

AMERICAN EXILE

Rapid Deportations That Bypass the Courtroom

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Rapid Deportations That Bypass the Courtroom

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Cover, interior, and back photographs: Sam Frost

Cover and interior images: Tijuana, Mexico, March 2014. Men standing on the beach look across the border to California as U.S. Border Patrol officers arrest two migrants.

Back cover image: The U.S. fence separating California and Mexico, expanded and fortified in 2011 and jutting 30 feet into the Pacific Ocean.

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EXECUTIVE SUMMARY

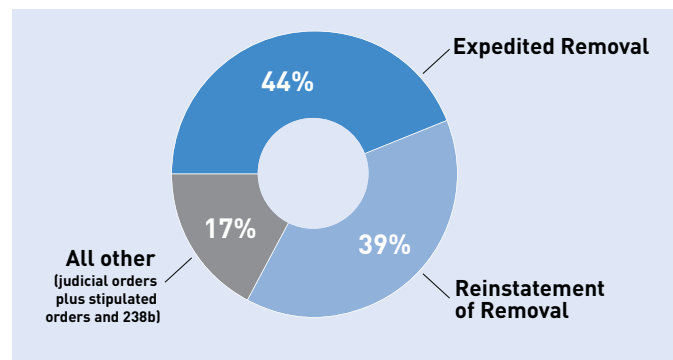
Hilda, a 35-year-old woman from Honduras, arrived in Texas in 2013, fleeing gang threats and domestic violence that had just resulted in the miscarriage of her twin babies. She was still bleeding when she was arrested by a Border Patrol officer with her two young surviving children. “I was caught crossing the river,” recalls Hilda:

It was 8 p.m. at night. They took me and my kids to a cell ... They started to ask us to sign a lot of papers. The problem was I didn’t understand anything he was asking me. Since he saw that I didn’t understand, [the officer] would just write and write and just tell me, “Sign.” ... He would just put [the form] in front of me and say, “Sign, next one, sign.” ... I was afraid [to ask for help]. Everyone there was afraid. [The officers] don’t let you even talk to them. ... The fear they instill in you doesn’t let you ask for help.¹

Hilda and her two-year-old and 12-year-old sons were issued deportation orders by an immigration enforcement agent. Hilda never saw the deportation order; she did not know what language it was in.

In 2013, the United States conducted 438,421 deportations.² In more than 363, 279³ of those deportations—approximately 83 percent—the individuals

FIGURE 1
FY 2013 Removal Figures by Deportation Process



Department of Homeland Security, Office of Immigration Services, Annual Report, Immigration Enforcement Actions: 2013, September 2014, available at http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf. Note: Total may not equal 100% because of rounding.

In FY 2013, 83 percent of deportation orders came from immigration officers, not judges.

did not have a hearing, never saw an immigration judge, and were deported through cursory administrative processes where the same presiding immigration officer acted as the prosecutor, judge, and jailor. Some of those expelled without a hearing had lived in the United States for many years, have U.S. citizen children, and were never afforded the opportunity to say goodbye to relatives or call an attorney before being wrenched from their lives rooted in American communities. Some of those deported were fleeing violence, persecution, or torture and were turned back to danger. Others had lawful status in the United States, including U.S. citizenship, but were erroneously deported.

Deportation has incalculable consequences for the individual removed⁴ and the family left behind in the United States, so the decision to deport should be arrived at with care by a judge trained in immigration law and considering the facts and circumstances of each case. Instead, in the current system, U.S. law enforcement officers make complicated decisions about a person’s rights, with catastrophic results when they are wrong. In many cases, individuals have been coerced to sign forms they do not understand and were threatened or lied to about their rights. In this coercive environment, it is inevitable that individuals with the right to be in the United States may abandon those rights. They were told to sign a form, and then they were gone.

Summary removal procedures⁵ are a short-circuited path to deportation. At the U.S. border, a Mexican national can be deported almost instantly. The speed of a summary removal may be attractive, but it has also resulted in devastating and predictable errors, leading to the banishment and, in some cases, death of people who had a right to be in the United States. And while these orders, including mistaken ones and their severe penalties, are quickly delivered, they cannot easily be undone.



Joe Raedle/Getty

Undocumented Guatemalan immigrants are supervised by guards while on a deportation flight from Mesa, Arizona, to Guatemala City, Guatemala, on June 24, 2011.

WHAT ARE SUMMARY REMOVAL PROCEDURES?

Before 1996, with minor exceptions, every person who received a formal deportation order (and all the consequences that accompany it) was given a full hearing before an independent judge. Individuals whom the government sought to deport could make claims about why they should be allowed to remain in the United States, retain a lawyer, present evidence, examine witnesses, and dispute the charges against them. And, if the immigration judge denied their claims—rightly or wrongly—the individual still had a chance to have that decision reviewed by an administrative appeals body and then by one or more federal courts.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)⁶ dramatically changed that system. In creating new and dramatically expanding pre-existing summary removal procedures, IIRIRA established an administrative system that replaced judges with immigration officers—the same officers who arrest, detain, charge, and deport. IIRIRA allowed these officers to issue deportation orders (called “removal orders”) without the kind of hearing that had always been afforded before. The removal orders issued in these summary removal procedures come with the same significant penalties as deportation orders issued by a judge after a full hearing, but the processes that lead to these orders could not be more different.

In a summary removal process, immigration officers and agents determine who can enter or remain in the

United States, despite the notorious complexity of immigration law. Immigration courts frequently reject the charges brought by the Department of Homeland Security (DHS) or find the non-citizen eligible for relief from deportation.⁷ However, in summary deportation procedures, there is no neutral judge to evaluate the legitimacy of the charges or a person’s eligibility for relief or lawful status.

There are several types of summary removal or return processes that bypass the courtroom, although two

processes together give rise to the vast majority of these removal orders. The first, “expedited removal,” accounts for approximately 44 percent of all deportations. The process permits DHS officers to order non-citizens deported, with a ban on readmission ranging from five years to life, when the officer determines that the individual does not have a valid entry document.

The second, “reinstatement of removal,” issued to individuals previously deported who reenter without permission, accounts for the largest single number of deportations (39 percent). Reinstatement orders are used throughout the country and can occur especially quickly at the border, offering virtually no chance to raise or overturn errors in a prior deportation order. Other summary procedures such as “stipulated orders removal” and “administrative removal” also apply nationwide and allow DHS to divert people away from immigration courts, where constitutional and statutory rights established over a century govern the proceedings.

These summary procedures invite, and guarantee, error. And yet erroneous—even illegal—summary removal orders are difficult to challenge because of the speed of the process, the limited “evidence” required, and the absence of a complete record of the proceeding. These procedures might need more review, as they lack many courtroom safeguards; instead, most summary procedures are subject to strict jurisdictional limits that severely limit the possibility of any judicial review.

Asylum seekers, longtime residents, and others with rights to be in the United States can be deported without a hearing in a matter of minutes.

WHO IS GETTING DEPORTED WITHOUT A HEARING?

Summary expulsion processes like expedited removal were introduced in 1996 to combat what was perceived to be an abuse of the asylum system by unauthorized migrants coming to the United States for the first time.⁸ But today, DHS officials use these procedures not only to rapidly deport genuine asylum seekers arriving at our borders, but also to remove longtime residents with U.S. citizen family; children; individuals with valid work and tourist visas; and others with significant ties or legal claims to be in the United States. Some individuals quickly deported through these processes are eligible for relief from deportation and would win the right to remain in the United States if brought before an immigration judge. But hasty, non-judicial procedures deprive these individuals of that opportunity and rely on DHS's equivalent of police officers to identify and adjudicate a person's rights, sometimes in a matter of minutes.

Asylum Seekers

Individuals fleeing persecution in their home countries have been deported through expedited removal when they arrive at the U.S. border seeking protection. Congress recognized this potential danger early on, and so it required in IIRIRA that border officials processing an individual for expedited removal refer individuals who claim fear to an asylum officer with specialized training so that those individuals are not rapidly deported without the chance to seek protection.⁹

In practice, these statutory safeguards have proven illusory for many bona fide asylum seekers, as the U.S. government recognized in a study commissioned by Congress and published in 2005.¹⁰ Almost a decade later, border officials still fail to adequately screen all asylum seekers for fear of return before ordering them deported—and the consequences are severe. Of the 89 individuals interviewed by the ACLU who received a summary removal order (expedited removal or reinstatement or, in the case of unaccompanied children, voluntary return) within the broad U.S. border zone,¹¹ 55 percent said they were never asked about their fear of persecution or that they were not asked anything in a language they understood. Only 28 percent said they were asked about their fear of returning to their country of origin by a border officer or agent; 40 percent of those asked about fear said they told the agent they were afraid of returning to their country but were nevertheless *not* referred to an asylum officer before being summarily deported.

The failure to follow these limited but essential safeguards has had catastrophic consequences. Braulia A.¹² and Hermalinda J. were gang-raped and shot after being deported to Guatemala; Braulia's son, who joined her in Guatemala after her deportation, was murdered by the same gang that raped and shot her. Nydia R., a transgender woman who actually had asylum status when she was (twice) deported without a hearing, was attacked by men who raped her and tried to cut out her breast implants; she was then kidnapped and sex-trafficked in Mexico. Laura S. told border officials that she was afraid of her abusive ex-partner; her pleas ignored, she was deported and was murdered by him within days of her removal to Mexico.

People Lawfully in the United States, Including U.S. Citizens

In summary removal proceedings, which can be a single quick encounter with an officer, immigration officers have erroneously identified individuals as having no legal status in the United States and have ordered them removed. Determining who is and is not "removable" is far from straight-forward and can involve complex legal determinations.¹³ But even individuals whose lawful status can be easily verified have been quickly removed without the chance to procure or consult with an attorney.

Maria, a U.S. citizen, was issued an expedited removal order by a Border Patrol officer who did not believe a U.S. citizen would speak only Spanish. She spent years in Mexico trying to return to the United States and did so successfully only after finding an attorney and many months of litigation. Francisco, who had lived most of his life in the United States and had a valid U visa,¹⁴ was erroneously arrested and deported by immigration officers. He was able to return to the United States and his family only after facing threats and harassment in Mexico, asking for help from U.S. border officers, and being arrested, detained, and flown to a detention facility far from his family.

The risk of an unfair removal order increases with the expansion of “border”¹⁵ enforcement. For many people, crossing the U.S. border is their daily commute to work, to school, or to see friends and family. Expedited removal, in practice, gives immigration officers virtually unreviewable power to determine that someone with a valid visitor or business visa is not complying with the terms of that visa. One company, Yolo Medical, cancelled its plans to expand its business in the United States and closed a distribution center in Washington State, laying off U.S. citizen employees, due to the expedited removal of one employee and the continuing difficulties employees faced with border officials at ports of entry.

Longtime Residents

At the border and well into the interior, expedited removal and many other summary deportation processes are used against people whose lives and family are rooted in the United States. Some individuals interviewed by the ACLU had lived in the United States since childhood and left only briefly (to see a dying relative, for example); upon their return, they were deported, their time in and ties to the United States effectively erased. Inocencia C., for example, had lived in the United States for almost 15 years and was the mother of three young U.S. citizen children when she was deported through expedited removal after returning home to California from Mexico. Braulia A. had gone to Tijuana for the day and was issued an expedited removal order when she tried to return to the United States, separating her from her five children. Veronica V., a mother of three U.S. citizen children, had been living in the United States for almost 20 years when police stopped the car her husband was driving. Taken into immigration detention, Veronica was prevented from speaking with her attorney and coerced into accepting voluntary return. Although she would have been a strong candidate for discretionary relief, she is now in Mexico, separated from her young children.

Children Arriving Alone

For unaccompanied children arriving in the United States, the experience of being arrested, detained, and processed by a U.S. immigration agent can be particularly harrowing. Through the Trafficking Victims Protection Reauthorization Act (TVPRA), Congress attempted to ensure that children were given the opportunity to be heard by a judge. Under the TVPRA, Mexican unaccompanied children are to be screened for asylum or trafficking claims and cannot be turned back without seeing a judge unless they have the capacity to “choose” voluntary return. As applied by U.S. Customs and Border Protection (CBP), however, this has not offered



Born in Russia, a nine-year-old cheers while sitting in the lap of his adoptive father during the children's citizenship ceremony.



Reuters

In 2014, thousands of young children fled violence in Central America and arrived alone in the United States.

protection to Mexican children. An estimated 95 percent of Mexican unaccompanied children are turned back to Mexico without seeing a judge.¹⁶ Only one of the 11 Mexican children traveling alone who were interviewed by the ACLU said he was asked about his fear of returning to Mexico. Most did not recall being asked anything and said they were yelled at and ordered to sign “some form.” All were returned without a hearing. And yet, children seeking protection will continue to come alone to escape violence or reunite with family. Arturo, a 15-year-old abandoned by his father and hoping to reunite with his mother, was left in limbo in a Mexican shelter after his deportation: “There is no reason for me to stay [in Mexico] if my dad doesn’t want me here.”¹⁷ M.E., a young girl whose brother was “disappeared” by a gang in Mexico and who was herself threatened with kidnapping, made multiple efforts to seek

sanctuary in the United States but was repeatedly turned away at the border and accused by CBP officers of lying about the danger she faced.

The Obama administration has recognized the rising number of children fleeing violence in Central America as a humanitarian situation,¹⁸ one which has been well documented by the United Nations High Commissioner for Refugees (UNHCR) and others.¹⁹ Nonetheless, the U.S. government’s response to date has been to expand detention and accelerate the deportation process, as though the push factors of extreme violence and poverty that have driven these children to seek protection in the United States can be addressed through a more punitive response. Statutory changes suggested by Obama administration officials and some lawmakers would place Central American children in the same reflexive removal system that is applied to unaccompanied Mexican children; as a result, more children are likely to be removed to countries where they are in danger and left vulnerable to trafficking and other exploitation, in violation of U.S. obligations under international and domestic law.

An estimated 95 percent of Mexican unaccompanied children are turned back to Mexico without seeing a judge.

AFTER DEPORTATION: THE CONSEQUENCES OF UNFAIR SUMMARY REMOVAL PROCESSES

While summary removal processes are, by design, much quicker and more truncated than a full hearing,²⁰ the rights adjudicated and penalties imposed through these procedures are no less significant. In a matter of minutes, a person whose entire life is in the United States can be deported with a removal order that makes returning lawfully (if even a possibility) extremely difficult or that may permanently exclude him or her from future immigration benefits.

Given the incredible danger in many places to which non-citizens are deported, those summarily deported are often unwilling to uproot (and endanger) their families living in the United States. Therefore, some deported parents return without applying for authorization. If they are not apprehended, they and their families—which often include U.S. citizen children—face an uncertain future with no way, under the current immigration laws, to fix their immigration status and give security to their families.

If apprehended, on the other hand, these individuals can face criminal prosecution and lengthy incarceration, and can also have their prior order “reinstated.” For individuals who never got a fair hearing and a chance to defend their rights the first time, this punitive system recycles old errors and offers virtually no way for individuals unjustly deported to have their orders reviewed and expunged.

Such a strict and harsh aftermath is not accidental, but rather is part of a larger DHS strategy to reduce returns without authorization by increasing the difficulty and consequences of returning.²¹ The success of this strategy in deterring unlawful migration is questionable.²² But what is apparent is that these stacked penalties disproportionately hurt people with ties to and potential legal rights to stay in the United States. Asylum seekers who face real threats in their countries of origin will continue to look for protection in the United States; many told the ACLU that they would rather be in jail in the United States than dead in their homelands. Individuals with family obligations, particularly parents of young U.S. citizen children, will brave the threat of

another removal order or time in prison to be reunited with their families. For these individuals, the penalties of DHS’s strategy are felt by their entire families for years to come.

WHAT SHOULD BE DONE?

Since 1997, summary removal procedures have been applied to millions of people, not only along the border, but also throughout the United States. The U.S. government has attempted to justify the expansion (and the corresponding retrenchment of rights) by stating that these processes are for people with no right to enter or remain in the United States.²³ But as this ACLU report based on over 135 cases demonstrates, that simply is not true.

The use of summary deportation procedures has become the default. Yet their use is neither wise nor mandated under current law. DHS officers, who have great power to expel non-citizens with limited review, also have discretion to refer an individual for a hearing in front of a judge. Allowing someone to present his or her case does not impede DHS’s ability to enforce the law; rather, it allows DHS to enforce the law more fairly and accurately, ensuring that individuals with rights and claims to be in the United States can have those rights respected.

