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STATEMENT OF THE AMERICAN IMMIGRATION COUNCIL

**SUBMITTED TO THE U.S. HOUSE OF REPRESENTATIVES JUDICIARY
COMMITTEE, SUBCOMMITTEE ON IMMIGRATION AND BORDER SECURITY**

HEARING ON “INTERIOR IMMIGRATION ENFORCEMENT LEGISLATION”

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The American Immigration Council is a non-profit organization which for over 25 years has been dedicated to increasing public understanding of immigration law and policy and the role of immigration in American society. We write to share our research and analysis in recent years regarding immigration enforcement, asylum, and protection of unaccompanied immigrant children.

As explained below, and as addressed in the reports attached, U.S. immigration enforcement is at all-time highs. We have spent billions of dollars deporting millions of people who have committed only immigration violations, and focused on quantity, not quality of deportations, while separating families. We have responded to an influx of Central American asylum seekers with family detention camps and proposals to roll back protections, rather than ensuring the protection of these vulnerable populations. Most importantly, we have failed to enact legislation, and failed to recognize that enforcement *with* reform is the only effective way to repair a broken immigration system.

I. Enforcement and the SAFE Act

The United States has been pursuing an “enforcement first” approach to immigration control for more than two-and-a-half decades—and it has yet to work.¹ The U.S. currently spends more on immigration enforcement—\$18 billion per year—than all other federal law enforcement combined.² Since the last major legalization program for unauthorized immigrants in 1986, the

¹ American Immigration Council, “The Fallacy of ‘Enforcement First’,” May 2013, at <http://www.immigrationpolicy.org/just-facts/fallacy-enforcement-first>.

² Consolidated Appropriations Act, 2014, P.L. 113-76, 128 Stat. 5, 248-52 (Jan. 17, 2014), at <http://www.gpo.gov/fdsys/pkg/PLAW-113publ76/pdf/PLAW-113publ76.pdf>; Doris Meissner, Donald M. Kerwin, Muzaffar Chishti, and Claire Bergeron, *Immigration Enforcement in the United States: The Rise of a Formidable Machinery*, MIGRATION POLICY INSTITUTE (2013), www.migrationpolicy.org/pubs/enforcementpillars.pdf.

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federal government has spent over \$200 billion on immigration enforcement.³ Yet during that time, the unauthorized population has tripled in size to 11 million. This is a testament that enforcement measures alone pale in the face of a strong economy where the demand for foreign workers outstrips the available visas. Meanwhile, punitive laws separate families unnecessarily despite the natural desire of immigrants to be reunited with their families.

In the American Immigration Council's August 2013 report, *Cracking the SAFE Act*, the Council states that the SAFE Act "represents an attrition-through-enforcement approach to unauthorized immigration that has not proven effective and which runs contrary to many of the objectives of immigration reform."⁴ (Attachment A) The report details the provisions of the SAFE Act that would make unlawful presence in the United States a criminal act punishable with jail time, would greatly expand detention of immigrants, would authorize states and local governments to create their own immigration enforcement laws, and would impose harsher penalties and restrictions for immigration violations, among other enforcement-related provisions.

The report concludes that the "evidence does not support an indiscriminate increase in penalties, detention, and deportation that removes the ability of immigration authorities to make common-sense, fact-based decisions on individual cases."⁵ Moreover, "the economic and social harm caused by state and local immigration laws argues against a policy that encourages the proliferation of such laws."⁶

Other American Immigration Council publications also examine the phenomenon of increased immigration enforcement without concomitant positive effects on U.S. society:

- "The Growth of the U.S. Deportation Machine" (March 2014),⁷ which explains, among other things, how the Obama Administration has come to remove more immigrants than any other U.S. Administration;⁸ (Attachment B)
- "Misplaced Priorities: Most Immigrants Deported by ICE in 2013 Were a Threat to No One" (March 2014), which demonstrates that most individuals apprehended by ICE committed minor, non-violent crimes or have no criminal histories at all;⁹ (Attachment C) and

³ Marc R. Rosenblum, Migration Policy Institute, Testimony to House Judiciary Committee, *Examining the Adequacy and Enforcement of Our Nation's Immigration Laws* (Feb. 3, 2015), p. 18, at http://judiciary.house.gov/?a=Files.Serve&File_id=31971212-6FDB-4FE6-ABBB-406B7C673B21.

⁴ American Immigration Council, "Cracking The SAFE Act: Understanding the Impact and Context of H.R. 2278, the 'Strengthen and Fortify Enforcement Act'," August 2013, at <http://immigrationpolicy.org/just-facts/cracking-safe-act>.

⁵ *Ibid.* at 7.

⁶ *Ibid.*

⁷ American Immigration Council, "The Growth of the U.S. Deportation Machine," March 2014, at <http://www.immigrationpolicy.org/just-facts/growth-us-deportation-machine>.

⁸ Mark Noferi, American Immigration Council, "New Report Explains How U.S. Reached Record-Breaking Removals," *Immigration Impact*, Oct. 17, 2014, at <http://immigrationimpact.com/2014/10/17/new-report-explains-how-u-s-reached-record-breaking-removals/>.

⁹ American Immigration Council, "Misplaced Priorities: Most Immigrants Deported by ICE in 2013 Were a Threat to No One," March 2014, at <http://www.immigrationpolicy.org/just-facts/misplaced-priorities-most-immigrants-deported-ice-2013-were-threat-no-one>.

- “Removal Without Recourse: The Growth of Summary Deportations from the United States” (April 2014), which expresses further concern that the vast majority of those removed do not have the right to appear before a judge or apply for status in the United States.¹⁰ (Attachment D)

II. Protections for Asylum Seekers

The American Immigration Council expresses concern regarding the rolling back of asylum protections for vulnerable individuals, at a time when asylum seekers already face obstacles to bringing claims, including the increased detention of children and mothers fleeing persecution in their home countries. How we respond to those fleeing violence and persecution will signal to the world whether our commitment to due process and the protection of refugees is real or illusory, and it could have a profound effect on how other countries around the world respond to our call to deal fairly and humanely to refugee crises in places like Syria and the Sudan.¹¹

Under U.S. and international law, the United States cannot return or expel people to places where their lives or freedoms could be in jeopardy. The American Immigration Council’s fact sheet *Asylum in the United States* sets out this legal background.¹² (Attachment E)

The Council’s 2014 report, *Mexican and Central American Asylum and Credible Fear Claims: Background and Context*, details the rising numbers of “credible fear” claims made by those apprehended near the southern border, as Central American violence has risen.¹³ (Attachment F) The report addresses concerns regarding abuse of the system, but concludes that “the credible fear and asylum process poses obstacles for applicants that far surpass the supposed abuses claimed by its detractors.”¹⁴ “Obstacles to asylum stem from the government’s failure to follow laws, rules, and policies, as well as inadequate funding for the administrative bodies and courts that hear asylum claims.”¹⁵

Evidence has emerged in recent months that these obstacles to applying for asylum continue. For example, Human Rights Watch issued a report detailing the failure of Customs and Border Protection (CBP) officers to properly screen individuals who fear persecution.¹⁶ Subsequently, several NGOs submitted a complaint to DHS’ Office of Civil Rights and Civil Liberties

¹⁰ American Immigration Council, “Removal Without Recourse: The Growth of Summary Deportations from the United States,” April 2014, at <http://www.immigrationpolicy.org/just-facts/removal-without-recourse-growth-summary-deportations-united-states>.

¹¹ American Immigration Council, *America Must Uphold Its Obligations to Protect Children and Families Fleeing Persecution* (June 30, 2014), at <http://www.americanimmigrationcouncil.org/newsroom/release/america-must-uphold-its-obligations-protect-children-and-families-fleeing-persecuti>.

¹² American Immigration Council, “Asylum in the United States,” August 2014, at <http://immigrationpolicy.org/just-facts/asylum-united-states>.

¹³ American Immigration Council, “Mexican and Central American Asylum and Credible Fear Claims: Background and Context,” May 2014, at <http://immigrationpolicy.org/special-reports/mexican-and-central-american-asylum-and-credible-fear-claims-background-and-context>.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Beth Werlin, American Immigration Council, *Report Discloses Deportation of Central American Asylum Seekers* (Oct. 21, 2014), at <http://immigrationimpact.com/2014/10/21/report-discloses-deportation-of-central-american-asylum-seekers/#sthash.EzC59IC0.dpuf>.

regarding these screening failures.¹⁷ Given these failures, the American Immigration supports the strengthening, rather than rolling back, of asylum procedures with robust oversight.

Moreover, the American Immigration Council continues to express deep concern regarding family detention of asylum seekers. The U.S. has responded to the influx of Central Americans fleeing violence by establishing family detention camps for vulnerable mothers and children.¹⁸ The Council remains committed to ensuring that families and individuals have access to the critical legal assistance they need, and to aggressively advocating and litigating to end the detention of children and mothers.

III. Unaccompanied Immigrant Children

The American Immigration Council's 2014 report, *Children in Danger: A Guide to the Humanitarian Challenge at the Border*, describes the reasons for and responses to the influx of unaccompanied Central American children to the United States.¹⁹ (Attachment G) The report concludes that “[r]ecent U.S. immigration enforcement policy does not appear to be a primary cause of the migration” of children,²⁰ and that research “indicates that violence is the primary cause, even among those who also cite poverty or family reunification as reasons for their departure.”²¹

Accordingly, it is “inaccurate” to say that “we face little more than an upsurge in unauthorized immigration which can be handled by kicking the deportation machine up a notch.”²² Putting children on the fast track to deportation back to the countries they fled is not an effective (or ethical) way to handle a humanitarian crisis.²³ Thus, the Council supports strengthening, rather than rolling back, procedures protecting unaccompanied children.

Our response must be built on the recognition that although some of these children can and should be safely returned, many deserve and have the right to the protections that our laws afford to those who are fleeing violence and persecution.²⁴ Moreover, all children should be provided

¹⁷ Emily Creighton, American Immigration Council, *Civil Rights Complaint Documents Government's Failure to Properly Screen Asylum Seekers*, Immigration Impact (Nov. 14, 2014), at <http://immigrationimpact.com/2014/11/14/civil-rights-complaint-documents-governments-failure-properly-screen-asylum-seekers/#sthash.uWxpttuf.dpuf>.

¹⁸ Wendy Feliz, American Immigration Council, *New York Times Exposes 'Shame of America's Family Detention Camps'*, (Feb. 9, 2015), at <http://immigrationimpact.com/2015/02/09/new-york-times-exposes-shame-americas-family-detention-camps/#sthash.t9vxqeLt.dpuf>.

¹⁹ American Immigration Council, *Children in Danger: A Guide to the Humanitarian Challenge at the Border* (July 2014), at <http://www.immigrationpolicy.org/special-reports/children-danger-guide-humanitarian-challenge-border>.

²⁰ Ibid.

²¹ Elizabeth Kennedy, “No Childhood Here: Why Central American Children are Fleeing their Homes,” American Immigration Council, July 2014, at http://www.immigrationpolicy.org/sites/default/files/docs/no_childhood_here_why_central_american_children_are_fleeing_their_homes_final.pdf.

²² Walter Ewing, American Immigration Council, *Refugee Children Don't Need More Immigration Enforcement* (July 22, 2014), at <http://immigrationimpact.com/2014/07/22/refugee-children-dont-need-more-immigration-enforcement/#sthash.fhSSMTuq.dpuf>.

²³ Ibid.

²⁴ American Immigration Council, *America Must Uphold Its Obligations to Protect Children and Families Fleeing Persecution* (June 30, 2014), at <http://www.americanimmigrationcouncil.org/newsroom/release/america-must-uphold-its-obligations-protect-children-and-families-fleeing-persecuti>.

counsel, at government expense if necessary, to help navigate complicated immigration proceedings. No child should be deported without legal representation.²⁵

The American Immigration Council is also concerned that children on new “priority dockets” are too often rushed through immigration court with insufficient safeguards to ensure that they receive proper notice of their hearings and that they have a real opportunity to learn whether they may be eligible to remain in the United States.²⁶

* * *

Undeniably, America's immigration system remains in urgent need of reform. However, enforcement-only provisions and rolling back due process protections for those seeking protection in the United States is not the type of reform we need. Ultimately, immigration reform that includes a pathway to legal status for unauthorized immigrants already living in the country, coupled with the creation of flexible avenues for future immigration, will enhance enforcement and help bring unauthorized immigration under control.

²⁵ Beth Werlin, American Immigration Council, *Why We Are Suing the Government on Behalf of All Children Facing Deportation*, Immigration Impact (July 9, 2014), at <http://immigrationimpact.com/2014/07/09/why-we-are-suing-the-government-on-behalf-of-all-children-facing-deportation/#sthash.wbnHjQEp.dpuf>.

²⁶ Kristin McLeod-Ball, American Immigration Council, *Unrepresented Children Still Being Fast-Tracked Through Immigration Hearings*, Immigration Impact (Feb. 6, 2015), at <http://immigrationimpact.com/2015/02/06/unrepresented-children-still-fast-tracked-immigration-hearings/#sthash.KmGcfIWi.dpuf>.

ATTACHMENT A

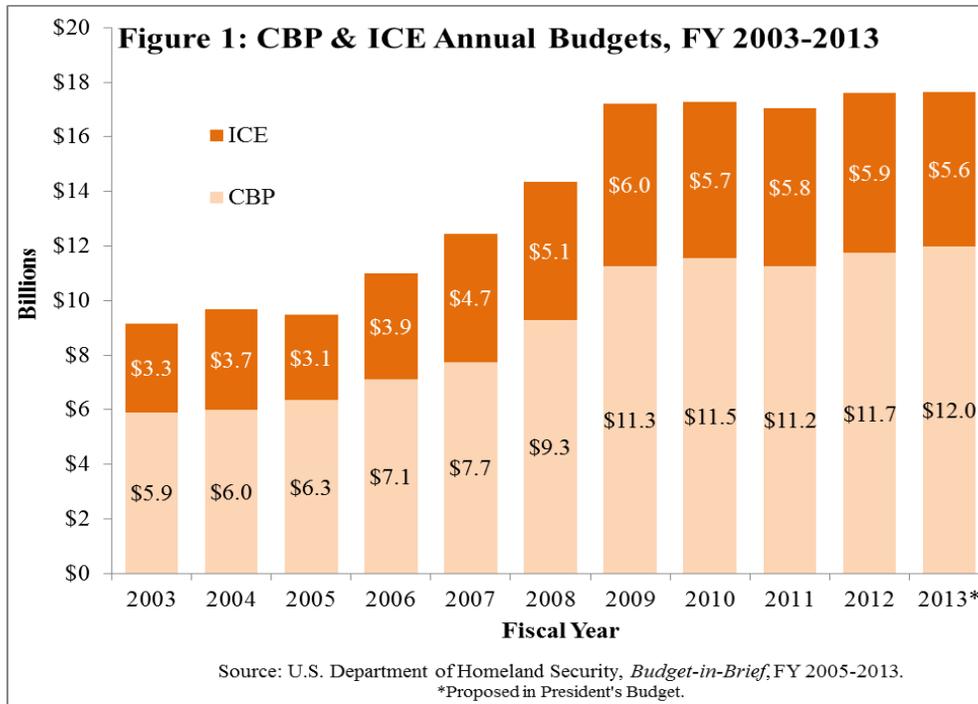
**CRACKING THE SAFE ACT:
Understanding the Impact and Context of H.R. 2278,
the “Strengthen and Fortify Enforcement Act”**

On June 6, 2013, the House Judiciary Committee considered H.R. 2278, the “Strengthen and Fortify Enforcement Act,” commonly known as the SAFE Act. This wide-ranging immigration enforcement bill would make unlawful presence in the United States a criminal act punishable with jail time, greatly expand detention of immigrants, authorize states and local governments to create their own immigration enforcement laws, and impose harsher penalties and restrictions for immigration violations, among other enforcement-related provisions. The bill, introduced by Judiciary Chairman Bob Goodlatte (R-VA) and Immigration Subcommittee Chairman Trey Gowdy (R-SC), was the subject of a contentious committee mark up, ending in its passage out of committee on a straight party line vote of 20 to 15. The SAFE Act is one of several bills that the House leadership might offer as part of its “step-by-step” approach to immigration reform, in which various House bills addressing different aspects of the immigration system may be voted on separately.

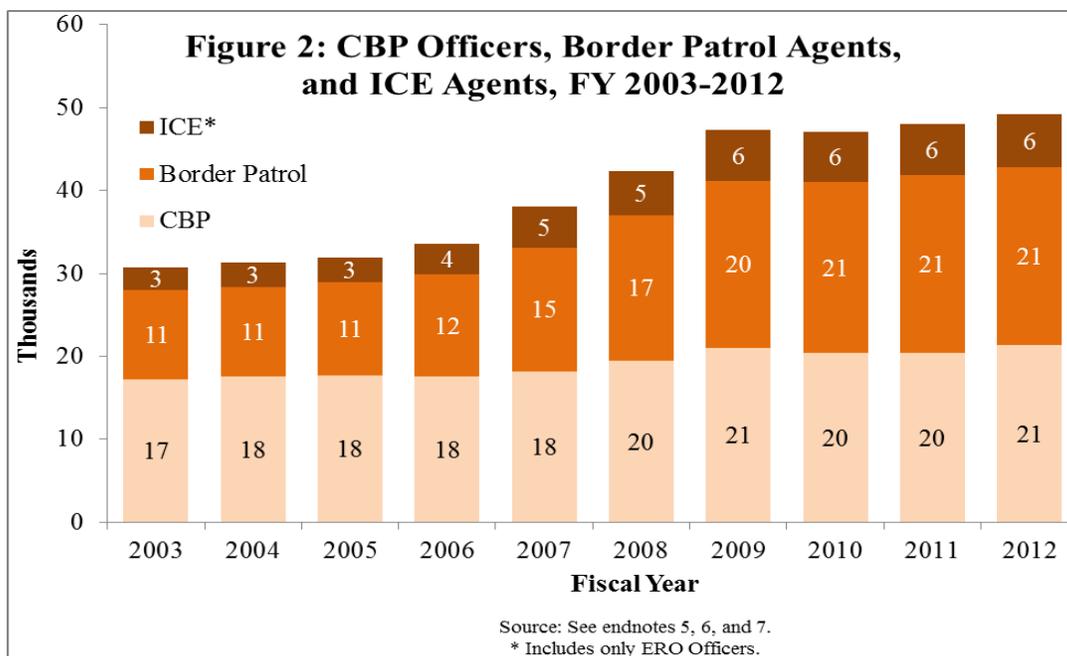
However, the SAFE Act represents an attrition-through-enforcement approach to unauthorized immigration that has not proven effective and which runs contrary to many of the objectives of immigration reform. It returns to a philosophy which holds that punitive enforcement measures alone can address the many flaws in our immigration system. But the United States has essentially been pursuing an enforcement-only approach for decades which has divided communities and proven to be extremely expensive,¹ all without actually achieving its goals.² It is important to keep in mind that, since 1986, the federal government has spent \$187 billion on immigration enforcement, yet the unauthorized population has tripled in size to 11 million during that time.³ The House Judiciary’s endorsement of an outdated philosophy that touts more enforcement, more detention, more penalties, and a more complicated, expensive, and decentralized immigration enforcement system flies in the face of the House leadership’s repeated pledge to fix that very system.

Spending on immigration enforcement is at an all-time high.

Contrary to the impression created by supporters of the SAFE Act, federal spending on border and immigration enforcement has been growing for years and is now at an all-time high. Since the creation of the Department of Homeland Security (DHS) in 2003, the budget of U.S. Customs and Border Protection (CBP)—the parent agency of the Border Patrol within DHS—has increased from \$5.9 billion to \$12 billion per year. On top of that, spending on U.S. Immigration and Customs Enforcement (ICE), the interior-enforcement counterpart to CBP within DHS, has grown from \$3.3 billion since its inception to \$5.6 billion today {Figure 1}.⁴



This growth in enforcement spending has been accompanied by a rise in the number of enforcement personnel. In fact, the number of border and interior enforcement personnel now stands at more than 49,000. The number of Border Patrol agents doubled from 10,717 in FY 2003 to 21,394 in FY 2012.⁵ The number of CBP officers staffing ports of entry (POEs) grew from 17,279 in FY 2003 to 21,423 in FY 2012.⁶ And the number of ICE agents devoted to Enforcement and Removal Operations increased from 2,710 in FY 2003 to 6,338 in FY 2012 {Figure 2}.⁷



What are the origins of the SAFE Act?

The SAFE Act is a direct descendant of H.R. 4437, the Border Protection, Antiterrorism, and Illegal Immigration Control Act. This bill was passed by the House in 2005 and is commonly known as the Sensenbrenner bill, named for the former Chair of the House Immigration Subcommittee. When the Sensenbrenner bill passed the House it led to mass public demonstrations because it criminalized unauthorized immigrants, expanded detention, and created additional harsh immigration penalties.⁸ The SAFE Act revives these provisions, but goes further. Significant provisions of the SAFE Act attempt to overturn last year's ruling by the Supreme Court in *Arizona v. U.S.* that limited states' ability to enact their own immigration laws because immigration is the domain of federal law.⁹ Since that decision, a series of other cases interpreting this ruling have struck down state immigration laws on a range of issues, such as forbidding landlords from renting to unauthorized immigrants and precluding the enforcement of contracts with them. The SAFE Act would essentially resurrect all these laws and encourage the passage of more because it changes federal law to comport with SB 1070 and similar local attrition-through-enforcement bills.

How would the SAFE Act affect the enforcement of immigration laws?

The breadth of the provisions in the SAFE Act, allowing for unlimited state and local enforcement of federal immigration law as well as an expansion of state and local immigration laws, amounts to an abandonment of federal control of immigration enforcement and creates a patchwork of potentially conflicting, burdensome, inefficient, and divisive laws. In fact, some provisions of the SAFE Act explicitly require the federal government to renew federal-state enforcement models that the Department of Homeland Security (DHS) has rejected as inefficient and prone to discrimination and racial profiling—essentially opening the door to abuses of the system such as those that have been uncovered during Sheriff Joe Arpaio's tenure in Maricopa County.¹⁰ The negative social and economic consequences of state immigration enforcement laws have been well-documented and have proven highly divisive, so much so that the Supreme Court, in its opinion in *Arizona v. U.S.*, urged Congress to face its responsibilities and pass a coordinated and unified federal enforcement scheme.¹¹ Instead, the SAFE Act would have the federal government cede ground to the states, encouraging the creation of a patchwork of hundreds of immigration laws at state and local levels. The resulting proliferation of state and local immigration laws similar to Arizona's, enforced by untrained local authorities, would create a complicated, expensive,¹² and conflicting patchwork of regulation, harming the ability of local law enforcement to prioritize the prosecution of violent crimes and causing economic harm and legal uncertainty for local businesses. Arizona and Georgia serve as case studies in how a state which chooses to implement its own punitive immigration law can rapidly incur hundreds of millions of dollars in economic losses as a result.¹³

The SAFE Act would also transform the act of being in the country unlawfully into a criminal offense, shifting the enforcement of immigration law from a civil framework in which deportation is the ultimate penalty to a criminal one in which a possible prison term (followed by deportation) is the norm. Expanded criminalization at the federal level, expanded state and local enforcement, and a massive increase in federal detention are all contemplated by the SAFE Act,

at a time when public sentiment supports legalizing rather than deporting or criminalizing the unauthorized population. This massive increase of criminalization, detention, and deportation of immigrants would also be extraordinarily expensive and divert law enforcement priorities and resources from fighting violent and serious crime.¹⁴ DHS already spends \$2 billion a year on immigration detention alone, or \$5.05 million per day.¹⁵ Ironically, the SAFE Act, if enacted, would further expand the kind of punitive measures that have been shown to undermine local economies and a functional immigration system.¹⁶

What are the consequences of expanded state and local enforcement of immigration laws?

Under current law and policy, federal, state, and local governments have numerous cooperative relationships that exist to facilitate enforcement of immigration laws. Many of these programs have come under fire, most notably the 287(g) program, for undermining public safety,¹⁷ shifting local emphasis from community policing to immigration enforcement, and creating an atmosphere that encourages racial profiling.¹⁸ While the federal government has rejected many of these charges in programs such as Secure Communities, it has significantly revised the 287(g) program, terminating the contracts of notorious violators like Maricopa County, revising the terms of the agreements entered into with localities, and restructuring the program. Under the SAFE Act, these reforms would be eliminated, and the decision as to whether to enforce immigration laws would be controlled by state and local jurisdictions.

Law enforcement and community groups have been frequent critics of unregulated state and local enforcement of federal immigration laws, pointing out that such programs are costly,¹⁹ reduce levels of trust between the public and law enforcement, turn police officers into immigration agents, and—in the wrong hands—are vehicles for discrimination and racial profiling.²⁰ Given this critique, expansion of 287(g)-type programs and the elimination of much federal oversight would heighten rather than improve the significant public safety concerns associated with state and local enforcement of immigration laws—especially because the SAFE Act requires the detention of all persons arrested on immigration violations at the state and local level.²¹ For these reasons, state immigration laws have become increasingly unpopular²² and local law enforcement officials are declining to serve federal immigration enforcement purposes.²³ States are recognizing that punitive local immigration enforcement hurts local businesses and economies and causes the loss of jobs and tax revenue, in addition to dividing the local community and decreasing public trust in law enforcement.²⁴

What are the Key Provisions of the SAFE Act?

