/08/violence-against-women-act_n_1500693.html.

[2] *See* Congressional Research Service report, "Immigration Provisions of the Violence Against Women Act (VAWA)", by William Kandel, June 7, 2012 (hereafter CRS Report), 2nd page of summary ,which states, "While some suggest that VAWA provides opportunities for dishonest and enterprising foreign nationals to circumvent U.S. immigration laws, empirical evidence offers minimal support for these assertions."

[3] *See* CRS Report, p. 6.

[4] *See* USCIS, Department of Homeland Security , "Report on the Operations of the Violence Against Women Act Unit at the USCIS Vermont Service Center," October 22, 2010, at p. 3 ("Consolidation of VAWA petition adjudications in the VSC [Vermont Service Center] was intended, among other things, to prevent fraud by assigning adjudication of specialists in domestic violence cases who could efficiently discern fraudulent petitions, fairly adjudicate legitimate petitions, and protect victims from accidental violations of confidentiality."), available at: http://www.uscis.gov/USCIS/Resources/Resources%20for%20Congress/Congressional%20Reports/vawa-vermont-service-center.pdf *See also* CRS report, p. 8 fn 48.

[5] *Id.*, pp. 4-5. RFEs are issued by the specialized adjudicators at the USCIS VAWA Unit if the information submitted with an application is incomplete or inconsistent. While RFE rates as such "measure neither fraud nor fraud prevention" (*see* CRS Report, p.5), they do speak to the high degree of diligence and vigilance that the VAWA Unit exercises in adjudicating petitions.

[6] The average approval rate for VAWA Self-Petitions is only 74%, compared with 88% for all petition types. *See* CRS Report, p. 4.

[7] In FY 2011, only 4,285 VAWA self-petitions for abused family members of US citizens and permanent residents were approved, compared to 509,020 other family-based petitions that were approved. Statistics for I-129F (fiancé petitions) and family petitions (immediate relatives) were combined to reach the number 509, 020. USCIS Servicewide Receipts and Approvals for All Form Types, FY2011 (November 8, 2011).

[8] HR 4970 seeks to add another interview requirement at the USCIS local office at the outset of the VAWA self-petition process. This would be duplicative, lead to increased adjudication costs, and delay the ability of victims to safely leave their abusive spouse-sponsors.

[9] U Visa Law Enforcement Certification Resource Guide for Federal, State, Local, Tribal, and Territorial Law Enforcement, Department of Homeland Security, p. 15.

[10] See U.S. Citizenship and Immigration Services Form I-914 Applications for T Nonimmigrant Status and Form I-918 Petitions for U Nonimmigrant Status Visa, Service-wide Receipts, Approvals and Denials, Report of August 8, 2012, available at: http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I914T_I918U-jun-visastatistics.pdf.

[11] *See* Violence Against Women Reauthorization Act of 2011, S. 1925, 112th Congress, Report 112- (March 12, 2012), Senate Committee on the Judiciary p. 13, fn. 30 (noting that the minority *"cite no case or study – not even a single allegation – where a U visa was obtained fraudulently."* [emphasis added].")

[12] *See* CRS Report, p. 12 fn 72.

Statement Submitted by 194 Immigrant and Victim Advocacy Organizations

Hearing of the Senate Judiciary Committee, March 20, 2013:
"Building an Immigration System Worthy of American Values"

March 20, 2013

We, the undersigned 194 national, regional, state and local organizations that assist and advocate on behalf of immigrant survivors of domestic violence, sexual assault, and human trafficking in the United States, as well as refugee and immigrant women fleeing violence in other countries and seeking safe haven in the United States, write in support of the Senate Judiciary Committee's focus in Monday's hearing on concerns of women and families in comprehensive immigration reform (CIR) and in today's hearing on reflecting American values through our immigration system, and we urge particular attention to key issues of vital concern to the courageous survivors we represent. At this moment, Congress has a unique opportunity to enact meaningful reforms to a broken immigration system and provide essential protections for those immigrants who are most vulnerable. Indeed, many immigrants find themselves in abusive or exploitative situations in their homes and workplaces due to their lack of immigration status. Abusive partners, opportunistic predators, and manipulative employers often exploit a victim's lack of immigration status, or dependent immigration status, as a way to maintain power and control and to keep victims silent. While immigration remedies provided under the Violence Against Women Act (VAWA), the Trafficking Victims Protection Act, and US asylum laws may help some, clarifying and strengthening these forms of protection so that no survivor falls through the cracks is urgently needed. Additionally, comprehensive immigration reform is needed to help prevent this vulnerability to abuse and exploitation in the first place. Reforms are also imperative to enable the United States to live up to its domestic and international protection obligations, and to reassert our country's leadership globally as a nation of compassionate, well-reasoned, and above all, just, laws.

As advocacy organizations and victim services providers, we believe that any comprehensive immigration reform effort must be particularly mindful of the needs of survivors of domestic violence, sexual assault, human trafficking and other gender-based human rights abuses. There continue to be obstacles and barriers to access immigration relief and other protections and assistance for immigrant survivors that we urge Congress to address through comprehensive immigration reform, most notably through expanding opportunities for law enforcement to enlist help from immigrant victims of crimes, supporting immigrant survivors in their efforts to achieve self-sufficiency, clarifying the availability of asylum protection for those who flee gender-based persecution, and ensuring that immigration enforcement reforms do not impede the access of survivors of violence to life-saving protections. Increased attention to preventing violence and exploitation is also needed, including greater access to vital information about rights and resources for all immigrants, as well as greater regulation of foreign labor recruiters and other systems responsible for labor migration.

We preview below just a few of the important priorities for refugee and immigrant women facing violence that we urge the Senate Judiciary Committee to take up in the context of comprehensive immigration reform, and look forward to working further with you to address additional acute concerns:

1. Enhancing Law Enforcement's Ability to Enlist Help from Crime Victims.

For the third year in a row, 10,000 crime victims and their children have received U visas, exhausting the annual cap (set by Congress in 2000) before the end of the fiscal year.[1] Tens of thousands of law enforcement officials across the country in the years since the U visa was established have been helped by noncitizen victims of crimes who bravely came out of the shadows to report crimes and assist in investigations and prosecutions, helping enhance victim and community safety and hold all perpetrators accountable. These victims have risked brutal retaliation from abusers and perpetrators, but have been reassured by the U visa that they at least might be protected from deportation. USCIS Director Alejandro Mayorkas has stated that, "the U-visa is an important tool aiding law enforcement to bring criminals to justice. At the same time, we are able to provide immigration protection to victims of crime and their families. Both benefits are in the interest of the public we serve."[2]

The U visa and T visa (for victims of trafficking) are essential tools for combating crime and improving community outreach and policing, getting perpetrators off the streets and making not only the immigrant victims upon whom they prey, but also the whole community, safer.[3] For this reason, Congress should strengthen the U and T visa programs through comprehensive immigration reform, empowering more victims to come forward by encouraging law enforcement in their use of T and U visa certifications and expanding the number of U visas available on an annual basis. More visas are needed, precisely because the program is working as intended, to encourage immigrant help-seeking and crime-reporting, and perpetrator-accountability. In the T-visa context, too few visas are being granted to this vulnerable population, and Congress needs to look seriously at reforming the T-visa application system to ensure that trafficking survivors are able to access and receive this important form of relief.[4]

2. Supporting Survivors' Self-Sufficiency; Removing Dependence on Abusers and Other Vulnerabilities to Further Victimization