There are people living productive lives in the United States who are alive today because a Border Patrol agent followed the law, took the essential step to ensure someone understood their rights, and referred them to help. But there are also many cases where immigration officers pressure an individual to sign a deportation order that he or she does not understand, one that simultaneously obliterates critical rights and opportunities. Wrongful deportations are hard to set right. And for some, a later court challenge would be too late: people have been deported to their death after receiving a summary deportation order.

The U.S. government has the responsibility and the ability to prevent unlawful deportations. To that end, the United States must provide individuals with a fair and independent hearing, the chance to defend against deportation and seek review of an unjust order. These are basic safeguards in line with core American values of due process and justice and in keeping with our obligations to respect and promote human rights.

KEY RECOMMENDATIONS

To ensure that individuals facing deportation have the opportunity to be heard and defend their rights, the U.S. government should do the following:

1. Provide a full removal hearing and a chance to be heard before an immigration judge to individuals with claims to be in the United States—for example, asylum seekers or individuals with strong equities such as close U.S. citizen family, strong community ties, or long residence in the United States.
2. Continuously train and retrain immigration enforcement officers not to use coercion, threats, or misinformation to convince individuals to give up the right to see a judge and to accept deportation.
3. Recognize and expand the rights of individuals deported without a hearing to seek review of their deportation order.
4. Reduce the use of criminal prosecution for illegal entry or reentry and ensure that individuals with claims to be in the United States, such as asylum seekers, have the opportunity to present their claims before being referred for prosecution.
5. Make sure that all people facing deportation through a summary removal procedure are given the chance to consult with a lawyer before they are ordered removed, and provide lawyers to vulnerable individuals such as children and people with mental disabilities who are facing deportation or repatriation.
6. Ensure that all individuals detained by immigration enforcement agencies are treated with respect and dignity, that detention conditions are humane, and that detention is used only as a last resort and for the shortest time possible.

A complete list of recommendations is set forth at the end of this report.

METHODOLOGY

This report is a qualitative study on deportations without hearings that aims to illustrate *who* is deported without seeing a judge and to identify the shortcomings of the summary removal proceedings that lead to deportations in violation of U.S. obligations under international and domestic law. The report is based on 136 cases of individuals removed from the United States, without seeing an immigration judge, through a summary removal proceeding such as expedited removal, voluntary return, administrative removal, or a stipulated order of removal. Of the stories included in this report, 94 are from individuals interviewed in person or by phone; 6 cases were documented based on interviews with family members where the individual had been deported and could not be reached (and, in at least one case, murdered). The ACLU documented the remaining 36 cases by reviewing case files, wherever available, and publicly available pleadings. Attorneys were asked to obtain consent from their clients before providing case documents to the ACLU; in a few cases where the individuals had either been removed or could no longer be located, attorneys provided redacted copies of the individuals' cases to the ACLU without the individuals' names or other identifying information.

In the United States, the ACLU conducted interviews in person and by phone with individuals in Arizona, California, Florida, New Mexico, and Texas. In Mexico, the ACLU conducted in-person interviews with recent deportees and advocates in Agua Prieta, Ciudad Juárez, Matamoros, Nogales, Reynosa, and Tijuana. In addition to these in-person interviews, we interviewed some migrants at shelters in southern Mexico by phone. Finally, the ACLU conducted several additional interviews by phone with individuals who had been deported to, and were still in, England, Canada, and India. All interviews were conducted by Sarah Mehta, Human Rights Researcher for the ACLU, and, where necessary, with an interpreter. All individuals were informed that their interviews were to be used in a public report on deportations without hearings. In this report, we have included only the interviews with individuals who were deported without seeing a judge but have excluded individuals with *in absentia* orders unless

those individuals were subsequently removed from the United States by a summary removal procedure.

Many individuals interviewed for this report were still in immigration proceedings at the time of their interview; others were contemplating an attempt to rejoin their families in the United States after being deported. To protect the anonymity of these individuals, only first names are used in the report. For unaccompanied children, all names have been changed to pseudonyms. For all individuals with attorneys, we were able to obtain and review the immigration and, where relevant, federal prosecution records. In some cases where an unrepresented individual still had their removal documents, we were able to review those documents as well.

The ACLU also interviewed 69 attorneys and advocates—including immigration attorneys, defense attorneys working on illegal entry or illegal reentry cases, Mexican migrant shelter staff, Mexican lawyers and advocates, and community organizers and activists in the United States—about summary removal practices and processes and their effects on the individuals removed, their families, and the community. We also met with Mexican immigration and consular staff who interview Mexican nationals before and after their removal to the United States.

In addition to information obtained from the individuals and their attorneys, the ACLU submitted six requests for information under the Freedom of Information Act. These requests were submitted to the Department of Homeland Security, including Immigration and Customs Enforcement and Customs and Border Protection, and to the Department of Justice, including the Executive Office of Immigration Review and the Office of Immigration Litigation. Some of these requests have not been yet answered, and other requests are currently being litigated. Where responses were provided, the ACLU analyzed the information for this report. Requests and responses are provided online at www.aclu.org.

Some of these findings were informally shared with federal government agency staff while the report was being drafted.

I. SUMMARY DEPORTATION PROCEDURES: AN INTRODUCTION

Where Did This Come From?

In a country built on immigration, U.S. law has historically recognized the importance of fair hearings for those whom the U.S. government wants to remove. In 1903, the Supreme Court of the United States recognized that the Due Process Clause of the Fifth Amendment to the U.S. Constitution applies in cases where the government seeks to deport those who have already entered the United States.²⁴ Similarly, the Supreme Court has repeatedly recognized that deportation often carries grave consequences, and therefore implicates

the rights to life, liberty, and property, “or of all that makes life worth living.”²⁵

This recognition of deportation as a “drastic deprivation”²⁶ with severe, reverberating consequences both for the individual and his or her family in the United States is not reflected in the procedures used to deport. In immigration court, despite the well-known complexity of immigration law,²⁷ there is no established right to a lawyer provided by the government, and the majority of immigration detainees are consequently alone and unrepresented in extremely complex immigration proceedings where the government is represented by an attorney.²⁸ Even children as young as five years old go forward in confusing and intricate legal proceedings without a lawyer.²⁹ But increasingly, those who actually get a hearing before an immigration judge are the exception.

In 1996, Congress passed a series of sweeping and restrictive immigration laws, including the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which established summary removal procedures by which immigration enforcement officers could not only arrest and detain non-citizens but could also

Undocumented Guatemalan immigrants are searched before boarding a deportation flight to Guatemala City, Guatemala.



John Moore/Getty

adjudicate their claims, with limited review by courts.³⁰ As a result, the majority of people deported from the United States—approximately 83 percent in 2013—are removed without seeing a judge, with limited procedural safeguards, with few opportunities to make claims to remain in the United States, and yet with significant consequences. The procedures created and expanded, and now used to remove people without a hearing, include expedited removal, reinstatement of removal, administrative removal, stipulated orders of removal, and administrative voluntary departure (known as voluntary return).

The 1996 laws that created these removal mechanisms assumed they would be applied to “arriving” immigrants who had no rights to be in the United States; today, most individuals apprehended at the border are considered priorities for removal as “recent border crossers” although many such individuals are apprehended in the interior of the United States. In fact, the individuals processed through these rapid, truncated procedures include individuals who have lived most of their lives in the United States, asylum seekers, people with valid business and tourist visas, and sometimes, even U.S. citizens.³¹

Who Is Deported Through These Processes?

Today, approximately 83 percent of people deported from the United States are removed without a hearing or a chance to present their claims to an immigration judge. Around 44 percent of all those deported in fiscal year (FY) 2013 were deported through expedited removal, a procedure where there is virtually no opportunity (and very restricted rights) to consult with a lawyer and submit defenses, and very limited right to judicial review.

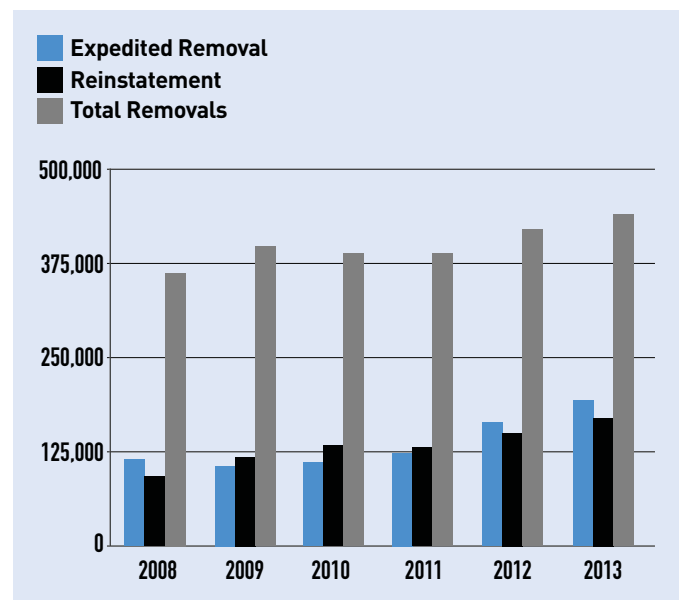
A recent report from the Migration Policy Institute (MPI) observed that at the border, the number of apprehensions (i.e., people coming into the United States) is declining: in FY 2000, the number of apprehensions was 1.7 million people, whereas in FY 2013, it was 421,000.³² Nevertheless, deportation numbers are rising because Customs and Border Protection (CBP), which is the primary immigration enforcement agency at U.S. international borders, now “places a larger share of those it apprehends in formal removal proceedings and/or brings

criminal charges against them.”³³ MPI estimates that 84 percent of the growth in deportations stems from the use of a summary removal procedure where the individual is deported without seeing a judge.³⁴ Previously, some non-citizens arriving at the border without authorization to be admitted were referred to an immigration judge; others were allowed to “withdraw” their application. Individuals who are “informally” returned and allowed to withdraw their applications do not have a removal order and may be able to apply for visas and apply for relief in the United States in the future. While individuals may still withdraw their applications at the border, CBP increasingly issues formal deportation orders to these individuals. As discussed at length in this report, a formal removal order—even one issued by a law enforcement officer and not a judge—has significant immediate and long-term

FIGURE 2

The Growth of Expedited Orders of Removal and Reinstated Orders of Removal FY 2008–FY 2013

The total number of removals each year includes expedited removal, reinstatement, administrative removal, stipulated orders, and judicial orders (issued by an immigration judge).



Source: Department of Homeland Security, Office of Immigration Statistics, Annual Report, Immigration Enforcement Actions: 2010, available at <http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf>; *Id.*, Immigration Enforcement Actions: 2011, available at http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement_ar_2011.pdf; *Id.*, Immigration Enforcement Actions: 2012, available at http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2012_1.pdf; *Id.*, Immigration Enforcement Actions: 2013, available at http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf.

consequences and makes returning to the United States in the future very difficult.

At the same time, simply allowing individuals to withdraw their claims is not always the most rights-protective path, particularly for asylum seekers. Refusing to allow a person into the United States to apply for asylum and returning him or her to a country where he or she faces danger violates domestic and international human rights law.³⁵ But the current practice of deporting asylum seekers with a formal deportation order and *without* the opportunity to present their claims not only denies an individual his or her right to seek asylum, but also comes with increasingly harsh and punitive consequences, as discussed in this report.

Why an Immigration Hearing Matters

Removal proceedings under Section 240 of the Immigration and Nationality Act (INA) are conducted in court and presided over by an immigration judge.³⁶ A removal proceeding starts with the service of a Notice to Appear (NTA), which informs the non-citizen of the immigration charges against him or her (i.e., the grounds upon which he or she is believed to be removable from the United States). The NTA also triggers *Miranda*-like protections: once the NTA has been filed, the person charged must be informed of their right to be represented at their own expense by a lawyer and that any statements made during interrogation can be used against them in the removal proceedings.³⁷

In charging a person (through the NTA), immigration officers are also supposed to use prosecutorial discretion to determine whether or not to initiate removal proceedings.³⁸ Some of the factors immigration officers should consider include length of residence in the United States and family ties and relationships.³⁹

When a non-citizen appears before an immigration judge, he or she is entitled to certain procedural protections so that the hearing is fair. For example, a person in immigration court facing removal has the right to present, challenge, and examine evidence and has the right to a lawyer (currently at his or her own expense, except in limited circumstances).⁴⁰ Immigration courts must also

The immigration courts are notoriously under-resourced. Nevertheless, they offer critical procedural and substantive protections utterly absent from summary removal processes.

maintain a complete record of all testimony and evidence produced at the proceeding.⁴¹ Perhaps most critically, given the absence of appointed counsel for immigrants facing deportation, an immigration judge is obligated to tell a person facing removal of his or her eligibility for relief from deportation and his or her ability to apply for it. If an individual is ordered removed by an immigration judge, that individual can appeal that decision to the Board of Immigration Appeals (another entity within the Department of Justice); if unsuccessful on appeal, the individual can further petition for review of the decision to a federal court of appeals.

Undoubtedly, the current immigration court system is far from perfect. The immigration courts are notoriously under-resourced,⁴² and, in the absence of appointed (government-funded) lawyers, many people (including children and people with mental disabilities) represent themselves in complicated legal proceedings.⁴³ Immigration court hearings are often very quick, and the results vary drastically by courtroom and location, and depending on whether the individual has a lawyer.⁴⁴ Nevertheless, they offer critical procedural and substantive protections that are utterly absent in summary removal processes: a judge is trained in immigration law and part of a different agency from the one detaining and seeking to deport the non-citizen; a court hearing provides the opportunity to collect and present evidence and to retain counsel; and certainly compared with a Border Patrol station, a courtroom is a more public and less coercive space.

The Limitations of Deportation Procedures without Hearings

Summary deportation procedures that bypass the courtroom are hazardous because they offer little to no opportunity for individuals to advocate for their rights; rather, these processes rely on immigration officers to be the prosecutor, judge, and jailor. And while review may be even more important for individuals ordered deported in a summary process by someone untrained in immigration law, judicial review and the opportunity to appeal and correct an unfair or illegal removal order is considerably circumscribed.

In recent years, DHS has favored the use of formal removal orders as part of its package of penalties under the “Consequence Delivery System.” This program is intended to deter unlawful entries through more punitive measures such as the use of formal removal orders; “lateral” deportations, where people are deported far from where they entered the United States; and criminal prosecution of immigration offenses such as illegal entry and illegal reentry.

When processes like expedited removal were first introduced and then expanded across the border, agency and congressional officials applauded this move to bypass the courtroom as an efficient way to accelerate deportations and save costs.⁴⁵ However, the costs to those wrongfully removed through summary deportation processes are extreme. And the risk of error in a system that expects

Update

On November 20, 2014, DHS issued a new memorandum on prosecutorial discretion that applies to *all* its agencies, including CBP. This memorandum continues to prioritize noncitizens apprehended at the border “unless they qualify for asylum or another form of relief.” How this memorandum will be implemented and qualifying individuals identified at the border remains to be seen.

http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf

non-lawyers, inundated with other law enforcement responsibilities, to evaluate a person’s legal claim with limited opportunities for review of an erroneous order is predictably high.

As the MPI report observed, while deportation procedures that do not require a hearing may be speedy, “these gains in ‘efficiency’ come at a cost in terms of the ability of the system to identify people with strong equities in the United States who, prior to IIRIRA, might have been able to petition an immigration judge for relief from removal.”⁴⁶ Immigration and Customs Enforcement (ICE), which largely operates in the interior of the United States, applies prosecutorial discretion in determining *whom* to deport and to place in deportation proceedings, but CBP has not developed any similar guidance.⁴⁷ Thus, when the mother

FIGURE 3

Summary and Judicial Removal Orders FY 2003–2013 — Border and Interior

Removal Type	Arrest Location			Total
	Border	Interior	Unknown	
Judicial	331,385 (16%)	804,319 (61%)	148,859 (65%)	1,284,563 (35%)
Expedited Removal	1,119,770 (53%)	37,473 (3%)	13,159 (6%)	1,170,402 (32%)
Reinstatement	662,331 (31%)	385,164 (29%)	46,323 (20%)	1,093,818 (30%)
Administrative Removal	9,330 (0%)	96,087 (7%)	21,959 (10%)	127,376 (3%)

Source: Marc R. Rosenblum & Kristen McCabe, Migration Policy Institute, *Deportation and Discretion: Reviewing the Record and Options for Change* (2014) (based on ICE data analyzed by Migration Policy Institute), available at <http://www.migrationpolicy.org/research/deportation-and-discretion-reviewing-record-and-options-change>.