The SAFE Act redefines the federal enforcement landscape, moving immigrant prosecution from the civil to the criminal arena. The bill would create a system that promotes state and local enforcement of immigration laws and imposes expanded detention of unauthorized immigrants, harsher civil and criminal penalties for a range of immigration violations, expanded police authority for Immigration and Customs Enforcement (ICE) agents, and rigid limits on the authority of immigration agencies, prosecutors, and immigration judges to set immigration enforcement priorities. The following summary includes some of the most notable proposed changes to existing law, but is not exhaustive.²⁵

- **Proliferation of State and Local Immigration Laws:** Among the most controversial of the SAFE Act provisions are those which give state and local jurisdictions power to create and enforce immigration law. The Act would give them nearly unfettered authority to enforce federal immigration laws, excluding only the power to issue an immigration charging document and to actually remove unauthorized immigrants. In addition to enforcing federal laws, states and localities would be empowered to create their own immigration laws which penalize the same conduct as the federal law.²⁶ This would allow state laws dealing with everything from the carrying of identity documents to working without authorization to residing unlawfully in the state. In practice, these kinds of laws, like Arizona's SB 1070, are frequently struck down by the courts as conflicting with the federal government's exclusive jurisdiction over immigration, as in the Supreme Court's decision in *Arizona v. United States*.²⁷ Moreover, in places where they have been put into effect, they have sometimes encouraged untrained local sheriffs and police to engage in racial profiling and other unlawful actions.²⁸ Though the federal government would be required to create training materials for local law enforcement, local law enforcement would not actually be required take the training.²⁹ The federal government might also be required to enter into controversial agreements known as 287(g) agreements, under which state and local police are deputized to act as federal immigration agents.³⁰ It would be difficult for the immigration agency to refuse or terminate an agreement, absent compelling circumstances or being subject to court review.³¹ State and local officers would be granted immunity for actions undertaken in the course of enforcing immigration laws.³²
- **Increased Detention:** Among other changes to immigration detention, the SAFE Act would require federal authorities to take an unauthorized immigrant into custody within 48 hours of a state or local arrest, regardless of the individual circumstances.³³ It would preclude the use of secure and less costly alternatives to detention, such as ankle bracelets or the release on bond of individuals who represent no flight risk or danger to the community, and would permit state and local jurisdictions to detain unauthorized immigrants for 14 days after completion of a sentence so that they may be taken into custody by DHS.³⁴ The SAFE Act would also permit the unlimited detention of immigrants who have been ordered removed, but who cannot be repatriated³⁵—a practice found unconstitutional by the Supreme Court in *Zadvydas v. Davis*.³⁶ Detention might also be required for immigrants who have been charged, but not convicted, of any crime.³⁷ Increases in spending on detention would be authorized, including a requirement that the government spend sufficient sums to provide detention facilities for all unauthorized persons arrested by state and local jurisdictions.³⁸ Such a large increase in immigration detention would be extremely expensive, as it currently costs \$159 per day per detainee, or \$5.05 million a day for all immigration detainees,³⁹ many of whom have no criminal records or only committed traffic violations. States and localities would be required to cooperate and share information with federal immigration authorities, and those who fail to do so would be denied certain federal funding for community policing or other law enforcement or DHS grants.⁴⁰
- **Increased Penalties for Immigration Violations.** The SAFE Act would broaden the range of behaviors that are subject to immigration penalties and reduce the standard of

evidence necessary to find someone inadmissible, removable, or ineligible for a benefit.⁴¹ In some cases, changes to the law would allow removal based on suspicion of criminal behavior rather than convictions. For example, a mere reasonable belief that someone may be or have been a member of a gang that was involved in crime would constitute grounds for removal.⁴² The use of expedited removal (deportation without access to court) would be expanded to include immigrants with most any type of criminal conviction that affects immigration status, irrespective of whether they were encountered at a port of entry or at the border.⁴³

- **Expanded Definition of “Aggravated Felony.”** H.R. 2278 would expand the definition of “aggravated felony,” an immigration term of art and the most serious offense in immigration law. If an offense is considered an “aggravated felony” (which may not necessarily be aggravated or a felony), it leads to automatic deportation and permanent banishment with no consideration of individual circumstances.⁴⁴ Under the bill, the definition of aggravated felony would include expanded definitions of passport, visa, or immigration fraud; certain acts related to harboring of unauthorized immigrants; acts related to improper entry and reentry; and would include two convictions for driving while intoxicated, regardless of whether the convictions occurred long ago or were misdemeanor offenses.⁴⁵ Someone detained based on one drunk driving arrest would also be subject to mandatory detention.⁴⁶ This expanded list of aggravated felonies would make crimes as different as two DUI convictions, one conviction for shoplifting, or a conviction for premeditated murder all punishable by the maximum penalty under immigration law, further limiting the ability of authorities to focus resources on serious criminal offenders.
- **Criminal Prosecution of Unlawful Presence:** Under current law, illegal entry is a crime, but one that generally only applies if an individual is apprehended at the time of an illegal border crossing. Unlawful presence, by itself, is a civil—not a criminal—violation, and not punishable with jail time. The SAFE Act would change that, making every unauthorized immigrant into a criminal subject at any time to arrest, fines, and/or 6 months of jail time.⁴⁷ This could include legal visa holders who overstay their visas by one day, such as a foreign executive whose flight home is delayed, or visa holders who violate the terms of their visas for technical reasons, such as student visa holders who fail to take full course loads. Subsequent offenders would be felons subject to fines and 2 years in prison.⁴⁸
- **Increase in Heavily Armed ICE Agents:** The SAFE Act would authorize 8,260 new positions within ICE, primarily for detention enforcement and deportation officers.⁴⁹ It would expand arrest authority, provide body armor to all ICE agents and deportation officers, and make handguns, M-4 rifles and Tasers standard issue weapons.⁵⁰ It also would create a new ICE Advisory Council designed to advise Congress on the impact of DHS policies on ICE officers.⁵¹
- **Reduced DHS Ability to Set Law Enforcement Priorities:** The SAFE Act would prohibit implementation of ICE memos setting agency policy on prosecutorial discretion.⁵² These memos are the mechanism by which DHS sets national law

enforcement priorities, including a focus on immigrants who have committed serious crimes over those who have no criminal records and those with compelling circumstances, such as close relatives serving in the military.

- **Deportation of DREAMers:** The SAFE Act would also eliminate DHS discretion to temporarily prevent the removal of DREAMers—unauthorized immigrants who were brought to the U.S. as children and meet certain educational and age requirements.⁵³ Even those who have already been processed and granted temporary relief under the Deferred Action for Childhood Arrivals (DACA) program announced a year ago would become subject to deportation. The deportation of these law-abiding and educated young immigrants who are integrated into U.S. society could cost the economy hundreds of billions of dollars⁵⁴ and damage the social fabric, in addition to being politically unpopular.⁵⁵

Does the SAFE Act belong in a coordinated immigration reform package?

Regardless of whether immigration reform is addressed through a comprehensive package, such as S.744, or a series of related bills, the ultimate result must reflect a coherent vision of immigration policy. Despite differences of opinion over what that policy might look like, the evidence supports expanded legal immigration, legalization of the unauthorized population, and the smart use of enforcement measures. The evidence does not support an indiscriminate increase in penalties, detention, and deportation that removes the ability of immigration authorities to make common-sense, fact-based decisions on individual cases. Furthermore, the economic and social harm caused by state and local immigration laws argues against a policy that encourages the proliferation of such laws.

The creation of a sensible, coherent, forward-looking immigration system is incompatible with measures that eliminate the ability to make sensible individualized decisions on immigration cases, expand expensive and arbitrary mandatory detention and deportation, create a burdensome patchwork of potentially conflicting and unconstitutional state and local immigration laws, and criminalize the entire unauthorized population. In other words, when the House leadership considers what immigration bills to put forward as part of its “step-by-step” solution, the SAFE Act should not be on the list. Because it represents outdated principles that are ineffective and inherently in conflict with prevailing and accepted principles of immigration reform, the SAFE Act would undermine and contradict any achievements the House might make to fix our severely dysfunctional immigration system.

Endnotes

¹ Immigration Policy Center, [Checklist for Estimating the Costs of SB 1070-Style Legislation](#) (Washington DC: American Immigration Council, November 8, 2011); Immigration Policy Center, [Fiscally Irresponsible: Immigration Enforcement without Reform Wastes Taxpayer Dollars](#) (Washington, DC: American Immigration Council, October 19, 2011).

² Immigration Policy Center, [The Fallacy of Enforcement First](#) (Washington, DC: American Immigration Council, May 9, 2013); Immigration Policy Center, [A Decade of Rising Immigration Enforcement](#) (Washington, DC: American Immigration Council, January 8, 2013); Immigration Policy Center, [The 287\(g\) Program: A Flawed and Obsolete Method of Immigration Enforcement](#) (Washington, DC: American Immigration Council, November 29, 2012).

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- ³ Immigration Policy Center, [The Fallacy of Enforcement First](#) (Washington, DC: American Immigration Council, May 9, 2013).
- ⁴ U.S. Department of Homeland Security, [Budget-in-Brief](#), FY 2005-2013.
- ⁵ U.S. Border Patrol, [“Border Patrol Agent Staffing by Fiscal Year,”](#) February 2013.
- ⁶ U.S. Customs and Border Protection, Communications Management Office, November 2012.
- ⁷ U.S. Immigration and Customs Enforcement, Enforcement and Removal Operations, May 28, 2013.
- ⁸ Georgia Logothetis, [“Massive March in Chicago to Protest H.R. 4437,”](#) Daily Kos, March 10, 2006.
- ⁹ [Arizona v. U.S.](#), 567 U.S. (2012).
- ¹⁰ American Immigration Council, [“DOJ Report Slams Sheriff Joe Arpaio and DHS Restricts 287\(g\) and Secure Communities Programs”](#) (Washington, DC: December 15, 2011); Ted Hesson, [“Judge Says Sheriff Joe Arpaio Racially Profiled Latinos,”](#) ABC News, May 24, 2013.
- ¹¹ [Arizona v. U.S.](#), 567 U.S. (2012).
- ¹² Immigration Policy Center, [Checklist for Estimating the Costs of SB 1070-Style Legislation](#) (Washington DC: American Immigration Council, November 8, 2011).
- ¹³ David Hudson, [“The Top 5 Reasons Why S.B. 1070—and Laws Like It—Cause Economic Harm”](#) (Washington, DC: Center for American Progress, June 25, 2012); Madeline Meth, [“RELEASE: How Georgia’s Anti-Immigration Law Could Hurt the State’s \(and the Nation’s\) Economy”](#) (Washington, DC: Center for American Progress, October 4, 2011).
- ¹⁴ Alex Nowrasteh, [“SAFE Act an Expensive Boondoggle”](#) (Washington DC: Cato Institute, August 7, 2013).
- ¹⁵ National Immigration Forum, [The Math of Immigration Detention: Runaway Costs for Immigration Detention Do Not Add Up to Sensible Policies](#) (Washington, DC: August 2013).
- ¹⁶ David Hudson, [“The Top 5 Reasons Why S.B. 1070—and Laws Like It—Cause Economic Harm”](#) (Washington, DC: Center for American Progress, June 25, 2012); Immigration Policy Center, [Bad for Business: How Anti-Immigration Legislation Drains Budgets and Damages States’ Economies](#) (Washington DC: American Immigration Council, June 4, 2012).
- ¹⁷ Joey Garrison, [“Report: 287\(g\) undermines public safety in Davidson County,”](#) *Nashville City Paper*, August 12, 2010.
- ¹⁸ Christina Boomer, [“State law professor claims SB1070 ‘expressly authorizes racial profiling’,”](#) ABC15.com, August 12, 2010.
- ¹⁹ Alex Nowrasteh, [“SAFE Act an Expensive Boondoggle”](#) (Washington DC: Cato Institute, August 7, 2013).
- ²⁰ Ted Hesson, [“Judge Says Sheriff Joe Arpaio Racially Profiled Latinos,”](#) ABC News, May 24, 2013; National Immigration Law Center, [Why Police Chiefs Oppose Arizona’s SB 1070](#) (Los Angeles, CA & Washington, DC, June 2010).
- ²¹ H.R. 2278 § 108.
- ²² Fox News Latino, [“State Immigration Laws Less Popular in 2012,”](#) August 6, 2012.
- ²³ Campbell Robertson, [“New Orleans and U.S. in Standoff on Detentions,”](#) *New York Times*, August 12, 2013.
- ²⁴ Immigration Policy Center, [Bad for Business: How Anti-Immigration Legislation Drains Budgets and Damages States’ Economies](#) (Washington, DC: American Immigration Council, June 4, 2012).
- ²⁵ As of this writing, the version of the SAFE Act reported out of committee had not been formally published, but the text of the original bill and changes which were made during the committee process can be found [here](#).
- ²⁶ H.R. 2278 § 102.
- ²⁷ [Arizona v. U.S.](#), 567 U.S. (2012).
- ²⁸ Immigration Policy Center, [Arizona SB 1070. Legal Challenges and Economic Realities](#) (Washington DC: American Immigration Council, 2012).
- ²⁹ H.R. 2278 § 109.
- ³⁰ Immigration Policy Center, [The 287\(g\) Program: A Flawed and Obsolete Method of Immigration Enforcement](#) (Washington DC: American Immigration Council, November 29, 2012).
- ³¹ H.R. 2278 § 112.
- ³² H.R. 2278 § 110.
- ³³ H.R. 2278 § 108.
- ³⁴ H.R. 2278 § 111.
- ³⁵ H.R. 2278 § 310(a)(3)(C).
- ³⁶ [Zadvydas v. Davis](#), 533 U.S. 678 (2001).
- ³⁷ H.R. 2278 §§ 111 and 113, requiring detention of “criminal aliens,” which are defined as immigrants charged with, but not necessarily convicted, of a crime.

³⁸ H.R. 2278 § 107.

³⁹ National Immigration Forum, [*The Math of Immigration Detention: Runaway Costs for Immigration Detention Do Not Add Up to Sensible Policies*](#) (Washington, DC: August 2013).

⁴⁰ H.R. 2278 § 106.

⁴¹ H.R. 2278 Title III.

⁴² H.R. 2278 § 311.

⁴³ H.R. 2278 § 319.

⁴⁴ Immigration Policy Center, [*Aggravated Felonies: An Overview*](#) (Washington DC: American Immigration Council, March 16, 2012).

⁴⁵ H.R. 2278 §§ 301(a), 307(a), 309.

⁴⁶ H.R. 2278 § 309.

⁴⁷ H.R. 2278 § 315.

⁴⁸ The bill makes illegal entry a continuing offense, meaning that it can be prosecuted as long as the immigrant remains in the U.S., and it provides that overstaying a visa—no matter how short the time—counts as an illegal entry. It also explicitly makes unlawful presence a crime punishable by up to 6 months in jail.

⁴⁹ H.R. § 502, 506.

⁵⁰ H.R. § 503.

⁵¹ H.R. § 504.

⁵² King amendment.

⁵³ King amendment.

⁵⁴ Cristina Costantini, "[Study: DREAMers Could Add \\$329 Billion to Economy](#)," ABCnews.go.com, October 2, 2012.

⁵⁵ Eleni Delimpaltadaki, "[Americans Have Long Called for Legal Status for “Dreamers:” Public Opinion Round-Up](#)," opportunityagenda.org, June 15, 2012.

ATTACHMENT B

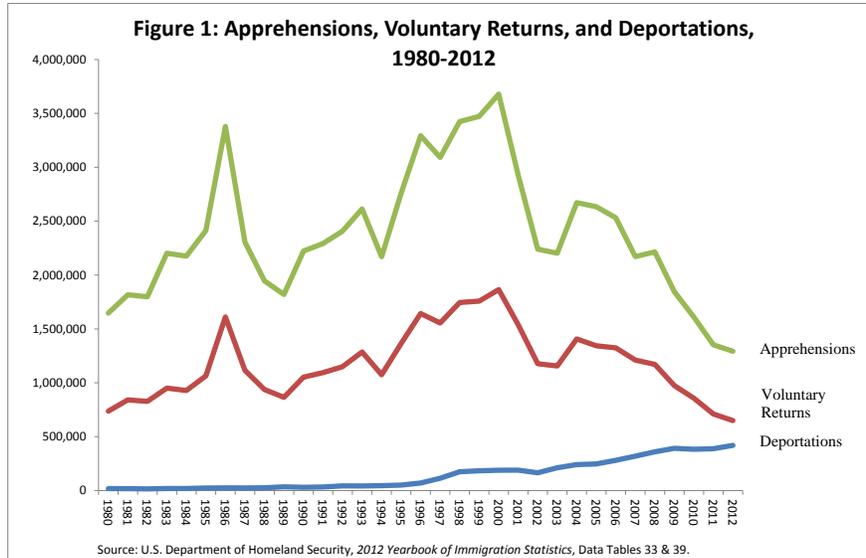
March 2014

THE GROWTH OF THE U.S. DEPORTATION MACHINE: More Immigrants are being “Removed” from the United States than Ever Before

Despite some highly public claims to the contrary, there has been no waning of immigration enforcement in the United States. In fact, the U.S. deportation machine has grown larger in recent years, indiscriminately consuming criminals and non-criminals alike, be they unauthorized immigrants or long-time legal permanent residents (LPRs). Deportations under the Obama administration alone are now approaching the two-million mark. But the deportation frenzy began long before this milestone. The federal government has, for nearly two decades, been pursuing an enforcement-first approach to immigration control that favors mandatory detention and deportation over the traditional discretion of a judge to consider the unique circumstances of every case. The end result has been a relentless campaign of imprisonment and [expulsion](#) aimed at noncitizens—a campaign authorized by Congress and implemented by the executive branch. While this campaign precedes the Obama administration by many years, it has grown immensely during his tenure in the White House. In part, this is the result of laws which have put the expansion of deportations on automatic. But the continued growth of deportations also reflects the policy choices of the Obama administration. Rather than putting the brakes on this non-stop drive to deport more and more people, the administration chose to add fuel to the fire.¹

IRCA and the New Era of Deportations

The U.S. system of deportation (and immigration detention) has been growing for decades under both Republican and Democratic administrations and congresses.² The impetus for this growth was a small section of the Immigration Reform and Control Act of 1986 (IRCA) known as the MacKay amendment, which encouraged the initiation of deportation proceedings against any immigrant convicted of a deportable offense.³ Since that time, a stream of punitive legislation has eaten away at the traditional discretion of judges to grant relief from deportation in particular cases.⁴ The end result is that the number of “removals” (deportations) has trended upward since the mid-1990s. Meanwhile, the number of apprehensions has fluctuated widely, primarily in response to changing economic conditions in the United States and Mexico, and nose-dived when the recession of late 2007 hit. The number of “voluntary returns” has tracked apprehensions closely. However, since 2005, voluntary return has been made available to fewer and fewer apprehended immigrants as deportation (with criminal consequences for re-entry into the country) becomes the preferred option of U.S. immigration authorities (Figure 1).⁵



Most unauthorized immigrants (and deportees) have long been men. However, faced with intensified immigration enforcement, men who in the past might have returned to their home countries after a few years of work in the United States are settling permanently and bringing their wives and children with them.⁶ At the same time, immigration enforcement has expanded along the full length of the southern border and into the interior of the country, beyond the border crossing points traditionally dominated by men. As a result, more and more women (and mothers) are being apprehended and deported.⁷

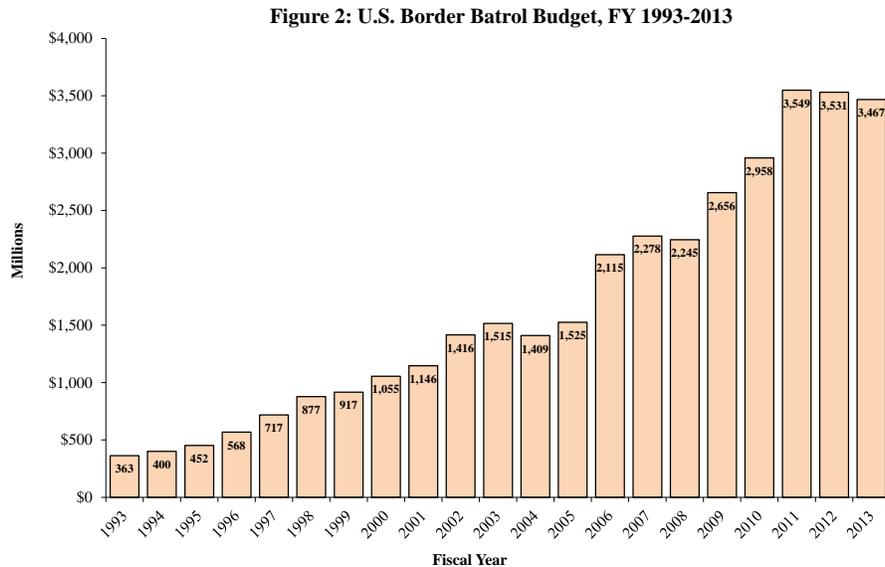
Be they men or women, though, most of the immigrants being deported are not dangerous criminals. According to U.S. Immigration and Customs Enforcement (ICE) [statistics](#), four-fifths of all deportations conducted by the agency in Fiscal Year (FY) 2013 did *not* fit ICE’s own definition of what constitutes a “Level 1” priority.⁸

The 1996 Laws

The most extreme cases of punishing post-IRCA immigration laws came in 1996 with the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) and Antiterrorism and Effective Death Penalty Act (AEDPA). These two pieces of legislation transformed immigration law in two ways. First, the laws mandated the detention and deportation of noncitizens (legal permanent residents and unauthorized immigrants alike) who had been convicted of an “aggravated felony.” Second, the laws expanded the list of offenses which qualify as “aggravated felonies” for immigration purposes (including tax evasion, failure to appear in court, and receipt of stolen property⁹). Moreover, the laws also applied this new standard retroactively to offenses committed years before the laws were enacted.¹⁰ In other words, a growing number of immigrants have been detained and deported for non-violent criminal offenses since 1996 as U.S. immigration policy criminalizes an ever-broadening swath of the immigrant population.¹¹

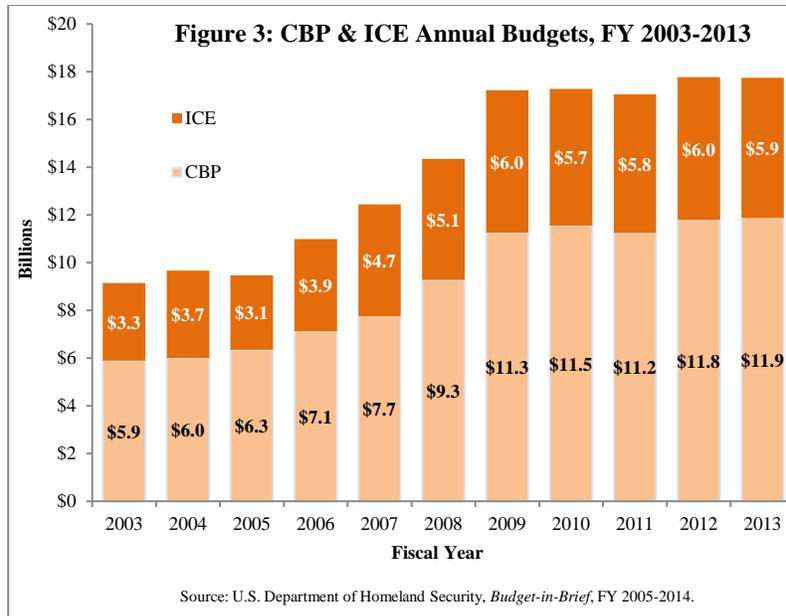
An Enforcement Spending Spree

Thanks to the proliferation of punitive laws and policies, immigration enforcement is a booming business. Since the federal government adopted a strategy of concentrated border enforcement known as “prevention through deterrence” in the early 1990s, the annual [budget](#) of the Border Patrol has increased ten-fold, from \$363 million in FY 1993 to \$3.5 billion in FY 2013 (Figure 2).¹²

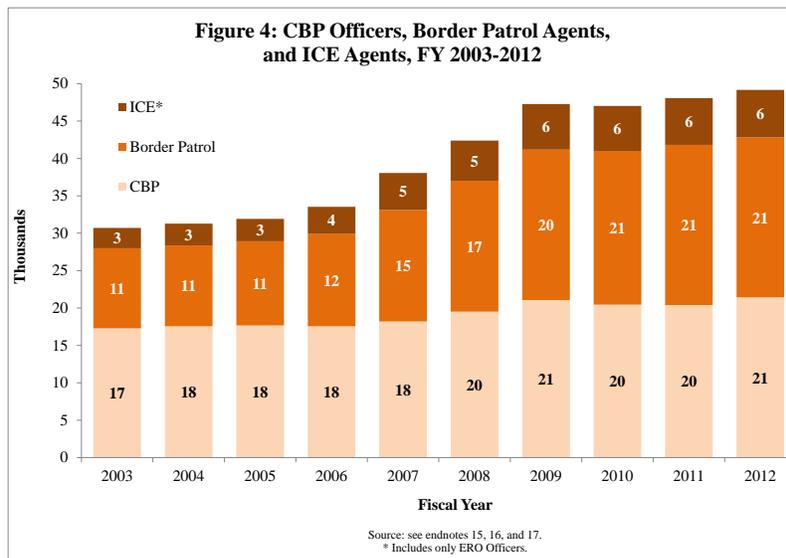


Source: U.S. Border Patrol, “U.S. Border Patrol Fiscal Year Budget Statistics,” January 27, 2014.

Moreover, since the creation of the Department of Homeland Security (DHS) in 2003, the annual budget of Customs and Border Protections (CBP)—which includes the Border Patrol—doubled from \$5.9 billion to \$11.9 billion in FY 2013. Spending on Immigration and Customs Enforcement (ICE)—the interior-enforcement counterpart to CBP within DHS—grew 73 percent, from \$3.3 billion since its inception to \$5.9 billion in FY 2013 (Figure 3).¹³ The budget of Enforcement and Removal Operations (ERO) in particular has increased from \$1.2 billion in FY 2005 to \$2.9 billion in FY 2012.¹⁴



As budgets have grown, so has staffing. The [number](#) of Border Patrol agents deployed between ports of entry roughly doubled from 10,717 in FY 2003 to 21,394 in FY 2012.¹⁵ At the same time, the number of CBP officers working at ports of entry grew from 17,279 to 21,423.¹⁶ And the number of ICE agents devoted to Enforcement and Removal Operations more than doubled from 2,710 to 6,338 (Figure 4).¹⁷ All told, the number of border and interior-enforcement personnel now stands at roughly 49,000.



