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

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[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.

ASIAN AMERICAN JUSTICE CENTER | MEMBER OF ASIAN AMERICAN CENTER FOR ADVANCING JUSTICE

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

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[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.

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[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

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

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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.

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.

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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.

<u>Immigration Detention</u>

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.

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/atf/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

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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
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Refugee and Immigrant Center for Education and Legal Services (RAICES)
San Antonio, TX

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Detroit, MI

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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.

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[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,

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[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.

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[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.

Statement for the Record
Vera Institute of Justice
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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.

AMERICAN IMMIGRATION COUNCIL

COMMUNITY EDUCATION 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.

AMERICAN IMMIGRATION COUNCIL

MARCH 2013

How the Immigration System Falls Short of American Ideals of Justice

Two Systems of Justice

ABOUT SPECIAL REPORTS ON IMMIGRATION

The Immigration Policy Center's Special Reports are our most in-depth publication, providing detailed analyses of special topics in U.S. immigration policy.

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IMMIGRATION POLICY CENTER
AMERICAN IMMIGRATION COUNCIL

ABOUT THE IMMIGRATION POLICY CENTER

The Immigration Policy Center (IPC), established in 2003, is the policy arm of the American Immigration Council. IPC's mission is to shape a rational conversation on immigration and immigrant integration. Through its research and analysis, IPC provides policymakers, the media, and the general public with accurate information about the role of immigrants and immigration policy on U.S. society. IPC reports and materials are widely disseminated and relied upon by press and policymakers. IPC staff regularly serves as experts to leaders on Capitol Hill, opinion-makers, and the media. IPC is a non-partisan organization that neither supports nor opposes any political party or candidate for office. Visit our website at www.immigrationpolicy.org and our blog at www.immigrationimpact.com.

LEGAL ACTION CENTER
AMERICAN IMMIGRATION COUNCIL

ABOUT THE LEGAL ACTION CENTER

The Legal Action Center (LAC) of the American Immigration Council advocates for fundamental fairness in U.S. immigration law. To this end, the LAC engages in impact litigation and appears as amicus curiae (friend of the court) before administrative tribunals and federal courts in significant immigration cases on targeted legal issues. The LAC also provides resources to lawyers litigating immigration cases and serves as a point of contact for lawyers conducting or contemplating immigration litigation. In addition, the LAC works with other immigrants' rights organizations and immigration attorneys across the United States to promote the just and fair administration of the immigration laws. More information is available on the LAC's website at www.legalactioncenter.org.

Introduction

There is a growing consensus that our immigration system is broken. Severe visa backlogs hurt U.S. businesses, undocumented workers are frequently exploited, and record levels of deportations tear families apart. While much energy is now focused on addressing these problems, one issue that is frequently overlooked is the structure and quality of justice accorded immigrants who are caught in the enforcement net. In reforming our immigration system, we must not forget that the immigration removal system—from arrest to hearing to deportation and beyond—does not reflect American values of due process and fundamental fairness.

The failure to provide a fair process to those facing expulsion from the United States is all the more disturbing given the increasing "criminalization" of the immigration enforcement system. Although immigration law is formally termed "civil," Congress has progressively expanded the number of crimes that may render an individual deportable, and immigration law violations often lead to criminal prosecutions. Further, local police now play an increasingly active role in immigration enforcement. Consequently, even relatively minor offenses can result in a person being detained in immigration custody and deported, often with no hope of ever returning to the United States.

At the same time, however, the immigration removal system lacks nearly all of the procedural safeguards we rely on and value in the U.S. 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. 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 life—the lack of procedural safeguards deprives countless individuals of a fair judicial process.

Last year, the Supreme Court signaled discomfort with this asymmetry. While declining to overrule the longstanding maxim that "deportation is not a punishment for a crime,"[1] the Court emphasized in *Padilla v. Kentucky* that "deportation is a particularly severe 'penalty'" and that "deportation is . . . intimately related to the criminal process."[2] *Padilla* further recognized that "recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders."[3] In an apparent effort to mitigate these harsh consequences, the Court held that criminal defense attorneys must advise noncitizen clients of the immigration consequences of a plea agreement.[4]

The Court's decision in *Padilla* reflects the degree to which years of neglect have created a sub-par system of justice for immigrants who, from arrest to deportation, do not have the basic due process protections most Americans assume come into play whenever someone's liberty is at stake. For a country that prides itself on fair treatment under the law, the lack of due process is an embarrassment and a danger, as it demonstrates how easily civil liberties can be eroded. Consequently, the deficiencies in the immigration removal system are not just an issue for immigrants or the immigration bar, but for any American concerned about equal justice under the law.