Currently, survivors of domestic violence, sexual assault and human trafficking are experiencing significant delays in the processing of their VAWA, U visa and T visa applications. For example, it can take upwards of 15-18 months for U.S. Citizenship and Immigration Services (USCIS) to adjudicate a VAWA self-petition.[5] Such long waits for the adjudication of their cases, coupled with other debilitating constraints (a lack of access to work authorization or other financial supports, and lack of adequate access to public assistance, including public housing) can be devastating to survivors who face dire personal and economic hardship, and may possibly place them in the unconscionable position of having to return to violent homes. In fact, domestic violence is a leading cause of homelessness for women, as abusers are often the ones in control of financial resources.[6] This issue is compounded for immigrant survivors who may not be eligible for financial supports or other resources

[1] On August 21, 2012, USCIS recently announced that the agency approved the statutory maximum of 10,000 petitions for U nonimmigrant status. USCIS. Press Release. USCIS Reaches Milestone for Third Straight Year: 10,000 U Visas Approved in Fiscal Year 2012, available at http://www.uscis.gov/news

[2] *Id.*

[3] USCIS. "Information for Law Enforcement Officials-Immigration Relief for Victims of Trafficking and other Individuals" available at: http://www.uscis.gov/USCIS/Resources/Humanitarian Based Benefits and Resources/TU_QAforLawEnforcement.pdf

[4] For example in 2011, USCIS granted 557 T-visas were granted to survivors although 5,000 are available annually. *See* 2012 U.S. Department of State Trafficking in Persons Report, pg 362, available at: http://www.state.gov/documents/organization/192598.pdf

[5] The processing time listed on USCIS website for I-360 VAWA self-petition at the Vermont Service Center is June 5, 2011, over a 1.5 year wait for adjudication of the application. https://egov.uscis.gov/cris/processTimesDisplayInit.do. Advocates among the signatories to this letter report VAWA self-petitions filed as early as December 2010 that are still pending.

[6] Futures without Violence. "The Facts on Housing and Violence," available at: http://www.futureswithoutviolence.org/userfiles/file/Children_and_Families/facts_housing_dv.pdf

to assist them and are economically dependent on abusers if they are ineligible for work authorization because of their lack of immigration status.

The profound ripple effects of processing delays and the inability to achieve self-sufficiency or access social safety-net supports can subject victims of crime to additional risks of violence, exploitation, and manipulation, including the loss of custody of their children,

For this reason, we urge Congress to address the lack of access to work authorization and other financial supports for VAWA, U and T visa applicants whose applications may be pending for a year or longer, and to remove other barriers to accessing critical resources to enable battered immigrants to escape violent homes.

3. Protection for Survivors of Gender-Based Violence Seeking Refuge in the United States

The availability of asylum in the United States for women fleeing gender-based persecution – such fundamental human rights abuses as domestic violence (severe, sustained and unaddressed by the authorities in their home countries), rape (including as a weapon of war), human trafficking, female genital mutilation, "honor" crimes, and forced marriage – urgently needs to be affirmed and the legal standards clarified. Women fleeing such human rights violations should have access to refugee protection.

Without clarity around gender-based asylum, women and girls around the country face inconsistent and adverse decisions on their applications, or lengthy adjudication delays and appeals – in fact, some of the women and their children whose very lives hang in the balance of the critical clarity we urgently seek have been left in limbo *for well over a decade.* Women and girls seeking asylum have often rejected cultural norms or practices (such as female genital mutilation or forced marriage) that make them unable to access help from their own families and communities, isolating them from the most common support and guidance systems available to other refugees or immigrants seeking protection in the United States and making their survival during prolonged adjudications that much more difficult and dangerous. Immigration reform must address this long-languishing field of law and ensure obstacles are removed to give women and girls the meaningful ability to access protection.

4. Survivors and Enforcement Efforts

We urge Congress to reject enforcement-related proposals that would create new obstacles, or exacerbate existing hurdles, for survivors of domestic violence, sexual assault, human trafficking and other violent abuses. Without adequate protections and supports for victims of crime, there will be a "chilling effect" on survivors, preventing them from accessing protections to keep themselves and their families safe and to seek justice for crimes committed against them.

Conclusion

We strongly support the Senate Judiciary Committee's efforts to seek comprehensive immigration reform, and urge you to prioritize the need to protect immigrant women and their families from violence and exploitation.

SIGNED

National Coalitions and Organizations

9to5
Advocates for Youth
America's Voice Education Fund
American Association of University Women (AAUW)
Americans for Immigrant Justice
Asian Pacific Islander Institute on Domestic Violence
ASISTA Immigration Assistance
Break the Cycle
Breakthrough
Casa de Esperanza: National Latin@ Network for Healthy Families and Communities
Center for Gender and Refugee Studies
Center for Women Policy Studies
Centro de los Derechos del Migrante, Inc.
Coalition to Abolish Slavery and Trafficking
Domestic Abuse Intervention Programs
FaithTrust Institute
First Focus
Forward Together
Futures Without Violence
Immigration Equality Action Fund
Institute for Science and Human Values
Institute on Domestic Violence in the African American Community
Jewish Women International
Kids In Needs of Defense (KIND)
League of United Latin American Citizens (LULAC)
Legal Momentum
Media Equity Collaborative
Mil Mujeres
National Alliance to End Sexual Violence
National Association of Commissions for Women
National Center for Victims of Crime
National Clearinghouse for the Defense of Battered Women
National Coalition Against Domestic Violence
National Coalition of Anti-Violence Programs
National Congress of Black Women, Inc.
National Council of Jewish Women
National Council of Women's Organizations
National Gay and Lesbian Task Force Action Fund
National Immigrant Justice Center
National Latina Institute for Reproductive Health
National Legal Aid and Defender Association
National Network to End Domestic Violence
National Organization for Women
National Organization of API Ending Sexual Violence
National Resource Center on Domestic Violence

National Task Force to End Sexual and Domestic Violence
OneAmerica
Raising Women's Voices for the Health Care We Need
Tahirih Justice Center
The Advocates for Human Rights
U.S. Committee for Refugees and Immigrants
UltraViolet
Union for Reform Judaism
United Methodist Women
V-Day
Women of Color Network
Women of Reform Judaism
Women's Refugee Commission
YWCA USA

Regional Organizations

Asian Pacific Islander Legal Outreach
East Bay Sanctuary Covenant
I AMCHOICE
Kansas City Anti-Violence Project
Lutheran Social Services of New England
Lydia's House
Massachusetts Immigrant and Refugee Advocacy Coalition
Pisgah Legal Services- Mountain Violence Prevention Project
Southern Poverty Law Center
Turning Anger into Change
Women's Law Project

State Organizations

ACCESS Women's Health Justice
Advocates for Women
Arizona Coalition Against Domestic Violence
Arkansas Coalition Against Sexual Assault
Arkansas National Organization for Women
Asian/Pacific Islander Domestic Violence Resource Project
California National Organization for Women
California Partnership to End Domestic Violence
Colorado Coalition Against Sexual Assault
Connecticut Sexual Assault Crisis Services
Consejo- Mi Casa Transitional Housing Program
Connecticut Coalition Against Domestic Violence
Delaware Coalition Against Domestic Violence
Delaware Department of Justice
Florida Council Against Sexual Violence
Hawaii State Coalition Against Domestic Violence
Idaho Coalition Against Sexual & Domestic Violence
Illinois Coalition Against Domestic Violence
Illinois Coalition Against Sexual Assault
Illinois National Organization for Women