The Melding of Border and Interior Enforcement

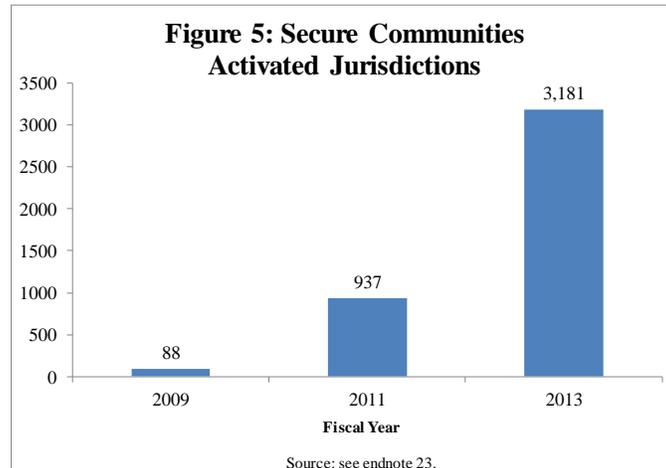
All of this spending on immigration enforcement has fueled programs like the Criminal Alien Program (CAP), Secure Communities, and 287(g), which reach into every corner of the country and thereby blur the line between interior enforcement and border enforcement.¹⁸

Criminal Alien Program (CAP)

CAP encompasses a number of different systems designed to identify, detain, and begin removal proceedings against deportable immigrants within federal, state, and local prisons and jails.¹⁹ CAP is currently active in all state and federal prisons, as well as more than 300 local jails throughout the country. It is one of several “jail status check” programs intended to screen individuals in federal, state, or local prisons and jails for removability. While other such jail status check programs (like Secure Communities) have garnered much more attention, CAP is the oldest and largest such interface between the criminal justice system and federal immigration authorities.²⁰ CAP was created between 2005 and 2007 through the fusion of two other programs that were launched in 1988: the Institutional Removal Program (IRP) and the Alien Criminal Apprehension Program (ACAP).²¹

Secure Communities

Secure Communities, which was created in 2008, is an information-sharing program between DHS and the Department of Justice. The program uses biometric data to screen for deportable immigrants as people are being booked into jails.²² Under Secure Communities, an arrestee’s fingerprints are run not only against criminal databases, but immigration databases as well. If there is an immigration “hit,” ICE can issue a “detainer” requesting that the jail hold the person in question until ICE can pick him up. Not surprisingly, given the new classes of “criminals” created by IIRAIRA, most of the immigrants being scooped up by Secure Communities are non-violent, are not serious criminals, and are not a threat to anyone. Moreover, as the program metastasized throughout every part of the country, more and more people were thrown into immigration detention prior to deportation.²³ The expansion of Secure Communities has been dramatic, to say the least—in part because participating jurisdictions cannot opt out of the program. In fact, the number of “activated jurisdictions” encompassed by the program grew from only 88 in FY 2009 to 937 in FY 2011 to *all* 3,181 in the country as of FY 2013 (Figure 5).²⁴ According to the [Government Accountability Office](#) (GAO), “from October 2008 through March 2012, Secure Communities led to the removal of about 183,000 aliens.”²⁵



287(g)

Under Section 287(g) of the Immigration and Nationality Act, DHS may deputize selected state and local law-enforcement officers to perform the functions of federal immigration agents. Like employees of ICE, these “287(g) officers” have access to federal immigration databases, may interrogate and arrest noncitizens believed to have violated federal immigration laws, and may lodge “detainers” against alleged noncitizens held in state or local custody. The program has attracted a wide range of critics since the first 287(g) agreement was signed more than ten years ago. Among other concerns, opponents say the program lacks proper federal oversight, diverts resources from the investigation of local crimes, and results in profiling of Latino residents—as was documented in the case of the 287(g) agreement with Sheriff Joe Arpaio of Maricopa County, Arizona. In its [budget justification](#) for FY 2013, DHS sought \$17 million *less* in funding for the 287(g) program, and said that in light of the expansion of Secure Communities, “it will no longer be necessary to maintain the more costly and less effective 287(g) program.”²⁶

The “Consequence Delivery System”

Meanwhile, along the U.S.-Mexico border, CBP began in 2005 to roll out its punitive “Consequence Delivery System” aimed at immigrants caught crossing the border without authorization. As described by Border Patrol Chief Michael J. Fisher, Consequence Delivery “uses a combination of criminal and administrative consequences developed by the Border Patrol, and implemented with the assistance of ICE, targeting specific classifications of offenders, effectively breaking the smuggling cycle along the border of the United States.”²⁷ In practice, this means that fewer apprehended Mexicans are given the option of “voluntary return” to Mexico. Rather, the Border Patrol now opts for three types of “high consequence” outcomes: formal removal (deportation), immigration-related criminal charges, and remote repatriation (that is, sending immigrants to remote locations far from the smugglers who helped them cross the border).²⁸ In other words, unauthorized Mexican immigrants are no longer allowed to just go home. They may face criminal prosecution and prison time if they return to the United States. They also are being sentenced in group “trials” that accord apprehended immigrants few legal rights—a process known as Operation Streamline.²⁹ According to the [Congressional Research](#)

[Service](#) (CRS), 208,939 unauthorized immigrants were prosecuted through Operation Streamline from its initiation in December 2005 through the end of FY 2012.³⁰

Roots in the United States

Many of the immigrants now being deported are long-term legal permanent residents of the United States who have run afoul of the 1996 laws. Yet even many of the unauthorized immigrants being deported have strong ties to the United States, such as U.S.-citizen family members (especially U.S.-born children), not to mention jobs and homes in the United States. Families containing a member who is an unauthorized immigrant live in constant fear of separation. And the burden of deportation is shouldered disproportionately by children.³¹ According to [estimates](#) from the Pew Hispanic Center, there are 4 million U.S.-born children in the United States with at least one parent who is an unauthorized immigrant, plus 1.1 million children who are themselves unauthorized immigrants and have unauthorized-immigrant parents.³² Moreover, DHS [estimates](#) that nearly three-fifths of unauthorized immigrants have lived in the United States for more than a decade.³³ In other words, most of these people are not single young men, recently arrived, who have no connection to U.S. society. These are men, women, and children who are already part of U.S. society.

by Walter A. Ewing

Endnotes

¹ *The Economist*, "[America's deportation machine: The great expulsion](#)," February 8, 2014.

² Ryan D. King, Michael Massoglia, and Christopher Uggen, "[Employment and Exile: U.S. Criminal Deportations, 1908–2005](#)," *American Journal of Sociology* 117, no. 6 (May 2012): 1796-1799.

³ *Ibid.*, p. 1797.

⁴ *Ibid.*, p. 1798.

⁵ U.S. Department of Homeland Security, [2012 Yearbook of Immigration Statistics](#), Data Tables 33 & 39.

⁶ Douglas S. Massey, et al., *Beyond Smoke and Mirrors: Mexican Immigration in an Era of Economic Integration* (New York: Russell Sage Foundation, 2002), chap. 6.

⁷ Jacqueline Maria Hagan, Nestor Rodriguez, and Brianna Castro, "[Social effects of mass deportations by the United States government, 2000–10](#)," *Ethnic and Racial Studies* 34, no. 8 (August 2011): 1381; Tanya Golash-Boza and Pierrette Hondagneu-Sotelo, "[Latino immigrant men and the deportation crisis: A gendered racial removal program](#)," *Latino Studies* 11, no. 3 (Autumn 2013): 274.

⁸ U.S. Immigration and Customs Enforcement, [ERO Annual Report: FY 2013 ICE Immigration Removals](#), December 2013, pp. 2-3.

⁹ INA § 101 (a)(43).

¹⁰ Juliet Stumpf, "[The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power](#)," *American University Law Review* 56, no. 2 (December 2006): 376-386.

¹¹ Jacqueline Maria Hagan, Nestor Rodriguez, and Brianna Castro, "[Social effects of mass deportations by the United States government, 2000–10](#)," *Ethnic and Racial Studies* 34, no. 8 (August 2011): 1375-1377.

¹² U.S. Border Patrol, "[U.S. Border Patrol Fiscal Year Budget Statistics](#)," January 27, 2014.

¹³ U.S. Department of Homeland Security, [Budget-in-Brief](#), FY 2005-2014.

¹⁴ U.S. Immigration and Customs Enforcement, [Budget Fact Sheet](#), FY 2005-2012.

¹⁵ U.S. Border Patrol, "[U.S. Border Patrol Fiscal Year Staffing Statistics](#)," January 27, 2014.

¹⁶ U.S. Customs and Border Protection, Communications Management Office, November 2012.

¹⁷ U.S. Immigration and Customs Enforcement, Enforcement and Removal Operations, May 28, 2013.

¹⁸ Jacqueline Maria Hagan, Nestor Rodriguez, and Brianna Castro, "[Social effects of mass deportations by the United States government, 2000–10](#)," *Ethnic and Racial Studies* 34, no. 8 (August 2011): 1375-1377.

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- ¹⁹ Marc R. Rosenblum and William A. Kandel, [*Interior Immigration Enforcement: Programs Targeting Criminal Aliens*](#) (Washington, DC: Congressional Research Service, December 20, 2012), p. 14.
- ²⁰ American Immigration Council, [*The Criminal Alien Program \(CAP\): Immigration Enforcement in Prisons and Jails*](#) (Washington, DC: August 2013).
- ²¹ Marc R. Rosenblum and William A. Kandel, [*Interior Immigration Enforcement: Programs Targeting Criminal Aliens*](#) (Washington, DC: Congressional Research Service, December 20, 2012), pp. 12-13.
- ²² *Ibid.*, p. 15.
- ²³ Michele Waslin, [*The Secure Communities Program: Unanswered Questions and Continuing Concerns*](#) (Immigration Policy Center, American Immigration Council, updated November 2011).
- ²⁴ U.S. Department of Homeland Security, Office of Inspector General, [*Operations of United States Immigration and Customs Enforcement's Secure Communities*](#), April 2012, p. 6; U.S. Immigration and Customs Enforcement, Secure Communities, [*Activated Jurisdictions*](#), January 22, 2013.
- ²⁵ U.S. Government Accountability Office, [*Secure Communities: Criminal Alien Removals Increased, but Technology Planning Improvements Needed*](#), GAO-12-708, July 2012, p. 14.
- ²⁶ U.S. Department of Homeland Security, [*Annual Performance Report: Fiscal Years 2011–2013*](#), February 2012, p. 1108.
- ²⁷ [*Testimony*](#) of Michael J. Fisher, Chief, U.S. Border Patrol, U.S. Customs and Border Protection, before the House Committee on Homeland Security, Subcommittee on Border and Maritime Security: “Does Administrative Amnesty Harm our Efforts to Gain and Maintain Operational Control of the Border?” October 4, 2011.
- ²⁸ Marc R. Rosenblum, [*Border Security: Immigration Enforcement Between Ports of Entry*](#) (Washington, DC: Congressional Research Service, May 3, 2013), pp. 6-8.
- ²⁹ Joanna Jacobbi Lydgate, “[*Assembly-Line Justice: A Review of Operation Streamline*](#),” *California Law Review* 98, no. 2 (April 30, 2010): 481-544.
- ³⁰ Marc R. Rosenblum, [*Border Security: Immigration Enforcement Between Ports of Entry*](#) (Washington, DC: Congressional Research Service, May 3, 2013), pp. 8.
- ³¹ Tanya Golash-Boza and Pierrette Hondagneu-Sotelo, “[*Latino immigrant men and the deportation crisis: A gendered racial removal program*](#),” *Latino Studies* 11, no. 3 (Autumn 2013): 274, 285–287; Jacqueline Maria Hagan, Nestor Rodriguez, and Brianna Castro, “[*Social effects of mass deportations by the United States government, 2000–10*](#),” *Ethnic and Racial Studies* 34, no. 8 (August 2011): 1378-1379, 1383.
- ³² Jeffrey S. Passel and Paul Taylor, [*Unauthorized Immigrants and Their U.S.-Born Children*](#) (Washington, DC: Pew Hispanic Center, August 11, 2010), p. 1.
- ³³ Michael Hofer, Nancy Rytina, and Bryan Baker, [*Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2011*](#) (Washington, DC: U.S. Department of Homeland Security, Office of Immigration Statistics, March 2012), p. 3.

ATTACHMENT C

March 2014

MISPLACED PRIORITIES: Most Immigrants Deported by ICE in 2013 Were a Threat to No One

No one can say with certainty when the Obama administration will reach the grim milestone of having deported two million people since the President took office in 2008. Regardless of the exact date this symbolic threshold is reached, however, it is important to keep in mind a much more important fact: most of the people being deported are not dangerous criminals. Despite [claims](#) by U.S. Immigration and Customs Enforcement (ICE) that it prioritizes the apprehension of terrorists, violent criminals, and gang members,¹ the agency's own deportation statistics do not bear this out. Rather, most of the individuals being swept up by ICE and dropped into the U.S. deportation machine committed relatively minor, non-violent crimes or have no criminal histories at all. Ironically, many of the immigrants being deported would likely have been able to remain in the country had the immigration reform legislation favored by the administration become law.

ICE's skewed priorities are apparent from the agency's most recent deportation [statistics](#), which cover Fiscal Year (FY) 2013.² However, it takes a little digging to discern exactly what those statistics mean. The ICE report containing these numbers is filled with ominous yet cryptic references to "convicted criminals" who are "Level 1," "Level 2," or "Level 3" in terms of their priority. But when those terms are dissected and analyzed, it quickly becomes apparent that most of these "criminal aliens" are not exactly the "worst of the worst."

The agency defines three "[priorities](#) for the apprehension, detention, and removal of aliens":

- *Priority 1* – "Aliens who pose a danger to national security or a risk to public safety."
- *Priority 2* – "Recent illegal entrants."
- *Priority 3* – "Aliens who are fugitives or otherwise obstruct immigration controls."³

Priority 1 includes certain immigrants without criminal convictions whom ICE believes threaten national security or public safety. In addition, priority 1 encompasses three "levels" of criminal convictions, many of which are not violent or threatening":

- "Level 1" – convicted of an "aggravated felony," or two or more felonies.
- "Level 2" – convicted of a felony, or three or more misdemeanors.
- "Level 3" – convicted of no more than two misdemeanors.

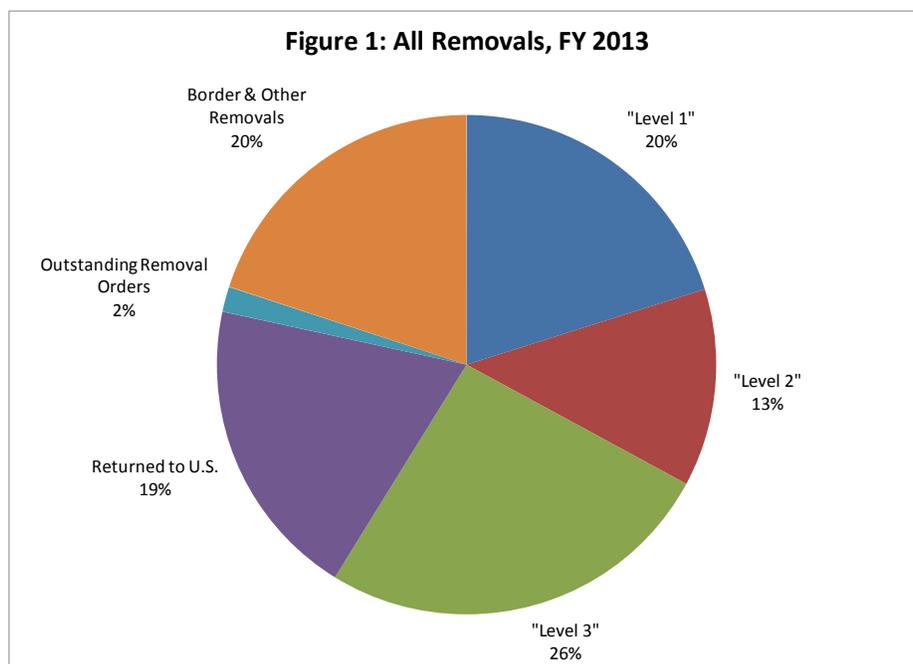
A felony is a crime punishable by more than one year in prison. Felonies encompass crimes ranging from murder and arson to robbery and burglary. A misdemeanor is a crime punishable by more than five days but not more than one year in prison. Misdemeanors include disturbing the peace, some drunk driving offenses, and some traffic violations. The term "aggravated felony," which certainly sounds dangerous, was invented by Congress solely for immigration purposes and need not refer to an offense that is "aggravated" or a "felony." As initially enacted

in 1988, the term referred only to murder, federal drug trafficking, and illicit trafficking of certain firearms and destructive devices. Congress has since expanded the definition of “aggravated felony” on numerous occasions and it now covers more than 30 types of offenses, including theft, filing a false tax return, and failing to appear in court.⁴

All of which serves to illustrate the point that even the highest-priority immigrants on ICE’s list are not necessarily violent or dangerous. But even if we overlook this fact for the sake of argument, last year’s deportation statistics make clear that even “Level 1” deportees make up a minority of the immigrants whom ICE removed from the country. This does not represent an effective crime-fighting policy or an effective immigration policy. It is a misallocation of enforcement resources that is being used to create a humanitarian catastrophe as people who are a threat to no one are torn from their families, their communities, and their jobs.

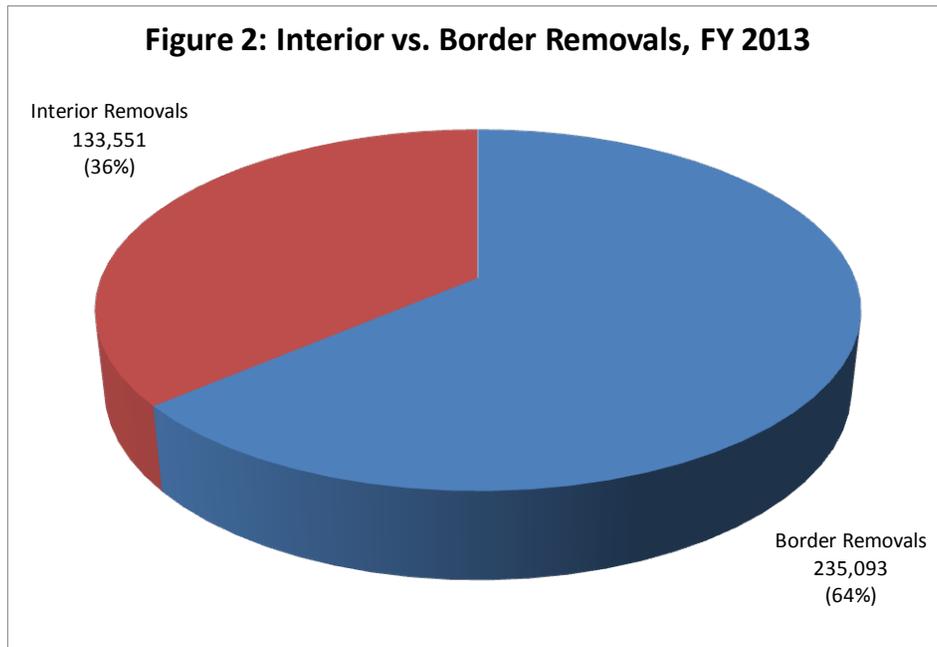
Four-fifths of all deportations did not fall within ICE’s definition of a “Level 1” priority.

- In FY 2013, ICE carried out 368,644 “removals” of immigrants from the United States.⁵
- One-in-five of these deportees qualified as “Level 1” as defined by ICE: immigrants convicted of an “aggravated felony” or at least two felonies (Figure 1).⁶
- One-in-eight deportees fit the definition of “Level 2” (immigrants convicted of a felony or three misdemeanors), while just over one-quarter were “Level 3” (convicted of no more than two misdemeanors) (Figure 1).⁷
- Just under one-in-five of those deported had been previously removed from the United States. Another one-in-five were removed for some other, non-criminal immigration violation. And two percent were immigrants with outstanding removal orders (Figure 1).⁸



Most removals involved immigrants apprehended near the border.

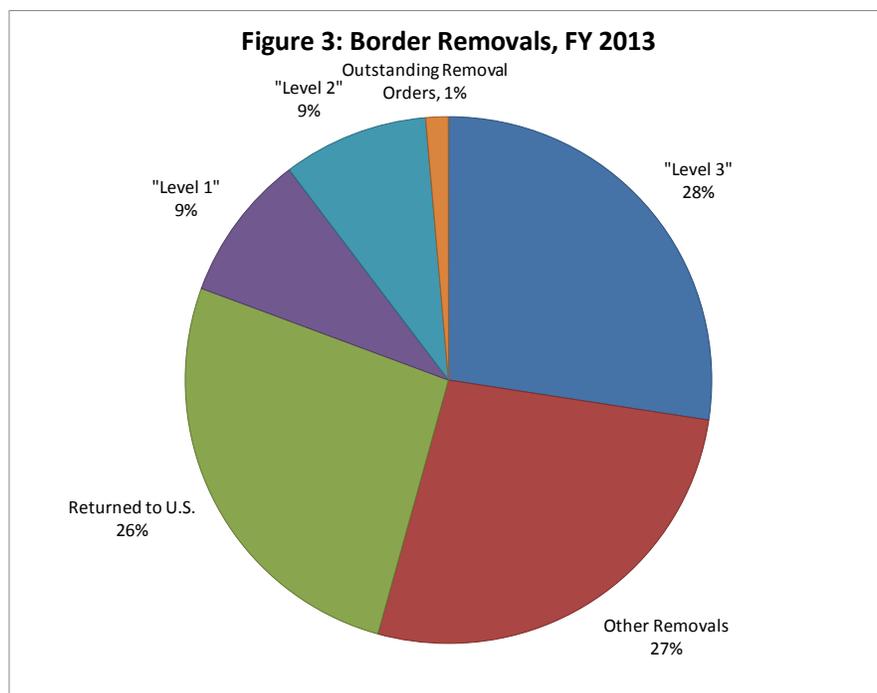
- ICE states that roughly one-third of deportees in FY 2013 were apprehended in the interior of the country, while nearly two-thirds were apprehended in the proximity of the border (Figure 2).⁹
- However, the ICE distinction between “border removals” and “interior removals” is not as clear-cut as it sounds.
 - ICE states that its border removal statistics refer to “recent illegal entrants,” defined as individuals “apprehended while attempting to illicitly enter the United States.”¹⁰
 - However, the border removal statistics appear to include all removals of individuals taken into custody by Customs and Border Protection (CBP) officers. CBP does not exclusively arrest individuals in the process of crossing the border. CBP’s Border Patrol agents also conduct roving patrols “near” the border, as well as operate checkpoints on roads which lead away from the border.¹¹
 - Furthermore, ICE has suggested that the term “recent border crossers” includes, among others, those who entered the United States within the last three years.¹²
 - As a result, “border removals” may include immigrants who live and work in communities quite some distance from the border itself, rather than individuals attempting to enter the United States.



Fewer than one-in-ten deportees apprehended near the border fell within ICE’s definition of a “Level 1” priority.

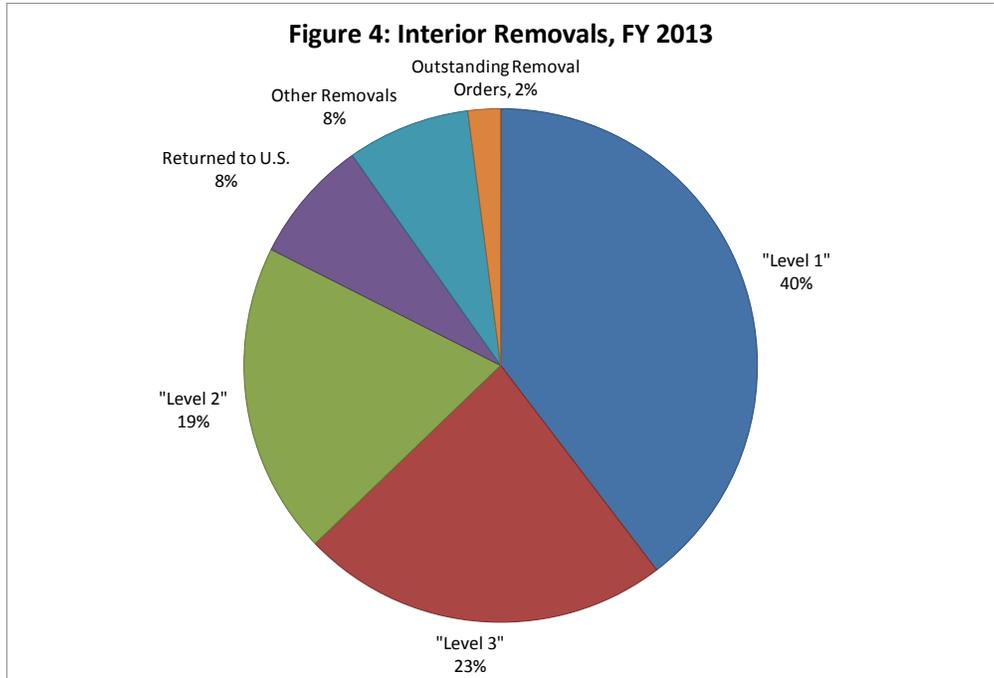
- Only 9 percent of “border deportees” qualified as “Level 1” as defined by ICE: immigrants convicted of an “aggravated felony” or at least two felonies (Figure 3).¹³

- Fewer than one-in-ten border deportees fit the definition of “Level 2” (immigrants convicted of a felony or three misdemeanors), while more than one-quarter were “Level 3” (convicted of no more than two misdemeanors) (Figure 3).¹⁴
- More than one-quarter of border deportees had returned to the United States after being removed. And more than one-quarter were removed for some other, non-criminal immigration violation. One percent were immigrants with outstanding removal orders {Figure 3}.¹⁵
- Being apprehended near the border and formally “removed” is not the same as voluntary return. An immigrant subject to “removal” may face criminal prosecution and prison time if he or she returns to the United States.



Three-fifths of deportees apprehended in the interior of the country didn’t fall within ICE’s definition of a “Level 1” priority.

- Two-in-five “interior deportees” qualified as “Level 1” as defined by ICE: immigrants convicted of an “aggravated felony” or at least two felonies (Figure 4).¹⁶
- Fewer than one-in-five interior deportees fit the definition of “Level 2” (immigrants convicted of a felony or three misdemeanors), while just under one-quarter were “Level 3” (convicted of no more than two misdemeanors) (Figure 4).¹⁷
- Eight percent of interior deportees had returned to the United States after being removed. Another eight percent were removed for some other, non-criminal immigration violation. And two percent were immigrants with outstanding removal orders (Figure 4).¹⁸



Only Scratching the Surface

As ICE’s own statistics make clear, the agency is involved primarily in the apprehension and deportation of people who have committed immigration violations and minor crimes—not terrorist operatives or violent criminals. But recognizing this is only the first step in understanding the way ICE functions. The next step is to examine *how* ICE carries out deportations. For instance, in FY 2013, 101,000 (or 27 percent) of the people whom ICE deported were summarily removed from the country via an “order of expedited removal,” and 159,624 (43 percent) were removed through a “reinstated final order of removal,”¹⁹ neither of which generally affords the deportee a hearing in court. In other words, seven out of every ten deportees in FY 2013 never had the opportunity to plead their cases before an immigration judge. Not only is ICE deporting people who aren’t a threat, but it’s deporting many of them in ways that don’t respect the full range of legal rights which form the basis of the U.S. criminal justice system.

Endnotes

¹ Memorandum for All ICE Employees from Director John Morton on “[Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens](#),” March 2, 2011, pp. 1-2.

² U.S. Immigration and Customs Enforcement, [ERO Annual Report: FY 2013 ICE Immigration Removals](#), December 2013.

³ Memorandum for All ICE Employees from Director John Morton on “[Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens](#),” March 2, 2011.

⁴ Immigration Policy Center, [Aggravated Felonies: An Overview](#) (Washington, DC: American Immigration Council, March 2012).

⁵ U.S. Immigration and Customs Enforcement, [ERO Annual Report: FY 2013 ICE Immigration Removals](#), December 2013, p. 1.

⁶ *Ibid.*, pp. 2-3.

⁷ *Ibid.*

⁸ Ibid.

⁹ Ibid., p. 1.

¹⁰ Ibid., p. 2.

¹¹ U.S. Customs and Border Protection, [Performance and Accountability Report: Fiscal Year 2012](#), p. 17.

¹² U.S. Department of Homeland Security, [Guidance to ICE Attorneys Reviewing the CBP, USCIS, and ICE Cases Before the Executive Office for Immigration Review](#), November 2011, p.1; “Written [testimony](#) of ICE Enforcement and Removal Operations Executive Associate Director Thomas Homan for a House Committee on Oversight and Government Reform, Subcommittee on National Security hearing titled *Border Security Oversight: Identifying and Responding to Current Threats*,” June 27, 2013.