The American Immigration Council is committed to preserving and enhancing the rights of immigrants in removal proceedings and the integrity of the immigration removal system as a whole. As the country begins the debate on substantive reform of our immigration laws, this report is intended to open a broader dialogue on immigration reform by focusing on procedural justice issues. Consequently, this report provides an overview of the fundamental differences between the criminal justice system and the immigration removal process. It also explains the legal justifications that have been offered for denying immigrants facing deportation the same rights as criminal defendants facing imprisonment. It concludes by emphasizing that any future immigration reform legislation must include greater procedural protections for immigrants in removal proceedings.

WHY ARE THERE TWO SYSTEMS OF JUSTICE?

To fully appreciate *how* criminal and removal proceedings are different, one must first understand *why* they are different. Since the late 1800s, the Supreme Court has maintained that deportation is a "civil" rather than "criminal" sanction—i.e., that deportation is not a punishment as such, but rather an administrative mechanism to return immigrants to their native countries. As the Court first said in 1893:

> The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation . . . has determined that his continuing to reside here shall depend.[5]

By classifying deportation as a "civil" penalty, the Court held that immigrants facing removal are not entitled to the same constitutional rights provided to defendants facing criminal punishment. It is for this reason that immigrants facing deportation today are not read their rights after being arrested, are not provided an attorney if they cannot afford one, and are not permitted to challenge an order of removal for being "cruel and unusual punishment."

For decades, the Supreme Court's classification of deportation as a "civil" rather than "criminal" penalty has been criticized as highly artificial. Deportation to a foreign country may result in punishment that lasts far longer than incarceration in a domestic prison. Indeed, as Supreme Court Justice Louis Brandeis famously wrote, deportation may lead to the "loss of both property and life; or of all that makes life worth living."[6]

Although the Supreme Court has overruled many of its decisions from the late 1800s, it continues to treat deportation differently than criminal punishment.[7] Consequently, legislation and regulations governing immigration must also be revisited. Only by affording noncitizens greater procedural safeguards in removal proceedings will the country be assured that the same level of fairness that exists in other areas of our judicial system also are at work in our immigration removal system.

Grounds for Removal: Proportionate Punishments

Because the Supreme Court has classified deportation as a "civil" penalty, immigrants are often placed in removal proceedings for engaging in conduct that—under the Constitution and laws of most states—could never be the basis for criminal prosecution. Unlike criminal defendants, for example, immigrants may be placed in removal proceedings for engaging in conduct that did not subject them to removability at the time it took place. In addition, unlike criminal offenses and many civil claims, the grounds of deportability under the federal immigration laws have no statute of limitations—meaning that immigrants may be placed in removal proceedings on the basis of misconduct regardless of how long ago it occurred or whether an individual can show evidence of rehabilitation.

For many immigrants, the prospect of deportation is much more daunting than imprisonment. The notion that deportation is not punishment ignores its wrenching impact on longtime immigrants, particularly those with immediate family members in the United States. Accordingly, the existing distinctions between the civil and criminal systems warrant rethinking.

NO PROHIBITION ON RETROACTIVE APPLICATION

One of the most fundamental tenets of the criminal justice system is that individuals cannot be prosecuted for engaging in conduct that was not against the law at the time it took place. Indeed, the Framers believed this protection so essential to the American justice system that even before the Bill of Rights, the original Constitution itself prohibited the government from enforcing criminal laws retroactively, or "ex post facto."[8]

Because the Supreme Court has held that deportation is not "punitive," however, this basic protection has never applied in removal proceedings—meaning that immigrants may be deported for engaging in conduct that was perfectly legal at the time it took place. In a famous case from the McCarthy era, for example, the Supreme Court upheld the deportation of a man for briefly joining the Communist Party, even though it was not unlawful to do so during his period of membership.[9] According to the majority, "whatever might have been said at an earlier date for applying the *ex post facto* Clause, it has been the unbroken rule of this Court that it has no application to deportation."[10]

Today, the government regularly seeks to deport *lawfully present* immigrants based on old criminal convictions that did not render a person deportable at the time they were committed, but that Congress subsequently designated as "aggravated felonies." In expanding the aggravated felony definition in 1996, Congress imposed no limitations on its ability to reach back and designate crimes regardless of when they occurred. For example, certain misdemeanor fraud and theft offenses became aggravated felonies under the 1996 amendments to the immigration laws, so that conduct for which a person was never even imprisoned can now serve as a basis for deportation.[11]

NO STATUTES OF LIMITATIONS ON REMOVABLE OFFENSES

In the criminal system, the prosecution of all but the most serious offenses, such as murder, are subject to "statutes of limitations," or laws establishing periods of time after which the government can no longer levy charges against an alleged perpetrator. Although they sometimes allow guilty individuals to avoid prosecution, statutes of limitation serve numerous important benefits for society at large. For one thing, they reduce the number of wrongful convictions by requiring the government to initiate proceedings before memories fade or evidence otherwise disappears. For another, they eliminate the threat of prosecution against former criminals who have since rehabilitated themselves, thereby providing an incentive to continue abiding by the law.