Immigration Center for Women and Children
Iowa Coalition Against Sexual Assault
Justice For Our Neighbors - Nebraska
Kansas Coalition Against Sexual and Domestic Violence
Kathlynne Ramirez, Esq. LLC
Kentucky Coalition for Immigrant and Refugee Rights
Kentucky Domestic Violence Association
La Esperanza Health Counseling Services
Latinas Unidas por un Nuevo Amanecer (L.U.N.A.)
Maryland National Organization for Women
Michigan National Organization for Women
MMG Law, Wisconsin
Maryland Network Against Domestic Violence
Monsoon United Asian Women of Iowa
Montana National Organization for Women
Network for Victim Recovery of DC
Nevada Network Against Domestic Violence
New Jersey Coalition Against Sexual Assault
New York State Coalition Against Sexual Assault
Nisaa African Women's Program
No More Deaths
North Carolina Coalition Against Sexual Assault
Ohio Domestic Violence Network
Ohio National Organization for Women
Project S.A.R.A.H.
Rhode Island Coalition Against Domestic Violence
South Carolina Victim Assistance Network
Students Working for Equal Rights
The Texas Council on Family Violence
UNIDOS Against Domestic Violence
Vermont Network Against Domestic and Sexual Violence
Virginia National Organization for Women
Virginia Poverty Law Center
Virginia Sexual and Domestic Violence Action Alliance (VSDVAA)
Washington Coalition of Sexual Assault Programs
Washington Defender Association's Immigration Project
Washington State Coalition Against Domestic Violence
WEAVER
West Virginia Foundation for Rape Information and Services
Wisconsin Coalition Against Domestic Violence
Women Watch Afrika, Inc.
Women's Law Center of Maryland
Worker Justice Center of New York
Wyoming Coalition Against DV/SA

Local Organizations

African Services Committee
Alexandra House, Inc.
Alternatives to Domestic Violence

Anna Marie's Alliance
Bluff Country Family Resources, Inc.
Capstone Counseling Center
Casa de Esperanza
Catholic Charities on North East Kansas
Community Solutions
Crisis Intervention Center
Dady & Hoffmann LLC
Domestic Abuse Project
Durham Immigrant Solidarity Committee
East End National Organization for Women
Enlace Comunicario
Family Counseling Center of St. Paul's
Family Crisis Center, Inc.
Family Service Madison
First Pittsburgh Chapter, National Organization for Women
Freeborn County Crime Victims Crisis Center
GaDuGi SafeCenter
Human Rights Initiative of North Texas
Just Neighbors
Lakes Crisis and Resource Center
Liberal Area Rape Crisis and Domestic Violence
Montgomery County Commission for Women
Mosaic Family Services
MUJER
My Sister's House
National Asian Pacific American Women's Forum-DC Chapter
New York City Gay and Lesbian Anti-Violence Project
Ni-Ta-Nee National Organization for Women
North Dallas Chapter of National Organization for Women
Northern Manhattan Improvement Corporation
Options: Domestic and Sexual Violence Services
Pauli Murray Project
Palm Beach County National Organization for Women
Public Counsel
SAFEHOME
SafeHouse Center
SCSU Women's Center
SEPA Mujer Inc
Services, Immigrant Rights and Education Network
Sexual Assault Recovery Program
Sojourner House
Squirrel Hill National Organization for Women
The Aurora Center
The Nurtured Parent Support Group for Survivors of Domestic Abuse Tri-City Community Action Program, Inc.
Victim Resource Center of the Finger Lakes, Inc.
Violence Intervention Program
Voices Against Violence
Washtenaw Interfaith Coalition for Immigrant Rights

Waypoint
Wild Iris
WOMAN Inc
Women's Resource Center, Pennsylvania
Womenspace
YWCA Domestic Violence Shelter and Sexual Assault Program, Iowa
YWCA of Binghamton and Broome County, New York

This statement was prepared by a national committee of leading experts on existing protections – and protection gaps – in US laws affecting refugee and immigrant women survivors of domestic violence, sexual assault, human trafficking, and gender-based persecution, including ASISTA Immigration Assistance, Casa de Esperanza: National Latin@ Network for Healthy Families and Communities, The Center for Gender and Refugee Studies, The Coalition to Abolish Slavery and Trafficking (CAST), National Immigrant Justice Center, National Immigration Project of the National Lawyers Guild, Tahirih Justice Center and the Washington State Coalition Against Domestic Violence.

For more information, please contact Cecelia Levin with ASISTA Immigration Assistance at cecelia@asistahelp.org or Jeanne Smoot with the Tahirih Justice Center at jeanne@tahirih.org.

DUE PROCESS CHALLENGES FACED BY UNDOCUMENTED IMMIGRANTS: AN IMMIGRATION ATTORNEY'S PERSPECTIVE

Submitted to

U.S. Senate Judiciary Committee

Submitted by

Pamela A. Stampp, Esquire

Managing Immigration Attorney with

The Castro Firm, Inc.

March 20, 2013

1719 Delaware Avenue, Wilmington, DE 19806

Chairman Leahy, Ranking Member Grassley, presiding Senator Coons and Committee members, it is a privilege to share with you today, some concerns regarding the due process challenges faced by many undocumented immigrants who try to navigate their way through our complex immigration system. I currently manage the immigration law area of practice at The Castro Firm, Inc., in Delaware and, because of our firm's commitment to and close involvement with the community, I have had the opportunity of assisting many undocumented immigrants both directly and through the conducting of seminars and workshops throughout the state. We also collaborate with and conduct training sessions for the staff of dedicated non-profit community service providers such as the Latin American Community Center and the Delaware Alliance for Community Advancement, to assist this sector of our population.

As an immigrant myself, while I did not have to contend with the issues arising from being undocumented, I fully recognized the necessity of having expert legal advice to guide me through the process. The need for representation by Counsel is even more important in the case of an individual placed in removal proceedings.

NEED FOR COUNSEL:

According to one recent study,[1] approximately 60 percent of immigrants placed in removal proceedings are unrepresented by immigration counsel. Despite the sterling efforts of organizations such as The American Immigration Lawyers Association (AILA) to provide pro bono assistance to many, there is a clear need for a framework to provide greater access to counsel for persons in proceedings. We are already confronted with an immigration court system unable to keep up with the ever increasing case load. By the summer of 2012, the backlog had increased to 322,681 cases pending, an increase of 23 percent over the preceding 2 year period.[2]

Court administrative time and, consequently, cost increases, when immigration judges are required to spend additional time guiding pro se respondents' through proceedings or grant multiple continuances to afford them every opportunity to obtain representation by counsel. But even with the additional time taken by the immigration judge, it should never be forgotten that his/her role is not to represent the respondent, which can only be effectively accomplished through access to counsel. It is the role of counsel to ensure that all forms of available relief have been adequately explored, that all issues for proper consideration have been brought to the attention of the court and that the law

[1] National Immigration Justice Center, "Isolated in Detention: Limited Access to Legal Counsel in Immigration Detention Facilities Jeopardizes a Fair Day in Court (Sept. 2010), 4, 8 available at: http://www.immigrantjustice.org/policy-resources/isolatedindetention/intro.html

[2] TRAC Immigration, "Latest Immigration Court Numbers, as of August 2012." (Sept. 13, 2012), available at http://trac.syr.edu/immigration/reports/latest_immcourt/#backlog

has been correctly applied to the facts and circumstances of the particular respondent. The greater the access to counsel, the less the likelihood of exploitation of undocumented immigrants by "notarios" and "immigration consultants".

When the person facing removal proceedings is from one of the more vulnerable groups, such as juveniles, VAWA, U visa or asylum candidates, or persons with mental disabilities, the need for court-appointed counsel to ensure the interests of justice are served, is even more pressing.