¹³ U.S. Immigration and Customs Enforcement, [ERO Annual Report: FY 2013 ICE Immigration Removals](#), December 2013, p. 3.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid., p. 2.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid., p. 4.

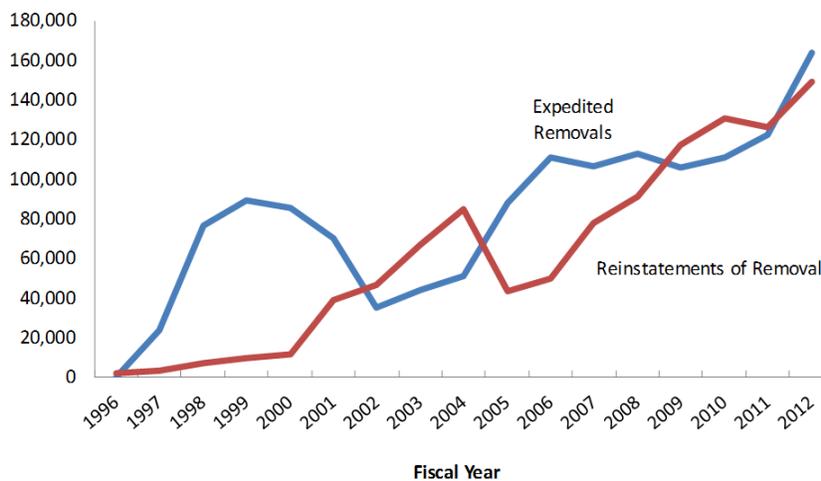
ATTACHMENT D

**REMOVAL WITHOUT RECOURSE:
THE GROWTH OF SUMMARY DEPORTATIONS FROM THE UNITED STATES**

The deportation process has been transformed drastically over the last two decades. Today, two-thirds of individuals deported are subject to what are known as “summary removal procedures,” which deprive them of both the right to appear before a judge and the right to apply for status in the United States. In 1996, as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Congress established streamlined deportation procedures that allow the government to deport (or “remove”) certain noncitizens from the United States without a hearing before an immigration judge. Two of these procedures, “expedited removal” and “reinstatement of removal,” allow immigration officers to serve as both prosecutor and judge—often investigating, charging, and making a decision all within the course of one day. These rapid deportation decisions often fail to take into account many critical factors, including whether the individual is eligible to apply for lawful status in the United States, whether he or she has long-standing ties here, or whether he or she has U.S.-citizen family members.

In recent years, summary procedures have eclipsed traditional immigration court proceedings, accounting for the dramatic increase in removals overall. As the chart below demonstrates, since 1996, the number of deportations executed under summary removal procedures—including expedited removal, reinstatement of removal, and stipulated removal (all described below)—has dramatically increased.

**Expedited Removals & Reinstatements of Removal,
FY 2001-2012**



Source: U.S. Department of Homeland Security, *Immigration Enforcement Actions: 2010 and 2012*; U.S. Immigration and Naturalization Service, *2000 Statistical Yearbook*, chp. 6.

In Fiscal Year (FY) 2013, more than 70 percent of all people Immigration and Customs Enforcement (ICE) deported were subject to summary removal procedures.¹

Expedited Removal (INA § 235(b))

In FY 2013, ICE deported about 101,000 people through the expedited removal process.² Expedited removal is a summary process for formally deporting certain noncitizens who do not have proper entry documents and who are seeking entry to the United States at a port of entry (POE), such as a border crossing or an airport, or who are found within 100 miles of the border. Specifically, it applies only if the immigration officer determines that an individual:

- committed fraud or misrepresented a material fact for purposes of seeking entry to the United States;
- falsely claimed U.S. citizenship; or
- is not in possession of a valid visa or other required documentation.

When expedited removal was first enacted, immigration officers applied it only to people who were seeking entry to the United States and not to those who were already in the United States. However, in 2004, the Department of Homeland Security (DHS) drastically expanded the scope of expedited removal by deciding that noncitizens encountered within 100 air miles of the southwest border who have not been present in the United States for the 14 days immediately prior to the date of encounter can be subject to expedited removal.³ In 2006, DHS announced that it would implement this policy along all of the U.S. borders.⁴

A person subject to expedited removal is immediately ordered removed without any further hearing, review, or opportunity to apply to stay in the United States unless the person expresses a fear of persecution, in which case he or she is afforded a “credible fear interview” to determine whether he or she may apply for asylum.⁵ The process is so truncated that frequently a person with an expedited removal order has no idea why he or she was deported. Individuals subject to expedited removal generally are not informed of their right to counsel. Likewise, they are not provided a sufficient opportunity to contact counsel to help them challenge the charges against them or present evidence that is not with them at the time of apprehension.

As a result, expedited removal can lead to erroneous deportations of individuals who are not deportable or who would be eligible to apply for lawful status in the United States or to seek prosecutorial discretion if processed through normal immigration court procedures. In addition, individuals who may have resided in the United States for decades, and left only for a brief period of time, may be deported pursuant to expedited removal despite having significant ties to the United States.⁶ Those subject to expedited removal are automatically barred from returning to the United States for five years. In cases where an expedited removal order is based on a false claim of U.S. citizenship, an individual is permanently barred from re-entering the country.

Reinstatement of Removal (INA § 241(a)(5))

In FY 2013, 159,634 individuals were deported based on a reinstatement of removal order,⁷ a 270 percent increase from 2005.⁸ Reinstatement of removal applies to noncitizens who return

illegally to the United States after having previously been deported. Essentially, DHS “reinstates” the original removal order without considering the individual’s current situation, reasons for returning to the United States, or the presence of flaws in the original removal proceedings. They even may apply it to someone whose initial deportation order was entered in absentia.⁹ A person whose order is reinstated is barred from applying to remain in the United States or from seeking to correct any errors that may have occurred in the original deportation. The primary exception to this rule is that an individual who expresses a fear of return during the reinstatement process must be referred to an asylum officer for screening for eligibility for withholding of removal or protection under the Convention Against Torture.¹⁰

Unlike expedited removal, immigration officers may use the reinstatement process anywhere throughout the United States—not just at a POE or within 100 miles of the border. Most persons subject to reinstatement are arrested and kept in custody throughout the process without an opportunity to seek a bond. The process is designed to allow DHS to remove individuals immediately; the entire process (including the removal) may occur within 24 hours. Typically, the DHS officer conducts a short interrogation to determine whether the individual has a prior removal order, actually is the person identified in the prior order, and has unlawfully reentered. At the conclusion of the interrogation, the person is afforded an opportunity to make a statement and, thereafter, the officer typically issues the final order. The process usually happens too quickly for an individual to consult with a lawyer to assist in challenging the reinstatement.

Stipulated Removal (INA § 240(d))

Stipulated removal orders are different from expedited removal orders and reinstated removal orders in that the person is formally charged and placed in immigration court proceedings before an immigration judge. However, like these other summary removal procedures, the person usually does not appear in an immigration court; rather, the noncitizen agrees (or “stipulates”) to deportation and gives up his or her right to a hearing. The immigration judge may enter the order of removal without seeing the person and asking him or her whether the stipulation was entered into knowingly and voluntarily. The use of stipulated removal expanded from zero in 2000 to over 30,000 in 2008.¹¹

Of the more than 160,000 noncitizens who agreed to stipulated removal orders between 2004 and 2010, the vast majority were in immigration detention—often far from family and home—and unrepresented by counsel.¹² The correlation between detention and stipulated removals is particularly troubling given that individuals in detention have little access to lawyers or even basic information about their legal options and because the conditions of confinement are inherently coercive.¹³ Until they go before an immigration judge, they may not know whether they have claims to immigration relief,¹⁴ and they may not appreciate the timeframes for making decisions in their cases. ICE agents who ask detainees to sign stipulated removal orders often leave the individuals confused about their options and feeling pressured to agree to give up their right to hearings.¹⁵ As a result, many stipulated removals cannot be said to be voluntary, knowing, and intelligent, and the procedure raises serious due process concerns.

Conclusion

The deportation process has been transformed drastically over the last two decades. In the past, immigration court hearings were the standard procedure. These judicial proceedings ensure a basic level of due process, help safeguard against unlawful removals, and permit noncitizens to pursue legal status in the United States, if they are eligible. Today, two-thirds of individuals deported are subject to summary removal procedures which deprive them of both the right to appear before a judge and the right to apply for status in the United States. The deportation decisions are made quickly by immigration officers, and generally there is no opportunity to consult with counsel and there is no 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.

Too little attention has been paid to this dramatic shift away from fundamental principles of fairness and due process. One of the hallmarks of the U.S. justice system is the right to have a day in court before an impartial decision-maker, yet the vast majority of immigrants who are removed never see the inside of a courtroom. Understanding this transformation from immigration court process to streamlined procedures is an important step in unraveling the breadth and scope of U.S. deportation policies today.

Endnotes

¹ U.S. Immigration and Customs Enforcement, [FY 2013 ICE Immigration Removals](#), December 2013, p. 4.

² Ibid.

³ 69 Fed. Reg. 48877 (Aug. 11, 2004).

⁴ DHS Press Release, [DHS Streamlines Removal Process Along Entire U.S. Border](#), January 31, 2006).

⁵ For an overview of the credible fear process and the challenges asylum seekers face in obtaining protection, see Sara Campos and Joan Friedland, [Mexican and Central American Asylum and Credible Fear Claims: Background and Context](#) (Washington, DC: American Immigration Council, May 2014).

⁶ ICE emphasizes that length of presence in the United States and ties to the community, including family relationships, are important factors in considering whether to exercise prosecutorial discretion. See Memorandum from John Morton, Director, ICE, on "[Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens](#)," June 17, 2011.

⁷ U.S. Immigration and Customs Enforcement, [FY 2013 ICE Immigration Removals](#), December 2013, p. 4.

⁸ In 2005, DHS deported 43,137 people with reinstatement orders. U.S. Department of Homeland Security, [Immigration Enforcement Actions: 2010](#), June 2011, p. 4.

⁹ See *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 488, 496 (9th Cir. 2007) (en banc).

¹⁰ While individuals subject to reinstatement of removal may not be eligible for asylum, treaty obligations require that the U.S. protect immigrants who express a reasonable fear of persecution or torture. Individuals subject to reinstatement who express fear of return are referred for a reasonable fear screening to determine whether they may apply for withholding of removal and protection under the Convention Against Torture. 8 CFR 208.31; INA § 241(b)(3).

¹¹ Jayashri Srikantiah and Karen Tumlin, [Backgrounder: Stipulated Removal](#) (Stanford Immigrants' Rights Clinic and National Immigration Law Center, 2008).

¹² Jennifer Lee Koh, et al., [Deportation without Due Process](#) (National Immigration Law Center, 2011); Jayashri Srikantiah and Karen Tumlin, [Backgrounder: Stipulated Removal](#) (Stanford Immigrants' Rights Clinic and National Immigration Law Center, 2008).

¹⁴ Jennifer Lee Koh, [Waiving Due Process \(Goodbye\): Stipulated Orders Of Removal And The Crisis In Immigration Adjudication](#), 91 N.C. L. REV. 475, 489 (2013).

¹⁵ Ibid.

ATTACHMENT E

August 2014

ASYLUM IN THE UNITED STATES

What is asylum?

Asylum is a protection granted to foreign nationals already in the United States or at the border who meet the international definition of a “refugee.” A refugee is defined as a person who has been persecuted or has a well-founded fear of being persecuted “on account of race, religion, nationality, membership in a particular social group, or political opinion.” This definition derives from the United Nations 1951 Convention and 1967 Protocols (“Convention and Protocols”)—international agreements to which the United States is a signatory. Congress incorporated this definition into U.S. immigration law in the Refugee Act of 1980. Also, the Convention and Protocols and U.S. law protect the asylum-seeker from “non-refoulement.” In other words, under international law, a country cannot return or expel people to places where their lives or freedoms could be in jeopardy. Asylum status is granted by asylum officers or immigration judges. In FY 2012, 29,484 individuals were granted asylum.

There are two asylum processes in the United States: the *affirmative* process and the *defensive* process.

- An affirmative asylum application occurs when an asylum-seeker files an application for asylum with U.S. Citizenship and Immigration Services (USCIS). If the asylum officer does not grant the asylum application, then the applicant is put into removal proceedings and can renew the request for asylum there.
- A defensive asylum application occurs when one who has already encountered the government, and is in removal proceedings, applies for asylum to an immigration judge. In other words, asylum is applied for “as a defense against removal from the U.S.”¹

What does an asylum-seeker have to show to be granted asylum?

- An asylum seeker has the burden to show either persecution or a “well-founded fear” of persecution “on account of race, religion, nationality, membership in a particular social group, or political opinion.”² Asylum seekers often provide substantial evidence. However, asylum can be granted solely on the asylum seeker’s testimony.³

What happens when an asylum seeker’s case goes to court?

- Asylum seekers and other foreign nationals in immigration proceedings do not have the right to have an attorney provided for them.⁴

- In FY 2012, asylum applicants “made up more than a quarter (29.4%) of all cases closed under the prosecutorial discretion initiative...These closures are not included in the 11,939 individuals who won their asylum cases” in the same year.⁵

What is credible fear?

- Credible fear is a screening process, not a status. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 created a streamlined removal process called “expedited removal,” which authorizes the Department of Homeland Security (DHS) to perform rapid deportations of noncitizens found within 100 miles of a border without proper papers. In order to ensure that the United States does not violate international and domestic laws by returning individuals to countries where their life or liberty may be at risk, the credible fear screening process was created.
- Persons who express fear of returning to their home country or who ask to apply for asylum are afforded a “credible fear interview,” conducted by a USCIS officer. Credible fear is a lower standard than the “well-founded fear” ultimately necessary for asylum. If USCIS finds that the person has a credible fear, USCIS is saying that the individual *might* qualify for asylum status.
- In Fiscal Year (FY) 2013, USCIS found 30,393 individuals to have credible fear.⁶ These individuals will be afforded an opportunity to apply for asylum defensively and establish that they meet the refugee definition.
- Individuals not found to have credible fear are generally removed.
- Also, a different streamlined removal process called “reinstatement of removal” applies to those who re-enter the U.S. after a prior deportation order. Those in reinstatement of removal are provided a “reasonable fear” interview, similar to the “credible fear” interview above.

Upon entering the United States, an asylum-seeker must generally apply for asylum status within one year.

- Under revisions to the asylum laws enacted in 1996, every asylum applicant, with a few exceptions, must demonstrate “by clear and convincing evidence that the [asylum] application has been filed within 1 year after the date of...arrival in the United States.”⁷
- According to the National Immigrant Justice Center (NIJC), one in five asylum applicants are denied asylum because they missed this deadline.⁸
- In a 2010 study of more than 3,472 asylum cases decided by the Board of Immigration Appeals, the NIJC found that “in approximately 46 percent of cases where the filing deadline is an issue, it is the only reason cited...as justifying the denial of asylum.”⁹

Many asylum seekers are detained while their cases are determined.

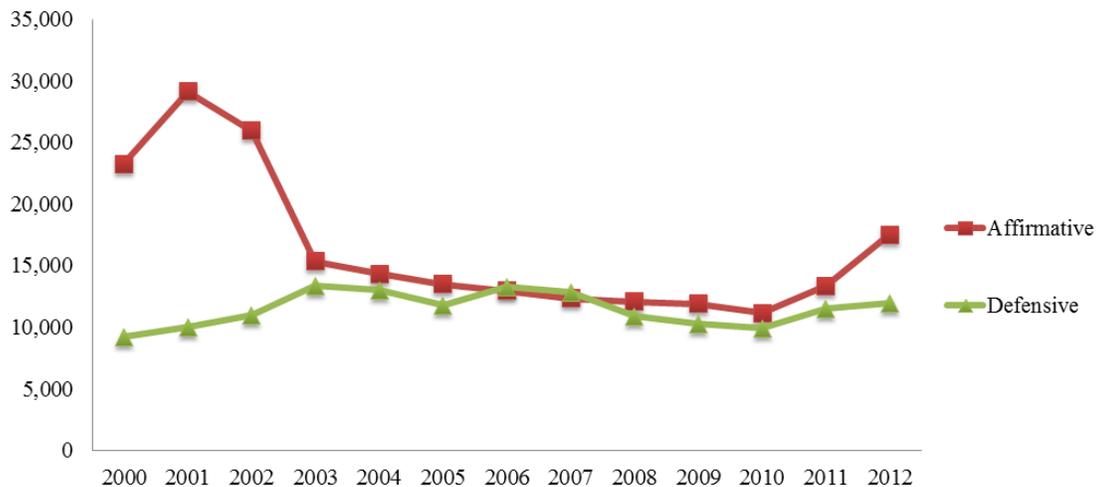
- According to a 2012 DHS report to Congress, U.S. Immigration and Customs Enforcement (ICE) detained 15,769 asylum applicants in FY 2010.¹⁰

- During this time, the average length of detention for affirmative asylum applicants was 65 days.¹¹
- Because “there are no statutory limits to the amount of time a non-citizen may be held in immigration detention,” the length of time in detention may vary. Some asylum applicants may be “kept in immigration detention for several months or even years.”¹²
- Approximately 3 percent of the detained asylum applicants in FY 2010 were under 18 years old.¹³
- Detention is mandatory pending credible fear and reasonable fear interviews.
- A 2013 report by The Center for Victims of Torture found that “in less than three years – from October 2010 to February 2013 – the United States detained approximately 6,000 survivors of torture as they were seeking asylum protection.”¹⁴
 - The report asserts that “the indefinite nature of immigration detention” contributes “to severe, chronic emotional distress” in asylum seekers who are survivors of torture.¹⁵

Who is granted asylum?

- In FY 2012, 29,484 individuals were granted asylum: 17,506 affirmatively and 11,978 defensively {Figure 1}.¹⁶

Figure 1: Individuals Granted Asylum Affirmatively or Defensively, FY 2000-2012

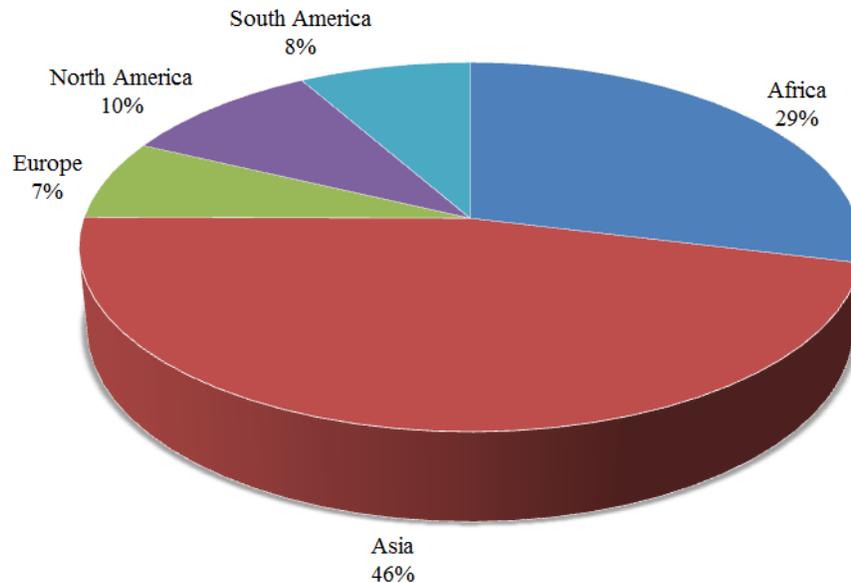


Source: DHS, *Yearbook of Immigration Statistics: 2012*, Table 16.

- Of the 17,506 individuals granted asylum affirmatively:
 - Slightly less than half (49 percent) were women.
 - 18 percent (3,098) were under the age of 19.

- 47 percent (8,165) were married or widowed.¹⁷
- Among those individuals granted asylum affirmatively, nearly half (46 percent) were from Asia and more than a quarter (29 percent) from Africa {Figure 2}.¹⁸

Figure 2: Individuals Granted Asylum Affirmatively, by Region, FY 2012



Source: DHS, *Yearbook of Immigration Statistics: 2012*, Table 17.

- The majority of all individuals granted asylum came from the People’s Republic of China (approximately 34.5 percent, or 10,151 people).¹⁹
- Other significant countries of origin in 2012 included Egypt, Venezuela, and Ethiopia.²⁰
- Only about 7.6 percent of all individuals granted asylum in 2012 came from Mexico or South America.²¹
- Of those granted asylum affirmatively, 8,609 were female and 8,897 were male. Among these were 2,554 children.²²
- About two-thirds of individuals granted asylum in 2012 lived in California, Florida, or New York.²³

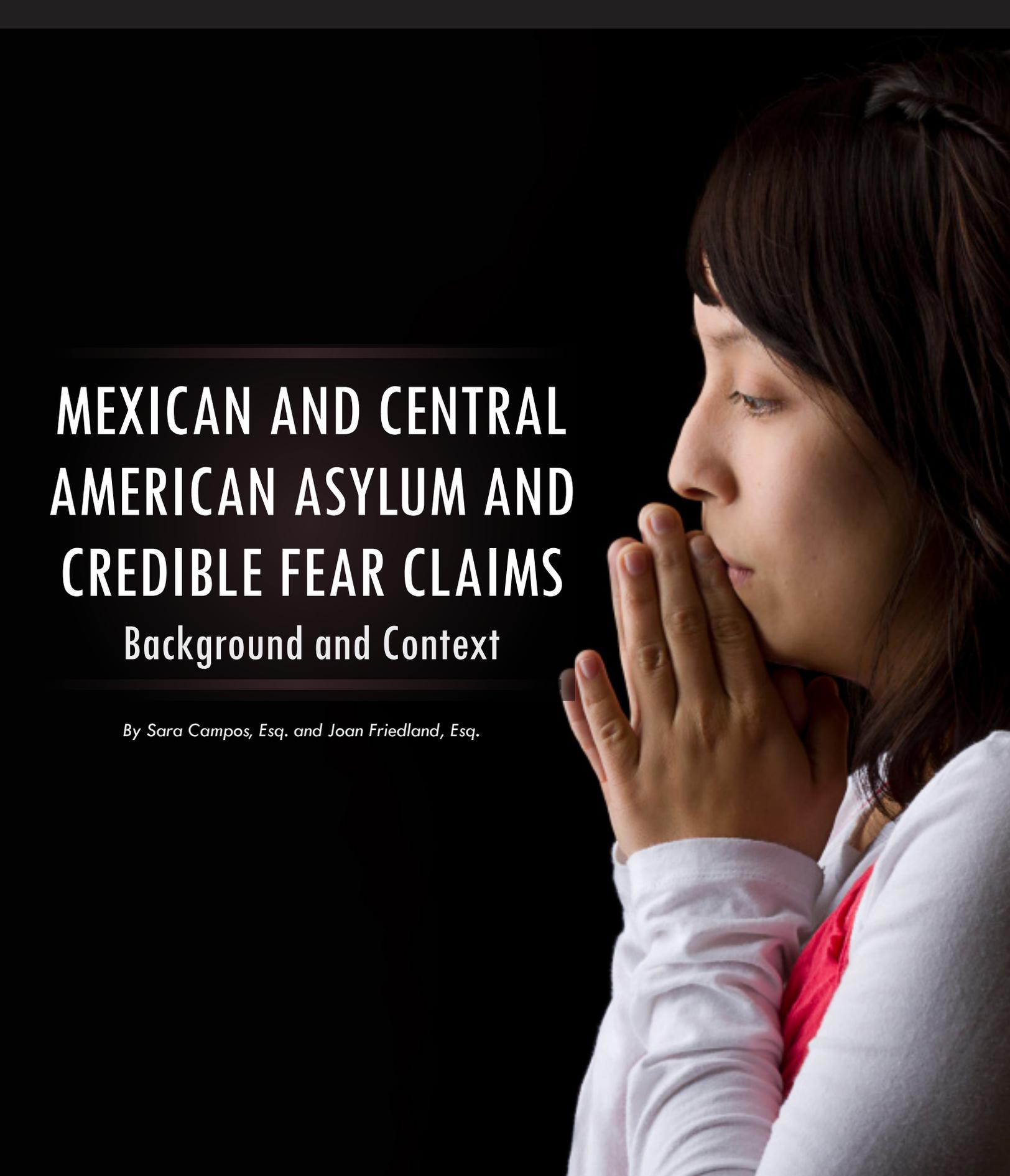
What happens when someone is granted asylum?

- If someone is granted asylum they are eligible to work immediately,²⁴ and to apply for a Social Security card, a green card, and immigration benefits for their spouse and any unmarried children under 21.²⁵

Endnotes

- ¹ USCIS, “Obtaining Asylum in the United States,” March 10, 2011.
- ² 8 U.S.C. § 1158(b)(1), § 1101(a)(42)(A).
- ³ 8 U.S.C. § 1158(b)(1)(B).
- ⁴ Lutheran Immigration and Refugee Service, “Asylum and Asylum Seekers,” accessed July 29, 2014.
- ⁵ TRAC Immigration, “FY 2012 A Record Year for Asylum Cases,” January 15, 2012.
- ⁶ USCIS Asylum Division, “Credible Fear Workload Report Summary FY 2013 Total Caseload,” “Credible Fear Workload Report Summary, FY 2013 Inland Caseload,” and “Credible Fear Workload Report Summary, FY 2013 Port of Entry (POE) Caseload.”
- ⁷ INA §208(a)(2)(B).
- ⁸ National Immigrant Justice Center, “Repeal the One-Year Asylum Deadline.”
- ⁹ National Immigrant Justice Center, *The One-Year Asylum Deadline and the BIA: No Protection, No Process: An Analysis of Board of Immigration Appeals Decisions 2005-2008*, October 2010.
- ¹⁰ DHS, *Detained Asylum Seekers: Fiscal Year 2009 and 2010 Report to Congress*, August 20, 2012.
- ¹¹ Ibid.
- ¹² The Center for Victims of Torture, *Tortured & Detained: Survivor Stories of U.S. Immigration Detention*, November 2013.
- ¹³ DHS, *Detained Asylum Seekers: Fiscal Year 2009 and 2010 Report to Congress*, August 20, 2012.
- ¹⁴ The Center for Victims of Torture, *Tortured & Detained: Survivor Stories of U.S. Immigration Detention*, November 2013.
- ¹⁵ Ibid.
- ¹⁶ DHS, *Yearbook of Immigration Statistics: 2012*, “Table 16: Individuals Granted Asylum Affirmatively or Defensively: Fiscal Years 1990 to 2012.”
- ¹⁷ DHS, *Yearbook of Immigration Statistics: 2012*, “Table 18: Individuals Granted Asylum Affirmatively by Relationship to Principal Applicant and Sex, Age and Marital Status: Fiscal Year 2012.”
- ¹⁸ DHS, *Yearbook of Immigration Statistics: 2012*, “Table 17: Individuals Granted Asylum Affirmatively by Region and Country of Nationality: Fiscal Years 2003 to 2012” and “Table 19: Individuals Granted Asylum Defensively by Region and Country of Nationality: Fiscal Years 2003 to 2012.”
- ¹⁹ Ibid.
- ²⁰ Ibid.
- ²¹ Ibid.
- ²² DHS, *Yearbook of Immigration Statistics: 2012*, “Table 18: Individuals Granted Asylum Affirmatively by Relationship to Principal Applicant and Sex, Age, and Marital Status: Fiscal Year 2012.”
- ²³ DHS, *Annual Flow Report*, “Refugees and Asylees: 2012,” April 2013.
- ²⁴ USCIS, “Asylum,” January 22, 2013.
- ²⁵ USCIS, “Types of Asylum Decisions,” March 15, 2011.