DHS officers have the option to refer a person to a full hearing in immigration court; in practice, this discretion appears to be rarely used.

of U.S. citizen children who has lived in the United States for a decade arrives at the border after a short trip to see a dying relative, she is treated the same as a person arriving in the United States for the first time—even though CBP could refer her to a judge who could weigh the equities of her case.

As discussed in the following sections, there are two principal differences between a hearing in immigration court and a removal procedure run by a DHS official; one is procedural and the other substantive. First, procedurally, a person in immigration court has more rights and opportunities to inspect and present evidence, get a lawyer, and be informed by a neutral arbiter of their rights and eligibility for relief. Immigration judges are required to inform unrepresented immigrants of any relief they may be eligible for. A similar responsibility does not exist in summary removal proceedings (and indeed, given that the officer conducting the process is generally not a lawyer, it is unlikely that he or she will even know those options). In some processes like expedited removal, the individual has a very limited right to a lawyer and is held in mandatory detention throughout the process.

Second, substantively, people who are diverted from the courtroom and instead processed through a summary removal procedure are barred from applying for some forms of relief from removal that would be available to them in immigration court. Individuals in administrative removal or whose prior deportation orders are “reinstated,” for example, are barred from seeking asylum and can generally apply only for “withholding of removal” or relief under the Convention Against Torture (CAT) if they fear returning to their country of origin, which are

less protective forms of relief, as shall be subsequently discussed. A father who had lived in the United States for over a decade might be eligible for non-LPR (non-lawful permanent resident) cancellation of removal based on family ties and other favorable factors, but if he is arrested at a port of entry, he can instead be quickly deported through expedited removal.

These differences are significant and can mean very different outcomes for an individual, not based on their individual circumstances but based on who is weighing their rights. And yet, compared with someone who had a full immigration hearing resulting in his or her deportation, the penalties are just as severe: a person ordered deported by a DHS officer is generally subject to the same requirements to remain outside of the United States and accrues the same significant penalties if he or she tries to return without authorization.

Although the numbers suggest that these non-judicial procedures are the default, in fact, an immigration enforcement officer does have the option to refer a non-citizen to a full hearing in an immigration court even where the non-citizen is eligible for a summary removal procedure. Such a referral would be advisable in several circumstances: for example, where the person may have a claim to remain in the United States or requires additional assistance due to his or her age or a disability. But it appears that most DHS officers are not using their discretion to refer a person to immigration court and all the benefits that come with it; instead, most people deported today are expelled through these quick but deficient proceedings.

These procedures are short-circuited on their face but even more problematic in practice, when administered by officers who may have insufficient training and (at the border in particular) may feel pressured to accelerate their processing responsibilities. The procedures themselves—expedited removal, reinstatement of removal, voluntary return, administrative removal, and stipulated removal—are, in practice, coupled with intimidation, misinformation, and coercion so that while they may be successful in boosting the number of people deported, they cannot be relied upon to guarantee a fair process or to deliver justice.

A. EXPEDITED REMOVAL

The Expedited Removal Statute and Its History

Aside from reinstatement orders, expedited removal orders account for the largest number of deportations in the United States. In FY 2013, almost 200,000 individuals (44 percent of all deportations) were deported through the expedited removal process.⁴⁸ In expedited removal, a non-citizen is ordered deported by an immigration officer (not a judge) while detained, with a very limited right to a lawyer and with very limited opportunities to seek review of the order even if it was unlawful.

The expedited removal statute applies to certain “inadmissible” individuals who arrive without valid travel documents or who attempt to enter through fraud or misrepresentation.⁴⁹ The law states that an officer who encounters such a person “shall order the alien removed from the United States without further hearing or review.”⁵⁰ Moreover, an “inadmissible” individual in expedited removal “is not entitled to a hearing before an immigration judge . . . or to an appeal of the expedited removal order to the Board of Immigration Appeals.”⁵¹ Unlike other summary removal procedures discussed in this report, expedited removal is geographically limited and is used at (1) ports of entry, such as an airport; (2) for people arriving by sea; or (3) against a non-citizen apprehended within 100 miles of any land border who has not been admitted or paroled *and* who cannot prove that he or she has been in the country for at least two weeks.⁵²

Those issued an expedited removal order are barred from returning to the United States for a minimum of five years.⁵³ Individuals with a prior removal order are subject to a 20-year ban on readmission; individuals ordered removed with a finding of fraud face a potentially permanent, unwaivable bar on return to the United States.⁵⁴ Individuals with an expedited removal order can be criminally prosecuted for reentering the United States without permission and are also frequently placed in reinstatement proceedings, discussed later in this report, where their opportunities for relief are extremely limited.

The only statutory exceptions to expedited removal are individuals who express a fear of persecution and/or the intent to apply for asylum, as well as people who claim to be U.S. citizens, lawful permanent residents (LPRs), or refugees.⁵⁵ If a DHS officer cannot determine a person’s status, an immigration judge is supposed to review the decision to place the individual in expedited removal.⁵⁶ Individuals claiming a fear of persecution or intent to apply for asylum must be referred for an interview with an asylum officer known as a “credible fear interview” (discussed at greater length later in this report).⁵⁷ The statutory scheme has been interpreted by some courts to provide only very limited judicial review of an expedited removal order. For example, according to those courts, U.S. citizens, LPRs, and individuals with refugee or asylum status, along with people claiming they were not deported through expedited removal, are the only individuals who can get judicial review of an expedited removal order.⁵⁸ So, for example, individuals attempting to apply for asylum but denied that opportunity have no recourse in federal court.

Expedited removal was initially—and explicitly—created to facilitate the rapid removal of individuals considered to be “arriving” immigrants without a judicial hearing.⁵⁹ The procedure, which became mandatory at ports of entry in 1997, was expanded first in 2002 to some non-citizens arriving by sea,⁶⁰ and then more dramatically in August 2004 to some non-citizens found within the United States. Specifically, the 2004 expansion applied to non-citizens who meet the other criteria for expedited removal if they:

“Expedited removal as it exists today takes place in a black box, with unchecked deportation authority by gun-wielding Border Patrol agents and immigration inspectors.”

— Mark Hetfield, Hebrew Immigrant Aid Society (HIAS)⁶¹

- Are present in the United States without having been admitted or paroled following inspection by an immigration officer at a port of entry;
- Are encountered by an immigration officer within 100 miles of the U.S. international (land) border; and
- Cannot establish to the satisfaction of an immigration officer that he or she has been continuously and physically present in the United States during the 14 days prior to the encounter with immigration authorities.⁶²



Expedited removal applies to individuals encountered at the U.S. border, defined by the U.S. government as within 100 miles of the U.S. land border.

The notice announcing this expansion stated that DHS could use prosecutorial discretion in expedited removal so that the geographic expansion would apply “only to (1) third-country nationals [not from Mexico or Canada] and (2) to Mexican and Canadian nationals with histories of criminal or immigration violations, such as smugglers or aliens who have made numerous illegal entries.”⁶³

Even before expedited removal’s expansion, lawmakers and advocates were concerned about its impact on asylum seekers, who generally do not have proper documentation with them or prior authorization to enter the United States when they arrive seeking protection. As noted before, and as discussed in greater detail later in this report, in recognition of this risk, the expedited removal statute states that if an immigrant “indicates either an intention to apply for asylum . . . or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer.”⁶⁴ If an asylum officer finds the individual does not have a “credible fear” of persecution in his or her country of origin, the asylum seeker may appeal that finding to an immigration judge.⁶⁵ But if the immigration judge also finds against him or her, the non-citizen, like others subject to expedited

removal is deported from the United States without further review or a hearing.⁶⁶

Expedited removal was controversial from the outset, and previous attempts to introduce it (as “summary exclusion”) had been rejected.⁶⁷ It continues to be a contentious and problematic procedure that short-circuits justice to advance expediency. At its core, it is a process that assumes a border official can easily identify people arriving in the United States for the first time who have no right to enter and for whom all a judicial hearing would accomplish would be an extended detention. And yet, even when expedited removal was first implemented, the Immigration and Naturalization Service (INS)⁶⁸ acknowledged that expanding the procedure beyond individuals arriving at the border to non-citizens already in the United States would “involve more complex determinations of fact and [be] more difficult to manage.”⁶⁹

The expansion of expedited removal beyond ports of entry and across the entire border zone dramatically changed the landscape of immigration enforcement. Explaining the significance of this expansion, the American Immigration Law Foundation observed,

For the first time, a non-citizen who has made a land entry into the United States can be removed without the procedural safeguards of a removal hearing, including the right to counsel, right to cross-examine the government’s witnesses and examine the government’s evidence, and significantly, the right to an impartial adjudicator.⁷⁰

Although expedited removal is used almost reflexively along the border, its use is not actually mandatory. The Board of Immigration Appeals, analyzing the expedited removal statute, has held that DHS retains discretion to put non-citizens subject to expedited removal in formal removal proceedings in front of an immigration judge.⁷¹ Similarly, supplemental information in the notice to expand expedited removal suggests that DHS has discretion to exempt someone from the procedure and to instead afford them a hearing or allow them to voluntarily return to their home country.⁷² As commentators observed, the notice providing DHS officials with discretion *not* to place a person in expedited removal included no guidance on how to make this decision.⁷³

Expedited Removal and Asylum

In 1996, although the U.S. House of Representatives overwhelmingly approved IIRIRA, the U.S. Senate rejected some of its provisions, including one limiting protections for asylum seekers.⁷⁴ That same year, Senators Patrick Leahy and Mike DeWine introduced an amendment to restrict the use of expedited removal “to times of immigration emergencies” certified by the U.S. Attorney General; as Senator Leahy observed, “This more limited authority was all that the Administration had requested in the first place, and it was far more in line with our international

Most people with an expedited removal order—even an unlawful one—can never get it reviewed by a judge.

and historical commitments.”⁷⁵ Although the amendment passed the Senate with bipartisan support, it was subsequently removed.⁷⁶

The version of expedited removal that became law in 1996 eliminated the opportunity for a hearing before an immigration judge for most people arriving in the United States; however, some explicit protections were provided for asylum seekers. These statutory safeguards were intended to ensure that asylum seekers—who frequently arrive without prior authorization or valid travel documents (particularly when fleeing persecution by the government that issues those documents)—were not deported through expedited removal and also to safeguard their opportunity to claim asylum in the United States.

Under the expedited removal statute, individuals who express a fear of returning to their home country and/or an intention of applying for asylum cannot simply be deported; rather, the immigration officer must refer these individuals for a credible fear interview conducted by asylum officers with United States Citizenship and Immigration Service.⁷⁷ Individuals found to have a “credible fear” are then referred to an immigration judge under the Executive Office for Immigration Review (EOIR) for a hearing. If a person is found *not* to have a credible fear, he or she may contest that finding and request a hearing in front of an immigration judge.⁷⁸

Despite these requirements, even in its initial years, when expedited removal was confined to ports of entry, the expedited removal process failed to adequately identify and protect arriving asylum seekers. In 2001, after several documented stories of legitimate asylum seekers being deported through expedited removal emerged, Senators Samuel Brownback, Edward Kennedy, and Patrick Leahy attempted to correct expedited removal and provide more protection for asylum seekers through the Refugee Protection Act of 2001, which never passed.⁷⁹ In 2004, Congress commissioned a study from the U.S. Commission on International Religious Freedom (USCIRF), which similarly found that immigration enforcement officers failed to refer asylum seekers to an asylum officer, even when they explicitly stated their fears of persecution or torture.⁸⁰ USCIRF’s suggested reforms, discussed later in this report, were not adopted. Instead, in 2005 after the

report was published, the expedited removal system was expanded and now accounts for 44 percent of deportation orders from the United States.

In Practice Today

Expedited removal is used extensively not only at ports of entry but also in border communities within 100 miles of the international border. It is not a targeted program that is applied only to individuals with no claims for relief or with significant criminal history; rather, it is a procedure used almost as a default all along the U.S. border.⁸¹ At ports of entry, as this report documents, expedited removal orders have been issued against longtime residents who left the United States briefly; people with status, including U.S. citizens; individuals traveling on valid business and tourist visas; and asylum seekers who were never given the opportunity to request asylum. In these cases, a border official made the decision that the individual was misrepresenting him or herself or intended to immigrate and, often without providing any evidence to support his or her finding, issued a removal order that led to separation from family, and which in some cases had life-threatening consequences.

Advocates interviewed for this report said it is incredibly rare to get an order rescinded by border officials; however, given the limitations of judicial review, most individuals

The sole procedure for judicial review of expedited removal—habeas corpus—is narrow and onerous. Unsurprisingly, between 2009 and 2014, only 27 such petitions were filed.

Source: Response from Department of Justice to ACLU Freedom of Information Act, Office of Immigration Litigation (OIL) Cases Received During Fiscal Years 2009 through 2014 (Received October 16, 2014), available at www.actu.org.

with an expedited removal order can never get a judge to review the circumstances of that order, even when it was unlawful. Whereas U.S. citizens, LPRs, and asylees may at least be able to get judicial review, many people erroneously removed will not and yet live with the consequences of a formal removal order.⁸²

Rosalba, a 56-year-old Mexican woman who never overstayed her tourist visa, was issued an expedited removal order at a port of entry in Texas when driving to visit her husband, who has lung cancer and lives in the United States. Although the U.S. Consulate in Mexico agrees that the order was unfair and that Rosalba never overstayed her visa, it has no authority to remove or ignore the order. She is saving money to apply for a waiver so she can see her husband again.

Maria, a U.S. citizen, was issued an expedited removal order and deported to Mexico because the immigration officer did not believe a U.S. citizen would speak only Spanish. She has only recently returned to the United States after over a decade in limbo in Mexico and two failed attempts to return and be recognized as a U.S. citizen at the U.S. border.

Nydia R., a transgender woman from Mexico, not only had status as an asylee when she was issued an expedited removal order but had also recently been attacked by a gang in Mexico. CBP officers wrote on her sworn statement for the expedited removal order that she had no fear of removal, despite recording her account of the violence she had just suffered. She was attacked and repeatedly sexually assaulted after her unlawful deportation to Mexico.

As courts have recognized, expedited removal gives immigration officers incredible power and discretion; not only do officers refuse entry to someone based in many cases on subjective assumptions and with little supporting evidence, but an expedited removal order comes with significant penalties and almost no opportunity for review.⁸³ And yet, despite these consequences, the processes and protections associated with expedited removal are, facially and in practice, disturbingly circumscribed.⁸⁴

B. REINSTATEMENT OF REMOVAL

Over the last several years, the largest number of removal orders have been “reinstatement orders,” which are issued by DHS officers against individuals who illegally reentered the United States after departure under a prior order.⁸⁵ In FY 2013, DHS deported 159,634 people through reinstatement.⁸⁶ Prior to 1997, individuals who had previously been deported and returned illegally had the right to a hearing before an immigration judge in which they could apply for any relief for which they were eligible. After 1997, however, such individuals face summary removal without an immigration judge hearing, a bar to relief from removal and other statutory obstacles.

Although DHS has the discretion to place an individual in regular removal proceedings before a judge,⁸⁷ individuals who reenter after their deportation—unless they fit within certain statutory exceptions⁸⁸—frequently have their prior removal orders “reinstated” by DHS officers without a hearing and without a meaningful chance to raise defects in the prior order or explain why a reentry may be lawful. As with other summary removal processes, in the reinstatement process, the DHS officers act as the prosecutor, judge, and jailor and can issue a reinstatement order very quickly.

In reviewing an order for reinstatement, a DHS officer must confirm the identity of the non-citizen, the prior order of deportation, and that the individual reentered the United States unlawfully.⁸⁹ As part of this proceeding, a DHS officer will conduct an interview, generally under oath, resulting in a written sworn statement signed by the non-citizen and a second officer.⁹⁰ The officer must provide non-citizens with written notice that they are removable and inform them that they may make a statement contesting this determination.⁹¹

An individual whose order is reinstated can appeal the determination to the appropriate circuit court of appeals within 30 days of the order.⁹² The record for this review is limited, as a court of appeals can only review the administrative record on which the reinstated order was based.⁹³

Immigration law does not have a statute of limitations for old removal orders; thus, individuals who have lived in the

With limited exceptions, once a removal order is reinstated, the person is not eligible and cannot apply for relief from deportation.