A framework needs to be established to ensure that these vulnerable groups are identified at the earliest opportunity and provided with representation by counsel in their immigration matter. As an example, an undocumented immigrant was in an abusive relationship for a number of years during which she suffered from repeated acts of domestic violence. Having acquired only an elementary level education and been repeatedly warned by her abuser that if she told anyone, she would be deported, her situation only came to light when an act of physical violence against her in a public parking lot was observed by a patrolling police officer. The offender was charged and a Protection from Abuse (PFA) order was issued by the court, but with the absconding of the offender, the issue has not yet reached to trial. Had a friend not recommended that she contact our firm for assistance, she likely would never have learned of the possibility of a U visa application being filed on her behalf. Especially for persons in such vulnerable situations, counsel is necessary to ensure that the legal help needed will be provided.

CUSTODY DETERMINATIONS and MANDATORY DETENTION:

The fact that any removable non-citizen can be detained and that many removable non-citizens do not have access to prompt bond hearings defies the fundamental tenets of due process. Indeed, if the basis for removal falls within certain categories, these persons may be subject to mandatory custody or detention, although some of the offenses which trigger such mandatory custody or detention may be relatively minor or may have occurred many years before.

Everyone placed in removal proceedings should have prompt access to a bond hearing, with the immigration judge having full discretionary authority to make a determination based on all factors relevant to the grant of release on bond, such as flight risk, the respondents' ties to the community and the likelihood that he will pose a threat to the community, or the interests of national security. The mere existence of a past criminal record, especially where the individual has served his sentence, taken concrete steps towards rehabilitation and has demonstrated a proper civic attitude for many years since his prior criminal encounter, should not by itself subject such individual to mandatory detention. Immigration and Customs Enforcement (ICE) data for

2009 reflects that 66 percent of detained immigrants were subject to mandatory detention whereas only 11 percent had committed violent crimes for which they had previously completed their sentence.

With the increasing costs to taxpayers for immigration detentions, the bond redetermination process should be clarified to give immigration officers and judges the authority in all cases to consider alternatives to detention for individuals who are vulnerable or pose little risk to communities and to consider in each case whether continued custodial detention is necessary and lawful.

I am reminded of the case of one immigrant, who arrived in the US in 1999 on a temporary visa, to seek care for his ailing wife, but later fell out of status. In 2001, he started a business in order to support himself and his family. He made sure that this business was duly licensed and insured and paid taxes for every year it was operating. By 2011, he had acquired two residential properties, was able to provide employment for two additional persons, was the sole financial supporter for his 7 year old US citizen son and had taxable earnings of over $100,000.00 for the tax year 2010. He was also acknowledged as providing significant support for certain community programs. In 2011, he was detained and placed in removal proceedings.

When he was detained, no bond application was entertained, until a bond redetermination hearing was requested in immigration court. Bond was granted by the immigration judge, but only after he had spent 10 days incarcerated. For the sole operator of a small business, this is detrimental. Not to be overlooked also, is the fact that this cost to the taxpayer of approximately $112.00 to $164.00 per day (using the average per bed day cost of immigrant incarceration)[3], could have been avoided if a clearly defined standard was established which would require DHS and immigration courts to place immigrants in the least restrictive setting and only impose institutional detention when concerns as to public safety and flight risk clearly mandate.

Unnecessary incarceration also creates hardship for the US citizen relatives of the detained immigrant. For example, those residing in southern Delaware (Sussex County), who wish to visit a detained family member at the closest facility in York P.A., must travel approximately four hours each way. Added to the strain is the fact that a detained immigrant may be relocated to any other detention facility at will, based on what might be described as "operational expediencies". Both the family and counsel representing the detained immigrant must now face the additional challenge of locating and maintaining communication with the immigrant. In practical terms, it would in many instances be virtually impossible for counsel to provide effective representation for a client who has been transferred, perhaps as far as Texas.

[3] *The Math of Immigration Detention* (Aug. 2012), 2, available at http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf.

JUDICIAL DISCRETION:

In conjunction with the need for adjustments to the bond redetermination and mandatory custody and detention policies, immigration judges should be afforded broader discretionary powers to review the facts and arguments presented by both sides and to grant relief based on the merits. In 2011 ICE issued guidance on the exercise of prosecutorial discretion. This policy, while promising on paper, has not been implemented effectively by ICE or Customs and Border Protection (CBP), as evidenced by the small percentage of cases which have been reviewed for prosecutorial discretion that have been administratively closed thus far, and the continued denial of many apparently sympathetic cases.

The prosecutorial discretion policy vests power solely in the hands of DHS who are in reality the adverse party in immigration proceedings. Does this not amount to giving them the power as final arbiter? The ability of an immigration judge to exercise judicial discretion in such circumstances and arrive at a decision on the merits would go a long way towards ensuring the interests of justice are served.

I revert to my example from the prior section regarding the business owner detained in 2011, who, having secured bond, must now establish a form of relief which would allow him to remain in the US. Regrettably, the assistance available to him was either Prosecutorial Discretion or Voluntary Departure. In the face of refusal by DHS to consider Prosecutorial Discretion and in the absence of any authority on the part of the immigration judge to exercise judicial review of such determination, he was given limited time to put his business affairs in order and depart.

How has our community benefitted from his departure? He sold his business assets and homes at a loss to ensure he could settle all outstanding obligations, while two persons were left without employment. The state has also been deprived of the taxes/ revenue previously generated by this business. Added to this, is the fact that his US citizen son has now been left without a source of financial support.

FOIA / DISCOVERY PROCESS:

Many immigration clients are unable to provide a clear, comprehensive and accurate record of their immigration history, despite the assistance of counsel. This may be as a result of the fact that they were young when they entered the country, or were simply not sure of the nature of their encounter with CBP / ICE, such as whether or not they were ordered removed. In order for me to better advise my clients as to their options, such as whether or not they may have an available form of relief, I must carefully consider their immigration as well as criminal history.

The current mechanism for determining past immigration history, is a FOIA request. This process has become time consuming because of the lengthy delays in receiving the requested information. Even where the more expedited format is adopted because the immigrant is in removal proceedings, this process can still take months.

This would be alleviated if there was an established procedure for ensuring that counsel representing an immigrant has access to the immigration and criminal records in the possession of DHS, in the fashion of the normal adverse party discovery process. This would have the advantage of providing counsel for the immigrant with adequate details of all issues which are likely to be raised and allow for timely preparation to address these and potentially reduce the judicial administrative time in the disposition of that case.

CONCLUSION:

There are numerous policy determinations which must be made in the course of structuring comprehensive immigration reform. However, if we truly desire to build an immigration system worthy of American values, the due process issues outlined herein, represent some of the ways in which the system could be improved, while ensuring the interests of justice are served, the costs to the taxpayer are reduced and, the efficiency of the administration of justice are enhanced.

Testimony to the Committee on the Judiciary

United States Senate

Wednesday, March 20, 2013

Testimony of Jan C. Ting[1]

Mr. Chairman and Committee Members: Thank you for your invitation to offer testimony on our shared goal of "Building an Immigration System Worthy of American Values."

I was privileged to serve as Assistant Commissioner at the Immigration and Naturalization Service from 1990 to 1993 when it was an agency of the U.S. Department of Justice. Since my return to Temple University in 1993, I have studied, taught, lectured and written about our immigration system, its laws, problems and challenges.

Both of my parents were immigrants, and many of their friends and neighbors, the parents of the children with whom I grew up, were also immigrants. So I start out with tremendous respect and admiration for immigrants and their enormous and undeniable contributions to America.

All Americans are either immigrants themselves or descendants of ancestors who came here from somewhere else, and I'm told that includes Native Americans. America has a great immigrant tradition and history. Of course, we should all respect and admire immigrants. But that's not the question.