ATTACHMENT F



MEXICAN AND CENTRAL AMERICAN ASYLUM AND CREDIBLE FEAR CLAIMS

Background and Context

By Sara Campos, Esq. and Joan Friedland, Esq.

MEXICAN AND CENTRAL AMERICAN ASYLUM AND CREDIBLE FEAR CLAIMS BACKGROUND AND CONTEXT

ABOUT THE AUTHORS

Sara Campos, Esq. is a writer, lawyer, and consultant specializing in immigration and refugee issues. Before working independently, she was a Staff Attorney for the National Immigration Law Center and the Lawyers' Committee for Civil Rights of the San Francisco Bay Area. She also taught Refugee Law at Golden Gate University and USF Law Schools.

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ABOUT THE AMERICAN IMMIGRATION COUNCIL

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- 3** Recent Attacks on Asylum Seekers Using the Credible Fear Process
- 5** Navigating the Asylum Process
- 8** Country Conditions Drive Refugees from Mexico and Central America to the U.S.
- 9** State of Credible Fear and Asylum Process Today
- 14** Conclusion
- 15** Endnotes

INTRODUCTION AND SUMMARY

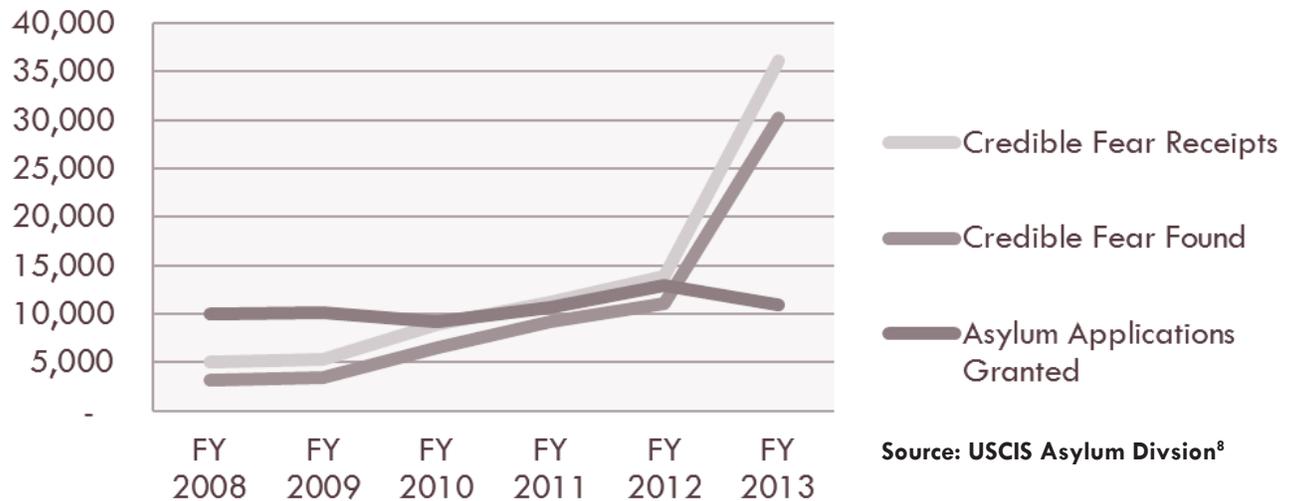
Carlos Gutierrez, a successful businessman in Chihuahua, Mexico, and the married father of two, refused to comply with a criminal cartel’s monthly demands of \$10,000. In retribution for his refusal and as an example to other businessmen, his feet were cut off and he was left for dead. According to his former attorney, that kind of “organized crime is not possible without the complicity of the municipal, state and federal police.”¹

Gutierrez’s friends rushed him to the hospital. He was later able to make his way to the United States to seek asylum and turned himself in to border agents in El Paso.² After passing a credible fear screening, he was placed in removal proceedings in immigration court, where his asylum case could be decided. His case was later administratively closed³ as a matter of prosecutorial discretion.⁴ The immigration judge’s order leaves Mr. Gutierrez in a precarious situation—a legal limbo with no permanent right to remain in the country and with no decision on his asylum claim unless removal proceedings are reopened.

Gutierrez’s case is just one of the thousands of asylum requests that Mexicans and Central Americans have presented along the U.S.-Mexico border in recent years. As described more fully below, persons seeking admission to the U.S. at a port of entry or near the border who express a fear of return to their countries must be interviewed to determine whether there is a significant possibility that they can establish persecution or a fear of persecution before an immigration judge. If the applicant meets this “credible fear” standard, the case proceeds to a removal hearing in immigration court. There the applicant may apply for asylum or other protections from removal based on persecution or torture. If the applicant cannot meet the initial threshold, he or she is deported immediately under an order of expedited removal.⁵

Recently, the credible fear process has become the target of political attacks. Detractors argue that it is too easy to obtain favorable credible fear determinations and avoid deportation. They point to rising credible fear claims as evidence that people are abusing the system. According to the Acting Chief of the U.S. Citizenship and Immigration Services (USCIS) Asylum Division, there were an “unprecedented number of credible fear referrals” during Fiscal Year (FY) 2012.⁶ In draft Congressional testimony in mid-2013, USCIS Associate Director Joseph Langlois noted that two-thirds of such claims came from Salvadorans, Hondurans, and

Credible Fear & Asylum FY 2008 - FY 2013



Guatemalans, most of which were presented in the Rio Grande Valley in South Texas. He attributed the rise “to reports of increased drug trafficking, violence and overall rising crime in those countries.”⁷

While the numbers are rising, political attacks are made without reference to how the credible fear and asylum processes actually work, to escalated violence in Mexico and Central America, and to the barriers to obtaining asylum in the United States. This paper addresses these issues, summarizes the concerns and experiences of numerous advocates in the field, and concludes that the credible fear and asylum process poses obstacles for applicants that far surpass the supposed abuses claimed by its detractors.

RECENT ATTACKS ON ASYLUM SEEKERS USING THE CREDIBLE FEAR PROCESS

Prior to 1996, persons seeking asylum in the United States could apply directly to the immigration service or, if they were charged with immigration violations, they could apply for asylum in the context of deportation or exclusion proceedings in immigration court. The asylum process was essentially the same regardless of whether someone was intercepted at the border, deemed inadmissible while attempting to enter the United States at an airport or other port of entry, or arrested and placed in proceedings after many years in the U.S.

In 1996, however, Congress enacted a streamlined removal procedure known as “expedited removal” (explained below that allows immigration officers to issue orders of removal under certain circumstances without affording the person an opportunity to appear before an immigration judge. If applicants establish a credible fear of persecution, they are allowed to apply for asylum in removal proceedings. This process has been criticized as both too harsh and too lenient. Detractors claim that increased claims come from ineligible individuals who apply and subsequently disappear.⁹ Yet, as country conditions deteriorate in Mexico, Central America, and other parts of the world, more people arrive at the border intending to apply for asylum. Upon stating their intent to apply for asylum, they are taken into custody, and may languish in detention, often in remote facilities. And if released from detention, immigration courts are so under-resourced that individuals must wait for years for the merits of their cases to be adjudicated.

In August 2013, House Judiciary Committee Chairman Bob Goodlatte (R-VA) called the credible fear process a “loophole.” Contrary to the actual numbers, he claimed Mexicans with fraudulent claims were responsible for the increase.¹⁰ Conservative media joined the fray, pointing to increased numbers of asylum seekers from Mexico and Central America and calling it an “effective tactic” to remain in the U.S., and suggesting that many asylum claims are fraudulent.¹¹ The release from detention of young DREAMer activists in the summer of 2013 after passing credible fear interviews also “provoked the ire of House Republicans, drawing attention to a broader policy that has led to large increases in the numbers of migrants gaining entry by requesting asylum at the southwest border.”¹²

In response to these concerns, the U. S. House of Representatives Judiciary Committee held hearings in December 2013 and February 2014 provocatively entitled, “Asylum Abuse: Is It Overwhelming Our Borders?” and “Asylum Fraud: Abusing America’s Compassion?”¹³ The premises of those hearings were that criminals were “gaming” the system by claiming a credible fear of persecution and that such abuse and fraud in the credible fear process warranted tightening of the process.¹⁴

Answering the claims of Representative Goodlatte, Eleanor Acer, Director of the Refugee Protection Program at Human Rights First, testified that preventing abuse of the asylum system is critical. But, as she pointed out, U.S. authorities already have a range of effective tools to address abuses. Furthermore, Congress and the Obama administration could take further steps to ensure the integrity of the asylum process, including providing more resources to the asylum office and immigration court system to prevent backlogs. Equally important is lessening the “many barriers and hurdles” that Congress has placed in the path of asylum seekers over the years.¹⁵

More recently, USCIS also responded to the increase in credible fear claims and perceptions of abuse. In February 2014, without requesting public comment or providing notice, the USCIS revised its credible fear instruction materials for asylum officers.¹⁶ Applicants now must “demonstrate a substantial and realistic possibility of succeeding” in their cases. Many advocates fear that the new guideline undermines the role of a credible fear finding as a threshold determination. According to Professor Bill Ong Hing, “[A] fair reading of the Lesson Plan leaves one with the clearly improper message that asylum officers must apply a standard that far surpasses what is intended by the statutory framework and U.S. asylum law.”¹⁷

The reality is that the entire credible fear and asylum process, from refugee attempts to enter and apply for asylum through subsequent interviews and hearings, is replete with hurdles. In the words of Paul Rexton Kan, Associate Professor of National Security Studies at the U.S. Army War College, “enduring the asylum process is not easy.”¹⁸ The obstacles to asylum stem from the government’s failure to follow laws, rules, and policies, as well as inadequate funding for the administrative bodies and courts that hear asylum claims.

The reality is that the entire credible fear and asylum process, from refugee attempts to enter and apply for asylum through subsequent interviews and hearings, is replete with hurdles.

NAVIGATING THE ASYLUM PROCESS

The General Rules for Applying for Asylum

In 1980, President Ronald Reagan signed the Refugee Act into law,¹⁹ thereby bringing the United States into compliance with the 1967 United Nations Protocol Relating to the Status of Refugees.²⁰ Under the act, in order to apply for asylum, an individual must be present in the United States and demonstrate a well-founded fear of persecution based on one of five grounds: race, religion, nationality, political opinion, or membership in a particular social group.²¹

An individual can apply for asylum affirmatively or defensively.²² If immigration officials have never apprehended the individual, he or she may apply before the USCIS Asylum Office within one year of entering the United States.²³ If the individual is not granted asylum, the case is referred to the immigration court for removal proceedings under the Executive Office of Immigration Review (EOIR).²⁴ The individual may renew the asylum request in court and also apply for withholding of removal and relief under the Convention Against Torture (CAT).²⁵ Both withholding of removal and CAT have higher burdens of proof than asylum. And unlike asylum,²⁶ these remedies do not offer a path to permanent resident status, as is offered to asylees after one year of residence.²⁷

Individuals may also apply for asylum defensively after they have been apprehended by U.S. Customs and Border Protection (CBP) or U.S. Immigration and Customs Enforcement (ICE) agents and are placed in removal proceedings in immigration court.²⁸ Individuals may be deportable unless they can show eligibility for a remedy such as asylum, withholding of removal, or relief under CAT. Prior to 1997, individuals with asylum claims arrested at the border or in the interior of the country could present their cases at adversarial hearings before immigration judges.

The Special Expedited Removal Rules for Applying for Asylum

In 1996, as part of the Illegal Immigration and Immigrant Responsibility Act (IIRIRA),²⁹ Congress enacted a new provision called “expedited removal.” It allows the summary expulsion of noncitizens who have not been admitted or paroled into the U.S., have been in the U.S. for less than two years, and who are inadmissible because they presented fraudulent documents or have no documents. Unless they express a fear of persecution or torture upon return to their home countries or indicate an intention to apply

for asylum, such individuals may be removed right away and will be barred from returning to the U.S. for at least five years (but often much longer).³⁰

Initially, the former Immigration and Naturalization Service (INS) applied expedited removal only to individuals arriving at ports of entry. However, over time, the Department of Homeland Security (DHS) announced that it would apply expedited removal along the entire U.S. border, including all coastal areas adjacent to the country's maritime borders.³¹ Currently, the government applies expedited removal to apprehensions made within 100 miles of the border.

In addition to expedited removal, IIRIRA also instituted two provisions that affect and bar asylum. The first is a one-year filing deadline.³² With limited exceptions, an applicant who does not file for asylum within a year of entering the country is barred from doing so.³³ The second bar is Reinstatement of Removal. If an individual is removed or voluntarily leaves under an order of removal and subsequently reenters illegally, he or she faces the reinstatement of the previous removal order.³⁴ Upon return, DHS bars the individual from asylum and other remedies except for withholding of removal or CAT protection.³⁵

As explained below, the expedited removal process involves three agencies within DHS: 1) CBP, which makes the initial determination of removal and refers an individual to a 2) USCIS asylum officer who conducts an interview to determine whether the individual has a credible or reasonable fear of persecution; and 3) ICE, which detains the individual and makes parole decisions. Individuals who are not deemed "arriving aliens,"³⁶ are eligible for bonds, and an immigration judge within EOIR, a branch of the Department of Justice, may review bond amounts. In all of these cases, an immigration judge determines eligibility for relief from removal.

Currently, the government applies expedited removal to apprehensions made within 100 miles of the border.

The Initial Encounter with Immigration Officers

Immigration officers must interview individuals who are subject to expedited removal.³⁷ If an individual expresses an intention to apply for asylum or expresses a fear of persecution or torture upon returning to his or her home country, the inspection officer must refer the individual to a USCIS asylum officer for a credible fear interview.³⁸ Regulations mandate that inspection officers inform individuals of their rights and create a record of their statements.³⁹ If an individual requires interpretation, it must be provided.⁴⁰ In addition, individuals who wish to apply for asylum must be detained, subject to limited exceptions, during the credible fear process.⁴¹

The Credible Fear Interview

Credible fear of persecution is defined by statute as “a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 1158 of this title.”⁴² Until recently, this standard was to be a preliminary threshold, designed as a fairly low bar due to its use as a screening mechanism. But USCIS has recently issued instructions to asylum officers to use a more rigorous standard that is more akin to the standard applied at merit hearings. The new instructions may prevent many asylum seekers from passing the credible fear stage and having their asylum claims fully considered in immigration court.

If the individual cannot demonstrate a credible fear of persecution or torture, she or he can ask an immigration judge to review the negative decision.⁴³ If the judge concurs with the prior negative decision, the individual has no right to appeal and must be removed from the United States.⁴⁴ If, due to a previous deportation or other bar, the individual cannot apply for asylum, but nevertheless expresses fear of persecution or torture, he or she can apply for withholding of removal or protections under the CAT. Asylum officers must interview such individuals to determine whether they have “reasonable fear” of persecution or torture.⁴⁵ If they pass that interview, they can bring their claims to immigration court and have them heard before a judge. If they do not pass the interview, they are summarily removed.⁴⁶

The Process After the Credible Fear Interview

If the USCIS asylum officer issues a favorable determination of credible or reasonable fear, the officer issues a Notice to Appear (NTA) requiring the individual to appear in immigration court for removal proceedings.⁴⁷ While USCIS asylum officers must ensure that applicants understand the credible fear process,⁴⁸ they are not required to advise applicants on what follows their credible fear interviews, leaving individuals in the dark as to how to pursue their claims. After ICE files the NTA with the court, a removal hearing is held before an immigration judge. Asylum and other claims such as withholding of removal or relief under CAT can be heard in that proceeding.⁴⁹

Release from Detention

Although detention of asylum seekers in expedited removal proceedings is mandatory,⁵⁰ it becomes discretionary as soon as individuals pass credible fear.⁵¹ Due to inconsistent application of ICE’s own policies and high bonds, however, asylum seekers may languish in detention for months, if not years, thus exacerbating post-traumatic stress and other

harms asylum seekers may have suffered in their own countries.⁵²

In 2009, in an effort “to ensure transparent, consistent, and considered” determinations for arriving aliens seeking asylum, ICE issued parole guidelines. Effective January 2010, individuals with favorable credible fear determinations who can prove their identity and are not flight risks and do not pose a danger to the community, may be paroled from detention.⁵³ The guidelines only affect “arriving aliens,” i.e., individuals who present themselves at a port of entry. Regulations allow such individuals to be paroled for urgent humanitarian or significant public interest reasons.⁵⁴ Immigration judges do not have jurisdiction to review ICE’s parole decisions. Individuals subject to the expedited removal process who are not deemed “arriving aliens” (i.e., those who have been apprehended after entering the United States, but within 100 miles of the border), may ask an immigration judge to set a bond for their release.⁵⁵

COUNTRY CONDITIONS DRIVE REFUGEES FROM MEXICO AND CENTRAL AMERICA TO THE U.S.

At the December 2013 House Judiciary Committee hearing, Ruth Ellen Wasem, Specialist in Immigration Policy at the Congressional Research Service, reported a “surge” in credible fear requests in FY 2013, noting that “a handful of countries lead the increase: El Salvador, Guatemala, Honduras, and to a lesser extent Mexico, India, and Ecuador....”⁵⁶ But as Ms. Wasem pointed out, “an increase in asylum or credible fear claims in and of itself does not signify an increase in the abuse of the asylum process any more than a reduction in asylum or credible fear claims signifies a reduction in the abuse of the asylum process.”⁵⁷ From October 2010 to the present, USCIS data show that El Salvador, Guatemala, Honduras, and—in smaller numbers—Mexico have tended to be among the top five countries of origin of individuals presenting credible fear claims.⁵⁸

Though the numbers of credible fear claims have increased and may create a strain on the adjudication system, the raw numbers are not enormous. Credible fear claims represent “a tiny portion of the millions of travelers who legally enter the country each year.”⁵⁹ Moreover, the numbers of asylum claims in general have not reached the levels of the mid-1990s.⁶⁰ Nevertheless, the numbers are rising, and these increases are not surprising. Even the U.S. government concedes that these countries have abysmal human

rights conditions. U.S. State Department Reports on Country Conditions show that while the particularities may vary, each of these countries suffers from widespread institutional corruption; police and military complicity in serious crimes; societal violence, including brutality against women and exploitation of children; and dysfunctional judicial systems that lead to high levels of impunity.⁶¹

Central Americans began seeking asylum in the U.S. in 1980 due to civil wars that ravaged the region.⁶² Their cases faced a decades-long history of wrongful practices and unfair asylum denials by the U.S. government. Salvadorans and Guatemalans have had to file several major lawsuits in order to obtain fair and equal treatment by immigration officials.⁶³ Recent claims from those countries arise from escalating gang violence, narco-trafficking, and the failure of judicial systems to institute justice.⁶⁴

Mexico's increase in claims is largely due to violence by a combination of cartel, military, and government actors, accompanied by widespread judicial impunity.⁶⁵ Since 2006, when former President Felipe Calderon initiated a war on drugs, at least 130,000 Mexicans have been murdered and 27,000 have officially disappeared.⁶⁶ Former Secretary of State Hillary Clinton described Mexico as an "insurgency" that is "looking more and more like Colombia looked 20 years ago."⁶⁷ The murder of six members of the Reyes Salazar family, community activists in the Juarez Valley of the state of Chihuahua— "the deadliest place in Mexico" —and the flight of the remaining extended family to the U.S., illustrates the nature of violence in Mexico in recent years.⁶⁸

STATE OF CREDIBLE FEAR AND ASYLUM PROCESS TODAY

In 2005, the U.S. Commission on International Religious Freedom (USCIRF) conducted a legally mandated study of expedited removal to determine whether the new procedure impaired U.S. obligations to asylum seekers.⁶⁹ The report concluded that some CBP agents dissuaded people from requesting asylum, did not record their fears of persecution, and did not refer them for credible fear interviews; immigration judges based decisions on "unreliable and incomplete" reports in the initial stages of the process; and asylum seekers were detained in jails and not released according to established criteria after they passed credible

fear interviews.⁷⁰ The report concluded that the procedure was replete with deficiencies and set forth numerous recommendations. Additional studies have also noted these problems.⁷¹

Many of those same flaws still plague the expedited removal system. During telephonic interviews conducted in February 2014⁷² and in correspondence, advocates reported that asylum seekers face significant hurdles beginning with their initial encounters with CBP officers and continuing to their merit hearings in immigration court. We heard frequent complaints that CBP officers often dissuade people from seeking asylum, sometimes berating and yelling at them. Some advocates complained that clients were harassed, threatened with separation from their families or long detentions, or told that their fears did not amount to asylum claims.

***El Paso private immigration attorney:** “We’ve encountered people who say they expressed a fear of persecution and were told by CBP that the U.S. doesn’t give Mexicans asylum, and they are turned back.”*

***Florida non-profit organization attorney in facility where detainees are transferred from the border:** “CBP doesn’t do its job and ask the right questions about fear of return. People are removed under expedited removal and then come right back because they are afraid. Then they are only eligible for a reasonable fear interview and withholding of removal and are detained for a long time.”*

Other attorneys noted that CBP conducted initial interviews too rapidly, without confidentiality, and without properly interpreting interviews or translating documents back to applicants. The resulting discrepancies, such as erroneous birth dates, were later used against applicants in court. Many attorneys stated that they routinely saw identical boilerplate statements in officers’ reports and that officers often failed to record asylum seekers’ statements even though clients told attorneys they had provided specific information to the officers.

***El Paso attorney at non-profit:** “Judges look at discrepancies between the immediate interview at the port of entry and a credible fear interview. CBP and asylum officers speak Spanish but our clients speak indigenous languages and little Spanish. They rarely get adequate interpretation.”*

Similarly, even if an applicant is passed on for a credible fear interview, lack of resources and confusing policies reduce the

chances that an applicant may pass the threshold test. In our interviews, attorneys and advocates also complained that detained asylum seekers may wait from one to two months for credible fear interviews. An attorney in Harlingen reported that until recently waits were as long as five months. Attorneys in some locations such as El Paso and South Florida report waiting periods from three months to a year for reasonable fear interviews. Several advocacy organizations and a private law firm recently filed a class action lawsuit challenging the long delays in reasonable fear interviews for detained persons.⁷³

Advocates also reported that credible fear decisions lack consistency and sometimes result in conflicting decisions on the same facts. In one case in El Paso, for example, a family reported the wife's brutal sexual assault to the police and subsequently received threats. The woman did not pass credible fear, but her husband did, even though his claim was based on the assault against her. A December 2013 *New York Times* story reported similar disparities in treatment of asylum claims based on identical facts. Amparo Zavala fled from Michoacan, Mexico with her extended family to escape cartel violence after a bullet was shot into their house. Two weeks later, Ms. Zavala and her daughter-in-law were deported while the rest of her family was allowed to remain and pursue their asylum claim.⁷⁴

Even when a positive credible fear determination is made, there are reports of failure to actually file charging documents with courts. Applicants whose cases are delayed are at risk that they will be unable to file their asylum claim before the one-year filing deadline ends.

Attorney with non-profit organization: *“There are jurisdictional issues. The asylum office won’t take jurisdiction because there was a credible fear interview at the border, but ICE hasn’t filed a notice to appear with the court. People are not told of the one-year deadline. That combined with the notice to appear not filed with the court, results in them missing the one-year deadline. They don’t know where to file their applications and can’t request a change of venue until proceedings are initiated.”*

In some areas, advocates report that parole is currently denied to detained persons without regard to the factors listed in the 2009 parole memo. Parole practices change without explanation and are inconsistent between and even within detention facilities, sometimes for individuals who present the same facts.

Advocates also reported that credible fear decisions lack consistency and sometimes result in conflicting decisions on the same facts

Attorney in AZ: “Generally, people aren’t getting paroled. A year ago, people provided information and identity docs to deportation officer and if there was a denial, reasons would be provided. Now people are routinely denied, even when people have stacks of corroborating documents.”

Attorney in El Paso: “Parole is discretionary, and they are denying anyone and everyone parole. We have heard that some deportation officers have recommended parole for certain individuals and then get overruled. My last client paroled was in November 2013.”

Advocates in El Paso report that officers sometimes split families and their cases; some family members—usually mothers and children—are released under Orders of Supervision and may not undergo credible fear interviews while other family members—usually fathers—remain detained and are often denied asylum and deported. Attorneys in Texas and Arizona report that people who are eligible for bonds because they are not “arriving aliens” are ordered bonds ranging from \$5,000 to \$10,000 that are impossible for them to pay.

These problems are compounded by lack of access to counsel, and a myriad of other issues relating to limited resources in immigration courts. For example, advocates report long waiting periods for hearings. Merits hearings for non-detained asylum seekers are often scheduled years away, exacerbating family separations and/or precarious situations for families remaining in the home countries. Attorneys in El Paso report master calendar hearings scheduled 1-2 years away and merits hearings 1-2 years after that. An attorney with a non-profit organization in Chicago that has clients whose asylum cases started at the border reported that an immigration judge in Chicago has a 4½ year backlog.

Further, free or low-cost services are stretched thin because of the numbers needing representation. Asylum seekers are often held in or transferred to detention facilities where representation is unavailable or limited. An attorney at a non-profit in South Florida reported an influx of detained female Central American asylum seekers transferred from the border, only a small number of whom can receive direct representation. Attorneys in El Paso and Berkeley have reported that they must file Freedom of Information Act (FOIA) requests to obtain records of credible fear interviews for their clients.

Perhaps the most difficult issue of all, however, is the general hostility to many of the Mexican and Central American asylum claims currently being filed. Despite reports of horrific violence,

most Mexican and Central American claims continue to be rejected. Some Mexican journalists⁷⁵ and human rights activists⁷⁶ have been granted asylum, as have family members of law enforcement and union activists⁷⁷ and Central American family members of murdered or tortured persons.⁷⁸ But many claims asserted by Central Americans are based on forced gang recruitment, and many claims presented by Mexicans are based on violence, including torture and murder, resulting from resistance to extortion or kidnapping by cartels, military, government officials, and sometimes by a combination of all three. Those claims do not fit neatly within the ever-narrowing definitions established by the Board of Immigration Appeals (BIA) through its decisions, of political opinion or membership in a particular social group.⁷⁹

While the numbers of asylum claimants from Central America and Mexico have increased, USCIS shows low numbers of affirmative asylum grants to Salvadorans, Guatemalans, Hondurans, and Mexicans from FY 2003 to FY 2012.⁸⁰ Likewise, immigration courts granted similarly low numbers of defensive asylum claims during those same years. In FY 2012, immigration courts granted asylum at rates of 6% to Salvadoran applicants, 7% to Guatemalan, 7% to Honduran, and 1% to Mexican applications.⁸¹ These figures contrast with asylum grant rates of more than 80% to applicants from Egypt, Iran, and Somalia for the same period.⁸²

The federal courts of appeal are not in agreement regarding the required showing for recent Central American and Mexican asylum cases⁸³, and despite horrific facts of persecution emanating from this region, they have reversed few BIA decisions denying relief. But some courts have rejected the BIA's narrow interpretation for eligibility for asylum, with one recent decision disputing the BIA's analysis of a particular social group for a Mexican police officer who had suffered persecution. The court even expressed wonder at why the U.S. government "wants" to deport him.⁸⁴ And some immigration judges have recognized refusal to submit to extortion by gangs as an expression of political opinion, particularly in the context of police involvement and the broader political context.⁸⁵

Given the undisputed levels of violence in Mexico and Central America, it is understandable that its victims flee and seek asylum in the U.S. And while their cases may present complicated legal questions, those issues can only be answered through a fair process allowing asylum cases to be heard in court. Getting there requires the credible fear phase to operate fully and fairly and for its deficiencies to be recognized and remedied.