United States for over a decade since their deportation, raised U.S. citizen kids, and built a life in the United States are cut off from virtually all avenues of remaining in the United States due to the prior order. And unlike expedited removal, reinstatement proceedings take place everywhere in the country.⁹⁴ A person with a reinstated order is barred from reentering the United States for up to 20 years—unless they have an aggravated felony conviction, in which case they are barred for life.⁹⁵ Individuals who reentered illegally after April 1, 1997, after a prior order are inadmissible and are not eligible to apply for a waiver to reenter the United States for another 10 years after their deportation.⁹⁶ In addition to these “civil” penalties, a person who reenters the United States after being deported can be federally prosecuted for illegal reentry.⁹⁷ In fact, federal prosecutions for these crimes (illegal entry and reentry) account for the vast majority of federal prosecutions today.⁹⁸

Moreover, with limited exceptions, the statute holds that once a removal order has been reinstated, “the [person] is not eligible and may not apply for any relief under this Act.”⁹⁹ For many individuals facing reinstatement of a prior order, the only relief they can apply for—assuming they are made aware of it—is mandatory protection for individuals who can demonstrate a reasonable fear of torture or persecution in their country of origin.¹⁰⁰

Again, DHS has the option of using its discretion to terminate the reinstatement process (and either cancel the reinstatement order, refer the person to a full immigration court hearing, or defer the deportation). Doing so allows individuals access to stronger procedural rights to develop and pursue their case and opens up other forms of relief

Seeking Refuge: Credible Fear vs. Reasonable Fear

Non-citizens who arrive in the United States and hope to seek asylum may do so if they have suffered or fear they will suffer persecution on the basis of their race, religion, nationality, membership in a particular social group, or political opinion. As discussed earlier, these individuals must pass a credible fear interview, administered by an asylum officer from USCIS (United States Citizenship and Immigration Services), and will then see an immigration judge who evaluates their claim. Asylum includes many critical benefits, such as the right to stay and work in the United States, a path to applying for lawful permanent residence in the United States (and eventually citizenship), and the ability to bring family members to join them in the United States. To be eligible, individuals must demonstrate a “credible fear” of persecution or torture—defined as “a significant possibility” that the individual (1) is eligible for asylum under INA § 208 because of past persecution or has a “well-founded fear” of future persecution¹⁰¹ or (2) is eligible for withholding of removal or deferral of removal under CAT, under 8 C.F.R. § 208.16 or § 208.17-102.

But individuals with prior removal orders (or those who have certain convictions) are not eligible for asylum and must meet a higher standard of proof by showing a “reasonable fear” of persecution or torture. These individuals must demonstrate a “reasonable possibility” of future persecution or torture.¹⁰³ Withholding of removal (under CAT and the Refugee Convention) and deferral of removal (under CAT) are important protections available for individuals with reinstated orders of removal, as they must be in order to comply with U.S. obligations under international human rights law. But these processes and their benefits are not equivalent. First, as indicated by the Asylum Office of USCIS, the standard for “reasonable fear” is higher than the standard of proof required to establish a “credible fear” of persecution.¹⁰⁴ For example, for a person in reinstatement proceedings, it is not enough to show past persecution “regardless of the severity of that persecution,”¹⁰⁵ even though such evidence would suffice for a person to show credible fear of persecution.



Police patrol a gang-dominated neighborhood in Honduras. Many Hondurans are fleeing the violence in search of protection in the United States.

Spencer Platt/Getty

Moreover, while the U.S. Supreme Court has observed that a 10 percent risk of future persecution might be sufficient to show a well-founded fear of persecution to support a grant of asylum,¹⁰⁶ courts have required immigrants seeking withholding to demonstrate at least a 51 percent likelihood of suffering future persecution.¹⁰⁷ Thus, individuals who might meet the lower threshold in a credible fear interview may have more difficulty passing a reasonable fear interview based on identical facts. Moreover, immigrants seeking protection while in reinstatement proceedings are likely to be detained for a long period of time. For years, advocates have been concerned about the delays applicants face in getting the interview with an asylum officer; although delays for the credible fear interview appear to be declining, individuals subject to reinstatement awaiting a *reasonable* fear interview will wait in detention an average of 111 days.¹⁰⁸ Finally, for a person who wins withholding of removal or deferral of removal, the full benefits of asylum are foreclosed; for example, he or she will not have the right to petition to bring his or her family to the United States. He or she can never travel internationally and cannot petition for derivative (lawful immigration) status for his or her children.¹⁰⁹

from deportation. In practice, it is unclear how often DHS officers utilize this discretion, given the speed with which reinstatement can be accomplished.

In Practice

Many individuals interviewed by the ACLU reported being told by immigration officers that because they had a prior deportation order, they had no chance to stay in the United States and would be deported. Some individuals were not actually aware they had a prior deportation order, either because they never received the paperwork or had their order explained; in some cases, individuals interviewed for this report had *in absentia* orders from an immigration judge but said they never received notice of the hearing where their deportation order was issued, which is a statutory ground for rescinding that order. For all these individuals, however, the near-automatic nature of the reinstatement process leaves little opportunity to explain the circumstances in which the prior removal order was issued—or to challenge it.

Some claims for relief may still be raised in the reinstatement process. If an individual facing reinstatement claims a fear of returning to his or her country of origin, the DHS officer is required to refer him or her to an asylum officer to determine whether the alien has a “reasonable fear” of persecution or torture.¹¹⁰ Should the asylum officer determine that the non-citizen has a reasonable fear of being removed to their country, the non-citizen must be referred to an immigration judge to apply for withholding of removal or relief under CAT.¹¹¹

Courts have held that the reinstatement statute prohibits a “second bite” to challenge their deportation. But many people never got a first bite at justice.

* * *

Underlying the reinstatement statute and its short-circuited procedures is an assumption that non-citizens who were previously deported have had their day in court. As the Second Circuit stated, without analysis, in *Garcia-Villeda v. Mukasey*, “[T]he reinstatement of removal statute expressly prohibits us from giving petitioner a second bite at the apple.”¹¹² But many people never had a first bite at justice, and these abbreviated reinstatement proceedings do not provide a real opportunity for the governmental agency or the courts to hear or correct mistakes in prior orders.

The reinstatement process is particularly harsh when applied to people who previously were deported in summary proceedings where they did not have a hearing before an immigration judge, and thus, had no opportunity to present evidence, receive legal assistance, or have a meaningful opportunity to appeal the prior removal order. The ACLU has documented several cases in this report where a person was erroneously deported by an immigration officer, has never had their day in court or been able to correct the original error, and still is not given the opportunity to have a hearing with meaningful review.

Narcisco G., who came to the United States in 2002, was given voluntary departure in 2009, but sick with cancer and concerned about leaving his three U.S. citizen children, he never left. He was subsequently detained by ICE after being arrested for an alleged fight (he believes he was never charged or convicted), and although he hired an attorney, he was not allowed to meet with him. Narcisco said all the forms were in English, which he does not read, and he was not asked about his fear of returning to southern Mexico or given the chance to call his family before he was deported to Reynosa: “The ICE agent said sign the order, and I said no, my attorney is looking into it. He said, ‘Whether you want to sign or not, you’re going to be deported.’”¹¹³

Hermalinda L., an indigenous asylum seeker from Guatemala, was placed in reinstatement proceedings because she had previously been issued an expedited removal order but returned to the United States after her deportation. At the time CBP issued an expedited removal order, she had claimed fear of being removed but was not referred for a credible fear interview prior to her removal. Once deported to Guatemala, Hermalinda was

gang-raped by police and shot because of her oppositional politics. She left her daughter with family in Guatemala and once again make the dangerous journey to the United States. Fortunately, Hermalinda, who was represented by an attorney, expressed her fear of being deported to ICE officers and was given a reasonable fear interview. Even though she had previously claimed fear at the border and suffered harm after being deported back to Guatemala, she cannot bring her daughter from Guatemala to join her *even if* she wins her claim to withholding of removal in immigration court.

Some immigrants subject to reinstatement may also be able to adjust their status in certain limited circumstances.¹¹⁴ In reality, however, even individuals who are not subject to removal or are eligible to have their orders cancelled likely will find it difficult to learn about and present these arguments, given the speed of these proceedings, the absence of legal assistance, and the lack of a neutral arbiter such as a judge. A reinstatement order can be entered immediately after the interview so that the person is quickly deported, and most individuals are unlikely to have a lawyer or the opportunity to consult with legal services prior to their deportation.

Cited in USA v. Peralta-Sanchez
No. 14-50393 archived on February 2, 2017

C. ADMINISTRATIVE VOLUNTARY DEPARTURE/VOLUNTARY RETURN

The Statute

Administrative voluntary departure, also known as “voluntary return,” is a summary deportation procedure by which a non-citizen “accepts” removal from the United States without a formal removal order. This is not to be confused with the form of voluntary departure that is granted by an immigration judge during or after a formal hearing. Instead, voluntary return is issued by an immigration officer and bypasses the immigration court system completely. According to December 2013 statistics from ICE, 23,455 voluntary returns took place in FY 2013.¹¹⁵

The administrative voluntary departure statute reads, in part: “The Attorney General may permit an alien voluntarily to depart the United States at the alien’s own expense . . . in lieu of being subject to [removal proceedings before an immigration judge] . . .”¹¹⁶ The accompanying regulations make clear that this process must be voluntary: “Voluntary departure may not be granted unless the alien requests such voluntary departure and agrees to its terms and conditions” [emphasis added].¹¹⁷ Federal courts have similarly confirmed that a person taking voluntary return may do so only if the decision is “voluntary and knowing.”¹¹⁸

Under the statute, an individual who accepts voluntary return has up to 120 days to leave the United States.¹¹⁹ The actual amount of time allotted may vary, as the implementing federal regulations permit an “authorized officer” to set the time frame for departure, so long as it is within 120 days of the non-citizen’s acceptance of voluntary departure.¹²⁰ For many non-citizens, having some period of time to arrange their affairs in the United States—for example, to make child care and housing arrangements for family members who stay behind, spend time with family, close bank accounts, or prepare a place to live in the country to which they are being deported—is a key benefit of voluntary return, since deportation is such a significant rupture in a family’s life. In practice, however, the ACLU has found that a voluntary return is executed “as rapidly as logistically possible.”¹²¹

Voluntary return, which is reserved for non-citizens with a limited or no criminal history, is often considered to be an immigration “benefit” because the recipient does not receive a formal removal order. That does not mean there are no consequences that accompany voluntary departure. For example, a person who has been unlawfully present in the United States for one year or more and takes voluntary departure is thereafter “inadmissible” for a period of ten years.¹²² A person unlawfully present for over 180 days but less than one year is inadmissible for a period of three years if he or she takes voluntary departure.¹²³ It is possible for some individuals to get a waiver of this inadmissibility bar, but such waivers are entirely discretionary and available only to individuals who can demonstrate “extreme hardship” to a U.S. citizen or lawful permanent resident spouse or parent.¹²⁴ If the waiver is denied, there is no way to appeal or have that denial reviewed.¹²⁵ A person who reenters the United States before the time bar has run will be subject to an even more severe ground of inadmissibility and will be disqualified from most forms of relief from deportation.¹²⁶

The relative informality of voluntary return has led to a common misconception that there are no penalties for reentry. Similarly, the lack of formal process in expedited removal leads many immigrants to assume they have been granted voluntary departure when, in fact, they have an expedited removal order (which acts just like a judge-issued removal order).

Voluntary return may act as a benefit for some individuals, but for immigrants with strong claims to relief from removal, voluntary departure is not a rights-protective process. As in other forms of summary proceedings that bypass the courtroom, voluntary return denies an individual the opportunity to apply for relief from deportation, i.e., for ways to remain in the United States. For example, a person who takes voluntary return cannot apply for cancellation of removal, and once he or she has been returned to Mexico cannot apply for programs like Deferred Action for Childhood Arrivals (DACA) that require an individual be in the United States at the time of the application.

Unlike expedited removal, voluntary departure is not confined to the (already broadly interpreted) border

zone, nor is it applied only to recent border crossers. Moreover, advocates interviewed for this report expressed their concerns that people eligible for relief from removal and/or eligible to adjust status and remain in the United States are instead being coerced to take voluntary return by immigration officers without knowing the rights they are waiving or penalties they will incur. As immigration enforcement officers are generally not trained to screen for and evaluate a person's immigration claims—which often requires sophisticated legal analysis—they are not in a position (nor should they be) to advise immigrants whether voluntary departure is a benefit. Given the speed of this process and the fact that most people are not represented by—or even able to contact—an attorney and by default rely on the arresting or interrogating officer to explain their rights, there is a significant risk that individuals with strong claims to remain in the United States will and have been coerced to give those rights up.

The administrative voluntary departure process is supposed to include procedural protections to ensure that the person who agrees to voluntary departure—and waives the right to go to court and defend their claims—is making a truly voluntary decision. For example, federal regulations governing voluntary departure require that “every decision regarding voluntary departure shall be communicated in writing on Form I-210, Notice of Action—voluntary departure” and authorize a grant of voluntary departure only when the non-citizen has requested it and accepted its terms.¹²⁷ In practice, however, these procedural requirements are not always fulfilled and, indeed, this form is not even used.

In Southern California, local attorneys and the ACLU of San Diego & Imperial Counties documented numerous examples of coercion and misinformation used by immigration officers to secure a voluntary departure and the officers' failure to comply with the regulations' procedural safeguards. In particular, the ACLU found that the form immigration officers were actually using for voluntary return, Form I-826, was legally deficient in significant ways. For example, the form is silent on the legal consequences of taking voluntary departure, such as the loss of significant procedural rights that apply in immigration court, the relinquishment of forms of relief that a person cannot apply for outside of the United States, and the bars on readmission to the United States for

individuals who lived unlawfully in the United States for different time periods.¹²⁸

In June 2013, the ACLU filed a class action lawsuit challenging both the adequacy of the form and the abusive practices used to coerce individuals with rights to remain in the United States into signing voluntary departure.¹²⁹ One of the named plaintiffs in the lawsuit, Isidora Lopez-Venegas, is the mother of an 11-year-old U.S. citizen son with Asperger's syndrome. Immigration officers coerced her to accept voluntary departure, claiming she would otherwise be detained and separated from her son for several months, and incorrectly stating that it would be easy for her to apply for legal status from Mexico.¹³⁰ Isidora's son joined her in Mexico but has not been able to receive the necessary educational services he needs given his disability. The ACLU reached a settlement with DHS in August 2014, under which DHS will be required to do the following:

- Provide detailed information—in writing, orally, and through a 1-800 hotline—regarding the consequences of taking “voluntary return” to non-citizens asked to choose between “voluntary return” and a hearing before a judge;
- Cease “pre-checking” the box selecting “voluntary return” on the forms that DHS officers provide to non-citizens;
- Permit non-citizens to use a working phone, provide them with a list of legal service providers, and allow them two hours to reach someone before deciding whether to accept “voluntary return”;

People eligible to remain in the United States are coerced to take voluntary return without knowing the rights they waive or the penalties incurred.



Isidora Lopez-Venegas (pictured above with her family in San Diego, California) was picked up by CBP and coerced into signing a voluntary departure form.

- Provide lawyers meaningful access to clients detained by Border Patrol or ICE;
- Cease pressuring or coercing individuals to accept “voluntary return”; and
- Allow ACLU attorneys to monitor compliance with the settlement agreement for three years.¹³¹

The misconduct and abuses challenged in this lawsuit are not unique to California, however. This report documents similar stories in other parts of the United States. For example, in May 2013, Veronica V., a mother of three young U.S. citizen children who had been living in the United States for 19 years, was apprehended by police in a traffic stop near San Antonio, Texas, referred to ICE, and pressured to sign a voluntary departure form, which was in English, a language she does not read fluently. Although her husband secured a lawyer and brought paperwork showing she was in the process of applying for status, immigration officers refused to let her speak to an attorney or her family and deported her, 24 hours later, to Mexico. Although Veronica repeatedly told the officers that she wanted to see a judge, she recalls that during several hours of questioning the officers continually told her that if she did not sign, she would go to jail. She has been separated from her husband and children for a year.¹³²

Both Veronica V. and Isidora Lopez-Venegas would have been eligible for cancellation of removal if they had gone before an immigration judge, given their strong family and community ties, their long presence in the United States, and their lack of criminal history. But because they took voluntary return, they lost that opportunity and are subject to the 10-year unlawful presence bar—although they may wait much longer, as they will need to wait until their children (as the “qualifying relatives”) are 21 years old so that they can apply to adjust status.