Unlike virtually all criminal statutes, federal 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 (LPRs, or "green card" holders) for relatively minor convictions that occurred decades earlier. This draconian practice can disrupt the lives of both the immigrants in question as well as their U.S.-citizen family members. It also discourages many LPRs from applying for full-fledged citizenship, an important step towards integration into American society, due to fears that discovery of an old criminal conviction could lead to deportation.

The case of Juan Rivas-Melendrez, a Mexican citizen, provides a stark example. He entered the country in 1970 as an LPR. Ten years later, at age 21, he was convicted of statutory rape based on a consensual sexual encounter with his 17-year-old girlfriend. In 2009, nearly three decades later, the Department of Homeland Security (DHS) initiated removal proceedings when it became aware of the conviction. In the interim, Rivas-Melendrez had served in the U.S. Navy, married his wife (also an LPR), and fathered four U.S.-citizen children.

In a decision dismissing a challenge to Rivas-Melendrez's removal order on jurisdictional grounds, a federal court noted that his case was "sympathetic" and questioned whether it was wise for DHS to pursue the deportation of a "long-time permanent resident, husband, and father of four who has served in the military and remained gainfully employed—on the basis of a 30-year-old statutory-rape conviction."[12] Because of the lack of a statute of limitations on the grounds of deportability, someone like Rivas-Melendez can be removed from his home and family at any point, without regard to the amount of time since the conviction or any evidence of rehabilitation or civic contributions.

Prior to Removal Proceedings: Understanding Rights and an Opportunity to be Heard

For many immigrants, the road to deportation begins at the point of arrest. Following arrest, however, noncitizens suspected of violating the immigration laws receive many fewer protections than criminal suspects. Once in the custody of the federal government, immigrants are not advised of their rights before being questioned and are subjected to preliminary examinations before immigration officers, not independent judges. While removal proceedings are pending, broad categories of immigrants are subject to mandatory detention. And tens of thousands of immigrants "agree" to deportation each year without ever appearing in person before, or having their rights explained by, an immigration judge.

LACK OF 'MIRANDA' WARNINGS PRIOR TO INTERROGATION

When criminal suspects are taken into custody, authorities are generally required to advise them prior to interrogation that they have a right to remain silent, that anything they say can be used against them, that they have a right to an attorney, and that an attorney will be provided to them if they cannot afford one.[13] As the Supreme Court explained in *Miranda v. Arizona*—the landmark decision that first recognized this requirement—providing these warnings prior to questioning ensures that criminal suspects are aware of their rights, thereby neutralizing the intimidation inherent in any police interrogation.[14]

Unlike criminal suspects, noncitizens placed under arrest for suspected violations of the immigration laws do not receive "Miranda" warnings before they are questioned. In fact, the federal government generally refuses to allow immigrants to have an attorney present at all during interrogation. The reason for this disparity is not because immigrants are more immune to coercive practices, but because courts have held that such constitutional protections are not required in "civil" proceedings.[15]

While the Constitution does not require that immigrants be given "Miranda" warnings, federal regulations adopted by the Justice Department require that they receive similar advisals regarding the reasons for arrest, the right to be represented by an attorney at their own expense, and the fact that any statement made can be used in a subsequent proceeding. Under a 2011 decision from the Board of Immigration Appeals, however, immigration officers need not provide even these watered-down warnings *before* questioning a person, but may wait until *after* removal proceedings have officially begun.[16] In many cases, the warnings are not given for days or even weeks after the questioning has concluded, which effectively defeats the purpose of the advisals.

NO PRELIMINARY HEARING BEFORE A NEUTRAL MAGISTRATE

Under the Constitution, criminal suspects who are arrested without a warrant may not languish indefinitely in jail. Instead, they must be given a preliminary hearing before a judge or other neutral magistrate within 48 hours to determine whether the police had valid justification (i.e. "probable cause") to arrest them. As the Supreme Court has explained, the purpose of such hearings is to ensure that criminal suspects are not unnecessarily detained without a review of their case by someone "independent of police and prosecution."[17]

Unlike criminal suspects, immigrants who are arrested without a warrant are not given a prompt hearing before a neutral magistrate. Under federal law, they may be examined behind closed doors by federal immigration agents,[18] including the officers who took them into custody in the first place.[19] Immigrants who are detained may request a bond hearing, which must be scheduled for the "earliest possible date."[20] Anecdotal evidence indicates that the scheduling process may take a week or more in some parts of the country, leaving immigrants stranded in detention in the meantime.

MANDATORY DETENTION WITHOUT OPPORTUNITY FOR BOND HEARING

Under the Constitution, criminal suspects are entitled to a hearing where they can argue that they should receive bail. Only if the government can demonstrate that they pose a danger to the community or are likely to flee before trial may bail be denied. By contrast, under a law passed in 1996, large classes of immigrants are subject to "mandatory detention" while their removal proceedings are pending.[21] 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.