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CONCLUSION

Asylum seekers in the expedited removal process must navigate a lengthy and complex labyrinth to have their asylum claims considered. And, as new waves of Mexican and Central American applicants raise claims, some lawmakers are attempting to politicize and attack the asylum process, irrespective of the relatively minor role credible fear plays in overall admissions or entries into the U.S.

When Congress instituted expedited removal, it created a procedure that was intended to operate rapidly without compromising U.S. obligations to protect refugees. That balancing of obligations, necessitated by Congress's decision to create a streamlined process, is often at the heart of allegations of abuse of the system. Human rights organizations have explained that the government already has tools at hand to combat fraud, and that these should be enhanced to make sure that fraud can be effectively identified and combated when it occurs. The courts and asylum offices desperately need additional resources to adjudicate claims in a timely manner. But the government also needs to ensure that officers in the agencies charged with implementing expedited removal and asylum strictly adhere to the regulations, policies, and laws that have been instituted. Otherwise, the government will fail in its obligations of offering protection to refugees.

ENDNOTES

¹ Priscila Mosqueda, “Exiled Mexican Seeking Justice Pedals for Justice,” *Texas Observer*, November 9, 2013.

² Deborah Hastings, “Fleeing Wrath of Vicious Cartels, Record-Breaking Numbers of Mexicans Seek Political Asylum in the U.S.,” *New York Daily News*, October 13, 2013.

³ *Supra*, note 1.

⁴ Administrative closure is one form of the exercise of prosecutorial discretion. It is an ICE policy intended to focus resources on immigration enforcement priorities. John Morton Memo re Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens, Immigration and Customs Enforcement, June 17, 2011.

⁵ Immigration and Nationality Act (“INA”) §235.

⁶ Memorandum from Ted H. Kim, Acting Chief of the Asylum Division, re Implementation of Credible Fear Determination Checklist Pilot, January 14, 2013.

⁷ Alicia A. Caldwell, “Immigrant Asylum Requests on the Rise in the U.S.,” *Associated Press*, July 16, 2013. Mr. Langlois’ later submitted testimony that does not include these facts.

⁸ Compiled from three charts: USCIS Asylum Division, “Asylum Applications Granted by Asylum Office FY 2008 — FY 2014Q2,” “Credible Fear Found Rates by Asylum Office FY 2004 — FY 2014 Q2 (October 2003 — March 2014),” “CF Receipts 2004 — 2014 Q2.” Because the processing of asylum cases may take a long time, the number of asylum cases granted each year may include applications that were filed in a previous year.

⁹ Statement of Judiciary Committee Chairman Bob Goodlatte for the hearing on “Asylum Abuse: Is It Overwhelming Our borders,” December 12, 2013.

¹⁰ Press Release, “Goodlatte to Napolitano: Asylum Process Loophole Needs to Be Addressed,” August 21, 2013.

¹¹ *Associated Press*, “Report Shows Modest Rise in Requests for Asylum,” August 17, 2013; Joel Millman, “More Illegal Immigrants Ask for Asylum,” *Wall Street Journal*, October 17, 2013. For a response, see Eleanor Acer, “Asylum and the Border: Setting the Record Straight,” Human Rights First, August 14, 2013.

¹² Julia Preston, “Young Immigrants Protest Deportations,” *New York Times*, August 22, 2013. See also Brian Skoloff, “Asylum Seekers at U.S., Mexico Border Double,” *Huffington Post*, August 16, 2013. For recent restrictionist claims, See Dan Cadman, “Malfunctioning Asylum System Fosters Fraud, Executive action, agency inaction, and judicial activism at fault,” Center for Immigration Studies, March 26, 2014).

¹³ “Asylum Abuse: Is It Overwhelming Our Borders?” December 12, 2013; “Asylum Fraud: Abusing America’s Compassion?” February 11, 2014.

¹⁴ Statement of Judiciary Committee Chairman Bob Goodlatte for the hearing on “Asylum Abuse: Is It Overwhelming Our borders,” December 12, 2013.

¹⁵ Statement for the Record of Eleanor Acer, for the hearing on “Asylum Fraud: Abusing America’s Compassion?” Dec. 12, 2013. Tools that currently exist to counter abuses include criminal prosecutions of immigration fraud rings. Kirk Semple, Joseph Goldstein, and Jeffrey E. Singer, “Asylum Fraud in Chinatown: An Industry of Lies,” *New York Times*, February 22, 2014.

¹⁶ John Lafferty, Release of Updated Asylum Division Officer Training Course (ADOTC) Lesson Plan, *Credible Fear of Persecution and Torture Determinations*, February 28, 2014.

¹⁷ Memo from Bill Ong Hing to John Lafferty, Chief of the USCIS Asylum Division, re “*Lesson Plan, Credible Fear of Persecution and Torture Determinations*,” April 21, 2014.

¹⁸ Paul Rexton Kan, “Mexico’s ‘Narco-Refugees’: The Looming Challenge for U.S. National Security,” Strategic Studies Institute, June 22, 2012.

¹⁹ Pub. L. 96-212

²⁰ The protocol is the principal international agreement affecting U.S. obligations to refugees. 19 U.S.T. 6223, T.I.A.S. No 6577, 606 U.N.T.S. 267 (1967).

²¹ §208 of the Immigration and Nationality Act (hereinafter “INA”); 8 U.S.C. §1158

²² U.S. Citizenship and Immigration Services, Obtaining Asylum in the United States, Last Reviewed/Updated March 10, 2011.

²³ INA §208; 8 USC §1158.

²⁴ 8 CFR §1208.14(c)(1)

²⁵ 8 CFR §208.14 and §208.16.

²⁶ 8 CFR §208.16(b); 8 CFR §208.17(a).

²⁷ INA §209; 8 USC §1159

²⁸ 8 CFR §1208.4 (c)(1).

²⁹ Pub. L. 104-208

³⁰ INA §235(b), 8 U.S.C. §1225(b), 8 CFR 235.3(b)(c); INA 241(c), 8 U.S.C. §1231(c), 8 CFR §241; INA §212(a)(9)(A) and (a)(9)(C)(i), 8 U.S.C. 1182(a)(9)(A) and (a)(9)(C)(i)

³¹ 69 Fed. Reg. 48877 (Aug. 11, 2004) and DHS Press Release, *DHS Streamlines Removal Process Along Entire U.S. Border* (Jan. 30, 2006).

³² INA §208(a)(2)(B); 8 USC §1158(a)(2)(B); 8 CFR §208.4(a)(2)(B).

³³ *Id.*

³⁴ 8 USC §1231(a)(5); INA §241(a)(5).

³⁵ *Id.*

³⁶ Arriving aliens are individuals who present themselves at a port of entry. See 8 CFR §1.1(a).

³⁷ 8 CFR §235.3(b)(2).

³⁸ 8 CFR §235.3(b)(4).

³⁹ 8 CFR §235.3(b)(2).

⁴⁰ *Ibid.*

⁴¹ 8 CFR §235.3(b)(2).

⁴² INA §235(b)(1)(B)(iii)(v); 8 USC §(b)(1)(B)(iii)(v).

⁴³ 8 USC §1225(b)(1)(B)(iii)(III), INA §235(b)(1)(B)(ii)(III), 8 CFR §208.30(f).

⁴⁴ 8 CFR §235.3(b)(ii)

⁴⁵ 8 CFR §§208.16 and 208.17. A reasonable fear interview is available to persons whose prior order of removal is being re-instated after an

illegal re-entry or who have an administrative removal order because of aggravated felony conviction, U.S. Citizenship and Immigration Services, Questions & Answers: Reasonable Fear Screenings, Last Reviewed/Updated: June 18, 2013.

⁴⁶ 8 CFR §235.3(b)(8)

⁴⁷ 8 CFR §208.30(f).

⁴⁸ 8 CFR §208.30(d)(2)

⁴⁹ 8 CFR §235.6(a)(1)(iii)

⁵⁰ INA §235(b)(1)(B)(iii)(IV); 8 USC §1225(b)(1)(B)(iii)(IV)

⁵¹ 8 CFR §235.3(b)(2)(ii).

⁵² Center for Victims of Torture, Torture Abolition Survivor Support Coalition, International and Unitarian Universalist Service Committee, “Torture and Detained Survivor Stories of U.S. Immigration Detention” (2013).

⁵³ U.S. Immigration and Customs Enforcement, Parole of Arriving Aliens Found to have a Credible Fear of Persecution or Torture, December 8, 2009.

⁵⁴ 8 CFR § 212.5(b).

⁵⁵ 8 CFR §1003.19.

⁵⁶ Testimony of Ruth Ellen Wasem, Specialist in Immigration Policy, Congressional Research Service, for the U.S. House of Representatives Committee on the Judiciary Hearing on “Asylum Abuse: Is it Overwhelming our Borders?” December 12, 2013, at 14. Ms. Wasem notes that “El Salvador, Guatemala, and Honduras have histories of sending significant numbers of asylum seekers to the United States in the past.”

⁵⁷ *Id.* at 16.

⁵⁸ These same countries have also been among the top five for the number of reasonable fear claims presented during the same period. USCIS, Monthly Credible and Reasonable Fear Nationality Reports, Top Five Countries, FY 2010, FY 2011, FY 2012, FY 2013, FY 2014.

⁵⁹ Associated Press, “Report Shows Modest Rise in Requests for Asylum,” August 17, 2013.

⁶⁰ *Supra*, note 56.

⁶¹ U.S. Department of State, Bureau of Democracy Human Rights, and Labor, “Country Reports on Human Rights Practices for 2012.”

⁶² Susan Gzesch, “Central Americans and Asylum Policy in the Reagan Era,” MPI, April 1, 2006.

⁶³ *Orantes-Hernandez v. Meese*, 919 F.2d 549 (9th Cir. 1990); *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal 1991).

⁶⁴ Mesoamerican Working Group, “Rethinking the Drug War in Central America and Mexico,” Americas Program, November 2013.

⁶⁵ Peter Watt, “U.S. Alarmism Denies Complicity in Rising Mexican Asylum Requests,” NACLA, November 29, 2013.

⁶⁶ Molly Molloy, “The Mexican Undead: Toward a New History of the ‘Drug War’ Killing Fields,” Small Wars Journal, August 21, 2013.

⁶⁷ Adam Entous and Nathan Hodge, “US Sees Heightened Threat in Mexico,” *Wall Street Journal*, September 10, 2010.

⁶⁸ Melissa del Bosque, “The Deadliest Place in Mexico,” *Texas Observer*, February 29, 2012.

⁶⁹ The United States Commission on International Religious Freedom, “Asylum Seekers in Expedited Removal” (2005).

⁷⁰ *Ibid.*

⁷¹ Michele R. Pistone and John J. Hoeffner, “Rules Are Made to Be Broken: How the Process of Expedited Removal Fails Asylum Seekers,” Villanova University School of Law, 2006.

⁷² This summary is based on interviews with Amy Gottlieb, AFSC, Newark, New Jersey; Judy London, Public Counsel, Los Angeles, CA; Lauren Major, AFSC, Newark, New Jersey; Lynn Marcus, Immigration Clinic, University of Arizona, Tucson, AZ; Pat Murphy, Casa de Migrante, Centros Scalabrini, Tijuana, Mexico; Krishma Prasad, Immigration Justice Project, ABA, San Diego, CA; Alyssa Simpson, Canal Community Alliance, San Rafael, CA; Kaveena Singh and Michael Smith, East Bay Sanctuary Covenant, Berkeley, CA; Ali Boyd, Annunciation House, El Paso, TX; Jessica Anna Cabot, volunteer attorney, Las Americas, El Paso, TX; Jodi Goodwin, Harlingen, TX; Ashley Huebner, National Immigrant Justice Center Chicago, IL; Melissa Lopez, Diocesan Migrant & Refugee Services, El Paso, TX; Jessica Shulruff, Americans for Immigrant Justice, LUCHA project, Miami, FL; Pamela Muñoz, El Paso, TX; Denise Gilman, University of Texas Law School, Austin, TX; Adela Mason, Casa Cornelia Law Center, San Diego, CA; individuals at Florence Immigrant and Refugee Rights Project, Florence, AZ.

⁷³ National Immigrant Justice Center, “Detained Asylum Seekers Sue Obama Administration to End Long Waits for Initial Interviews,” April 17, 2014.

⁷⁴ Damien Cave, “A Civil Servant in Mexico Tests U.S. on Asylum,” *New York Times*, December 28, 2013.

⁷⁵ Diana Washington Valdez, “Mexican journalist granted US asylum, El Paso lawyer says,” *El Paso Times*, June 6, 2013.

⁷⁶ Melissa Del Bosque, “Member of Well-Known Mexican Activist Family Granted Asylum,” *Texas Observer*, August 12, 2013.

⁷⁷ Redacted decision of Immigration Judge, July, 2013; “Mexican Family Wins Asylum in Florida After Fleeing Violence,” *Miami Herald*, April 21, 2013.

⁷⁸ *Henriquez-Rivas v. Holder*, 707 F. 3d 1081 (9th Cir. 2013).

⁷⁹ *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985); *Matter of C-A-*, 23 I&N Dec. 951 (2006); *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008); *Matter of W-G-R*, 26 I&N Dec. 208 (BIA 2014); *Matter of M-E-V-G*, 26 I&N Dec. 227 (BIA 2014)

⁸⁰ Department of Homeland Security, Yearbook of Immigration Statistics: 2012, table 17.

⁸¹ U.S. Department of Justice, Executive Office for Immigration Review, Office of Planning, Analysis, and Technology, Immigration Courts, Asylum Statistics FY 2009-2013.

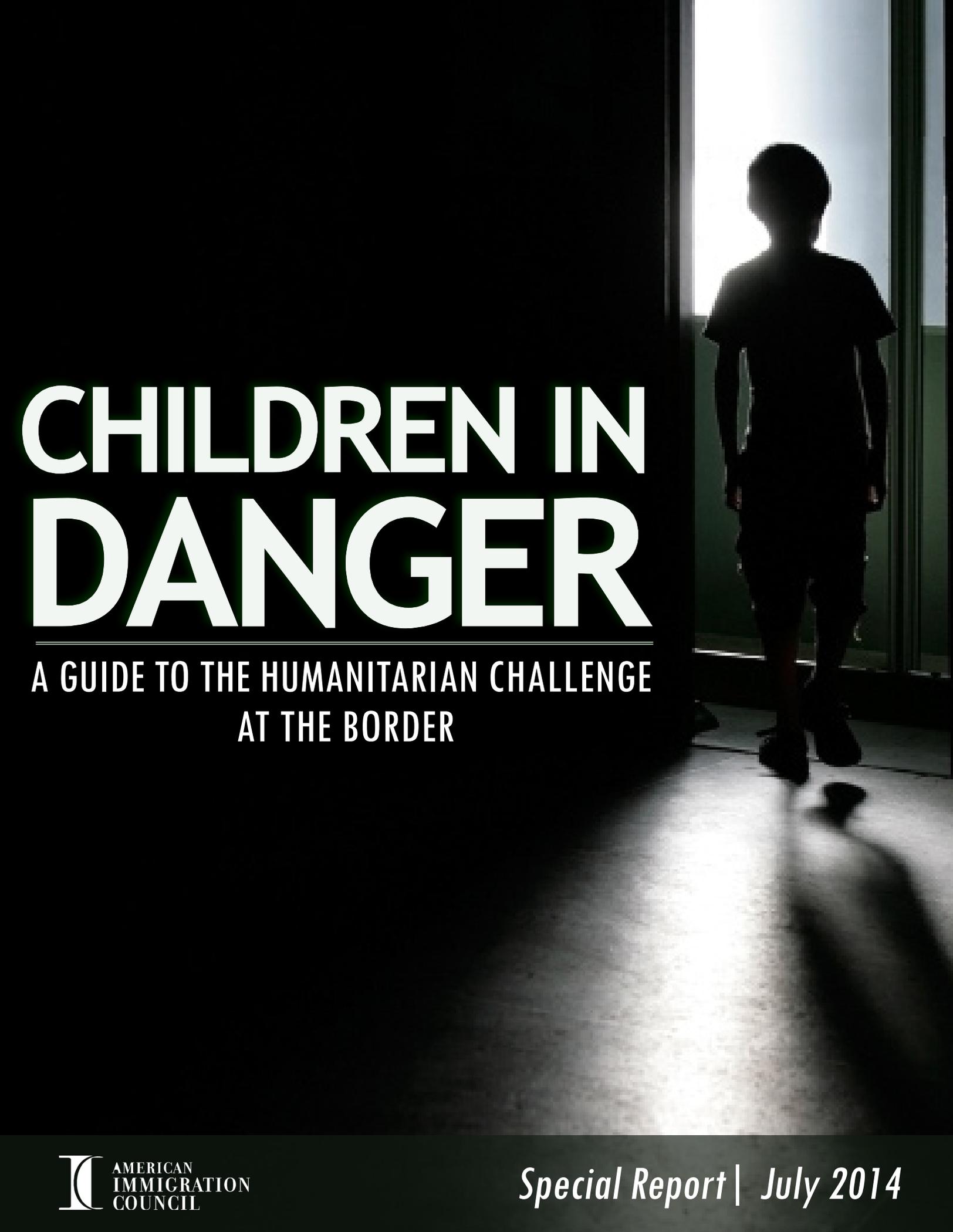
⁸² *Ibid.* The Immigration Court numbers do not distinguish by country between those who filed defensively following a favorable credible fear determination or whose cases were referred to Immigration Court by the asylum office or who otherwise were in removal proceedings.

⁸³ For an excellent analysis of gang-related cases, see Lisa Frydman and Neha Desai, “Beacon of Hope or Failure of Protection? U.S. Treatment of Asylum Claims Based on Persecution by Organized Gangs,” *Immigration Briefings*, No. 12-10, October 2012. See also Tom Boerman, “Central American Gang Related Asylum Cases: Background, Leverage Points and the Use of Expert Witnesses,” *Immigration Daily*, December 15, 2009.

⁸⁴ *R.R.D. v. Holder*, Case No. 13-2141 (C.A. 7, Mar. 19, 2014).

⁸⁵ *Matter of O.L.G.*, unpublished Immigration Judge decision, January 26, 2012.

ATTACHMENT G

A black and white photograph of a child's silhouette standing in a doorway, looking out into a bright light. The child is positioned on the right side of the frame, with their back to the camera. The doorway is the source of the light, creating a strong contrast between the dark interior and the bright exterior. The child's shadow is cast on the floor in the foreground.

CHILDREN IN DANGER

A GUIDE TO THE HUMANITARIAN CHALLENGE
AT THE BORDER

CHILDREN IN DANGER: A GUIDE TO THE HUMANITARIAN CHALLENGE AT THE BORDER

ABOUT THE AMERICAN IMMIGRATION COUNCIL

The American Immigration Council's policy mission is to shape a rational conversation on immigration and immigrant integration. Through its research and analysis, the Immigration Council provides policymakers, the media, and the general public with accurate information about the role of immigrants and immigration policy in U.S. society. Our reports and materials are widely disseminated and relied upon by press and policymakers. Our staff regularly serves as experts to leaders on Capitol Hill, opinion-makers, and the media. We are 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.

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INTRODUCTION

The American Immigration Council has prepared this guide in order to provide policymakers, the media, and the public with basic information surrounding the current humanitarian challenge the U.S. is facing as thousands of young migrants show up at our southern border. This guide seeks to explain the basics. Who are the unaccompanied children and why are they coming? What basic protections are they entitled to by law? What happens to unaccompanied children once they are in U.S. custody? What has the government done so far? What additional responses have been proposed to address this issue?

The children's reasons for coming to the United States, their care, our obligations to them as a nation, and the implications for foreign and domestic policies are critical pieces we must understand as we move toward solutions. Acknowledging the complexity of the situation, President Obama declared an "urgent humanitarian situation" along the southwest border requiring a coordinated federal effort by a range of federal agencies. The government's subsequent response has ignited a vigorous debate between advocates for refugees and unaccompanied minors and the government. We hope that this guide helps those engaging in the debate to understand the key concepts and America's laws and obligations related to unaccompanied children.

BACKGROUND

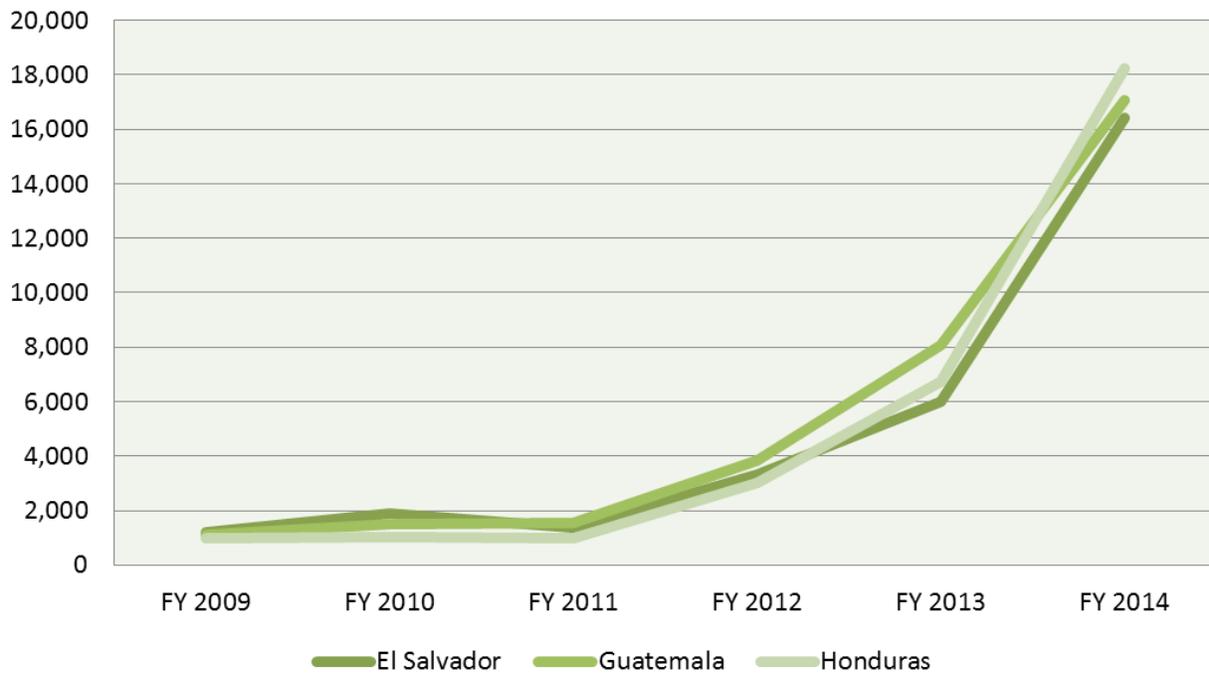
Who are the unaccompanied children?

Children who arrive in the United States alone or who are required to appear in immigration court on their own often are referred to as unaccompanied children or unaccompanied minors. "Unaccompanied alien child" (UAC) is a technical term defined by law as a child who "(A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom—(i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody."¹ Due to their vulnerability, these young migrants must receive certain protections under U.S. law.

Where are these children coming from?

The vast majority of unaccompanied children come from Mexico, Guatemala, Honduras, and El Salvador, although unaccompanied children may arrive from any country. The recent increase in arrivals is due to the migration of children from Guatemala, Honduras, and El Salvador—a region of Central America known as the "Northern Triangle." According to U.S. Customs and Border Protection (CBP), 68,541 unaccompanied children were apprehended at the southwest border between October 1, 2013, and September 30, 2014. The largest number of children (27 percent of the total) came from Honduras, followed by Guatemala (25 percent), El Salvador (24 percent), and Mexico (23 percent).²

Figure 1: Unaccompanied Migrant Children Encountered;



FY 2009-2014*

Source: [CBP](#).

Why are these children and families leaving their home countries?

Researchers consistently cite increased Northern Triangle violence as the primary recent motivation for migration, while identifying multiple causes including poverty and family reunification.³ A report by the [Assessment Capacities Project \(ACAPS\)](#), citing 2012 United Nations Office on Drugs and Crime (UNODC) data, highlighted that Honduras had a homicide rate of 90.4 per 100,000 people. El Salvador and Guatemala had homicide rates of 41.2 and 39.9, respectively. In comparison, the war-torn country of the Democratic Republic of the Congo, from which nearly [half a million refugees have fled](#),⁴ has a homicide rate of 28.3 per 100,000 people. Furthermore, in a recent report Tom Wong took the UNDOC data and compared it to the data on unaccompanied children provided by CBP. Wong found a positive relationship between violence and the flow of children: “meaning that higher rates of homicide in countries such as Honduras, El Salvador, and Guatemala are related to greater numbers of children fleeing to the United States.”⁵

While there can be multiple reasons that a child leaves his or her country, children from the Northern Triangle consistently cite gang or cartel violence as a prime motivation for migrating. Research conducted in El Salvador on child migrants who were returned from Mexico found that 61 percent listed crime, gang threats, and insecurity as a reason for leaving.⁶ The report, *Children on the Run*, by the United Nation’s High Commissioner for Refugees (UNHCR) found that 48 percent of the 404 children UNHCR interviewed “shared experiences of how they had been personally affected by the...violence in the region by organized armed criminal actors, including drug cartels and gangs or by State actors.”⁷ Furthermore, the youth are frequently the target of the violence. Recruitment for the gangs begins in adolescence—or younger—and there are incidents of youth being beaten

by police who suspected them of gang membership.⁸

Are they coming because of President Obama's enforcement policy?