Isidora Lopez-Venegas, however, will finally have a fair opportunity to present her claims. As previously noted, in August 2014, the ACLU settled its lawsuit against DHS, which has agreed to significant reforms of the voluntary return system in Southern California and to bring back ACLU plaintiffs who were unjustly removed through this practice.¹³³ As this landmark settlement demonstrates, even the U.S. government recognizes the deficiencies of the voluntary return system—but these practices are not unique to California and need to be addressed nationally.

While voluntary departure may help some people, its coercive application can violate due process and result in severe consequences for people who, if they had seen a judge, would today be lawfully in the United States with their families.

D. ADMINISTRATIVE REMOVAL UNDER INA § 238b

The Statute

DHS has an additional expedited removal tool that can be used anywhere in the United States against certain non-citizens based on their criminal history. Under INA § 238(b), DHS has discretion to place non-citizens who are not lawful permanent residents¹³⁴ and who have been convicted of certain criminal offenses (including “aggravated felonies,”¹³⁵ which are not necessarily felonies under criminal laws, and “crimes involving moral turpitude”¹³⁶) in administrative proceedings where they can be deported without seeing a judge.¹³⁷ In some cases, these proceedings (known as “238b”) take place while the individual is still serving their criminal sentence such that he or she never enters immigration detention but is deported directly from criminal custody.¹³⁸ However, the individual generally cannot be deported for 14 calendar days after the date the 238b order was issued, “in order that the alien has an opportunity to apply for judicial review.”¹³⁹ This temporary waiting period can be waived by the non-citizen.¹⁴⁰

Individuals in 238b proceedings must be given reasonable notice of the charges and an opportunity to review the charges and the evidence against them, and they may be represented by a lawyer, at their own expense.¹⁴¹ A record of the proceeding must be maintained for judicial review, and the officer who adjudicates the order cannot be the charging officer.¹⁴²

If the individual’s conviction does not meet the aggravated felony definition or if DHS does not have adequate proof of the conviction, DHS must terminate proceedings but can nonetheless initiate formal removal proceedings in immigration court.¹⁴³ Although the determination that a conviction is an aggravated felony is often very complicated, in 238b proceedings, it is a DHS officer—who need not be a lawyer, let alone a judge—who makes that determination.

The administrative removal statute does not require

that the non-citizen bypass the courtroom; in fact, it permits DHS¹⁴⁴ to exercise discretion either to process the individual through a summary 238b process *or* to initiate regular removal proceedings before an immigration judge.¹⁴⁵ If there is doubt as to whether the conviction is an aggravated felony, DHS could issue a Notice to Appear (NTA) before an immigration judge. Nonetheless, the statute and its implementing regulations contain no guidance for the charging officer as to whether a person should be processed through 238b or referred to immigration court. Consequently, the decision to place someone in a summary removal proceeding instead of a formal court hearing may be arbitrary—but also decisive.¹⁴⁶

The difference between a 238b removal procedure conducted by a DHS officer and a full hearing before a judge is considerable. A non-citizen’s options for relief (and, consequently, the outcome of the case) and his or her procedural rights differ dramatically depending on which process he or she is referred into. Notably, individuals

FIGURE 4
Administrative Removal (238b) Cases FY 2008–Present



Between FY 2008 and FY 2013, ICE issued 67,275 administrative “238b” removal orders. In only 0.85 percent of those cases was relief from deportation granted. Very few individuals in 238b proceedings are able to claim relief due in part to the substantive and procedural limitations of those processes. Source: Department of Homeland Security, Immigration and Customs Enforcement, Response to ACLU Freedom of Information Act Request, FOIA #14-11764, available at www.aclu.org.

processed through 238b are barred from receiving *any* discretionary relief from deportation—for example, the ability to adjust status or apply for cancellation of removal—even if they would be eligible for these forms of relief in immigration court.

In Practice

Individuals who may not be deportable based on their conviction and should not even be in these proceedings may never be made aware of that fact because the only person they speak with in 238b proceedings is likely to be the charging officer. Once in 238b proceedings, even for individuals who may be eligible for relief, the options for relief are more restricted than they are in immigration court. For example, a person who is afraid to return to their country of origin might be eligible for non-discretionary relief such as withholding of removal or relief under CAT.¹⁴⁷ They may also qualify for a U visa as a crime victim.¹⁴⁸ But in many cases, individuals are never made aware of these opportunities. Although the 238b process is not always as accelerated as that of expedited removal, which can be effectuated within 24 hours, it nonetheless takes place quickly, behind closed doors, and with little opportunity for the non-citizen to get assistance. In some cases, the proceeding takes place while the individual is still in criminal custody completing their sentence; in those cases in particular, it may be difficult to find immigration resources or relevant legal orientation services that could explain the various forms of relief from deportation and claims they could make.

The procedural protections in a 238b proceeding are limited to providing the non-citizen with a notice of intent that states the basis for his or her “deportability” as an aggravated felon; the right to counsel at the non-citizen’s *own* expense; and the right to examine the government’s evidence.¹⁴⁹ The individual then has the chance to respond in writing, within 10 days of receiving the notice, to dispute the designation of their crime as an aggravated felony or other designated offense.¹⁵⁰ If the individual does choose to appeal the removal order, he or she can file an appeal to the relevant federal circuit court of appeals.¹⁵¹

These procedural protections are no substitute for the

The decision to place someone in a summary removal proceeding instead of a formal court hearing may be arbitrary—but also decisive.

more substantial rights that apply in immigration court. Unlike a full immigration hearing, 238b proceedings provide no opportunity for the individual to present claims for relief or other equitable factors before a neutral decision-maker, no meaningful opportunity to provide evidence or question witnesses, and no verbatim recording of the proceeding.¹⁵² These proceedings often take place while the person is in criminal custody or immigration detention and may appear more like an interrogation than a judicial hearing. Critically, the presiding DHS officer, unlike an immigration judge, is not required to inform the non-citizen if he or she is eligible for relief (and, indeed, may not know whether a person is eligible for any relief). As these officers are not required to be lawyers, they may fail to recognize that the person cannot actually be placed in 238b proceedings, for example, because the individual was not convicted of a crime that is considered an aggravated felony. The determination that a person has been convicted not just of a crime, but of a crime that constitutes an aggravated felony or other designated offense under immigration law (such as a crime involving moral turpitude), generally requires significant legal analysis that these officers are not qualified to undertake. Advocates and federal public defenders interviewed for this report observed that this legal analysis is highly complicated and that untrained immigration officers, who are not legal professionals, are likely to make mistakes. Indeed, U.S. Supreme Court Justice Samuel Alito, concurring in *Padilla v. Kennedy* (the U.S. Supreme Court case recognizing the responsibility of criminal defense counsel to inform defendants of possible immigration consequences from a guilty plea), observed that even for lawyers untrained

Identifying an “aggravated felony” requires significant legal analysis that DHS officers are not qualified to undertake.

in immigration law, “determining whether a particular crime is an ‘aggravated felony’ or a ‘crime involving moral turpitude [(CIMT)]’ is not an easy task.”¹⁵³

Ricardo S., who came to the United States from Mexico when he was eight months old, was incorrectly processed through 238b based on a misdemeanor conviction for conspiracy to commit burglary, his first offense, which was not an aggravated felony and for which he spent only two days in jail. Ricardo—who was 20 at the time, without a lawyer, and in jail at the time of his interview with ICE—nevertheless asked to see a judge and wanted to appeal ICE’s decision to remove him. However, the ICE

officer conducting his 238b proceeding convinced him that there was no point in appealing. Ricardo withdrew his request for an appeal and was deported to Mexico, leaving his parents and U.S. citizen fiancée in the United States. He later returned to the United States and was prosecuted for illegal reentry in a federal court, which agreed that his earlier deportation violated due process and that he should not have been deported for an aggravated felony.¹⁵⁴

As in all these proceedings that bypass the courtroom, individuals with disabilities are at a significant disadvantage in defending their rights in the absence of both legal assistance and any neutral arbiter to help identify their rights and ensure the person is actually removable. Deolinda Smith-Willmore, a partially blind U.S. citizen born in New York who also had diabetes and schizophrenia, was misidentified as a citizen of the Dominican Republic while serving a sentence for assault and deported through 238b. Ms. Smith-Willmore, who was 71 at the time, remained in a nursing home in the Dominican Republic for four months while her lawyer fought to have her returned.¹⁵⁵

Although these summary removal orders for individuals with aggravated felonies may appear to be an efficient means of deporting those who fit within DHS’s stated

priorities, they sacrifice fairness and accuracy, and their use incorrectly presumes that all these individuals are both deportable and ineligible for relief.



An Arizona National Guardsman watches over the U.S. border with Mexico at an observation post on December 7, 2010, in Nogales, Arizona.

E. STIPULATED ORDERS OF REMOVAL

The Statute

A stipulated order of removal is another deportation order that is entered without an immigration hearing but is signed by an immigration judge.¹⁵⁶ Unlike other orders in this report, however, stipulated orders of removal can be used against any non-citizens, including lawful permanent residents as well as undocumented immigrants, and are technically issued by immigration judges. However, the only person who actually speaks to the individual is generally a deportation officer from DHS. An immigration judge must sign off on stipulated orders and may require that the individual be brought into court before approving the order, particularly where the stipulated order suggests due process problems.¹⁵⁷ However, federal regulations appear to permit the immigration judge (IJ) to “enter such an order without a hearing and in the absence of the parties based on a review of the charging document, the written stipulation, and supporting documents, if any,”¹⁵⁸ and in several cases, that has been the practice in the past.

The stipulation, which when signed by the judge becomes a final order of removal, must include the following:

1. An admission that all factual allegations contained in the charging document are true and correct as written;
2. A concession of deportability or inadmissibility as charged;
3. A statement that the alien makes no application for relief under the Act;
4. A designation of a country for deportation or removal under section 241(b)(2)(A)(i) of the Act;
5. A concession to the introduction of the alien’s written stipulation as an exhibit to the Record of Proceeding;
6. A statement that the alien understands the stipulated request’s consequences and that the alien enters the request voluntarily, knowingly, and intelligently;
7. A statement that the alien will accept a written order for his or her deportation, exclusion, or removal as a final disposition of the proceedings; and
8. A waiver of appeal of the written order of deportation or removal.¹⁵⁹

Like anyone accepting pre-hearing voluntary departure or receiving an expedited removal order, a non-citizen who signs a stipulated order is not given the opportunity to present claims for relief and defenses to deportation. Rather, when the person “stipulates” or agrees to accept deportation, they admit to the factual allegations against them and that they are removable;¹⁶⁰ the immigration judge’s role is confined to determining whether the individual’s decision to sign the order was made knowingly, voluntarily, and intelligently.¹⁶¹

ICE describes stipulated orders as beneficial for both the “interested aliens” and the government: “[A] stipulated removal order helps ensure swift justice, reduces their time in detention and expedites their return to their homeland. Furthermore, stipulated removal orders are a good avenue for judicial economy in that they create operational efficiencies for both the immigration and criminal courts.”¹⁶² Certainly, by circumventing a full hearing at which a non-citizen has the opportunity to present claims and defenses, stipulated orders may speed up deportation, but the benefits to those individuals who are otherwise eligible to see a judge are less obvious.

In Practice

Without a hearing and the opportunity to actually question the non-citizen, immigration judges are not truly able to assess whether the decision to sign a stipulated order—thereby waiving significant rights—was a “knowing, intelligent, and voluntary” decision. While several immigration judges refuse to sign stipulated orders or require that the individual be brought before them first, this is not required or standard practice.¹⁶³ The absence of a meaningful opportunity to check whether the individual understands the consequences of a stipulated removal is particularly problematic given the coercive detention setting in which these deportation orders are explained and signed. The overwhelming majority—96 percent—of

“ICE has very significant leverage over a pro se detained alien. I believe EOIR was created as a safety measure to ensure fairness.”

individuals who signed stipulated orders between 2004 and 2011 did not have a lawyer,¹⁶⁴ and as in other summary removal proceedings, might not understand that they have a deportation order if they never saw a judge.¹⁶⁵ Even immigration judges reviewing the orders appear to understand that individuals who take these orders have been coerced into signing rather than requesting a stipulated order.¹⁶⁶ ICE officers, who are generally the only people presenting information about stipulated removal to immigration detainees, have “routinely given misleading, confusing, and downright inaccurate information to detainees about the law.”¹⁶⁷

Deportation Without Due Process, a 2011 report on stipulated removals based on extensive government records obtained through FOIA requests, demonstrated that in the early/mid-2000s local ICE offices and some immigration courts were “encouraged, and given incentives, to increase the number of stipulated removals entered against non-citizens in their jurisdictions.”¹⁶⁸ The incentive was explicit: to increase the number of removal orders. Local ICE offices were given quotas, and immigration judges, who often grapple with heavy caseloads, were encouraged to utilize stipulated orders as a means to increase the case completion and removal figures.¹⁶⁹ The released government records also suggested that these orders might have been used against children and non-citizens in psychiatric institutions.¹⁷⁰ As one immigration judge observed, “the major weakness I see is that we are essentially handing over to ICE the duty of determining whether an alien has relief available. . . . In reality, ICE has very significant leverage over a *pro se* [unrepresented by counsel] detained alien. I believe EOIR [Executive Office

for Immigration Review] was created as a safety measure to ensure fairness.”¹⁷¹

Before 2003, stipulated orders were very rare; but in 2008, more than 30,000 individuals were removed through stipulated orders, and between 2004 and 2010, over 160,000 individuals were deported through stipulated orders of removal.¹⁷² Although DHS has not made public the most recent figures for stipulated orders, it appears that reliance on those orders has declined since 2010: in FY 2012, approximately 15,000 non-citizens were removed through stipulated removals.¹⁷³

Immigration attorneys and federal public defenders consulted for this report anecdotally report that use of these orders has dramatically declined, perhaps due to public and agency awareness that these orders frequently violate due process.¹⁷⁴ Advocates also credited a 2010 decision from the Court of Appeals for the Ninth Circuit, which found a stipulated order of removal violated due process because the non-citizen, who did not speak English and was not presented with forms in Spanish, could not have validly waived his rights to an attorney and an appeal.¹⁷⁵ According to Judge Dana Leigh Marks, President of the National Association of Immigration Judges, “The case made judges think about the process for stipulated orders of removal. There are just not enough safeguards.”¹⁷⁶ Nonetheless, these orders are still legal, and as such they may be the basis for a reinstated order of removal or prosecution for illegal reentry.¹⁷⁷

II. WHO IS GETTING DEPORTED WITHOUT A HEARING?

Or rather, who isn't? The overwhelming majority—83 percent—of people deported from the United States today never saw a judge, did not get a hearing, and never had the chance to be heard. But that does not mean that 83 percent of the people deported had no rights to enter and remain in the United States; rather, the summary removal infrastructure rapidly and reflexively deported hundreds of thousands of people, including people who are eligible for relief from deportation or who were already in or entering the United States lawfully.

In the 136 cases documented by the ACLU through interviews and case file review, the majority were *not* simply economic migrants coming to the United States for the first time with no connection to the country. Those deported (sometimes repeatedly) without a hearing include longtime residents of the United States with U.S. citizen children, asylum seekers escaping—and being returned to—violence, and people who were lawfully in the United States on visas or working with valid authorization. U.S. citizens have been deported when misidentified as undocumented individuals and quickly removed without the opportunity to get assistance and prove their citizenship. Families are torn apart when parents or their children are coerced into signing a deportation order despite having claims to be in the United States or when they are automatically expelled at the border after a short trip abroad. Asylum seekers, fleeing immediate persecution and often unable to procure travel documents (not that they would necessarily help them), arrive at the U.S. border seeking sanctuary but instead find a detention cell, an expedited removal order, and deportation back to danger.

Several individuals interviewed by the ACLU, including but not limited to asylum seekers, were attacked, kidnapped, raped, or robbed after their deportation from the United States. Many were returned to countries they had not seen

in years or decades, separated from young U.S. citizen children or other relatives they were supporting in the United States, and deported without the chance to say goodbye, without money or the opportunity to plan their next steps, and now face years of separation from loved ones. Young children arriving alone and fleeing violence or trafficking have been quickly removed without any inquiry into their situation or concern for what will happen to them. And these are only the stories of people who survived deportation to share their ordeal or eventually returned to the United States and found help.

Immigration law is notoriously complex, and a system that requires immigration enforcement officers to make complicated legal determinations about an individual's rights within minutes or hours and without legal training will inevitably allow the deportation of people with rights to enter and remain in the United States. Indeed, we know that it already has, and that U.S. citizens have been deported through these summary processes. Not every case is complicated, however; and in some cases, people are unjustly deported not because of a misunderstanding about the law but due to coercion, intimidation, and misinformation from immigration officers whose focus on accelerating and multiplying deportations comes at the expense of basic fairness and people's lives.