The Supreme Court has upheld this pre-removal mandatory detention law based on the understanding that removal proceedings are generally completed within 47 days, and that any appeals are resolved within an additional four months.[22] In reality, immigrants may spend years in detention while their hearings are pending, often due to the government's own mistakes. After being arrested in 2009, for example, Cheikh Diop, a native of Senegal, was detained for 1,072 days while his removal proceedings were pending. Mr. Diop's case dragged on, and he remained in detention, while the Board of Immigration Appeals remanded the case three separate times for the immigration judge to make further findings that could have been addressed in his first decision.[23] After a federal court finally ordered the government to provide a bond hearing, an immigration judge ordered Diop released from detention on bond. In a similar case in which a noncitizen was detained for seven years while pursuing relief from removal, the Ninth Circuit Court of Appeals held that LPRs could not be detained for a prolonged period without an opportunity to contest the need for continued detention.[24]

AGREEING TO REMOVAL WITHOUT APPEARING BEFORE A JUDGE

The vast majority of criminal cases are resolved through "plea bargains," or agreements by the defendant to admit guilt in exchange for the dismissal of certain charges or a recommendation for a more lenient sentence. To ensure that criminal defendants understand the consequences of pleading guilty—and that they have not been coerced into accepting a plea—the Constitution requires that they appear in person before a judge and waive their right to a trial knowingly and voluntarily.[25]

In the immigration system, noncitizens may agree to deportation under a process, known as "stipulated removal," that lacks even the basic protections afforded criminal defendants who similarly give up their rights to a full hearing. Immigrants who "stipulate" to their deportation never appear before an immigration judge. Instead, federal immigration officers advise them of their rights and present them with forms to sign. They are often forced to make this decision quickly and without the assistance of an attorney.

Allowing immigrants to agree to removal under such circumstances creates serious potential for abuse. In a case that began in 2006, for example, immigration authorities deported a Mexican citizen named Isaac Ramos through a "stipulated" order of removal. When Ramos returned to the United States to see his wife, an LPR,

and their two U.S.-citizen children, he was indicted for unlawful reentry. However, Ramos challenged his initial removal order, and the court determined that the immigration officer who had interviewed Ramos did not speak competent Spanish—meaning that Ramos was unaware of his right to hire an attorney, to opt for removal proceedings before an immigration judge, and to appeal any unfavorable ruling.[26]

Removal Proceedings: A Fair and Speedy Trial

Certain well-known procedural safeguards are enshrined in our criminal justice system. Under the Bill of Rights, defendants are presumed innocent until proven guilty; may only be convicted if their guilt is established beyond a reasonable doubt; and are entitled to be tried by a jury of their peers. In addition to these constitutional protections, both federal and state courts adhere to extensive rules barring the introduction of hearsay and other potentially unreliable evidence. While such protections make it more difficult for prosecutors to obtain convictions, they are the foundation of a system of justice premised on the idea that it is better that ten guilty persons go free than one innocent be imprisoned.

Under the theory that deportation does not rise to the level of punishment, most protections contained in the Bill of Rights are not available in removal proceedings. Among other disparities, immigrants enjoy no presumption of innocence; may be deported on the basis of evidence that would not be admissible in criminal proceedings; and are tried by administrative law judges who are considered Justice Department attorneys. Moreover, unlike criminal trials, removal proceedings are not subject to rules of evidence limiting the types of statements the government may introduce.

Although entire volumes could be written contrasting criminal trials and deportation proceedings, this paper will focus on seven key differences: the lack of judicial independence; the lack of an adequate discovery process; the likelihood of deportation without a hearing; the lack of a right to a speedy trial; the ability to conduct removal proceedings in a state other than the state of apprehension; the lack of appointed counsel for those who cannot afford to hire a lawyer; and the government's ability to use evidence obtained in violation of the Constitution.

LACK OF JUDICIAL INDEPENDENCE

A defining feature of our government is the separation of powers. Each of the three branches of government has distinct authority and serves as a check on the other two. Inherent in this system is the notion of judicial independence, which ensures that judges are impartial and protected from the influence of the executive and legislative branches of government. Accordingly, judges in the criminal courts are neutral decision-makers wholly independent of the prosecuting agency.