Recent U.S. immigration enforcement policy does not appear to be a primary cause of the migration, although the reasons behind so many unaccompanied children making their way to the United States are not simple. For instance, the rise in violence and corresponding increase in unaccompanied child arrivals precedes both the Deferred Action for Childhood Arrivals (DACA) program and Senate passage of S.744—positive developments that are sometimes cited as pull factors by Obama administration critics. In their 2012 report, the Office of Refugee Resettlement (ORR) stated that “in a five month period between March and July 2012, the UAC program received almost 7,200 referrals – surpassing FY2011’s total annual referrals.” As previously discussed, countries in the Northern Triangle of Central America face soaring murder rates and escalating gang violence. Research conducted by Elizabeth Kennedy, a Fulbright scholar in El Salvador, indicates that violence is the primary cause, even among those who also cite poverty or family reunification as reasons for their departure.⁹ This influx is not limited to the United States, as growing numbers of adults and children from those countries are also seeking refuge in Mexico, Panama, Nicaragua, Costa Rica, and Belize.¹⁰ Conditions in El Salvador, Honduras, and Guatemala have reached a tipping point, and more people are reaching the conclusion that they can no longer stay safely in their homes.

Would more Border Patrol resources deter border crossers?

There is little evidence to support the proposition that the border must be further fortified to deter an influx of children and families. The flow of undocumented immigrants into the United States is tied more to economic factors than to increased enforcement.¹¹ In this case, fear of violence is motivating the influx.¹² In addition, CBP's resources along the southwest border are already significant. There were 18,611 Border Patrol agents stationed along the southwest border as of Fiscal Year (FY) 2013.¹³ The annual Border Patrol budget now stands at \$3.5 billion.¹⁴ The Border Patrol has at its command a wide array of surveillance technologies: ground radar, cameras, motion detectors, thermal imaging sensors, stadium lighting, helicopters, and unmanned aerial vehicles.¹⁵ Treating the current situation as simply another wave of illegal immigration misses the broader policy and humanitarian concerns that are driving it. In fact, many children are turning themselves over to Border Patrol agents upon arrival and are not seeking to evade apprehension.

What do people mean when they talk about “international protection obligations?”

The United States has entered into numerous treaties with other countries to ensure the protection and safe passage of refugees.¹⁶ Among the most important are the 1952 United Nations Convention Relating to the Status of Refugees and the 1967 Protocol. Under these treaties, the United States may not return an individual to a country where he or she faces persecution from a government or a group the government is unable or unwilling to control based on race, religion, nationality, political opinion, or membership in a particular social group. A separate treaty, known as the Convention Against Torture, prohibits the return of people to a country where there are substantial grounds to believe they may be tortured.¹⁷

Under our laws, anyone in the United States may seek asylum with limited exceptions, or protection from torture with no exceptions.

The United States has implemented these treaties in various laws and regulations. They form the basis for both our refugee program and asylum program. (An asylee is simply a refugee whose case is determined in the United States, rather than outside it.) In fact, under our laws, anyone in the United States may seek asylum with limited exceptions, or protection from torture with no exceptions. It can be difficult, and often complicated, to determine whether an individual has a valid claim for asylum or protection

from torture. For children, ensuring that they are safe, have an understanding of their situation and their rights, and have adequate representation when they tell their story to a judge are all important components of ensuring that the U.S. meets its protection obligations.

Do Central American children qualify for international protection obligations?

Many of the children fleeing to the United States have international protection needs and could be eligible for humanitarian relief. According to UNHCR's survey of 404 unaccompanied children from Mexico, El Salvador, Honduras, and Guatemala, 58 percent “were forcibly displaced because they suffered or faced harms that indicated a potential or actual need for international protection.” Notably, of those surveyed, UNHCR thought 72 percent of the children from El Salvador, 57 percent from Honduras and 38 percent from Guatemala merited protection.¹⁸ While international protection standards are in some cases broader than current U.S. laws, the fact that over 50

percent of the children UNHCR surveyed might qualify as refugees suggests that a thorough and fair review of these children’s claims is necessary to prevent them from being returned to danger. Moreover, children may also qualify for particular U.S. forms of humanitarian relief, based on laws that recognize children as victims of trafficking and crime, or as children who have been abused or abandoned by their parents. A 2010 survey conducted by the Vera Institute of Justice indicated that 40 percent of children screened while in ORR custody could be eligible for relief from removal under U.S. laws.¹⁹ Given their age, the complexity of their claims, and the trauma that generally accompanies their journey, determining whether these children qualify for some form of protection can be a time-consuming process—one that is not easily completed in a short period of time.

What is the Trafficking Victims Protection Reauthorization Act (TVPRA)?

The Trafficking Victims Protection Act was signed into law in 2000 to address human trafficking concerns. It was subsequently reauthorized during both the Bush and Obama administrations in 2003, 2005, 2008, and 2013, and subsequently referred to as the TVPRA.

Under provisions added in 2008, the TVPRA requires that all unaccompanied alien children be screened as potential victims of human trafficking.²⁰ However, as described further below, procedural protections for children are different for children from contiguous countries (i.e. Mexico and Canada) and non-contiguous countries (all others). While children from non-contiguous countries are transferred to Department of Health and Human Services (HHS) for trafficking screening, and placed into formal immigration court removal proceedings, Mexican and Canadian children are screened by CBP for trafficking and, if no signs are reported, summarily returned pursuant to negotiated repatriation agreements.²¹ The TVPRA in 2008 also ensured that unaccompanied alien children are exempt from certain limitations on asylum (i.e. a one-year filing deadline, and the standard safe third country limitation).²² It also required HHS to ensure “to the greatest extent practicable” that unaccompanied children in HHS custody have counsel, as described further below—not only “to represent them in legal proceedings,” but “protect them from mistreatment, exploitation, and trafficking.”²³

Under provisions added in 2008, the TVPRA requires that all unaccompanied alien children be screened as potential victims of human trafficking.

What types of relief do unaccompanied children potentially qualify for?

The most common types of relief for which children potentially are eligible include:

Asylum: Asylum is a form of international protection granted to refugees who are present in the United States. In order to qualify for asylum, a person must demonstrate a well-founded fear of persecution based on one of five grounds: race, religion, nationality, political opinion, or membership in a particular social group.

Special Immigrant Juvenile Status (SIJS): SIJS is a humanitarian form of relief available to noncitizen minors who enter the child welfare system due to abuse, neglect, or abandonment by one or both parents. To be eligible for SIJS, a child must be under 21, unmarried, and the subject of certain dependency orders issued by a juvenile court.

U visas: A U visa is available to victims of certain crimes. To be eligible, the person must have

suffered substantial physical or mental abuse and have cooperated with law enforcement in the investigation or prosecution of the crime.

T visas: T visas are available to individuals who have been victims of a severe form of trafficking. To be eligible, the person must demonstrate that he or she would suffer extreme hardship involving unusual or severe harm if removed from the United States.

Are they refugees?

The vast majority of these children currently lack papers permitting them to reside lawfully in the United States and thus are part of the broader flow of undocumented immigration. However, many may be in need of international protection, requiring a careful and balanced analysis of their claims. UNHCR and many U.S.-based groups that monitor U.S. refugee and asylum practices have cautioned that concerns over illegal immigration should not trump the United States' international obligations to protect those fleeing persecution or other harm.²⁴ Because establishing an asylum claim may take time and frequently requires counsel, these groups ([including the American Immigration Council](#)) have warned that accelerated processing could cause adjudicators to overlook legitimate claims for asylum.

Can new arrivals obtain a grant of Temporary Protected Status?

Although Salvadorans and Guatemalans in the United States have been eligible for Temporary Protected Status (TPS) in the past based on natural disasters, there is currently no category that would include the unaccompanied children arriving today. TPS is a limited immigration status that allows an individual to remain temporarily in the United States because of civil war, natural disasters, or other emergency situations that make it difficult for a country to successfully reintegrate people. TPS requires a formal designation by the Secretary of Homeland Security, in consultation with the Secretary of State, and requires, among other things, that a country formally request this designation from the U.S. government.

PROCEDURES AND POLICIES

How are unaccompanied children treated compared to adults and children arriving in families?

Adults, families, and unaccompanied children are treated differently under U.S. law.

Adults, when apprehended, are traditionally placed in removal proceedings before an immigration court.²⁵ However, in FY 2012, 75 percent of adults removed by the U.S. were removed through summary, out-of-court removal proceedings by a DHS officer rather than appearing before an immigration judge.²⁶ This commonly occurs through [expedited removal](#), when an adult noncitizen encounters immigration authorities at or within 100 miles of a U.S. border with insufficient or fraudulent documents.²⁷ This also commonly occurs through “reinstatement of removal,” when an adult noncitizen unlawfully reenters after a prior removal order.²⁸ Most adults apprehended at or near the border will be placed into expedited removal or reinstatement of removal.

Families (adults traveling with children) can also be processed under these provisions. Unaccompanied children, however, receive greater protections under U.S. law.

What happens to unaccompanied children once they're in U.S. custody?

The majority of unaccompanied children encountered at the border are apprehended, processed, and initially detained by CBP, which is a part of the Department of Homeland Security (DHS).²⁹ Unlike adults or families, though, unaccompanied children cannot be placed into expedited removal proceedings under the TVPRA of 2008, signed by President Bush.³⁰

The TVPRA of 2008 responded to concerns that unaccompanied children apprehended by the Border Patrol “were not being adequately screened” for eligibility for protection or relief in the United States.³¹ The TVPRA also directed the development of procedures to ensure that if unaccompanied children are deported, they are safely repatriated.

Children from non-contiguous countries, such as El Salvador, Guatemala, or Honduras, are placed into standard removal proceedings in immigration court. CBP must transfer custody of these children to Health and Human Services (HHS) within 72 hours, as described below.

Children from contiguous countries—Mexico or Canada—must be screened by CBP officers to determine if each child is unable to make independent decisions, is a victim of trafficking, or fears persecution in his home country. If none of these conditions apply, CBP will immediately send the child back to Mexico or Canada through a process called “voluntary return.” Although voluntary return does not carry the same consequences as deportation, CBP is not required to first turn over Mexican or Canadian children to HHS, unlike children from other countries. Return occurs pursuant to agreements with Mexico and Canada to manage the repatriation process, negotiated by the U.S. Department of State.³²

NGOs have expressed concern that CBP is the “wrong agency” to screen children for signs of trauma, abuse, or persecution.

Non-governmental organizations (NGOs) have expressed concern that CBP is the “wrong agency” to screen children for signs of trauma, abuse, or persecution.³³ Appleseed issued a report that stated “as a practical matter,” CBP screening “translates into less searching inquiries regarding any danger they are in and what legal rights they may have.”³⁴ Appleseed also expressed concern that the U.S.-Mexico repatriation agreement has been geared towards “protocols of repatriations logistics,” rather than best practices for child welfare.³⁵

Do the children get attorneys?

In general, children facing deportation—just like adults facing deportation—are not provided government-appointed counsel to represent them in immigration court. Under the immigration laws, all persons have the “privilege” of being represented “at no expense to the Government.”³⁶ This means that only those individuals who can afford a private lawyer or those who are able to find pro bono counsel to represent them free of charge are represented in immigration court. And, although Congress has directed the Secretary of Health and Human Services (HHS) to ensure the provision of counsel to unaccompanied children “to the greatest extent practicable,” Congress further explained

that the Secretary “shall make every effort to utilize the services of pro bono counsel who agree to provide representation to such children without charge.”³⁷ A vast network of pro bono legal service providers has responded to the call, and these providers represent many children nationwide, but they simply are unable to meet the need.

As a result, each year, thousands of children are forced to appear before an immigration judge and navigate the immigration court process, including putting on a legal defense, without any legal representation. In contrast, DHS, which acts as the prosecutor in immigration court and argues for the child’s deportation, is represented in every case by a lawyer trained in immigration law.

Can unaccompanied children be detained?

Yes, but special laws govern the custody of children based on child welfare standards that take the “best interests” of the child into account. As background, adults who are processed by CBP (if encountered at or near the border) are held in short-term CBP custody and then transferred to Immigration and Customs Enforcement (ICE) custody. As a DHS report found, despite the civil nature of immigration laws, “the facilities that ICE uses to detain [adults] were built, and operate, as [criminal] jails and prisons,” with “only a few exceptions.”³⁸

Children who arrive with a parent may be detained by DHS in family detention centers, described below.

Unaccompanied children must be transferred by DHS to the custody of HHS within 72 hours of apprehension, under the Homeland Security Act of 2002 and TVPRA of 2008.³⁹ ORR’s Unaccompanied Alien Children Program, then manages custody and care of the children until they can be released to family members or other individuals or organizations while their court proceedings go forward.

Under the TVPRA of 2008, HHS is required to “promptly place” each child in its custody “in the least restrictive setting that is in the best interests of the child.”⁴⁰ As such, children in ORR care are generally housed through a network of state-licensed, ORR-funded care providers, who are tasked with providing educational, health, and case management services to the children.⁴¹

Under international law, children “should in principle not be detained at all,” according to the United Nations High Commissioner for Refugees.

Under international law, children “should in principle not be detained at all,” according to UNHCR.⁴² Detention, if used, should only be a “measure of last resort” for the “shortest appropriate period of time,” with an overall “ethic of care.”⁴² Detention has “well-documented” negative effects on children’s mental and physical development,⁴³ including severe harm such as anxiety, depression, or long-term cognitive damage, especially when it is indefinite in nature.⁴⁵

Can unaccompanied children be released from custody?

Yes. ORR seeks to reunify children with family members or release them to other individual or organizational sponsors whenever possible, on the grounds that children’s best interests are served by living in a family setting.

As of May 2014, ORR reported that the average length of stay in its facilities was approximately 35 days and that about 85 percent of the children served are released while their deportation

proceedings are in progress.⁴⁶ Recently, ORR decided to resume requiring fingerprint checks for sponsors, due to concerns about fraud, abuse and children’s safety.⁴⁷ Previously, in 2013, ORR had decided to stop fingerprinting certain sponsors to speed up the process, because of a lack of resources.⁴⁸

ORR is also required to ensure that individuals taking custody of the children are able to provide for their well-being.⁴⁹ A court settlement in the case *Flores v. Reno* outlines the following preferences for sponsors:⁵⁰ (1) a parent; (2) a legal guardian; (3) an adult relative; (4) an adult individual or entity designated by the child’s parent or legal guardian; (5) a licensed program willing to accept legal custody; or (6) an adult or entity approved by ORR. The sponsor must agree to ensure that the child attends immigration court.

Why is the Government opening family detention Facilities?

The increase in families arriving at the southwest border—frequently mothers with children—has reignited a debate over the appropriate treatment of families in the immigration system. Family immigration detention has a complicated and troubled history in the U.S.⁵¹

Prior to 2006, ICE commonly detained parents and children separately. In FY 2006 appropriations language, however, Congress directed ICE to either “release families,” use “alternatives to detention such as the Intensive Supervised Appearance Program,” or, if necessary, use “appropriate” detention space to house families together.⁵²

ICE responded by opening the T. Don Hutto Residential Center in Texas, with over 500 beds for families. The Women’s Refugee Commission, however, explained that it was a “former criminal facility that still looks and feels like a prison.”⁵³ For example, although DHS claimed Hutto was specially equipped to meet the needs of families, reports emerged that children as young as 8 months old wore prison uniforms, lived in locked prison cells with open-air toilets, were subject to highly restricted movement, and were threatened with alarming disciplinary tactics, including threats of separation from their parents if they cried too much or played too loudly. Medical treatment was inadequate and children as young as 1 year old lost weight.⁵⁴

The Hutto detention center became the subject of a lawsuit, a human rights investigation, multiple national and international media reports, and a national campaign to end family detention.⁵⁵ In 2009, ICE ended the use of family detention at Hutto, withdrew plans for three new family detention centers, and said that detention would be used more “thoughtfully and humanely.”⁵⁶ The recent announcement that ICE will open additional family detention centers, with the first facility in Artesia, New Mexico, marks the first expansion of family detention since Hutto’s closing.⁵⁷

Parents reported that guards frequently threatened children with separation from parents for misbehavior, with children losing respect for parents because of parents’ lack of control.

Family detention is rarely in the “best interests of the child,” as opposed to community-based alternatives.⁵⁸ Families and children require specialized educational, medical, and legal support. But although governments can control families in detention, critics have argued that detaining families in jail-like settings profoundly impacts the emotional and physical well-being of children and breaks down family relationships. Parents reported that guards frequently threatened children with separation from parents for misbehavior, with children losing respect for parents because of parents’ lack of control.⁵⁹ Additionally, parents reported being forced to meet

lawyers and discuss details of abuse in front of their children.⁶⁰ Conversely, countries like Belgium have open reception facilities for migrant families seeking asylum, where they can come and go at will with certain restrictions.⁶¹ Caseworkers are assigned, and officials report high rates of attending proceedings.⁶²

Can Alternatives to Detention Be Used?

Yes. ICE operates alternatives to detention (ATD) for adult detainees—one program with case management, supervision, and electronic monitoring, and another program with electronic monitoring only.⁶³ U.S. government [data shows](#) that alternatives to detention are 96 percent effective in ensuring appearance in immigration court. Alternatives, as well as being more humane, are also less expensive than detention—\$17/day and less, as opposed to \$159/day.⁶⁴ Bipartisan support has emerged for alternatives to immigration detention,⁶⁵ as it has emerged for alternatives to criminal incarceration.⁶⁶

There appears to be no legal barrier to using alternatives to detention for families who would otherwise be in family detention. It is unclear whether supervision techniques such as electronic tracking bracelets will be used on children.⁶⁷

U.S. GOVERNMENT RESPONSE, AND OTHER PROPOSED RESPONSES

What has the government done thus far?

On June 2, 2014, President Obama issued a [memorandum](#) terming the influx of children along the border “an urgent humanitarian situation” under the Homeland Security Act, requiring coordination of federal government agencies. President Obama then directed the Secretary of Homeland Security to establish a Unified Coordination Group, which includes DHS and its components together with the Departments of Health and Human Services, Defense, Justice, and State, and the General Services Administration. In turn, Secretary of Homeland Security Jeh Johnson designated Federal Emergency Management Agency (FEMA) Administrator Fugate to coordinate the U.S. government-wide response.

A White House [fact sheet](#) stated that the government is “taking steps to improve enforcement and partnering with our Central American counterparts in three key areas: combating gang violence and strengthening citizen security, spurring economic development, and improving capacity to receive and reintegrate returned families and children.” Secretary Johnson, [in his testimony](#) before the House Committee on Homeland Security, laid out DHS’ plan to address the situation. It includes adding capacity to process and house the children, increasing Spanish-speaking staff, increasing transportation assets, coordinating with faith-based and voluntary organizations, and initiating a public affairs campaign in Spanish in Central America about the dangers of the journey to the United States.

Since the increase in arrivals of unaccompanied children, HHS requested and received approval from the Department of Defense for the use of Lackland Air Force base in San Antonio and a Naval

Base in Ventura County in California. These facilities hold 1,290 and 600 children, respectively. Facilities at Fort Sill, Oklahoma, also were housing roughly 1,000 children as of June 25 and had capacity to hold up to 1,200.⁶⁸ Secretary Johnson also announced plans to create new family detention centers, starting with a large temporary facility in Artesia, New Mexico.⁶⁹

On June 30, 2014, the President sent a [letter](#) to Congress outlining additional administration steps and requests for congressional action. The President stated he was “taking aggressive steps to surge resources to our southwest border.” The Justice Department and DHS will be deploying additional immigration judges, ICE attorneys, and asylum officers to the border. The administration’s stated goal is that “cases are processed fairly and as quickly as possible, ensuring the protection of asylum seekers and refugees while enabling the prompt removal of individuals who do not qualify for asylum or other forms of relief from removal.”

“Part of this surge will include” family detention (in the letter’s words, “detention of adults traveling with children”), and DHS will be “working to secure additional space that satisfies applicable legal and humanitarian standards.” Reports indicate the government will seek to send families held in the new immigration detention centers back to their home countries within 10 to 15 days.⁷⁰ The letter also stated that “expanded use of the Alternatives to Detention program” would be used “to avoid a more significant humanitarian situation.”

On July 8, the Obama administration asked Congress for \$3.7 billion to address the situation. Congress must approve the funding, which would, according to news reports, [speed up](#) removal proceedings to decide if unaccompanied children can stay in the U.S. or if they will be sent back to Central America.⁷¹ In a [letter](#) to House Speaker John Boehner, the White House laid out how the sum would be split between multiple government agencies to apprehend, care for, and remove unaccompanied minors who are in the U.S.⁷² According to the White House, the [\\$3.7 billion](#) would consist of:

- **\$1.8 billion to the Department of Health and Human Services** for additional capacity to care for unaccompanied children transferred from Homeland Security custody and the necessary medical response to the arrival of these children.
- **\$1.1 billion to Immigration and Customs Enforcement** that would cover \$879 million for the detention, prosecution, and removal of apprehended undocumented families; \$116 million for transportation costs associated with the surge in apprehensions of unaccompanied children; and \$109 million for expanded domestic and international investigative and enforcement efforts.
- **\$433 million to Customs and Border Protection**, including \$364 million for operational costs associated with apprehending unaccompanied children and families; \$29 million for expansion of the Border Enforcement Security Task Force program; and \$39 million to increase air surveillance capabilities to detect illegal activity in the Rio Grande Valley region.
- **\$300 million to the Department of State** to cover \$295 million for repatriation of migrants to Central America and to help governments in the region better control their borders and address the root causes of the migration. And \$5 million would support State Department media campaigns in Mexico, Guatemala, El Salvador, and Honduras to tell potential migrants not to make the dangerous journey.

- **\$64 million to the Department of Justice Administrative Review and Appeals**, including \$45.4 million for additional immigration judge teams to increase case processing, \$2.5 million for expansion of legal orientation program, \$1.5 million for direct legal representation services to children in immigration proceedings, and \$1.1 million for additional legal activities.⁷³

What additional responses have been proposed to address this Issue?

NGOs, advocacy groups, and legislators have proposed short-term solutions to the current influx, longer-term systematic U.S. reforms to more holistically protect children and families reaching the U.S., and longer-term reforms in sending countries to address root causes and reduce the influx of children and families to the U.S.

Short-Term Solutions

Short-term proposals have focused on adding resources to process children and families' claims so that children can be transferred in a timely manner from CBP facilities not designed for them,⁷⁴ and children and families will receive a "timely, but not rushed" hearing.⁷⁵ These proposals include additional immigration judges and U.S. Citizenship and Immigration Services (USCIS) asylum officers, to avoid reallocation and increased backlogs elsewhere;⁷⁶ additional use of community-based shelters and alternatives to detention, to avoid additional human and financial costs;⁷⁷ and additional post-release caseworker services, to protect children, assist families, and ensure attendance at proceedings.⁷⁸

Longer-Term U.S. Systemic Reforms

Additionally, before the recent influx, NGOs and legislators had proposed longer-term reforms to more holistically protect children and families fleeing violence who reach the U.S. These reforms include:

- **Incorporating a "best interests of child" standard into all decision-making, not just custody decisions.**⁷⁹ S. 744, which the Senate passed in 2013, would require the Border Patrol, in the case of repatriation decisions, to give "due consideration" to the best interests of a child, "family unity," and "humanitarian concerns."⁸⁰ Amendment 1340, ultimately not included, would have made the best interests of a child the "primary consideration" in all federal decisions involving unaccompanied immigrant children.⁸¹ Organizations also recommended adopting more child-specific procedures.⁸²
- **Child welfare screening to replace or augment Border Patrol screening.** NGOs have uniformly questioned Border Patrol agents' adequacy to screen children for trafficking and persecution, as Border Patrol now does for Mexican and Canadian children, and prevent their return to their persecutors or abusers.⁸³ Reform proposals have ranged from improved training for CBP officers (included in S. 744),⁸⁴ to pairing CBP screeners with child welfare experts (also in S. 744)⁸⁵ or NGOs,⁸⁶ to replacing CBP screeners with USCIS asylum officers.⁸⁷
- **Due process protections and resources.** NGOs have advocated for a system that provides procedural protections, resources, and time to appropriately protect children and families from violence, under international and U.S. laws, without unduly delaying decision making.⁸⁸ Proposals include appointed counsel,⁸⁹ legal orientation programs,⁹⁰

and additional resources to backlogged immigration courts (all included in S. 744).⁹¹

- **Detention reforms.** NGOs have proposed that children be detained as little as possible,⁹² released to families or other sponsors whenever appropriate,⁹³ and if detained, supervised in a community-based setting⁹⁴ because of detention's severe impact on children.⁹⁵ Along these lines, organizations and legislators have recommended improving detention conditions,⁹⁶ and expanding alternatives to detention (as S. 744 does),⁹⁷ by reallocating detention funding to those cheaper alternatives.⁹⁸

Reforms in Sending Countries

Lastly, organizations have proposed reforms in sending countries to improve conditions and ultimately reduce the influx of refugees to the United States. These reforms include:

- **Aid to sending countries.** NGOs have proposed aid to sending countries and Mexico, to invest in systems that protect and care for children, help youth live productive lives, and ultimately reduce violence and address root causes of flight.⁹⁹
- **Screening of refugees in sending countries.** NGOs have also proposed pilots for implementing robust screening for persecution in sending countries before children reach the U.S., as the U.S. implemented in the former Soviet Union and Haiti.¹⁰⁰ Mechanisms for this exist under current law (Section 104 of the 2008 TVPRA).¹⁰¹

ENDNOTES

- ¹ 6 U.S.C. 279(g).
- ² U.S. Customs and Border Protection, “[Southwest Border Unaccompanied Alien Children](#),” July 14, 2014.
- ³ United Nations High Commissioner for Refugees, *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection*, March 2014, http://www.unhcrwashington.org/sites/default/files/1_UAC_Children%20on%20the%20Run_Full%20Report.pdf; Elizabeth Kennedy, *No Childhood Here: Why Central American Children Are Fleeing Their Homes*, American Immigration Council, September 24, 2014.
- ⁴ UNHCR, “[2014 UNHCR country operations profile – Afghanistan](#),” 2014.
- ⁵ Tom Wong, “[Statistical Analysis Shows that Violence, Not U.S. Immigration Policies, Is Behind the Surge of Unaccompanied Children Crossing the Border](#),” 2014.
- ⁶ Kennedy, 2014.
- ⁷ UNHCR, *Children on the Run*, March 12, 2014.
- ⁸ Kennedy, 2014.
- ⁹ Kennedy, 2014.
- ¹⁰ Leslie E. Velez, UNHCR, *Testimony to U.S. House Judiciary Committee*, June 25, 2014, p. 5.
- ¹¹ American Immigration Council, *Tackling the Toughest Questions on Immigration Reform: Short Answers to the Most Common Questions*, July 29, 2013.
- ¹² Molly Hennessy-Fiske, “[On the Texas border, patrol chief sees younger faces](#),” *LA Times*, June 27, 2014.
- ¹³ U.S. Border Patrol, “[U.S. Border Patrol Fiscal Year Staffing Statistics](#),” January 27, 2014.
- ¹⁴ U.S. Border Patrol, “[U.S. Border Patrol Fiscal Year Budget Statistics](#),” January 27, 2014.
- ¹⁵ Marc R. Rosenblum, *Border Security: Immigration Enforcement Between Ports of Entry* (Washington, DC: Congressional Research Service, May 3, 2013), pp. 17-18.
- ¹⁶ UNHCR, *The 1951 Refugee Convention*.
- ¹⁷ United Nations, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1985.
- ¹⁸ UNHCR, *Children on the Run*, March 12, 2014, p. 6.
- ¹⁹ Vera Institute of Justice, *The Flow of Unaccompanied Minors Through the Immigration System* (2010), at 24-25.
- ²⁰ Pub. L. 110-457, 122 Stat. 5044 (Dec. 23, 2008), at <http://www.gpo.gov/fdsys/pkg/PLAW-110publ457/pdf/PLAW-110publ457.pdf>. See also Polaris Project, “[Current Federal Laws](#),” <http://www.polarisproject.org/what-we-do/policy-advocacy/national-policy/current-federal-laws>
- ²¹ 8 U.S.C. § 1232. See also Deborah Lee, Manoj Govindaiah, Angela Morrison & David Thronson, “Update on Legal Relief Options for Unaccompanied Alien Children Following the Enactment of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008: Practice Advisory,” AILA Infonet Doc. No. 09021830, available at http://www.ilrc.org/files/235_tvpra_practice_advisory.infonet.pdf
- ²² Deborah Lee, Manoj Govindaiah, Angela Morrison & David Thronson, “Update on Legal Relief Options for Unaccompanied Alien Children Following the Enactment of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008: Practice Advisory,” AILA Infonet Doc. No. 09021830, available at http://www.ilrc.org/files/235_tvpra_practice_advisory.infonet.pdf.
- ²³ Pub. L. 110-457, 122 Stat. 5079, sec. 235(c)(5) (8 U.S.C. § 1232(c)(5)).
- ²⁴ UNHCR recommended in short that “[t]he extreme vulnerability of a child takes precedence over the status of an ‘illegal alien.’” UNHCR Detention Guidelines, ¶52 (2012), <http://www.unhcr.org/505b10ee9.html>.
- ²⁵ 8 U.S.C. § 1229a.
- ²⁶ Marc R. Rosenblum and Doris Meissner, *The Deportation Dilemma: Reconciling Tough and Humane Enforcement* (Washington, DC: Migration Policy Institute, April 2014), <http://www.migrationpolicy.org/research/deportation-dilemma-reconciling-tough-humane-enforcement>.
- ²⁷ 8 U.S.C. § 1225(b)(1)(A)(i) (expedited removal provisions); § 1182(a)(6)(C) (fraud and misrepresentation provisions); § 1182(a)(7)(A)(i)(I) (insufficient documents provisions).
- ²⁸ 8 U.S.C. § 1231(a)(5); 8 C.F.R. § 1241.8.
- ²⁹ Congressional Research Service, *Unaccompanied Alien Children: An Overview* (June 13, 2014), <http://fas.org/sgp/crs/homesec/R43599.pdf>.
- ³⁰ P.L. 110-457.
- ³¹ CRS at 4.
- ³² CRS at p. 4.
- ³³ Appleseed, Letter to Congressional Research Service, May 23, 2014, at p. 2; Appleseed, *Children at the Border: The Screening, Protection and Repatriation of Unaccompanied Mexican Minors*, 2011, at <http://appleseednetwork.org/wp-content/uploads/2012/05/Children-At-The-Border1.pdf>; Women’s Refugee Commission, *Halfway Home: Unaccompanied Children in Immigration Custody* (Feb. 2009).
- ³⁴ Appleseed, Letter, p. 4.
- ³⁵ Appleseed, Letter, p. 4.
- ³⁶ 8 USC § 1362.
- ³⁷ 8 USC § 1232(c)(5).
- ³⁸ Dr. Dora Schriro, Department of Homeland Security, Immigration and Customs Enforcement, *Immigration Detention Overview and Recommendations*, p. 2, October 6, 2009, <http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf>.
- ³⁹ 8 USC § 1232(b)(3).
- ⁴⁰ 8 USC § 1232(c)(2).
- ⁴¹ U.S. Department of Human Services, Administration for Children and Families, Office of Refugee Resettlement, *Unaccompanied Alien Children Program, Fact Sheet*, <https://www.acf.hhs.gov/sites/default/files/orr/>

[unaccompanied_childrens_services_fact_sheet.pdf](#).