A. ASYLUM SEEKERS RETURNED TO DANGER

“I think it ennobles us as a country, and it also speaks volumes to the rest of the world, when we open our country up to help those in the worst of circumstances. ... [O]ur Nation has a long and noble tradition of being a country of refuge. We are the world’s leader in the protection of refugees and asylum seekers, and I am pleased that we are and I want us to continue to be that.”

—Former Senator Samuel Brownback¹⁷⁸

The United States has a long tradition of providing protection to individuals fleeing persecution and violence. Even contemporary critics of the U.S. asylum system accept this narrative as a valuable American tradition to be preserved.¹⁷⁹ Under human rights law, every person has the right to seek asylum from persecution.¹⁸⁰ Moreover, international law recognizes the obligation of receiving countries not to return an asylum seeker to a place where they are likely to be persecuted or tortured. The United

States ratified both the Convention Against Torture and the Convention Relating to the Status of Refugees (“Refugee Convention”) and adopted them into domestic law, so that both federal and international human rights law prohibit the expulsion of asylum seekers to places where they face persecution.¹⁸¹ The Refugee Convention further provides that a non-citizen should not be penalized for attempting to enter, without authorization, in order to seek protection,¹⁸² and when expedited removal was introduced, in recognition of the U.S. obligation to protect asylum seekers, the statute included a carve-out for asylum seekers who would be referred to an asylum officer to be interviewed instead of deported if they claimed fear.

Of the 136 cases in this report (which include 11 unaccompanied children), 89 of the individuals interviewed by the ACLU received a summary removal order (expedited removal or reinstatement or voluntary return in the case of unaccompanied minors) within the broad U.S. border zone (i.e., at a port of entry or within 100 miles of the U.S. border).¹⁸³ Of those individuals, 49 (55 percent) said they were never asked about their fear

New York, NY. The Statue of Liberty has traditionally been a symbol of hope and freedom for individuals fleeing persecution and seeking sanctuary in the United States. Today, many asylum seekers are returned to danger before they have had the opportunity to ask for protection.

Cited in USA v. Peralta-Sanchez
No. 14-50393 archived on February 2, 2017

Spencer Platt/Getty



Fifty-five percent said they were not asked about fear or persecution of torture. Forty percent who were asked and said they were afraid were ordered deported without seeing an asylum officer.

of persecution, or that they were not asked anything in a language they understood.

Only 25 (or 28 percent) said they were asked about fear of returning to their country of origin by a border officer or agent, and 10 of those individuals (40 percent) said they told the officer they were afraid of returning to their country but were nevertheless not referred to an asylum officer. Of the 25 individuals who said they were asked about fear, four said they had not been asked on other attempts to come to the United States.

Only one of the 11 unaccompanied children (all Mexican) interviewed by the ACLU was asked about fear of returning to his country of origin, and all were quickly returned to Mexico.

The remaining 15 individuals (17 percent of the 89 individuals) did not recall specifically being asked or not asked; in the majority of these cases, their primary reason for coming to the United States was not to seek protection but because of family ties, claims to U.S. citizenship, to visit friends or work on valid visas, or in search of economic opportunities. Two individuals said they did tell border officials, of their own initiative, of their fear of returning to their countries. One was referred to an asylum officer; the other was not.

There is no formal mechanism for an individual unjustly denied a credible fear interview (CFI) and deported to

get review and a second chance. Rather, often they must put themselves in danger and at risk of prosecution and imprisonment by seeking to reenter the United States. This danger is more than theoretical. While some of the individuals interviewed by the ACLU did eventually return and win withholding of removal or CAT (mandatory relief that is more limited than asylum), often they first had to experience additional violence in their home country, followed by detention and, in some circumstances, prosecution when they returned to the United States.

1. Expedited Removal and the Impediments for Asylum Seekers

Expedited removal requires that DHS officers refer a non-citizen who claims to be afraid of persecution in his or her country of origin for an interview by an asylum officer.¹⁸⁴ To ensure that individuals are aware of their right to seek asylum, federal regulations require that interviewing officers read the following script, in full, at the outset of the interview, and state that interpreters shall be used if necessary.¹⁸⁵

Except as I will explain to you, you are not entitled to a hearing or review. U.S. law provides protection to certain persons who face persecution, harm or torture upon return to their home country. If you fear or have a concern about being removed from the United States or about being sent home, you should tell me so during this interview because you may not have another chance. You will have the opportunity to speak privately and confidentially to another officer about your fear or concern. That officer will determine if you should remain in the United States and not be removed because of that fear.¹⁸⁶

This rights recital, significantly, says nothing about the *source* of the fear—i.e., whether it comes from a governmental or non-governmental actor—nor does it ask DHS officers to screen for specific facts that would trigger an asylum claim. What triggers a referral is intentionally broad and was intended to ensure that asylum seekers could claim and explain their fear to a trained asylum officer with specialized knowledge of asylum law.¹⁸⁷

Yazan S., a 19-year-old from Syria with a congenital heart defect, tried to request asylum but was deported at the airport instead.

It is essential that this language is read to all arriving immigrants because most asylum seekers arriving in the United States are unlikely to have a sophisticated or even rudimentary understanding of U.S. asylum law and procedures, and may not even know they exist. As attorney Kaveena Singh observes, “A lot of our clients don’t know they are eligible for asylum when they arrive; they are just trying to escape danger. Some—probably the most deserving—are so traumatized they are reluctant to share their stories, even with us. They aren’t getting an orientation at the border about their rights.”¹⁸⁸

Asylum seekers are dependent upon the border officials who arrest, detain, and interrogate them to also explain their rights and refer them to an asylum officer. In many cases documented by the ACLU and others, border officers are not providing necessary information in the language spoken by the asylum seeker—if at all—and sometimes fail to refer individuals for a CFI even when those individuals are able to articulate a fear of returning to danger.¹⁸⁹ For asylum seekers who may be traumatized from the harm they fled, their dangerous journey, and finally, arrival into a detention center, claiming and adequately communicating that fear of being removed may be extremely challenging. But it is not only reticence or post-traumatic stress that prevents individuals who risked their lives to seek protection from asking for asylum: systemic failures and, in some instances, abuse and coercion by the screening border officer prevent some asylum seekers from ever requesting assistance when they reach the United States.

2. Language and Information Barriers

Most of the individuals interviewed by the ACLU stated that they were given forms to sign in English, which most did not speak or read, and often were not interviewed by an immigration officer who fluently spoke their language or through an interpreter. The asylum protections in place can be activated only when a person is informed of those rights, and the consequences if they waive them, in a language they understand. Because many officers may not speak languages other than English fluently, there is a fundamental breakdown in their ability to communicate with individuals about their rights and ask the critical questions about fear of returning.

Yazan S., a 19-year-old Syrian with a congenital heart defect and attention deficit hyperactivity disorder, speaks Arabic and very little English. He came to the United States alone in October 2013 after shelling devastated his neighborhood in Damascus. Shortly after the conflict started, his family says, Yazan—who is Christian—was stabbed on the street by Islamic extremists, severing his pacemaker; he came to the United States to seek both medical care and protection from the violence. En route to his uncle in California, Yazan transferred through Detroit, where CBP officers interrogated him for hours and detained him at a local police department overnight. Although Yazan’s uncle Manaf hired a lawyer, DHS officials refused to let either the attorney or Manaf speak with Yazan. A CBP officer did call Manaf to confirm Yazan’s identity: “I repeatedly asked to speak to my nephew. Finally the agent just hung up on me. I called back [and] I told them, this guy has been through a lot of trauma. . . . The officer said to me, ‘You guys come here and take advantage of our system.’” Yazan told his uncle that six officers were standing around him, telling him to sign a form and that they would not provide him with an interpreter or the chance to call his uncle until he signed. In his limited English, Yazan tried to tell officers that he was afraid to return to Syria but was nevertheless deported through expedited removal.¹⁹⁰

Hilda, a 35-year-old from Honduras, fled death threats from gangs and domestic violence perpetrated by her husband. In 2013, after a severe beating, Hilda miscarried the twins she was pregnant with and fled to the United States, still bleeding daily. “We never want to return,” says



A woman and her child walk past gang graffiti in a neighborhood with heavy gang violence on July 20, 2012, in Tegucigalpa, Honduras. Honduras now has the highest per capita murder rate in the world and its capital city, Tegucigalpa, is plagued by violence, poverty, homelessness, and sexual assaults.

Hilda and both her children were given expedited removal orders, and Hilda says they were never asked about fear of returning to Honduras.¹⁹²

Ana N. R., a 47-year-old from El Salvador with two U.S. citizen kids, had gone back to El Salvador to see family when a gang burned down her family's beauty salon and raped an employee. Her children were going to petition for her to join them in the United States, but given the danger, she could not wait. Arriving in McAllen, Texas, in March 2014, Ana said the officers asked about her fear of being returned but said if she claimed fear, she would be detained for a year:

Hilda. "All you're going to find in Honduras is death." She took her two-year-old and 14-year-old children with her, arriving in Texas in November 2013. "I was caught crossing the river," recalls Hilda:

It was 8 p.m. at night. They took me and my kids to a cell. . . . They started to ask us to sign a lot of papers. The problem was I didn't understand anything he was asking me. Since he saw that I didn't understand, [the officer] would just write and write and just tell me, "Sign." . . . He would just put [the form] in front of me and say "Sign, next one, sign." . . . I was bleeding when I arrived. I was afraid [to ask for help]. Everyone there was afraid. [The officers] don't let you even talk to them. . . . The fear they instill in you doesn't let you ask for help. . . . I needed help and it just felt horrible to be rejected like that.¹⁹¹

I said I would prefer one year in jail alive to death. They wanted me to sign papers after I told them about my fear. But I wouldn't sign. The officer said "Sign or I'm going to sign for you." They slammed the door in my face because I wouldn't sign. The papers were in English. I asked what they were for and said I would sign if they were in Spanish. I saw people saying no, they wouldn't sign, and the officers just signed for them. They called us pigs and said we smelled like fish. There were 10 kids lying on the floor. They would insult us all the time. I thought, maybe this isn't the U.S. Maybe this is Cuba. After all the years I spent in the U.S., I had such a good impression of it. I was really shocked.¹⁹³

Carlos C. Z., an asylum seeker from El Salvador, was moved from *hielera* ("icebox," a term commonly used to refer to CBP holding cells) to *hielera* when he first arrived in the United States. He came to the United States fleeing violence from the Mara Salvatrucha gang ("MS-13"), which left him with scarring and deformed fingers. Although he told a Spanish-speaking officer by phone at the first holding facility that he was afraid to go back to El Salvador, Carlos says that another officer who spoke very little Spanish then came into the room and gave him forms to sign. Carlos does

"All you're going to find in Honduras is death."

Hieleras—“Ice Boxes”

In many cases, individuals are afraid to talk to CBP officers because of the conditions in which they are held. An investigation by Americans for Immigrant Justice found that individuals apprehended by CBP were held for up to 13 days in freezing cells with no blankets, little food, no showers, no privacy for using the restroom, and little space.¹⁹⁷ Almost everyone interviewed by the ACLU described inhumane detention conditions while in CBP custody, citing verbal abuse, freezing conditions, inadequate food, lack of adequate medical care, and overcrowding. For some individuals fleeing violence, the experience of being detained and in inhumane conditions is traumatizing, and as a result, some individuals with strong asylum claims nevertheless decide to abandon them and accept deportation rather than remain in detention.

not read or speak English and refused to sign the forms.¹⁹⁴ At that point, as detailed in Carlos’s declaration, the officer became angry and “slapped [Carlos] across the face with the forms. At that point, [Carlos] asked to speak to a judge, to which he recalls the officer replied, ‘Here...’”¹⁹⁵ From the judge, the attorney, and the one who is going to deport you.’ A different officer then wrote on every page of the forms that [Carlos] refused to sign. [Carlos] did not learn what the form stated until another immigrant translated it for him at a different detention facility in Pennsylvania weeks later.”¹⁹⁵

At seven years old, Karen R. L., now a 21-year-old from El Salvador, was coerced into joining the gang that murdered her mother; the gang members, Karen said, “told me I had to finish paying the accounts of my mom.”¹⁹⁶ When she tried to leave the gang, she says, she was sexually assaulted by gang members and threatened with death. Arriving in South Texas, Karen recalls, the officers initially gave her forms to sign in English: “I started asking what they were but [the officers] just said, ‘Sign here, sign here,’ really loudly. When I found out what I was signing, I said, ‘But I’m afraid and I can’t go back to my country.’”¹⁹⁸ Karen was finally given a CFI, which she passed.

For individuals who do not know about the asylum process, it may not occur to them to raise their fear if they are never asked. Ponchita, a 33-year-old woman from Mexico, said she was not asked and did not mention the domestic violence she was fleeing because “in Mexico we are just used to no one asking about it.”¹⁹⁹

Many asylum seekers interviewed for this report said they were unaware of the existence of asylum; generally, the only individuals who were aware of the right to apply for asylum were persons who, after receiving an expedited removal order from CBP, were taken to an ICE facility to await a plane to take them back to their country of origin. While in detention, they learned for the first time from ICE officers, legal services organizations, and sometimes other detainees about the existence of the asylum process.

Many individuals told the ACLU that the only information CBP officers gave them was that they would be detained a long time—and probably deported anyway—unless they immediately signed a removal order. Moreover, many said the environment in which they were detained suggested that they had no rights.

Few people recalled CBP ever telling them of the existence of asylum, but several were given misinformation by CBP officials. Nydia R., a transgender woman from Mexico, said she told border officials that she had been attacked in Mexico and wanted help, but she was not referred for a CFI; she later successfully entered the United States without being apprehended, applied for and was granted asylum. “I didn’t know the immigration agents could have helped me,” Nydia said, recalling her previous attempts to enter the United States. “They had known all the reasons I was trying to come back to the U.S. and even knowing them, they sent me back.”²⁰⁰

Cesar, who had been in the United States for 14 years when he was arrested by CBP, says he was not asked anything about his fear of returning to Mexico: “They didn’t ask me anything. They were just mocking me. They asked why would I come into their land. I was trying to explain that there is a lot of violence in Mexico, and I don’t want to die. . . . I asked to call my family, my sister or my wife, but they said they only give Central Americans, the elderly and kids that privilege.” Cesar was deported to Reynosa, where he

still has some family: “I didn’t last long because there were a lot of shootings.”²⁰¹

Felipe R., a 32-year-old Mexican, left the United States and his two U.S. citizen children to attend his father’s funeral in Michoacán, Mexico, where he was kidnapped and held for ransom. He escaped and was caught by border officers when he attempted to reenter the United States in Laredo, Texas. Although he told the officers what had happened, Felipe said, “Border Patrol said I didn’t have the right to claim asylum because the U.S. doesn’t give asylum to Mexicans.” He has tried multiple times to return to his children but says he has never been asked about fear of returning to Mexico.²⁰²

3. Failure to Refer Asylum Seekers to an Asylum Officer

While the majority of individuals interviewed by the ACLU said they were never asked about their fear of being deported, some did attempt to tell border officials that they were in danger and needed assistance, but they were still not referred to an asylum officer.

The regulation requiring border officers to refer a person to an asylum officer if they fear persecution or torture if returned to their country says nothing about the identity of the perpetrator; however, our interviews and a recently leaked UNHCR report indicate some border officers incorrectly think that violence from non-state actors, such as gangs or a family member, can never be the basis of an asylum claim and refuse to refer these asylum seekers for an interview.²⁰³ In fact, if a government is unable or unwilling to protect an individual who otherwise satisfies the eligibility requirements for asylum, a perpetrator’s non-state identity does not foreclose asylum.²⁰⁴

Nydia R., a transgender woman who had already been granted asylum in

the United States, was issued an expedited removal order when she arrived at the U.S. border after being attacked and raped by a gang; the gang had also tried to cut out her breast implants, and the wounds were fresh when she explained her story to CBP. CBP nevertheless deported her. Nydia returned, and although DHS records available to and in fact procured by the officers showed she had asylum status, DHS officers reinstated her removal order and deported her once again. In Mexico, she was raped, kidnapped by Los Zetas, and repeatedly attacked by gangs and other men because of her transgender status until she could return, without inspection, to the United States.²⁰⁵

Roberto Lopez-Gutierrez, a Mexican national, was kidnapped in Mexico and held for ransom in caves on the U.S.-Mexico border; when he escaped, he was arrested by CBP and referred for illegal entry prosecution. Although the CBP agent did ask if he was afraid of returning to Mexico and he said yes, the agent wrote that he said no, explaining in subsequent testimony that she wrote he had no fear because “he was afraid of kidnappers, not of government persecution.”²⁰⁶ The agent later admitted in court testimony that she was not trained in asylum law and that the regulation was silent on whether the violence needed to come from the government for a person to



After being attacked by a gang in Mexico, Nydia returned to the United States, where she had asylum status. Immigration officers ordered her deported.

be referred for an asylum interview;²⁰⁷ nevertheless, she excluded all of Mr. Lopez-Gutierrez's statements about the kidnapping from his sworn statement.²⁰⁸

Similarly, Telma M. did explain her fear of being deported, which was recorded by CBP officers in her sworn statement, but the question she recalls being asked was, "Are you afraid of your government?" to which she says she responded, "No, not the government, but I am afraid of my husband back in El Salvador."²⁰⁹ Although she may be eligible for asylum based on domestic violence,²¹⁰ Telma was issued an expedited removal order and transferred from Texas to the Broward Transitional Center in Florida to be deported.