Immigration courts, however, lack many of the attributes of an impartial forum. As an initial matter, they are not wholly independent of the prosecuting agency. The immigration courts are housed in the Executive Office for Immigration Review, which is located in the Department of Justice (DOJ). As employees of the executive branch, immigration judges technically are not judges, but rather DOJ attorneys. In this capacity, they are subject to DOJ performance evaluations, which emphasize case completion goals, rather than judicial standards of conduct.[27] Moreover, the

Justice Department's enforcement responsibilities include defending removal orders in the courts of appeals, and the Attorney General has authority to reverse an immigration judge's decision at any time. These roles are irreconcilable with immigration judges' obligation to "exercise … independent judgment and discretion" when deciding cases.[28]

LACK OF AN ADEQUATE DISCOVERY PROCESS

In the criminal process, the prosecutor is required to turn over "exculpatory evidence" to the defendant.[29] "Exculpatory evidence" is evidence in the government's possession that is favorable to the defendant and that may clear him or her of guilt. In addition, at the defendant's request, the prosecution must disclose certain material relevant to the case and provide a written summary of any testimony the government intends to use. If a criminal defendant requests such disclosure and the government complies, the defendant must, upon request, provide the government with certain evidence that will be used at trial.[30]

The removal process, however, lacks an adequate discovery system and fails to afford noncitizens automatic access to their immigration records. The information in the government's files may be essential to establishing that a person has lawful status in the United States or is eligible for relief from removal. Despite this, most noncitizens facing removal are forced to request copies of their files by filing Freedom of Information Act (FOIA) requests. The FOIA process—which is completely separate from removal proceedings—is inadequate because FOIA requests often take a very long time, continuances in removal hearings are discretionary, and noncitizens in removal proceedings do not always get responses to their FOIA requests before they are removed. In addition, under FOIA, the government may withhold or redact documents.

A 2010 case highlights the problem with the current system.[31] DHS initiated removal proceedings against Sazar Dent, but he maintained that he was a naturalized U.S. citizen and thus could not be removed from the country. Unfortunately, he did not have any evidence establishing his citizenship claim, which the government disputed. The immigration judge ordered him removed. On appeal, Mr. Dent, who was unrepresented, asked for assistance in obtaining documents related to his citizenship claim. The government did not turn over any documents, and his removal order was upheld. It was later discovered that Mr. Dent's immigration file contained a naturalization application that his mother had submitted on his behalf in 1982 and a copy that Mr. Dent himself had submitted in 1986. Neither the immigration judge nor the Board of Immigration Appeals was aware of these documents when they issued decisions ordering Mr. Dent's removal.

The Ninth Circuit Court of Appeals held that the government must automatically provide immigration files to all noncitizens in removal proceedings in which removal is contested, and that the failure to do so may constitute a due process violation. To date, the government has failed to apply *Dent* outside the Ninth Circuit, and has narrowly interpreted the decision even within the Ninth Circuit. As a result, most immigrants in removal proceedings still must file FOIA requests to access their immigration files.

LIKELIHOOD OF DEPORTATION WITHOUT A HEARING

The Constitution gives all criminal defendants the right to have their guilt or innocence determined during a trial before an independent decision-maker. Whether it takes place before a judge or jury, a trial affords both parties—the government and the accused—an opportunity to make their case. Although frequently waived in exchange for a lighter sentence, the right to a trial remains an important facet of the U.S. criminal justice system.

Unlike criminal defendants facing imprisonment, many immigrants who do not meet the criteria for admission to the United States do not receive a hearing before an independent decision-maker but are instead subject to an expedited process. They must plead their case to DHS employees, who under current law are empowered to issue final orders of removal. Indeed, the majority of deportations over the past decade were based on removal orders issued not by immigration judges, but by DHS officers.[32]

Today, barely one in three deportations from the United States occurred following an order of removal from an immigration judge. And after factoring in "stipulated" orders of removal, it is likely that fewer than 25% of removals involved immigrants who appeared in person before an immigration judge.

NO RIGHT TO A SPEEDY TRIAL

In the criminal justice system, the Constitution guarantees all defendants the right to a "speedy" trial. As the Supreme Court has explained, limiting delays between arrest and trial carries benefits for both suspects and society at large.[33] Allowing cases to linger not only prevents innocent defendants from having their names cleared, but can lead to extensive court backlogs. In addition, defendants who are confined pending trial must be detained at taxpayer expense. Whatever its justification, the constitutional right to a speedy criminal trial embodies the familiar maxim that "justice delayed is justice denied."

Unlike criminal defendants, immigrants facing deportation do not enjoy a right to a "speedy" removal proceeding. Today, the backlog in our nation's immigration courts has grown to historic proportions. At the end of July 2012, immigration judges were presiding over more than 320,000 deportation cases around the country that were collectively pending for an average of more than 500 days. (In California, the state with the largest immigration court backlog, the average case was pending for nearly 700 days.) According to immigration attorneys, it is not uncommon for judges to schedule hearings more than a year in advance.

As in the criminal system, significant delays in deportation proceedings raise concerns from both a legal and practical standpoint. For immigrants with no right to stay in the United States, the backlogs simply delay the point by which they must leave the country. At the same time, immigrants who were wrongly placed in removal proceedings—as well as asylum seekers whose fates hinge on the outcome of a hearing—remain stuck in legal limbo and may needlessly languish in detention until their cases are decided.[34] Finally, in hopes of reducing the backlog, immigration judges themselves may feel pressure to resolve cases quickly rather than thoroughly.[35]

HOLDING REMOVAL PROCEEDINGS ACROSS STATE LINES

In addition to guaranteeing a speedy trial, the Constitution also requires criminal defendants to stand trial in the same district in which the offense occurred. The purpose of this provision is to prevent prosecutors from placing defendants on trial in other states, where, in addition to being separated from their families and friends, they could face greater difficulty finding an attorney or gathering evidence needed to defend their cases.