⁴² UNHCR Detention Guidelines, “Guideline 9.2, Children,” ¶¶ 51-57, 2012, <http://www.unhcr.org/505b10ee9.html>.

⁴³ UNHCR Detention Guidelines, ¶ 52.

⁴⁴ UNHCR Detention Guidelines, ¶ 52.

⁴⁵ Alice Farmer, The impact of immigration detention on children, *Forced Migration Review*, 2013, <http://www.fmreview.org/detention/farmer>.

⁴⁶ U.S. Department of Human Services, Administration for Children and Families, Office of Refugee Resettlement, Unaccompanied Alien Children Program, *Fact Sheet*, https://www.acf.hhs.gov/sites/default/files/orr/unaccompanied_childrens_services_fact_sheet.pdf.

⁴⁷ Associated Press, *Feds launch bilingual hotline for parents of migrant children*, June 20, 2014, at <http://www.foxnews.com/us/2014/06/20/feds-launch-bilingual-hotline-for-parents-migrant-children/>.

⁴⁸ Molly Hennessy-Fiske, *More youths crossing U.S.-Mexico border alone*, L.A. Times (Feb. 21, 2014), at <http://articles.latimes.com/2014/feb/21/nation/la-na-texas-young-migrants-20140222>.

⁴⁹ 8 USC § 1232(c)(3).

⁵⁰ Congressional Research Service, *Unaccompanied Alien Children: An Overview* (June 13, 2014), p. 10, <http://fas.org/sgp/crs/homesec/R43599.pdf>.

⁵¹ Women’s Refugee Commission and Lutheran Immigration and Refugee Service, *Locking Up Family Values: The Detention of Immigrant Families*, p. 2, 2007, http://www.womensrefugeecommission.org/component/docman/doc_download/150-locking-up-family-values-the-detention-of-immigrant-families-locking-up-family-values-the-detention-of-immigrant-families?q=locking+family.

⁵² WRC and LIRS at 6.

⁵³ WRC and LIRS at 2.

⁵⁴ Grassroots Leadership, *Letter to DHS Secretary Jeh Johnson* (July 2, 2014), <http://grassrootsleadership.org/sign-against-return-family-detention>.

⁵⁵ Margaret Talbot, *The Lost Children*, *The New Yorker* (March 3, 2008), at http://www.newyorker.com/reporting/2008/03/03/080303fa_fact_talbot?currentPage=all.

⁵⁶ Nina Bernstein, *U.S. to Reform Policy on Detention for Immigrants*, N.Y. Times (Aug. 5, 2009), at <http://www.nytimes.com/2009/08/06/us/politics/06detain.html?pagewanted=all&r=0>.

⁵⁷ Zack Ponce, *Artesia center set to house women, children*, *El Paso Times* (June 26, 2014), http://www.elpasotimes.com/latestnews/ci_26038396/mayor-artesia-nm-center-may-keep-immigrants-year.

⁵⁸ Katharina Obser, *Human Rights First, Children and Families Seeking Protection Deserve Better than Detention and Summary Deportation*, July 2, 2014, <http://www.humanrightsfirst.org/blog/children-and-families-seeking-protection-deserve-better-detention-and-summary-deportation>.

⁵⁹ Women’s Refugee Commission, *Halfway Home: Unaccompanied Children in Immigration Custody*, pp. 28-31, Feb. 2009.

⁶⁰ Talbot, *The Lost Children*.

⁶¹ Liesbeth Schockaert, *Alternatives to detention: open family units in Belgium*, *Forced Migration Review*, 2013, <http://www.fmreview.org/detention/schockaert#sthash.iIlACtkM.dpuf>.

[detention/schockaert#sthash.iIlACtkM.dpuf](#).

⁶² *Id.*

⁶³ Doris Meissner et. al., Migration Policy Institute, *The Rise of a Formidable Machinery*, p. 130, (2013), <http://www.migrationpolicy.org/research/immigration-enforcement-united-states-rise-formidable-machinery>.

⁶⁴ National Immigration Forum, *The Math of Immigration Detention*, August 2013, <http://www.immigrationforum.org/images/uploads/mathofimmigrationdetention.pdf>.

⁶⁵ Council on Foreign Relations, *Jeb Bush and Thomas F. McLarty III, Chairs, Independent Task Force Report No. 63, U.S. Immigration Policy*, p. 106-107 (July 2009), http://www.cfr.org/immigration/us-immigration-policy/p20030?breadcrumb=/bios/2472/edward_alden?page=2; Elisa Massimino and Grover Norquist on Immigration Detention, *Human Rights First*, May 2, 2013, at <https://www.youtube.com/watch?v=rOGc7PWdhWg>.

⁶⁶ See Richard Viguerie, *A Conservative Case for Prison Reform*, N.Y. Times, June 9, 2013, http://www.nytimes.com/2013/06/10/opinion/a-conservative-case-for-prison-reform.html?_r=0; Right on Crime, at <http://www.rightoncrime.com/>.

⁶⁷ The White House, Office of the Press Secretary, *Press Briefing by Principal Deputy Press Secretary Josh Earnest* (June 20, 2014) (Q: “[A]re you going to be putting ankle bracelets on [these] kids? A: “I’d refer you to DHS for that...”), at <http://www.whitehouse.gov/the-press-office/2014/06/20/press-briefing-principal-deputy-press-secretary-josh-earnest-62014>.

⁶⁸ Chris Casteel, “Oklahoma Rep. Jim Bridenstine wants “unfettered access” to Fort Sill facility holding minors,” *The Oklahoman*, July 7, 2014.

⁶⁹ <http://washington.cbslocal.com/2014/06/27/officials-nm-detention-center-will-be-focused-on-deporting-illegal-immigrants-within-15-days/>.

⁷⁰ CBSDC/AP, “*Officials: NM Detention Center Will Be Focused on Deporting Illegal Immigrants Within 15 Days*,” June 27, 2014; Juan Carlos Llorca, *Feds: Immigrant center to expedite deportations*, June 26, 2014.

⁷¹ Elise Foley, “*Obama Requests \$3.7 Billion To Deal With Border Crisis*,” *The Huffington Post*, July 8, 2014.

⁷² The White House, “*Letter to the Speaker of the House of Representatives*,” July 8, 2014.

⁷³ The White House, “*Fact Sheet: Emergency Supplemental Request to Address the Increase in Child and Adult Migration from Central America in the Rio Grande Valley Areas of the Southwest Border*,” July 8, 2014.

⁷⁴ James Silkenat, President, American Bar Association, *Statement, House Judiciary Committee*, June 25, 2014, p. 2, http://www.americanbar.org/content/dam/aba/unacategorized/GAO/2014june25_unaccompaniedalienminors_t.authcheckdam.pdf; *Women’s Refugee Commission, Halfway Home: Unaccompanied Children in Immigration Custody* (Feb. 2009), p. 2;

⁷⁵ Human Rights First, *How to Manage the Increase in Families At the Border*, June 2014, <http://www.humanrightsfirst.org/sites/default/files/Families-at-the-Border.pdf>.

⁷⁶ Human Rights First, *How to Manage the Increase in Families At the Border*, June 2014, <http://www.humanrightsfirst.org/sites/default/files/Families-at-the-Border.pdf>. Although additional resources would speed up cases, organizations also note that a child or adult should have time to recover from dangerous and abusive travels, receive a legal orientation program, obtain legal counsel, and assist in preparing their case, before facing government officials and removal. *Id.*

⁷⁷ Lutheran Immigration and Refugee Service (LIRS), Testimony, House Judiciary Committee, June 25, 2014, p. 2; Human Rights First, *How to Manage the Increase in Families At the Border*, June 2014, <http://www.humanrightsfirst.org/sites/default/files/Families-at-the-Border.pdf>.

⁷⁸ United States Conference of Catholic Bishops (USCCB), *Testimony of Most Reverend Mark Seitz, Bishop of the Diocese of El Paso, Texas*, House Judiciary Committee, p. 10-11, June 25, 2014 (recommending an increase in post-release funding for caseworkers, community-based reception services, and health care and medical care services), [hereinafter USCCB HJC Testimony], <http://judiciary.house.gov/cache/files/c8aea408-278a-4f3a-9fac-c790681f2611/bishop-mark-seitz-uac-hearing-testimony.pdf>; Lutheran Immigration and Refugee Service (LIRS), Testimony, House Judiciary Committee, June 25, 2014, p. 2. USCCB also recommended improving background checks for sponsors, as well as increased funding to the Legal Orientation Program for Custodians (LOPC), to inform sponsors of their responsibilities. USCCB HJC Testimony, p. 11.

⁷⁹ The “best interests of child” standard is internationally recognized. In the U.S. child welfare system, it applies special importance to “family integrity, health, safety, protection of the child, and timely placement.” The United States Conference of Catholic Bishops (USCCB) has thus recommended a “transnational family approach,” with a holistic assessment of all family members for potential reunification, performed by child welfare professionals. United States Conference of Catholic Bishops (USCCB), Testimony of Most Reverend Mark Seitz, Bishop of the Diocese of El Paso, Texas, House Judiciary Committee, June 25, 2014, p. 12, [hereinafter USCCB HJC Testimony], <http://judiciary.house.gov/cache/files/c8aea408-278a-4f3a-9fac-c790681f2611/bishop-mark-seitz-uac-hearing-testimony.pdf>.

⁸⁰ S. 744, *An act to provide for comprehensive immigration reform and for other purposes*, Sec. 1115(b)(1)(B), <http://www.lawandsoftware.com/bseoima/bseoima-senate-1115.html>. If repatriation occurs, the ABA first recommends screening by a legal advocate, and the involvement of a formal intercountry child welfare agency. James Silkenat, President, American Bar Association, Statement, House Judiciary Committee, June 25, 2014, p. 3 [hereinafter ABA HJC Statement], http://www.americanbar.org/content/dam/aba/unacategorized/GAO/2014june25_unaccompaniedalienminors_t.authcheckdam.pdf.

⁸¹ S. 744, Amt. 1340, <https://beta.congress.gov/amendment/113th-congress/senate-amendment/1340/text>. See also The Young Center for Immigrant Children’s Rights, <http://theyoungcenter.org/news/historic-senate-bill-protecting-childrens-safety-in-immigration-legislation/>.

⁸² USCCB and others have thus recommended procedures reflecting this paradigm—an appointed lawyer and child advocate in the process repatriation only after screening by a child welfare advocate, the development of child-appropriate asylum procedures, and separate children’s dockets in immigration court, with specialized training for judges. USCCB HJC Testimony at 11-12; National Immigrant Justice Center (NIJC), *Statement, House Judiciary Committee, June 25, 2014*, at 8, <http://www.immigrantjustice.org/sites/immigrantjustice.org/files/NIJC%20statement%20for%20House%20Judiciary%20Hearing%20on%20Unaccompanied%20Children%206-25-14.pdf>. S. 744 would also institute a multi-year program to ensure “safe and sustainable repatriation.” S. 744, Sec. 3612 (j), <http://www.lawandsoftware.com/bseoima/bseoima-senate-3612.html>.

⁸³ Appleseed Foundation, *Children at the Border: The Screening, Protection and Repatriation of Unaccompanied Mexican Minors*, 2011, at <http://appleseednetwork.org/wp-content/uploads/2012/05/Children-At-The-Border1.pdf>. As one organization put it, children “do not divulge their complex histories of abuse and neglect during a first meeting with strangers,” let alone “armed strangers in uniform.” Center for Refugee and Gender Studies,

Calling on President Obama to Protect Child Migrants, June 30, 2014 (relaying story of child who only divulged details of rape to her attorney), <http://cgrs.uchastings.edu/our-work/june-2014-policy-statement-children>.

Border Patrol representatives have also publicly expressed frustration with assuming a child welfare role. CBP union head Brandon Judd stated, “Forty percent of our agents have been pulled from the field to babysit, clean cells, change diapers.... That’s not our job.” David Nakamura, Border agents decry ‘Diaper Changing, Burrito Wrapping’ with influx of children, *Washington Post* (June 20, 2014), at http://www.washingtonpost.com/politics/border-agents-decry-diaper-changing-burrito-wrapping-with-influx-of-children/2014/06/20/1a6b6714-f579-11e3-8aa9-dad2ec039789_story.html.

⁸⁴ S. 744, Sec. 3611 (requiring training by child welfare professionals of CBP officials “likely to come into contact with unaccompanied alien children”), <http://www.lawandsoftware.com/bseoima/bseoima-senate-3611.html>; Sec. 1115(c) (requiring training on preserving children’s best interests), <http://www.lawandsoftware.com/bseoima/bseoima-senate-1115.html>. See also *Women’s Refugee Commission, Halfway Home: Unaccompanied Children in Immigration Custody* (Feb. 2009), p. 2; *American Immigration Lawyers Association (AILA)*, Testimony, House Judiciary Committee, June 25, 2014, p. 6, <http://www.aila.org/content/default.aspx?docid=49015>.

⁸⁵ S. 744, Sec. 3612(d), (e), “Child Trafficking Victims Prevention Act” (requiring HHS to hire child welfare professionals to be placed in seven largest Border Patrol offices, screen children, and provide assessments), at <http://www.lawandsoftware.com/bseoima/bseoima-senate-3612.html>; USCCB, HJC Testimony, p. 10.

⁸⁶ Lutheran Immigration and Refugee Service (LIRS), Testimony, House Judiciary Committee, June 25, 2014, p. 2.

⁸⁷ Appleseed Foundation, *Children at the Border: The Screening, Protection and Repatriation of Unaccompanied Mexican Minors*, 2011, at <http://appleseednetwork.org/wp-content/uploads/2012/05/Children-At-The-Border1.pdf>.

⁸⁸ Conversely, USCCB and other organizations have stated that “subjecting these families to expedited removal procedures, as intended by the Administration, could undercut their due process rights.” USCCB, HJC Testimony, p. 10.

⁸⁹ S. 744, Sec. 3502 (providing counsel to unaccompanied children, the mentally disabled, and particularly vulnerable), <http://www.lawandsoftware.com/bseoima/bseoima-senate-3502.html>. H.R. 15, the House comprehensive reform bill, is similar. H.R. 15, Sec. 3502, <https://beta.congress.gov/bill/113th-congress/house-bill/15/>. H.R. 4936, the Vulnerable Immigrants Voice Act, introduced by Rep. Hakeem Jeffries (D-NY) and others, would provide counsel to unaccompanied children and the mentally disabled. <https://beta.congress.gov/bill/113th-congress/house-bill/4936>; Richard Simon, “Lawmakers seek legal aid for youths caught crossing Southwest border,” *Los Angeles Times*, June 23, 2014. Those bills would not, however, provide counsel in DHS expedited removal processes, were Congress to change the law to allow DHS expedited removal or summary return of unaccompanied children.

Organizations have uniformly recommended counsel for unaccompanied children. See American Immigration Council, *Two Systems of Justice*, March 2013, at 12 (“Counsel should be appointed in cases where an immigrant is unable to retain a lawyer, beginning with minors”). See also e.g. USCCB, HJC Testimony, p. 12; *American Immigration Lawyers Association (AILA)*, Statement, House Judiciary Committee, June 25, 2014, p. 6; NIJC HJC Statement, pp. 5-7; ABA HJC Statement, p. 3.

Particularly, children fleeing abuse and violence are often not

capable of articulating a fear of return by themselves, let alone arguing legal claims. USCCB HJC Testimony at p. 11. Organizations have also reported that counsel assists in ensuring children attend court proceedings. Safe Passage Project, Testimony, House Judiciary Committee, June 25, 2014, at p. 2 (“Out of the approximately three hundred children screened by Safe Passage, only two young people failed to appear for immigration court hearings after we were able to match them with pro bono counsel.”), <http://www.safeassageproject.org/safe-passage-testimony-to-congress-on-child-migrants/>.

The Administration has proposed \$2 million for a “justice AmeriCorps” program of pro bono lawyers. Organizations have called it a “step in the right direction,” but “not adequate to meet overwhelming need.” NIJC HJC Statement at 6 (“given its modest size, geographic application to only 29 cities, limitation to children under the age of 16, and the time it will take to get the program operational, the overwhelming need for legal services for unaccompanied immigrant children remains.”) The Senate’s Commerce, Justice and Science Appropriations bill, if passed, would also provide \$5.8 million for a pilot program for lawyers for unaccompanied children. Senate Appropriations Committee, *FY15 Minibus Text: CJS, THUD & Agriculture*, Amt. 3244 to H.R. 4660, p. 24, <http://www.appropriations.senate.gov/news/fy15-minibus-text-cjs-thud-agriculture>.

⁹⁰ Organizations have also recommended increasing Legal Orientation Program funding, to provide know-your-rights presentations to all detainees nationwide. AILA HJC Testimony, at 6; Human Rights First, *How to Manage the Increase in Families At the Border*, June 2014, <http://www.humanrightsfirst.org/sites/default/files/Families-at-the-Border.pdf>. S. 744 and H.R. 15 would provide this. S. 744, Sec. 3503, <http://www.lawandsoftware.com/bseoima/bseoima-senate-3503.html>; H.R. 15, Sec. 3503.

⁹¹ Organizations have recommended additional resources to backlogged immigration courts, even before the recent children’s crisis. Currently, an immigration case has been pending for 578 days on average (over a year and a half), and in Los Angeles, 799 days (over two years). Transactional Records Access Clearinghouse (TRAC), http://trac.syr.edu/phptools/immigration/court_backlog/. S. 744 and H.R. 15 would add 75 immigration judges in each of the 2014-2016 fiscal years, nearly doubling immigration court capacity. Sec. 3501(a). The Senate 2015 CJS Appropriations bill under consideration contains an extra \$17 million to hire 35 new immigration judges. S. Amt. 3244 to H.R. 4660, p. 24, <http://www.appropriations.senate.gov/news/fy15-minibus-text-cjs-thud-agriculture>; S. Rep. 113–181, p. 63. The House’s CJS Appropriations bill, which passed, does not. H.R. 4660, pp. 22-23, <http://beta.congress.gov/113/bills/hr4660/BILLS-113hr4660rh.pdf>. Neither S. 744 nor H.R. 15, nor current Appropriations bills, include extra funding for USCIS asylum officers.

⁹² UNHCR *Detention Guidelines*, “Guideline 9.2, Children,” ¶¶ 51-57, 2012; WRC, *Halfway Home*;

⁹³ USCCB HJC Testimony, p. 11.

⁹⁴ More broadly, organizations have recommended appropriate HHS facilities for children—smaller, community-based facilities with services, rather than larger, detention-like facilities. LIRS HJC Statement at 1; USCCB HJC Testimony at 13; WRC, *Halfway Home*.

⁹⁵ UNHCR *Detention Guidelines*, ¶ 52.

⁹⁶ Groups have particularly criticized conditions in Border Patrol’s short-term detention facilities. Silkenat, ABA Statement at 2; AILA HJC Statement, at 5; WRC, *Halfway Home*, at 5-12. On June 11, 2014, a group of civil, immigrant, and human rights organizations filed an administrative complaint on behalf of 116 children who had reported abuse and mistreatment while in CBP custody, such as shacking, inhumane conditions, inadequate access to medical care, and verbal, sexual, and physical abuse. ACLU,

Unaccompanied Immigrant Children Report Serious Abuse by U.S. Officials During Detention, June 11, 2014, <https://www.aclu.org/immigrants-rights/unaccompanied-immigrant-children-report-serious-abuse-us-officials-during>. Additionally, the American Immigration Council released a report detailing the lack of accountability for complaints filed against Border Patrol officials from custody. American Immigration Council, *No Action Taken: Lack of CBP Accountability in Responding to Complaints of Abuse*, May 4, 2014 (of 809 complaints of alleged abuse, 97 percent resulted in “no action taken”), <http://www.immigrationpolicy.org/special-reports/no-action-taken-lack-cbp-accountability-responding-complaints-abuse>.

Several legislative proposals have been introduced to address short-term CBP detention conditions. These include H.R. 3130, the Protect Family Values at the Border Act, introduced by Rep. Lucille Roybal-Allard (D-CA), <http://thomas.loc.gov/cgi-bin/query/z?c113:H.R.3130>; Amendment 1260 to S. 744, introduced by Sen. Barbara Boxer (D-CA), <https://beta.congress.gov/amendment/113th-congress/senate-amendment/1260/text>. Additionally, H.R. 4303, the Border Enforcement Accountability, Oversight, and Community Engagement Act of 2014, introduced by Rep. Steve Pearce (R-NM) and Rep. Beto O’Rourke (D-TX), would establish an ombudsman over border-related concerns. <https://beta.congress.gov/bill/113th-congress/house-bill/4303/>.

⁹⁷ S. 744, Sec. 3715 (establishing “secure alternatives programs that incorporate case management services,” with “nongovernmental community based organizations”); Human Rights First, *How to Manage the Increase in Families At the Border*, June 2014, <http://www.humanrightsfirst.org/sites/default/files/Families-at-the-Border.pdf>; LIRS HJC Statement, at 2.

Currently, the House DHS appropriations bill recommends \$94.5 million for alternatives to detention (compared to \$2.01 billion for detention overall). H.R. 4903, <http://www.gpo.gov/fdsys/pkg/CCAL-113hcal/html/CCAL-113hcal-pt2.htm>; see also H. Rept. 113-481, p. 58. The Senate DHS Appropriations bill recommends \$94 million for alternatives to detention (compared to \$1.87 billion for detention overall). S. 2534, at <https://beta.congress.gov/bill/113th-congress/senate-bill/2534/text>; See also Senate Appropriations Committee, *Committee Approves FY15 Homeland Bill* (June 26, 2014), at <http://www.appropriations.senate.gov/news/committee-approves-fy15-homeland-bill>.

⁹⁸ Detention Watch Network, *Advocates Denounce @BarackObama for Seeking \$2 Billion to Detain & Deport Women & Children on the Border*, July 1, 2014, at <http://detentionwatchnetwork.wordpress.com/2014/07/01/advocates-denounce-barackobama-for-seeking-2-billion-to-detain-deport-women-and-children-on-the-border/>; Council on Foreign Relations, Jeb Bush and Thomas F. McLarty III, Chairs, *Independent Task Force Report No. 63, U.S. Immigration Policy*,” p. 106-107 (July 2009).

⁹⁹ USCCB, HJC Testimony, pp. 13-15.

¹⁰⁰ USCCB, HJC Testimony, pp. 12, 14.

¹⁰¹ 22 U.S.C. § 7105(a). It requires the “Secretary of State and the Administrator of the United States Agency for international development” to “establish and carry out initiatives in foreign countries...in cooperation and coordination with relevant organizations, such as the United Nations High Commissioner for Refugees, the International Organization for Migration, and private nongovernmental organizations...for--”(i) increased protections for refugees and internally displaced persons, including outreach and education efforts to prevent such refugees and internally displaced persons from being exploited by traffickers; and (ii) performance of best interest determinations for unaccompanied and separated children who come to the attention of the United Nations High Commissioner for Refugees, its partner organizations, or any organization that contracts with the Department of State in order to identify child trafficking victims and to assist their safe integration, reintegration, and resettlement.”