The question is: how many? More specifically, the question is should we enforce a numerical limit on immigration to the U.S., or alternatively, should we allow unlimited immigration into the U.S., as we did for the first century of the republic?

This is a binary choice: an enforced limit or no limits. I believe our failure and inability to clearly choose between these two alternatives is at the root of our

---

[1] Professor of Law, Temple University Beasley School of Law; B.A. Oberlin College, 1970. M.A. University of Hawaii, 1972. J.D. Harvard Law School, 1975. Former Assistant Commissioner (1990-1993), Immigration and Naturalization Service, U.S. Department of Justice.

dilemma over immigration policy. We keep searching for a third way, but there isn't one. We have to choose.

****

Like many lawyers, I like to think I can argue both sides of any question. I respect those who openly advocate for unlimited immigration to the U.S. for all who are neither criminals nor national security threats. Open borders is an intellectually coherent and defensible position. Many different arguments can be made in defense of allowing unlimited immigration including philosophical, religious, historical, utilitarian, libertarian, and social justice.

But it is neither intellectually coherent nor defensible to argue that we need to retain legal limits on immigration, but we don't have to enforce them, and we can instead periodically amnesty immigration law violators whenever they attain a sufficiently large number. That makes no sense. If we're going to allow unlimited immigration anyway, why bother with the expensive window dressing of immigration enforcement? Let's transfer responsibility and funding for apprehension of immigrant criminals and national security threats to the FBI.

The current U.S. immigration system provides a complicated formula for determining the legal limit on immigration to the U.S. It is the most generous legal immigration system in the world, providing each year more green cards for legal permanent residence with a clear path to full citizenship than all the rest of the nations of the world combined. It is an immigration system worthy of American values. In a typical year we admit around a million legal immigrants in various categories.

But to enforce the numerical limitation, U.S. immigration law also provides that immigration violators can be removed from the U.S. after being found to be either inadmissible or deportable. The enforcement provisions of U.S. immigration law are essential to maintaining the statutory numerical limit on legal immigration.

Now we are constantly being told that our immigration system is broken, the main evidence for which is the presence of at least 11 million illegal immigrants living among us without legal right to do so. But there are many causes for this evident failure in our immigration system, including an ineffective employer

sanctions system adopted in 1986, the mistaken belief that the 1986 amnesty would "solve" our illegal immigration problem instead of attracting more illegal immigrants, and ineffective management and political interference in our immigration enforcement system.

Illegal immigrants make a rational choice when they deliberately choose to violate our immigration laws. A former colleague at Temple University used to observe correctly that, "The poor people of the world may be poor, but they are not stupid. They are as capable of doing multi-functional cost-benefit analysis to determine their own self-interest as anyone in this room. And they do it all the time."

Those considering illegal immigration to the U.S. weigh the costs, like the risks of getting caught, against the benefits of a better life in the U.S. If we want more illegal immigration, we should lower the costs, through discretionary prosecution of violators, and increase the benefits, through amnesty for immigration violators. Conversely, if we want to reduce the number of illegal immigrants, we have to increase the costs, through more effective enforcement, and lower the benefits through more certain removal from the U.S.

Border enforcement alone will never be sufficient to enforce a numerical limit on immigration. Would-be violators have to be deterred from making the attempt through clear understanding that costs outweigh the benefits of violating U.S. immigration law.

****

Why should we enforce a numerical limit on immigration? The first answer is population growth.

The Pew Research Center has estimated that the U.S. population will grow to 438 million by 2050, up from 296 million in 2005, and increase of 142 million in only 45 years.[2] Where are we going to put another 142 million people?

Where will they drive and park their cars? How much more highway pavement will they require? How much more land for housing? How much more

[2] http://www.pewsocialtrends.org/2008/02/11/us-population-projections-2005-2050/

fossil fuel will they burn to heat and air-condition their homes? How will we provide good jobs, education and health care for the additional population when we are struggling to provide the minimum requirements for the current population? How will another 142 million people affect the environment and climate change and the availability of clean water and air?

Are these questions we should be asking? Or are these questions we can afford to ignore? Should we be trying to slow the growth of the U.S. population, or should we allow population growth without limit and without regard to cost?

Another study by the Pew Research Center reports that the birthrate in the U.S. has now fallen to 1.9 children per U.S. woman, which is below the 2.1 children per U.S. woman required to maintain the U.S. population.[3] But how can the U.S. population be projected to experience rapid future growth at the same time that the birthrate has fallen below the replacement level?

The answer is immigration. The first Pew report makes clear that fully 82% of the 142 million population growth projected between 2005 and 2050 will be attributable to immigrants entering during that time period and their descendents.[4] And that's without an amnesty which will accelerate immigration and population growth.

****

The historical precedent for open immigration is no longer applicable. The frontier is long gone, and the country is fully settled and populated. We live in a world where both communication and travel are easier and cheaper than at any time in the past, increasing the demand for immigration. And we live in a world where foreign terrorism is a constant threat, which could be reduced by limiting immigration and the size of the "haystack" in which we have to search for "needles".

---

[3] http://articles.washingtonpost.com/2012-11-29/local/35585758_1_birthrate-immigrant-women-population-growth. http://www.pewsocialtrends.org/2012/11/29/u-s-birth-rate-falls-to-a-record-low-decline-is-greatest-among-immigrants/

[4] http://www.pewsocialtrends.org/2008/02/11/us-population-projections-2005-2050/

The U.S. is now a social welfare state struggling and having to borrow to pay the social costs of the population which is already here. Augmentation of the population through additional immigration increases the social costs without sufficient offsetting revenue. That's true especially for state and local government which incurs cost for education, emergency Medicaid, and incarceration of criminal aliens,[5] but also for the federal government.[6]

A 2009 Pew Hispanic Center report found that unauthorized immigrants are disproportionately likely to be poorly educated and living in poverty.[7] They compete with some native workers for jobs. In times of high unemployment they hold down wages and undermine labor standards. Legalization through amnesty would make these immigrant workers better able to compete with American workers for jobs, including at least 12 million American workers still trying to find work.

****

But here's why enforcing a numerical limit on immigration is hard. First, there's a constant argument over what the limit should be. Is it too high, or too low? And within the limitation, are we admitting the right kind of immigrants or not? Not enough STEM graduates? Too many uneducated relatives of recently naturalized citizens? That's a constant, permanent discussion.

But the hardest thing about enforcing a numerical limit on immigration is that it requires us to say no to people who remind us of our own ancestors, who are neither criminals nor national security threats, who just want to work hard and make a better life for themselves and their families. And if they come in violation of our legal limit, we have to deport them to raise the costs of illegal immigration and deter other would-be illegal immigrants who could through their large numbers overwhelm our immigration system.

---

[5] See generally Congressional Budget Office, The Impact of Unauthorized Immigrants on the Budgets of State and Local Governments (December 2007). http://www.cbo.gov/publication/41645 .

[6] Steven Camarota, The High Cost of Cheap Labor: Illegal Immigration and the Federal Budget (Center for Immigration Studies 2004). http://www.cis.org/High-Cost-of-Cheap-Labor .

[7] http://www.pewhispanic.org/files/reports/107.pdf .

Are we able and willing to do that? If not, then we should declare the borders open to all hard-working immigrants like our ancestors who are not criminals or national security threats, regardless of numbers. We can save billions in taxpayer dollars now spent trying to enforce immigration limits.

But what we can't do is keep the legal limits, but not enforce them against anyone but criminals and national security threats. We can't keep spending the money on enforcement, but then give amnesty all who come illegally to work. That's a formula for a permanently dysfunctional immigration system, not an immigration system worthy of American values.