In the immigration system, by contrast, noncitizens are routinely placed in removal proceedings far from the state in which they are apprehended. For example, federal immigration officials routinely transfer noncitizens who are arrested in the Northeast to detention centers in Texas, Louisiana, Georgia, and Alabama.[36] Not only does this mean that they are far from their families, lawyers, and the evidence that they need to support their

cases, but it also results in the application of the law of the Fifth and Eleventh Circuits—federal courts that are generally more conservative and less frequently rule in favor of immigrants.

NO APPOINTMENT OF COUNSEL FOR INDIGENT IMMIGRANTS

In the criminal system, defendants facing even one day in jail are entitled to an attorney if they cannot afford one.[37] The right to counsel begins as soon as a suspect is interrogated and, if the person is convicted, extends through an initial appeal of the verdict. As the Supreme Court has explained, requiring criminal defendants to represent themselves would violate the Constitution, because "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[38]

Unlike criminal defendants, immigrants facing deportation are not provided an attorney if they cannot afford one. And, DHS often refuses to allow even a privately retained attorney to be present during a post-arrest interrogation.

Of all the differences between criminal and removal proceedings, the lack of appointed counsel may have the most profound impact on immigrants' ability to receive a fair hearing. The immigration laws are so complicated that courts have described them as a "labyrinth" and "second only to the Internal Revenue Code in complexity."[39] As studies have shown, immigrants who are represented by lawyers are much more likely to prevail in their removal case than those who are not, particularly if they are detained while their removal proceedings are pending.[40]

LIMITED ABILITY TO EXCLUDE UNLAWFULLY OBTAINED EVIDENCE

The U.S. criminal justice system enables defendants to prevent the introduction of evidence that was obtained in violation of the Fourth Amendment, which protects against "unreasonable searches and seizures." For example, if the police fail to obtain a warrant before entering a suspect's home, judges will typically exclude any piece of evidence discovered during the ensuing search. Similarly, if a suspect is arrested without "probable cause," judges will ordinarily prevent prosecutors from introducing statements made during subsequent questioning. Although this practice may prevent prosecutors from relying on otherwise reliable evidence, it has undoubtedly deterred many law enforcement officers from violating the Constitution in the first place.

By contrast, immigrants facing deportation are typically unable to prevent the introduction of evidence obtained in violation of the Fourth Amendment. In a decision issued in 1984, the Supreme Court held that immigrants generally cannot suppress unconstitutionally obtained evidence in removal proceedings (subject to a narrow exception for "egregious" violations).[41] As a result, the government often relies upon evidence in removal proceedings that prosecutors would be prohibited from using at a criminal trial. Not surprisingly, because it is more difficult for immigrants to suppress evidence in removal proceedings, federal immigration officers (and, increasingly, local law enforcement agents who play a role in enforcing immigration law) have little incentive to follow the Fourth Amendment in the course of their duties.

In one recent example, Jorge Angel Puc-Ruiz was arrested by local police in St. Charles, Missouri, after officers received a tip from his acquaintance's wife that he and other individuals were consuming alcohol inside a restaurant after hours, in violation of a local ordinance. The officers entered the restaurant without a warrant, placed Puc-Ruiz under arrest, and contacted federal immigration authorities. Although local prosecutors subsequently dropped the charges and the judge expunged the arrest record, finding that the officers had lacked

probable cause to arrest Puc-Ruiz in the first place, a federal judge determined the officers' violation of the Fourth Amendment was not sufficiently "egregious" to merit suppression of the evidence used in immigration court.[42] This watered-down constitutional protection leaves the door open for law enforcement agents to target suspected noncitizens for enforcement without fear of being held accountable for abusing their authority.

After Removal Proceedings: Checks & Balances

When criminal defendants are convicted in court, the verdict often marks the beginning rather than the end of their legal struggle. In all 50 states, a criminal defendant has the right to appeal a verdict or sentence to a higher court, where they may challenge any aspect of their trial or sentence.[43] By contrast, immigrants slated for deportation have comparatively fewer means to challenge their orders of removal. Because they possess fewer rights than criminal defendants, immigrants have fewer legal grounds on which to base an appeal. Laws passed by Congress in 1996 have further limited the types of challenges that immigrants may bring.