In other circumstances, CBP officers simply reject individuals' statements regarding fear, perhaps because they do not believe the individuals, but CBP officers are not trained to determine credibility or to assess whether a specific experience meets international protection standards.

Juan Manuel C., from El Salvador, says he told CBP officers he was afraid to return to El Salvador, where he had been a victim of gang extortion, but they did not refer him for a CFI: "They didn't care; they said it was my country, I had to go." Instead, they told him he had to sign an expedited removal order even though he wanted to see a judge: "I didn't want to sign. But then they told me I would be in jail from 18 months to 5 years." After his deportation to El Salvador, gangs began to demand money from him: "The Mara Salvatrucha were charging me \$500 a month; they took \$7,000. They send you three notes and on the third time they kill you or your family. People have been killed right in front of my house."²¹¹

Bessy M., a 34-year-old woman from Honduras, came to the United States after her husband was murdered by her brother-in-law. She tried repeatedly to tell the border officers she was afraid to return to Honduras, but she was issued an expedited removal order. By the time she was transferred to Port Isabel, a detention center in South Texas, Bessy said, she retracted her statements, even though she was finally referred for a CFI: "I said I wasn't afraid because I was scared of saying yes. Everyone said I would be in jail for a long time."²¹² But while waiting for deportation at the T. Don Hutto Residential Center, an immigration

"The officer filled out a form and asked me to sign, but I refused. . . . They grabbed my fingers and pushed them on the paper."

detention facility in Taylor, Texas, Bessy says she felt she had made a mistake.²¹³

Lucila O. fled domestic violence in Nicaragua and was arrested by Border Patrol agents in Texas: "I told them I was afraid. . . . [The agent] just told me, 'You are getting deported. . . . Even if you are afraid you are going to get deported.'"²¹⁴ Ericka E. F., a 33-year-old woman from Honduras, fled gang violence and sexual and physical violence from her partner and was arrested in Texas: "I crossed in Laredo and I told them I needed asylum. I needed to stay here to protect myself. . . . I told him I was fleeing for protection because of the violence. They said women always come here with lies. I told them it was true. [The officer] just laughed and laughed."²¹⁵

Braulia A., a Guatemalan national and mother of four U.S. citizen children, was arrested by CBP officers at San Ysidro after she briefly left the United States. She told officers that she was afraid to be deported to Guatemala, where her father had been murdered and her mother was the target of extortion by gangs. According to Braulia, "The officers said, 'We don't care if you are killed there. Don't even think about coming back or we will put you in jail for a long time.' They just said, 'You don't have a right to anything, you are a criminal, you are worthless.'" Although Braulia told them she was illiterate, they forced her to initial that she had read the interview, which incorrectly stated that Braulia did not claim fear. She refused to sign the expedited removal order but was deported to Guatemala, where she was subsequently raped and shot by a gang; her son, who joined her in Guatemala, was murdered by the same gang.²¹⁶

The experience of being interrogated can be intimidating,

and the environment in which these interviews are conducted suggests to the asylum seeker that he or she has no rights. In its recent report, Human Rights First observed that CBP interviews with asylum seekers were sometimes conducted in crowded and loud rooms with no privacy.²¹⁷ Wendy, a 26-year-old woman from Honduras who had lived in the United States for almost a decade, recalled, “There were a lot of officers in a big line with all the officers around you. They did ask about fear but when I said yes, they said, ‘You all say the same thing. I don’t know why you guys say you are afraid. That is your country. This is not your home.’”²¹⁸

Rosa, a 22-year-old woman, fled domestic violence in El Salvador and was arrested by border officials when crossing into Texas. Although she was asked about fear, she was never referred to an asylum officer:

ICE said I had no reason to complain because I was already being deported. I was asked to sign forms my first day. I found out later it was my deportation order. The form was in English. ... At that time, they didn’t give us the opportunity to ask any questions.²¹⁹

After her deportation, Rosa’s ex-boyfriend found her, and the harassment and abuse continued. She returned to the United States and says she was not asked about fear when she was caught by CBP again in South Texas. “They just gave me some forms to sign, but I refused.”²²⁰ She was eventually allowed to get a credible fear interview, which she passed.

Too often, whether an asylum seeker is given a credible fear interview or, instead, deported with an expedited removal order is a matter of chance that depends on the particular officer. Because expedited removal orders are often issued quickly, with limited internal review and with little supporting evidence required, an asylum seeker can be erroneously deported without any opportunity—in the moment or later on—to challenge this deportation order.

Maria, Marian, and Rosemarie, three sisters from El Salvador, fled extortion and threats by gangs in El Salvador and came to the United States to join their brother (who has Temporary Protected Status) in May 2013. After crossing the Rio Grande into Texas, the sisters were caught



Maria, Marian, Rosemarie, and their brother.

by Border Patrol agents. Although all three were caught the same day and came with the same claim, they had very different experiences. Maria was the only one asked about her fear of being deported and referred for a credible fear interview: “I said yes [I was afraid], and he was just writing. He asked me to sign if I wanted to sign. I said no. The form was in English but I think it was to throw me back to El Salvador.”²²¹ Her sisters had very different experiences. Marian recalls, “They did not ask me any questions. They just took my ID. The officer filled out a form and asked me to sign, but I refused. He was very angry because I wouldn’t sign. He stood up, pulled me up, and they grabbed my fingers and pushed them on the paper.”²²² Rosemarie spoke with a Border Patrol agent who spoke Spanish, and she tried to ask for help, but when she explained why she was afraid, she was told “those are old stories”:

They didn’t ask me any questions, just my name and where I was from. I said to the official, “What are the possibilities for us to stay if we hire an attorney because I was afraid of going back.” He said that’s what everyone says and there is no possibility for us because there are already too many people inside the U.S. He said they don’t

give permits anymore—they used to but no longer... I asked to make a call to my brother because I was afraid of going back and he said no because we were going to be deported. . . . They said if I didn't sign [the expedited removal order] they would grab me and make me sign. I just put one fingerprint down then.²²³

Even Maria was not told at first that she would be allowed to seek asylum, so all three spent days in detention, sleeping on the floor in a crowded cell and certain they would be deported. Ultimately, Maria was issued a Notice to Appear and released on an order of supervision to report to ICE near her brothers' home in Florida. Maria has since won her immigration case before a judge. Marian and Rosemarie were also given orders of supervision and allowed to join their brother. However, Marian and Rosemarie currently have no way of affirmatively applying for asylum, as they were issued deportation orders and not referred for an asylum interview. For now, they are hoping they will not be deported back to danger and can stay together. If deported back to El Salvador, Rosemarie said, they would be in even more danger than when they left and would try to return to safety in the United States: "Since they made us pay that 'rent,' if we were to go back, we would have a bill. Since we left, they don't like it. Whoever doesn't pay, they kill them. We know people who've been killed. One girl said [to the police] that the gangs were threatening her, and 10 minutes after telling the police she was dead."²²⁴

Milton, a government electrician in Honduras, came to the United States after gang members repeatedly threatened to kill him and his family in revenge for a motor accident he was in that left the other individual, who was associated with the gang, disabled. Although he moved repeatedly within Honduras, nevertheless the gang repeatedly found him. Milton was not referred for a CFI by border officials but was issued an expedited removal order and released into the United States on an order of supervision; his attorney believes this is because he was with his young daughter.²²⁵ When he checked in with ICE, he once again expressed his fear of returning to Honduras; the ICE officer, instead of referring him to an asylum officer, incorrectly told him that it was his responsibility to get proof that he had had a credible fear interview or else he



Reynosa, Mexico, April 2014. A migrant shelter providing services primarily to Central American migrants heading toward or being deported from the United States. Migrants and recent deportees are targets for kidnapping and theft by local drug cartels and gangs.

would be deported.²²⁶ Through advocacy with DHS, his attorney, Jacqueline Bradley Chacon, was finally able to get him referred for a credible fear interview, which he passed. Had he been deported to Honduras, Ms. Bradley Chacon says, "He [would] be killed, I have no doubt."²²⁷

For asylum seekers whom the system fails, and who receive an expedited removal order instead of a credible fear interview, the consequences are immense: these individuals can be deported to danger,²²⁸ and if they try again to get protection in the United States, they can be prosecuted for illegal reentry and placed in reinstatement proceedings. Several of the individuals interviewed by the ACLU experienced all three.

For individuals who are able to eventually get before an immigration judge, the impact of the prior removal order and CBP's written recording that they had no fear continues to have consequences. Although the concern over border officials not asking about fear or misrecording the answer is not new and was documented in the 2005 USCIRF report, some judges and asylum officers nevertheless assume that these officers are asking the required questions in a way the asylum seeker understands. As one attorney noted, when an asylum seeker's sworn statement records that he or she has no fear, it can be used against him or her in court: "In one such case, I had a client with a strong gender-based claim for relief. Both the DHS

trial attorney and the immigration judge raised insistent concerns over my client's credibility, largely based on her alleged statements in her border interview that she was not afraid of returning to her home country. She stated that she had never been asked by authorities if she had a fear of return. These comments seemed to have been added into her file without her knowledge or consent, yet they plagued her for the rest of her case."²²⁹

Before winning relief under the Convention Against Torture, Braulia A. struggled to explain to the judge why she would sign a statement claiming she had no fear if that was incorrect, and the court was resistant to finding that the Border Patrol agent had lied. Eventually, given the weight of the evidence that Braulia had experienced extreme violence in Guatemala, the judge found in her favor without opining on whether she or the border official was more credible. Similarly, Ana D. eventually got an interview with an asylum officer while waiting for her removal—*after* CBP had already issued an expedited removal order and written that she had no fear. The asylum officer questioned her as to why CBP would say that:

Q: "Did you ever tell an immigration officer anything different?"

A: "I told him the same thing I am telling you now."

Q: "Why did you think he wrote that you had no fear?"

A: "I don't know."²³⁰

At a substantive level, the same benefits and protections are simply not available for an asylum seeker with a prior deportation order who has been removed. This is true even if the only reason they have a deportation order is the failure of CBP to inquire into fear or to refer an individual who claims fear for an asylum interview. As acknowledged by the Asylum Office of USCIS, the standard for "reasonable fear" is higher than the standard of proof required to establish a "credible fear" of persecution,²³¹ so individuals who might have met the lower threshold showing in a credible fear interview may have more difficulty passing a reasonable fear interview—even when the facts (on which the claim is based) are identical.

Moreover, immigrants seeking protection while in reinstatement proceedings (i.e., because they have a prior removal order) are likely to be detained for a long period of time. For years, advocates have been concerned about the delays immigrants face in getting an interview with an asylum officer and then getting their decision, and in April 2014, the ACLU and partners filed a lawsuit challenging the extensive delays in receiving a "reasonable fear" interview, delays resulting in many months of detention for asylum seekers with a prior removal order or a particular criminal conviction.²³² Under federal regulations, individuals with a "reasonable fear" of persecution or torture must be referred to an asylum officer to be interviewed and receive a decision within 10 days.²³³ In fact, however, individuals subject to reinstatement awaiting a *reasonable fear* interview will wait in detention an average of 111 days.²³⁴

Alejandro first came to the United States in 1995, when he was a teenager, fleeing gang violence in El Salvador. He was twice summarily deported without the chance to apply for asylum. Once back in El Salvador, he says he was threatened by gang members constantly, despite moving to different locations. Finally, the threats to his wife and daughter became too much: "They said, 'We are going to hit you where it hurts and take what you value.'"²³⁵ The family fled and settled in New Jersey. Eight years later, he was arrested by police when having an argument with his wife; ICE arrived and picked him up from jail. While in immigration detention, Alejandro asked to see a judge: "The officer tried to force me to sign a deportation order but because I understood English, I refused to sign it. When I refused to sign it, the officer tried to force me to put my fingerprint. He said, 'You have no chance, you're getting deported.'"²³⁶ Fortunately, he was referred to an asylum officer prior to being deported, but he then spent four months in detention before he was able to see a judge and be released on bond; his case is ongoing.²³⁷

Luis B. R., a 28-year-old gay man from Guatemala, experienced sexual and physical violence throughout his childhood, including from a police officer, because of his sexual orientation. He eventually fled to the United States but was arrested, detained for three months, and given some papers to sign (which appear to be an expedited removal order) before being deported back to Guatemala; he does not recall ever being asked about his fear of

The distinction between who can and cannot access the full range of protections and benefits of asylum is not supported by international or domestic law.

returning to Guatemala. After his deportation, the fear, threats, and attacks continued, so he returned to the United States and was able to enter without inspection. A few years later, however, after being assaulted by his then-boyfriend, Luis was arrested by the police, even though he was not the perpetrator. The police then turned Luis over to ICE. Luis then spent six months in detention before eventually winning his case with the assistance of pro bono counsel.

Finally, a person who wins withholding of removal or CAT relief will not receive the same benefits as a person who wins asylum, such as the right to petition to bring his or her family to the United States, to travel internationally, and to eventually become a lawful permanent resident and a U.S. citizen.²³⁸ Moreover, that individual may still be removed to a third country, even if he or she cannot be deported to his or her country of origin.²³⁹ For asylum seekers who are in reinstatement only because U.S. immigration officers incorrectly deported them when they first sought refuge, this distinction feels particularly undeserved and punitive. But for all asylum seekers, the distinction between who can and cannot access the full range of protections and benefits of asylum is not supported by international or domestic law. While advocates are challenging this unjustified and damaging distinction, for most people who can currently only access safeguards through reinstatement proceedings, many critical protections are foreclosed.²⁴⁰

Hermalinda L. and her husband, both indigenous Guatemalans, fled political violence and sought protection in the United States in 2006, leaving their daughter with family. They were able to enter the United States without inspection, but in 2008, they returned to Guatemala

because Hermalinda's mother was ill. Thinking the security situation had improved, Hermalinda decided to stay in Guatemala, and she and her husband had a second daughter. Hermalinda and her husband were both politically active in the opposition party and, in particular, in challenging mining companies' extraction activities. Their activism put them in danger, however. Hermalinda recalls, "On the 5th of March, 2011, about four men came to our house and beat us. Two were police officers and two were dressed in civilian clothes. They beat us and took us 30 minutes by car. Then they made us get out of the car and they beat us more. They took off my clothes and they raped me."²⁴¹ Hermalinda and her husband again fled to the United States, but were caught by Border Patrol at San Ysidro. The officers did not ask if she was afraid of returning to Guatemala: "They didn't give me any papers [to sign]. They just put my finger down like this," said Hermalinda, motioning to show her thumb being pushed on a table.²⁴² Hermalinda did not know that the papers were an expedited removal order; she found out what they were years later, when she applied for asylum in the United States and went to her interview, where she was met by ICE. Fortunately, she was not detained, but because she is in reinstatement proceedings, even if she wins her case when the time comes (her hearing is set for 2017), she will not be able to bring her daughters to the United States.

* * *

The failure to refer asylum seekers for an interview during which they can explain their fears is not new. Even before expedited removal was expanded geographically, the U.S. government was aware that the expedited removal process was resulting in the deportation of asylum seekers before they had the opportunity to be heard and seek protection.