The alternative to the big (false) fix of so-called comprehensive immigration reform is a series of smaller reforms, continuing review and adjustments to our immigration limits, and more certain enforcement of whatever legal limits on immigration we enact.

I believe the STEM Jobs Act passed by the House of Representatives deserves enactment, including its abolition of the fraud-prone and ethnically discriminatory Diversity Visa Lottery.[8] I believe the DREAM Act if reintroduced would easily pass both houses of Congress.

We need to dismiss the illusion of some that we can do a big, one-time "fix" of our immigration system, that we can get it off our plates once-and-for-all, and never have to deal with it again. We are going to be dealing with immigration forever. We have to get used to it!

Just as the 1986 amnesty led to more illegal immigration in subsequent years, talk of another amnesty may be having the same effect. As the front page story in Monday's Washington Post reported, "Several law enforcement observers said illegal migrants are starting to cross in larger groups, anticipating a more tolerant U.S. government policy to result from talks in Washington."[9]

---

[8] I testified with others against the Diversity Visa Lottery in 2004 before the House Judiciary Committee. http://judiciary.house.gov/Legacy/ting042904.pdf

[9] http://www.washingtonpost.com/local/in-arizona-border-security-in-spotlight-amid-immigration-reform-efforts-sequester-cuts/2013/03/17/d866858c-8801-11e2-999e-5f8e0410cb9d_story.html?hpid=z3

Closing Statement to the Committee on the Judiciary

United States Senate

Supplementing Testimony of Wednesday, March 20, 2013

Submitted by Jan C. Ting[1]

Mr. Chairman and Committee Members: Thank you for the opportunity to submit a closing statement supplementing testimony submitted for the March 20, 2013, hearing on "Building an Immigration System Worthy of American Values." I would like to make three additional points in response to the questions from the committee and the comments of my fellow panelists, and one clarification.

First, regarding the proposal to provide taxpayer-funded legal counsel for non-citizens in immigration proceedings: There is a historic distinction in the law between criminal proceedings which propose to punish a defendant, and civil proceedings such as immigration removal which do not propose to punish anyone, but merely seek to resolve civil disputes.

As someone in the business of training young lawyers preparing to enter the employment market, it would be very difficult for me to oppose a properly labeled "Lawyers Full Employment Act of 2013." But if I were sitting as a member of Congress (and I tried once to become one), I would be wary of advocating taxpayer-funded lawyers for foreigners in civil immigration proceedings when no such counsel is offered to United States citizens even in high stakes civil litigation over foreclosure on their homes, or removal of their child custody, or wrongful loss of their jobs.

A removal order issued by an immigration judge is usually required to remove an alien from the United States. Immigration judges are required to conduct proceedings to determine whether an alien is removable. During those hearings immigration judges have broad authority to determine and insure that

[1] Professor of Law, Temple University Beasley School of Law. B.A. Oberlin College, 1970. M.A. University of Hawaii, 1972. J.D. Harvard Law School, 1975. Former Assistant Commissioner (1990-1993), Immigration and Naturalization Service, U.S. Department of Justice.

justice is done, including power "to interrogate, examine, and cross-examine the alien and any witnesses."[2]

Second, regarding proposals for alternatives to detention of aliens prior to hearings and removal: The 1996 immigration reforms, including mandatory detention for certain aliens prior to hearings and removal, were enacted by Congress to insure the appearance of aliens for removal hearings and removals. Congress was dissatisfied with the high rate of no-shows from non-detained aliens, and the resulting low rate of actual removals.

Alternatives to detention that result in increased numbers of no-shows for immigration hearings and removal must be rejected if the integrity of the immigration enforcement system is to be maintained. The burden must be placed on the proponents of proposed alternatives to detention to prove that those proposed alternatives will not delay the enforcement of U.S. immigration law.

Third, regarding prosecutorial discretion: If motivated by limited resources, prosecutorial discretion should be based on priorities for prosecution, without putting any legal cases off-limits for political or unilateral policy reasons. If motivated by the backlog in immigration court dockets, that's a management issue for the Executive Branch in which the immigration courts reside. The purpose for administrative immigration judges was to expeditiously process immigration cases without burdening Article 3 federal courts.

The backlog in immigration court dockets is a manifestation of the failure to deter illegal immigration through enforcement. Cases should not be delayed and kept open because of pending visa applications. They should be decided on the merits, and then Immigration and Customs Enforcement can decide whether prosecutorial discretion is warranted in deferring removal.

Finally, a clarification on the DREAM Act intended to provide immigration relief to certain childhood arrivals: I believe the DREAM Act, if reintroduced as an alternative to amnesty and so-called Comprehensive Immigration Reform, would likely pass both houses of Congress in the current political environment. But as a policy matter, it should be restricted to benefit only the intended

[2] 8 U.S.C. Sec. 1229(b); I.N.A. Sec. 240(b).

beneficiaries, who were brought as children to the United States in violation of U.S. immigration law. It should not benefit the parents or other relatives of those children responsible for violating U.S. immigration law. It should be amended to make clear that beneficiaries once legalized cannot sponsor older relatives (except a spouse) for immigration benefits.

This concludes my closing statement, and I again thank the chairman and members of the Senate Judiciary Committee for the invitation to testify.

IMMIGRATIONEQUALITY

National Headquarters
40 Exchange Place
Suite 1300
New York, NY 10005
212 714-2904

Washington, DC Office
1325 Massachusetts Ave. NW
Suite 250
Washington, DC 20005
202 347-0002

An Immigration System Worthy of American Values Must Respect LGBT Immigrants

Testimony Submitted to U.S. Senate Committee on the Judiciary

Hearing: "Building an Immigration System Worthy of American Values"

Wednesday, March 20, 2013

Statement of Rachel B. Tiven, Esq., Executive Director, Immigration Equality

Immigration Equality is a national organization that works to end discrimination in U.S. immigration law, to reduce the negative impact of that law on the lives of lesbian, gay, bisexual, transgender ("LGBT") and HIV-positive people, and to help obtain asylum for those persecuted in their home country based on their sexual orientation, transgender identity or HIV-status. Immigration Equality was founded in 1994 as the Lesbian and Gay Immigration Rights Task Force. Since then we have grown to be a fully staffed organization with offices in New York and Washington, D.C. We are the only national organization dedicated exclusively to immigration issues for the LGBT and HIV-positive communities. More than 38,000 activists, attorneys, faith leaders, and other constituents subscribe to Immigration Equality's emails and action alerts, and our website has over 380,000 unique visitors per year. The legal staff fields over 3,700 inquiries a year from individuals throughout the entire U.S. and abroad via telephone, email and in-person consultations.

We applaud the Senate Judiciary Committee for convening this hearing today and hope that the Senate and House will move forward with Comprehensive Immigration Reform ("CIR") that is truly worthy of American Values. Every year, Immigration Equality speaks with thousands of foreign nationals, most of whom have been failed by our current immigration system. We hear from foreign nationals who have invested hundreds of thousands of dollars into the U.S. economy, only to have an investment visa denied because there was not enough "risk" involved. We hear from foreign nationals who have been waiting in line for a family-based visa to become current but who cannot file to adjust status because they have fallen out of lawful status in the U.S. while waiting for years to be eligible to apply. We hear from thousands of LGBT spouses and partners of U.S. citizens and green card holders who cannot get on the visa "line" at all because their relationships are given no value under our current system. We hear from LGBT people who fled their countries in fear and who are now stuck in a permanent limbo status of withholding of removal because they had no idea that sexual orientation or gender identity could be a ground for asylum in the U.S. and so missed the arbitrary one year filing deadline. We hear from LGBT detainees who live in daily fear of abuse, sexual assault, and lack or medical care in immigration detention simply because of their gender identity or sexual orientation.