NO BAR ON "CRUEL AND UNUSUAL" PUNISHMENT

In the criminal system, the Constitution prohibits courts from imposing punishments that are "cruel and unusual." As a result, criminal defendants may challenge the severity of their sentences for being grossly disproportionate in relation to the crimes for which they were convicted. The Supreme Court has upheld such challenges in numerous cases. In a 1983 case, for example, the Justices overturned a sentence of life in prison without the possibility of parole imposed on a defendant convicted of writing a bad $100 check.[44]

Because removal proceedings are considered "civil" rather than "criminal," courts have found that this protection does not apply—meaning that immigrants cannot challenge orders of deportation for being "cruel and unusual."[45] Without this protection, immigrants who are *legally* in the United States may be deported for criminal convictions that did not result in a day of incarceration. Similarly, immigrants who lack authorization to be in the country may be deported regardless of how many years they have lived here or whether their U.S. citizen relatives would be adversely affected by their removal.

LIMITS ON APPEALS OF REMOVAL ORDERS

A final disparity between the criminal and removal processes relates to individuals' ability to appeal an unfavorable decision. In the criminal system, defendants are typically entitled to at least two rounds of appeal—a "direct" appeal immediately following the verdict, and a subsequent "collateral" appeal that functions as an entirely new proceeding (such as a petition for habeas corpus).

By contrast, immigrants have far fewer opportunities to challenge a deportation order. Although immigrants facing removal may file a "petition for review" with a federal appellate court,[46] Congress has strictly limited the types of arguments that can be raised in such appeals. For example, immigrants are not permitted to challenge "discretionary" determinations by immigration courts,[47] such as waivers of certain grounds of ineligibility for relief, which may be granted on humanitarian grounds. Immigration authorities are also permitted to remove immigrants while their petitions for review are pending—meaning that immigrants who prevail at the appellate

stage may be stranded outside the United States despite an ultimately favorable decision. Finally, the immigration statute precludes the right to seek review of a removal order through a habeas corpus petition.

Conclusion

It has always been a tenet of the American justice system that how we treat the most vulnerable classes of our society reflects how we value justice as a whole. Because the entire immigration system has so long been an afterthought for most Americans, violations of due process that could not occur or would not be tolerated in the criminal justice system abound in the immigration system. There was a time when these disparities might not have been as significant, because the penalties for violating the immigration laws were not as draconian. Deportation did not mean banishment one hundred years ago, before increasingly punitive laws made the consequences of unlawful entry into this country so severe. As we revisit those laws, we must also revisit the framework for enforcing them, particularly within the removal process.

Each of the issues raised in this paper merits longer discussion and more explicit analysis of the appropriate solutions. In short, however, the following must be done to address the current crisis in protecting the rights and liberties of immigrants:

- For far too long, immigration courts have failed to provide a fair, efficient, and effective system of justice. Additional procedural safeguards are necessary to ensure that all immigrants in removal proceedings have an opportunity to present their cases to impartial decision-makers and, where necessary, a right to appeal.
- Access to counsel lies at the very core of our legal system and is integral to ensuring that noncitizens facing removal receive fair process. Immigrants should have access to counsel at every stage of the removal process, including post-arrest interrogation. Counsel should be appointed in cases where an immigrant is unable to retain a lawyer, beginning with minors, persons incompetent to represent themselves due to a mental disability, and other persons deemed particularly vulnerable such that appointment of counsel is necessary to ensure fair resolution and effective adjudication of the proceedings.
- Penalties for violations of our immigration laws must be proportionate to the offenses committed. To mitigate the harsh consequences of certain violations, Congress should impose statutes of limitations on most grounds of deportability and/or adopt broad waivers for humanitarian purposes, to ensure family unity, or where such waivers are otherwise in the public interest. Penalties for immigration law violations should not apply retroactively.
- 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. DHS should limit the use of mandatory detention and, wherever possible, employ alternatives to detention.
- As Congress considers immigration reform proposals, it must recognize the importance of procedural safeguards beyond the immigration court system. Each of the components of immigration reform—legalization, the future of the legal immigration system for family and employment-based immigrants, border and other enforcement revisions, integration and naturalization improvements—must be implemented in a way that comports with due process.

Endnotes

1 *Fong Yue Ting v. United States,* 149 U.S. 698, 730 (1893).

2 *Padilla v. Kentucky,* 130 S. Ct. 1473, 1481 (U.S. 2010).

3 *Id.*

4 *Id.* at 1486.

5 *Ting,* 149 U.S. at 730.

6 *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

7 *See*, *e.g.*, *Padilla v. Kentucky*, 130 S.Ct. at 1481.

8 U.S. Const. art. I, §9, cl. 3.

9 *Galvan v. Press*, 347 U.S. 522 (1954).

10 *Id. at* 531.

11 For instance, under current law theft offenses for which the term of imprisonment is at least one year are considered aggravated felonies, even if a judge suspends all or part of the sentence. 8 USC § 1101(a)(43)(G). Prior to the implementation of the 1996 law, only those theft offenses that carried a term of imprisonment of five or more years were considered aggravated felonies.

12 *Rivas-Melendrez v. Napolitano*, 689 F.3d 732, 739 (7th Cir. 2012).

13 *See Miranda v. Arizona*, 384 U.S. 436 (1966).

14 *Id.* at 467-68.

15 *See*, *e.g.*, *Navia-Duran v. INS,* 568 F.2d 803, 808 (1st Cir.1977) ("[T]he Constitution does not offer the same level of protection to persons subject to civil proceedings as it does to criminal defendants . . . "); *Bustos-Torres v. INS*, 898 F.2d 1053, 1056 (5th Cir. 1990) ("*Miranda* warnings are not required in the deportation context, for deportation proceedings are civil, not criminal in nature . . . "); *Trias-Hernandez v. INS*, 528 F.2d 366, 368 (9th Cir. 1975) (saying that deportation proceedings "are civil rather than criminal in nature and rules for the latter are inapplicable").

16 *Matter of E-R-M-F- & A-S-M-,* 25 I&N Dec. 580, 588 (2011).

17 *Gerstein v. Pugh,* 420 U.S. 103, 118 (1975).

18 INA 287(a)(2), 8 U.S.C. § 1357(a)(2).

19 8 C.F.R. § 287.3(a).

20 Office of the Chief Immigration Judge, *Immigration Court Practice Manual* §9.3(d), 1 April 2008.

21 Under the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Div. C of Pub. L. No. 104-20, detention without bond is mandatory for nearly all noncitizens with criminal convictions, including non-violent misdemeanors. Michael Tan, *Locked Up without End: Indefinite Detention of Immigrants Will Not Make America Safer* (Washington, DC: Immigration Policy Center Special Report, American Immigration Council, October 2011, pp. 3-4).

22 *Demore v. Kim*, 538 U.S. 510, 528-31 (2005); *cf. Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (finding that post-removal period detention is limited to a period reasonably necessary to bring about removal, and may not be indefinite in cases where removal is not possible).

23 *Diop v. ICE*, 656 F.3d 221, 223-26 (3d Cir. 2011).

24 *Casas-Castrillon v. Dep't of Homeland Sec.*, 535 F.3d 942, 949 (9th Cir. 2008).

25 *Brady v. United States,* 397 U.S. 742, 748 (1970).

26 *United States v. Ramos*, 623 F.3d 672, 680-82 (9th Cir. 2010).

27 *See* Hon. Dana Leigh Marks, "Still a Legal 'Cinderella'? Why the Immigration Courts Remain an Ill-Treated Stepchild Today," *The Federal Lawyer* (March 2012), pp. 29-30.

28 8 C.F.R. § 1003.10(b).

29 *See Brady v. Maryland*, 373 U.S. 83, 87 (1963).

30 Fed. R. Crim. P. 16.

31 *See Dent v. Holder*, 627 F.3d 365 (9th Cir. 2010).

32 *See A Decade of Rising Immigration Enforcement* (Washington, DC: Immigration Policy Center, American Immigration Council, January 2013, p. 3).

33 *Barker v. Wingo*, 407 U.S. 514, 519-21 (1972).

34 *See* Lenni Benson and Russell Wheeler, *Enhancing Quality and Timeliness in Immigration Removal Adjudication* (Washington, DC: Administrative Conference of the United States, June 7, 2012, p. 41), noting that immigration court backlogs have caused many asylum applications to be rejected as time barred.

35 *Id.* at 29.

36 *See*, e.g., Nina Bernstein, "For Those Deported, Court Rulings Come Too Late," *New York Times*, July 20, 2010.

37 *Argersinger v. Hamlin,* 407 U.S. 25, 40 (1972).

38 *Gideon v. Wainwright,* 372 U.S. 335, 344 (1963).

39 *Castro-O'Ryan v. U.S. Dep't of Immigration & Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1987).

40 *See* New York Immigrant Representation Study, *Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings* (December 2011, p. 19); showing successful outcomes in New York Immigration Courts by representation and detention status.

41 *Immigration & Naturalization Service v. Lopez-Mendoza*, 468 U.S. 1032, 1050-51 (1984).

42 *Puc-Ruiz v. Holder*, 629 F.3d 771 (8th Cir. 2010).

43*See Griffin v. Illinois*, 351 U.S. 12, 18 (1956).

44 *Solem v. Helm*, 463 U.S. 277, 303 (1983).

45 For further discussion of this issue, see Michael Wishnie, *Proportionality in Immigration Law: Does the Punishment Fit the Crime in Immigration Court?* (Washington, DC: Immigration Policy Center, American Immigration Council, April 2012).

46 INA § 242, 8 U.S.C. § 1252.

47 INA § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B).

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-ice-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

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[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/.

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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 political 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.

Moreover, 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.

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[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

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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

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]

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[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.").

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

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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]

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[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

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[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]

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[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.

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[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]

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[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 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

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[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.

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[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

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[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:

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[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.

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STATEMENT OF WADE HENDERSON, PRESIDENT & CEO
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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.

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[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).

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> 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.

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[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.