Undoubtedly, many will testify today about the need to fix our "broken immigration system." The sad reality is that many of the unauthorized immigrants who are in the United States are unable to legalize

their status because of draconian enforcement measures which were designed to reduce incentives for illegal immigration. Instead, as millions of foreign nationals have chosen to remain with their families rather than be separated by unjust laws, the enforcement measures themselves, such as the three year/ten year bar and the lack of waivers for unlawful presence or unlawful entry, have prevented millions from legalizing their status. CIR must address the fundamental due process flaws in our immigration system, or there will be a new class of unauthorized immigrants unable to legalize their status again in the future.

CIR Must Include the Uniting American Families Act

An immigration system worthy of American values cannot systematically exclude tens of thousands of families. Although Immigration Equality works on many issues affecting the LGBT immigrant community, no issue is more central to our mission than ending the discrimination that gay and lesbian binational couples face. Because there is no recognition of the central relationship in the lives of LGBT Americans, they are faced with a heart-rending choice that no one should have to make: separation from the person they love or exile from their own country. Inclusion of the Uniting American Families Act ("UAFA")[1] within CIR would provide a pathway to legalization to LGBT families.

Family unification is central to American immigration policy because Congress has recognized that the fundamental fabric of our society is family. Family-based immigration accounts for roughly 65% of all legal immigration to the United States.[2] Family ties transcend borders, and in recognition of this core value, the American immigration system gives special preference for the spouses of American citizens to obtain lawful permanent resident status without any limit on the number of visas available annually. Lesbian and gay citizens are completely excluded from this benefit.

An analysis of data from the 2000 Decennial Census estimated that approximately 36,000 same-sex binational couples live in the United States.[3] This number is miniscule compared to overall immigration levels: in 2011, a total of 1,062,040 individuals obtained lawful permanent resident status in the United States.[4] Thus, if every permanent partner currently in the U.S. were granted lawful permanent residence in the U.S., these applications would account for .03% of all grants of lawful permanent residence.

The couples reported in the census are, on average, in their late 30s, with around one-third of the individuals holding college degrees.[5] The average income level is $40,359 for male couples and just over $28,000 for females. Each of these statistics represents a real family, with real fears and real dreams, the most fundamental of which is to remain together.

One of the striking features of the statistical analysis performed of the 2000 census is how many same-sex binational couples are raising children together. Almost 16,000 of the couples counted in the census – 46% of all same-sex binational couples – report children in the household.[6] Among female couples, the figure is even more striking, 58% of female binational households include children. The vast majority of children in these households are U.S. citizens.[7] Behind each of these statistics is a real family, with real children who have grown up knowing two loving parents. In each of these households,

there is daily uncertainty about whether the family can remain together, or whether they will have to move abroad to new schools, new friends, and even a new language. No Comprehensive Immigration Reform can be truly comprehensive if it leaves out thousands of LGBT families. We urge the Senate and House to include UAFA language in any CIR bill.

CIR Must Repeal the One Year Filing Deadline for Asylum Seekers

Each year Immigration Equality represents more than 400 LGBT asylum seekers through direct representation and partnerships with pro bono attorneys. These brave individuals literally leave everything behind to seek freedom from persecution, violence, and abuse simply because of who they are and whom they love. Since the 1996 enactment of the Illegal Immigration Reform and Immigrant Responsibility Act, asylum seekers have been required to submit their application within one year of arriving in the United States. There are only two narrow exceptions to this rule: "changed circumstances" and "extraordinary circumstances," and lack of knowledge of the one year filing deadline or of asylum itself is not considered a valid exception. While many politieal dissidents are aware that if they reach the United States they can seek political asylum, there is no way for most LGBT people to know that asylum is potentially available to them based on their sexual orientation or gender identity.[8] The primary reason that Immigration Equality's attorneys decline otherwise meritorious cases for legal representation is that the asylum seeker has missed the one year filing deadline.

For those in removal proceedings who have no viable exception to the one year deadline, it may be possible to obtain withholding of removal and thus avoid removal to a country in which they fear persecution. But the standard for withholding is much higher than for asylum with an applicant required to prove that it is "more likely than not" that she will be persecuted rather than demonstrating a "well-founded fear" of future persecution. Thus individuals who miss the deadline yet cannot meet the higher standard for withholding can be removed even if they have clearly met the threshold of "well-founded fear" of persecution required under asylum law.

Morcover, an individual who is granted withholding remains in a permanent limbo status, with a final order of removal entered against him. An individual with withholding status can never travel outside the U.S., can never apply for lawful permanent residence or citizenship, must renew his Employment Authorization Document annually, and can be required to have regular check-ins with a deportation officer forever. Thus an individual who missed the one year filing deadline can never fully integrate into American society.

The one year filing deadline was initially enacted to prevent individuals who do not have legitimate asylum claims from filing for asylum solely to obtain work authorization. Since the enactment of the deadline, other changes to the asylum law – including a waiting period to obtain employment authorization, mandating that cases be resolved faster, and the imposition of strict penalties for filing a frivolous application – have caused a marked decrease in the number of asylum applications.[9] Thus there is no legitimate reason to continue to deny applicants with valid claims based on an artificial

application deadline.

We therefore urge the Senate and House to repeal the one year filing deadline as an important part of CIR. We recommend that CIR include the Refugee Protection Act.

CIR Must Reduce Mandatory Detention and Provide Greater Protections to Vulnerable Detainees

LGBT individuals are among the most vulnerable people held in immigration detention.[10] Every week, Immigration Equality hears from LGBT individuals who are subjected to verbal and physical abuse while detained. For transgender, as well as lesbian, gay, and bisexual asylum seekers who have suffered trauma in their home country, being housed in prison-like conditions while awaiting an immigration hearing is terrifying. We frequently hear from transgender detainees who are placed in administrative segregation – solitary confinement – purportedly to protect them from potential abusers. There, transgender detainees are isolated from all other detainees, denied access to vital programs, and often denied reasonable access to counsel. Transgender detainees are often unable to access necessary transition-related medical care and are often treated abusively by detention staff. If transgender individuals must be detained, they must be detained safely, in housing that protects them from harm without blaming the victim for abuse.

Current record levels of immigration detention are linked to funding by Congress for specific numbers of detention beds as well as mandatory detention rules that can prevent individuals with minor crimes from being considered for bond or alternatives to detention. The current detention system unnecessarily costs U.S. taxpayers billions of dollars a year and treats violators of civil immigration laws as if they were criminals, yet with no right to counsel.

Immigration Equality frequently hears from LGBT detainees in remote parts of the United States who would have viable claims for asylum, withholding of removal, or relief under the Convention against Torture but who have no realistic possibility to obtain counsel merely because of the individual's random assignment to a remote facility. The prohibitive cost of collect phone calls (which for many detainees is the only way to communicate with the outside world), lack of computers, and distance from visitors or counsel can make it nearly impossible for detainees to gather the evidence they need to win their cases. Moreover, for LGBT detainees, who may fear abuse while detained, lack of confidentiality when communicating in banks of pay phones also poses grave due process concerns.

There are alternatives to detention which can be used to ensure that foreign nationals appear for their removal proceedings. Any CIR bill should minimize the current reliance on a wasteful and inhumane detention system. It is shameful that the United States holds civil detainees in prison-like settings (often jails) with no right to counsel and often no right to an independent review of bond. For LGBT detainees and others, CIR must change the inhumane and wasteful immigration detention system.

Any E-Verify Program or Biometric Identification Card that CIR Implements Must not Discriminate against Transgender Individuals

If CIR requires employers to check employment eligibility through an E-verify system and/or if CIR implements social security cards or other national identification cards with biometric information, these measures should include only that personal information which is truly essential to employment verification. These measures should not make use of unnecessary personal information that invades the privacy of and could cause real harm to individuals. To cite just one example, for an estimated 700,000 to 1 million transgender people – Americans and newcomers alike – a system that flags gender discrepancies as suspicious will result in job loss and may threaten personal safety. Other personal data, such as a worker's former name, could also "out" individuals as transgender and make them vulnerable to discrimination which remains pervasive today. The Social Security Administration does not require the use of gender for employment verification, and the agency itself recommends that employers not submit gender markers for employees. We therefore believe that these systems should not include unnecessary personal information, such as gender markers, and should include strong privacy protections for all workers.

Conclusion

We applaud the Senate for convening this hearing and whole-heartedly agree that whatever immigration reforms are enacted must include due process protections and must be truly worthy of our American values. Too many individuals in the United States – lesbian, gay, bisexual, transgender, and straight – cannot fully access the American dream because of our antiquated immigration system. For LGBT families with young children, undocumented youth, and asylum seekers, it is time to pass rational, humane, *comprehensive* immigration reform that fully respects the unique needs and contributions of LGBT immigrants.

---

[1] UAFA would add "permanent partner" as a category of "immediate relative" to the INA. "Permanent partner" is defined as any person 18 or older who is:

1. In a committed, intimate relationship with an adult U.S. citizen or legal permanent resident 18 years or older in which both parties intend a lifelong commitment;
2. Financially interdependent with that other person;
3. Not married to, or in a permanent partnership with, anyone other than that other person;
4. Unable to contract with that person a marriage cognizable under the Immigration and Nationality Act; and
5. Not a first, second, or third degree blood relation of that other individual.

As with current marriage-based petitions, permanent partners would be required to prove the bona fides of their relationships and would be subject to strict criminal sanctions and fines for committing fraud.

[2] In 2011 family-based immigration accounted for 688,089 grants of lawful permanent resident status, Department of Homeland Security, Annual Flow Report, April 2012, Table 2, at 3available at http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_fr_2011.pdf

[3] Family, Unvalued: Discrimination, Denial, and the Fate of Binational Same-Sex Couples Under U.S. Law, joint report by Human Rights Watch and Immigration Equality, 2006, at 17, 3 available at http://www.hrw.org/en/reports/2006/05/01/family-unvalued .

[4] Department of Homeland Security, Annual Flow Report, March 2009, available at http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_fr_2008.pdf .

[5] Family, Unvalued, at 176.

[6] *Id.*

[7] *Id.* In female binational households, 87% of the children were U.S. citizens; in male households, 83% were U.S. citizens

[8] See, "The Gay Bar: The Effect of the One-Year Filing Deadline on Lesbian, Gay, Bisexual, Transgender, and HIV-Positive Foreign Nationals Seeking Asylum or Withholding of Removal" by Victoria Neilson & Aaron Morris, 8 New York City Law Review 233 (Summer 2005), discussing the disproportionate impact of the one year filing deadline on LGBT applicants.

[9] The number of asylum applications filed with the Department of Homeland Security, that is affirmative applications, dropped from 64,644 in 2002 to 24,988 in 2011. *See* United States Government Accountability Office, U.S. Asylum System, September 2008, at 58 available at http://www.gao.gov/new.items/d08940.pdf and DHS Annual Flow Report: Refugees and Asylees 2011, May 2012 available at http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_rfa_fr_2011.pdf .

[10] See, National Immigrant Justice Center, "Stop Abuse of Detained LGBT Immigrants," http://www.immigrantjustice.org/stop-abuse-detained-lgbt-immigrants

Statement for the Record
Vera Institute of Justice
233 Broadway, 12th Floor
New York, NY 10279

Senate Judiciary Committee Hearing
"Building an Immigration System Worthy of American Values"
March 20, 2013

Vera is an independent, nonpartisan, nonprofit center for justice policy and practice, with offices in New York City, Washington, D.C., Los Angeles and New Orleans. Since 1961, Vera has combined expertise in research, technical assistance, and demonstration projects to help develop justice systems that are fairer and more effective.

Vera has managed the Legal Orientation Program (LOP) for the Executive Office for Immigration Review (EOIR) of the U.S. Department of Justice since 2005. The LOP seeks to educate detained persons in removal proceedings—84 percent of whom receive no legal representation—about their rights and the immigration process so they can make better-informed decisions, thus increasing efficiencies in the immigration court and detention processes.

LOP services were provided to 60,000 detained persons in FY 2012 in 25 detention facilities across the country at a cost of $4.6 million. For each dollar spent on the program, there are four dollars in detention-cost savings.

A 2012 EOIR report to the Senate Appropriations Committee shows that detained LOP participants moved through immigration court **12 days faster** on average than detained persons who did not participate in the program. Using $112.83 as the average daily detention cost to Immigration and Customs Enforcement (ICE), the EOIR report documented **net cost savings** to the government in Fiscal Year 2011 of **more than $17.8 million.** Moreover, the LOP benefits ICE, detention facility staff, immigration judges, and detained persons as follows:

- **ICE** can remove more people without increasing the number of detention beds because shorter case processing times can lead to fewer days in detention and more available bed space. Alternatively, ICE can remove the same number of people using fewer detention beds.
- **Detention facility staff** describe reductions in behavior problems when detainees have access to legal information.
- **Immigration judges** report that the LOP increases court efficiency by preparing respondents for the court process and educating them about their eligibility or ineligibility for relief.
- **Detained persons facing removal** who are eligible for relief are more likely to obtain it, while those who are ineligible for relief are more likely to agree to depart the country without delay.

Based on models derived from existing program operations, Vera estimates that LOP could provide full nationwide coverage to all 130,000 detained individuals in removal proceedings for $17-19 million. National expansion of the LOP could lead to **potential net cost savings of $70 million**.

LOP offers four types of services:

- **Group Orientations.** In classes ranging from 5 to 50 participants, legal staff offer a broad overview of the immigration court process, relief from removal, and ways to expedite the removal process. These interactive classes are designed to give immigration detainees the tools they need to assess their cases and to make decisions about their options, if any, for relief from removal.

- **Individual Orientations.** After participating in a group orientation, detainees have the opportunity to speak individually and privately with LOP staff. In these individual orientations, participants can ask more detailed and specific questions. Individual orientations help detainees make decisions about how they want to proceed and prepare detainees for immigration court.

- **Pro Se Workshops.** After LOP participants have made a decision to represent themselves in immigration court, some attend self-help workshops. These small group classes focus on specific immigration law topics and allow detainees to practice representing themselves with similarly-situated participants. Participants also learn how to gather supporting evidence, work with witnesses, and submit applications to the immigration court.

- **Pro Bono Referrals.** In limited cases, LOP staff recruit attorneys from the community who are willing to represent detainees who are unable to represent themselves or whose cases could especially benefit from legal representation. LOP providers actively mentor these pro bono attorneys throughout the immigration court process.

While not a substitute for counsel, LOP provides important information to immigration detainees in large-group, small-group, and individualized settings. These services, with the Group and Individual Orientations designed to be offered before the first hearing in immigration court, have the effect of accelerating the immigration court and detention processes as detainees make more informed decisions earlier in the process.

Vera would like to commend the Committee, especially the Chairman and Ranking Member, for holding this important hearing on the immigration system.

○