In 2004, Congress commissioned the United States Commission on International Religious Freedom (USCIRF) to conduct a study on asylum seekers in expedited removal.²⁴³ The study, which included first-hand monitoring of CBP interviews at ports of entry, evaluated whether asylum seekers at ports of entry were in fact able to claim the protections intended for asylum seekers. The report found "serious implementing flaws which place asylum seekers at risk of being returned from the U.S. to countries where they may face persecution."²⁴⁴

In particular, the study found the following:

1. In 50 percent of expedited removal interviews observed by USCIRF researchers, arriving non-citizens were not informed they could ask for protection if they feared being returned to their home country;
2. In 72 percent of cases observed, individuals signed the sworn statement drafted by the immigration officer, which they were supposed to review and correct, without being given any opportunity to review it;
3. These sworn statements were not verbatim and sometimes included incorrect or made-up information; and,
4. In 15 percent of observed interviews, a person who expressed a fear of returning was nonetheless deported without a referral to an asylum officer; in 50 percent of those interviews, the files even stated that the person had claimed fear and yet the referral did not take place.²⁴⁵

Notably, these are findings based on interviews between immigration officers and non-citizens that took place in the physical presence of a USCIRF researcher with the full knowledge of the interviewing immigration officer. And yet, this monitoring was not sufficient to ensure that immigration officers followed the regulations. In 2007, USCIRF issued a report card on DHS's progress in addressing the failures identified by the report, noting that

[T]wo years later, most of the Study's recommendations have not been implemented. The Commission's overarching recommendation was that Expedited Removal not be expanded until the serious problems identified by the Study—which place vulnerable asylum seekers at risk—were resolved. Despite this recommendation, and the failure to resolve the problems cited in the study, DHS has in fact expanded Expedited Removal from a port-of-entry program to one that covers the entire land and sea border of the United States.²⁴⁶

The Commission gave CBP a score of “F” for its failure to apply the study's recommendations on protections for asylum seekers to ensure procedures were followed²⁴⁷

and for its failure to ensure the recommendations were implemented *before* expedited removal was expanded.²⁴⁸

Almost a decade later, none of these systemic failures have been corrected, nor have USCIRF's recommendations been adopted. Indeed, it is likely that problems with the process have only increased with the expansion of expedited removal across the entire border, as today even more people are arrested, detained, interviewed, and removed through this process without the opportunity for independent review. Non-governmental organizations continue to document problems with the credible fear process, including failure by border officers to ask about fear and refer individuals to credible fear interviews.²⁴⁹ And yet, in 2013 and 2014, congressional hearings—in their titles if not in the testimony—have suggested that the asylum process is too lax and ripe for manipulation by non-citizens.²⁵⁰

The allegation that this system is easily manipulated is not supported by fact, and indeed, agency officials are confident that their tools for detecting fraud are effective.²⁵¹ A recent Human Rights First report detailed at length, there are already numerous investigative and prosecutorial resources that can be used to punish and deter fraud in the asylum system,²⁵² and CBP and ICE officers are not concerned that their existing tools are insufficient or could be manipulated.²⁵³ Moreover, any individual who is found to have made a fraudulent claim for asylum is not only barred from receiving asylum but can also be prosecuted and imprisoned and is permanently barred from receiving *any* immigration relief in the future.²⁵⁴

Finally, even if some individuals may be fraudulently or just incorrectly applying for asylum, it does not appear that the majority of people attempting to enter the United States are trying to manipulate the asylum system. The actual number of individuals referred for a CFI at the border remains relatively small, with estimates that between 5 and 15 percent of individuals subject to expedited removal in FY 2013 expressed a fear of return and were placed in the credible fear screening process.²⁵⁵ The journey to the United States is fraught with incredible dangers;²⁵⁶ given how well-known these dangers are, it is not a journey someone would undertake lightly.

B. PEOPLE LAWFULLY IN THE UNITED STATES WHO ARE DEPORTED WITHOUT A HEARING

Summary removal procedures are not supposed to apply to people with the right to be in the United States—for example, U.S. citizens, lawful permanent residents (LPRs), or individuals with asylum status. Despite the expansion of these processes geographically and numerically, the U.S. government maintains that these processes are meant to speed the deportations of people who are unlawfully entering the United States. For example, Congressional and Administration statements in support of deportations without a hearing (as well as the new “expedited hearings” taking place along the southern U.S. border) take for granted that they are applied to newcomers who are unlawfully entering the United States and have no right to enter or remain here.²⁵⁷ However, due to coercion at the border, the absence of rigorous screening, and, in some cases, governmental misconduct, individuals lawfully residing in the United States have been deported without seeing a judge or even the chance to call an attorney. As a result of these rapid and hazardous processes, several U.S. citizens have been deported and able to return to the United States only after advocacy and legal representation.

A U.S. citizen, LPR, or asylee may at least seek judicial review of his or her deportation, although sometimes with considerable expense and difficulty, and perhaps have only a period of banishment from the United States. That U.S. citizens can be—and have been—deported from the United States by an immigration officer should not be surprising: while some U.S. citizens have been deported despite having verifiable evidence of their status, other citizenship cases involve complicated legal analysis and factual investigation. Summary removal procedures like expedited removal are not equipped for this intensive analysis, and given their speed, the absence of legal assistance, and the relative secrecy of these proceedings, are likely to result in erroneous deportations. But U.S. citizens are not the only individuals who can lawfully work and live in the United States and who have been erroneously subjected to summary removal proceedings. People with valid

work or study visas, lawful permanent residence, or other nonimmigrant visas have been deported without a hearing, sometimes in a matter of minutes, resulting in separation from family, unemployment, and significant difficulties in ever returning.

1. U.S. Citizens Deported Through Summary Procedures

“To deport one who so claims to be a citizen obviously deprives him of liberty ... [and may] result also in loss of both property and life, or of all that makes life worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law.”

—Justice Louis D. Brandeis,

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

Given the intimidating and militarized environment at ports of entry and along the border, combined with the apparent lack of training for CBP officers and the complexity of immigration law, it is inevitable that people who have status, including U.S. citizens, will be illegally deported by border officers and agents. Attorney Jaime Díez, who practices immigration law in Brownsville, Texas, says he routinely sees individuals who are U.S. citizens, or eligible for U.S. citizenship, who are deported by CBP. Some officers, he observes, “have stereotypes of who a U.S. citizen is. They assume people who don’t speak English can’t be a U.S. citizen. These officers don’t understand the

Some people are automatically U.S. citizens even when they were not born in the United States. As of 2010, around 2.5 million U.S. citizens were born abroad.



John Moore/Getty

Dominican immigrant Roberto Mercer holds his daughter Gianela, 10 months, at a special Valentine's Day naturalization ceremony for married couples on February 14, 2013, in Tampa, Florida.

reality of the border. . . . What I see all the time is people who shouldn't be removed getting removed.²⁵⁸

Identifying citizens is, at once, a simple and a complex issue. Legal scholar Jennifer Koh Lee explains that while the citizen/non-citizen distinction appears straightforward, in fact, that fundamental line is sometimes “unclear and unresolved.”²⁵⁹ Similarly, legal scholar Rachel Rosenbloom observes, “Although most citizenship claims are easily documented, there remain many U.S. citizens who have a tenuous evidentiary hold on their status.”²⁶⁰ U.S. citizens are not required to “register” in a national database, and most of us do not carry our birth certificates or other proof of U.S. citizenship on our person. Moreover, some people are automatically U.S. citizens by law under “acquired citizenship” without being born in the United States.

As of 2010, there are approximately 2.5 million U.S. residents who appear to have acquired citizenship when born abroad.²⁶¹ Similarly, under derivative citizenship, a foreign-born child can obtain citizenship if at least one parent naturalizes before the child turns eighteen and meets other statutory criteria.²⁶² Jennifer Koh Lee

observes that in both these cases, citizenship is conferred to the child upon birth “by operation of law, even if the individual is unaware of their U.S. citizenship status or lacks documentary proof of it.”²⁶³ For these individuals, proving their citizenship when stopped by immigration enforcement officers can be very challenging both in the absence of documentary evidence on hand and also because law enforcement officers may not be trained on the various ways in which a person can be a U.S. citizen.

The danger that more U.S. citizens will be erroneously arrested and deported through a summary removal procedure has increased as reliance on these processes swells and with the general expansion of immigration enforcement in border communities. As Rosenbloom notes, while a person with U.S. citizenship presenting him or herself at a port of entry is likely to be prepared for inspection and have his or her passport on hand, “the exponential expansion of immigration enforcement over the past few decades has increased the potential for individuals with a variety of statuses—from undocumented immigrants to those in lawful immigrant or non-immigrant status to those who are U.S. citizens—to interact with such enforcement in one form or another.”²⁶⁴ The possibility

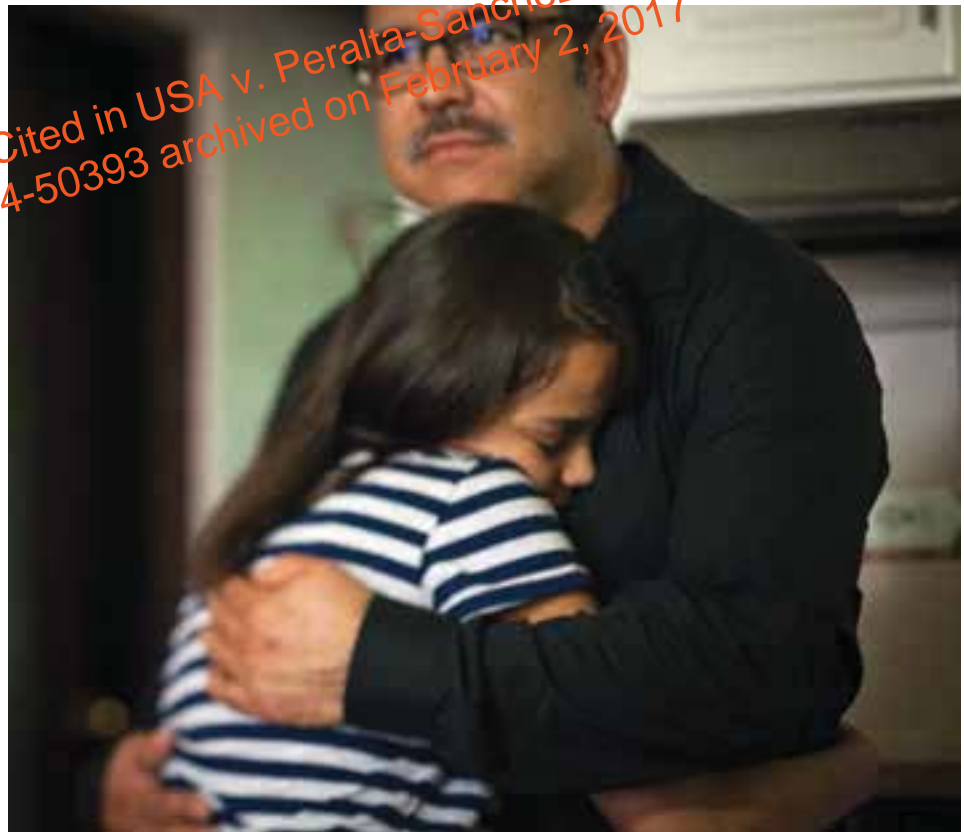
of being misidentified and funneled into the immigration system is compounded by incorrect assumptions about the “identifiability” of a U.S. citizen and, as several advocates along the southern border note, a lack of understanding about border communities and their fluidity.

Oscar Olivas is a U.S. citizen with a U.S. citizen daughter with disabilities. He was born in Los Angeles County in 1969. His mother, who was undocumented at the time (but is now a U.S. citizen), was afraid to go to a hospital given her undocumented status and so she gave birth with the assistance of a midwife in a private home. He was issued a delayed birth certificate when five months old. In 2009, Mr. Olivas began the process of applying for an immigrant visa for his wife and stepson, both Mexican nationals; the couple already had a U.S. citizen daughter but decided to move to Mexicali, Mexico (near the Californian border), while the application process went forward. The family planned that Mr. Olivas would work in the United States, crossing the border each day and taking his U.S. citizen

“For three years, I’ve been waiting to have my day in court. We are stranded in Mexico and desperate to return to the United States.”

daughter to school in the United States where she would receive the treatment and therapy she requires for her speech and language impairment.

As part of Mr. Olivas’s wife’s application process, the U.S. Consulate in Juárez, Mexico, interviewed Mr. Olivas’s mother, interrogating her for hours and coercing her to sign a “confession” that her son had been born in Mexico.



Oscar Olivas, a U.S. citizen, with his wife, stepson, and U.S. citizen daughter in Mexicali, Mexico. The U.S. government refuses to recognize Oscar as a U.S. citizen, so he and his family are in limbo in Mexico, which does not recognize Oscar as a Mexican citizen.

In 2011, while attempting to return to the United States, Mr. Olivas was told by CBP officers that he could not enter but would see an immigration judge to verify his citizenship claim. That hearing never came, but on one of Mr. Olivas's attempts to speak with CBP about his hearing, he was informed by a CBP officer that a removal order had been issued against him. "For three years, all I've wanted is my day in court so that I can prove that I am a U.S. citizen and that my family and I should be allowed to return to the United States. But the government has denied me any opportunity to prove my case. As a result, my family and I have been stranded in Mexico. We are desperate to return to the country we call home." After the ACLU filed a lawsuit on Mr. Olivas's behalf in June 2014, the U.S. government revealed that it had never filed the removal order—but it also had never served Mr. Olivas with an Notice to Appear in immigration court, leaving him in limbo these last three years. Mr. Olivas's attorney, Gabriela Rivera, observed that her client's case, while complicated, was not exceptional given the procedural and structural deficiencies in the expedited removal system: "Mr. Olivas's unlawful expulsion was not an innocent mistake by immigration enforcement officers," says Ms. Rivera. "It was the predictable consequence of a system that relies on racial and ethnic stereotypes, empowers officers to act as judge, jury and executioner, and all but prohibits affected individuals from seeking judicial review."²⁶⁵ Mr. Olivas and his family continue to live in Mexico, in limbo, where Mr. Olivas cannot work to support his family and where his daughter is unable to access the necessary care and treatment she needs for her disabilities.²⁶⁶ Ms. Rivera observes that the U.S. government's continued refusal to allow Mr. Olivas to return to his homeland is more than a symbolic injury for Mr. Olivas and others in his situation: "The benefits of citizenship—including stability, mobility, political rights, and protection against arbitrary expulsion—are not theoretical. They have real-life implications for people like Mr. Olivas and his family."²⁶⁷

Peter V. has always believed that he was a U.S. citizen like his siblings, even though part of his childhood was spent in Mexico, a not-uncommon experience along the southern U.S. border. His mother died when he was two, and his father, whom Peter and his family believe to be a U.S. citizen, was not a part of his life. But while serving a criminal sentence in California in 2003 for "resisting,

delaying or obstructing an officer or emergency medical technician," he was questioned by prison staff about his citizenship: "I said I don't know where I was born but I think I was born here, in the U.S. . . . I told them I grew up in part in Mexico. Then they just took me out and deported me."²⁶⁸ Several days later, he walked to the port of entry and asked to speak with a border official: "I said I needed help. I said, 'I think I'm a U.S. citizen.' They just put me in handcuffs and took me to CCA [a detention facility]."²⁶⁹ Peter was given the chance to see a judge, but the immigration judge incorrectly placed the burden on Peter to provide proof of citizenship and ordered him removed, suggesting he try to apply for a passport.²⁷⁰ Once again, Peter tried to return to his family in the United States but was turned back: "I just signed the papers without knowing what they were. I asked if this was going to get me in trouble and they said, 'No, it's just for your release.' They would ask where I was born and I would say, 'I don't know, I thought I was born here in the U.S.'"²⁷¹ Peter was finally able to enter without inspection, restart his life in California, and became engaged to a U.S. citizen. Three years later, CBP showed up at the gym where he worked, arrested him, and referred him for federal prosecution for illegal reentry. Peter then spent 13 months in federal prison for reentering; with the help of his federal public defender, Peter is appealing and hopes to win recognition as a U.S. citizen. In the meantime, with no Mexican birth certificate and no ID, he is constantly harassed by Mexican police in Tijuana and feels lost: "What am I doing here?" he asked.²⁷²

Maria de la Paz is a 30-year-old U.S. citizen who, like her two sisters, was born in Houston, Texas; her mother is an LPR. When Maria was 18, she was issued an expedited removal order at a port of entry in Texas by a CBP officer who refused to believe she was a U.S. citizen. As detailed in her habeas petition, the officer who inspected her at the border said that someone who did not speak English could not be a U.S. citizen and ordered her removed.²⁷³ Although

"I said I needed help, [that] I think I'm a U.S. citizen. They just put me in handcuffs..."

“It was as if we had been kidnapped.”

her birth was properly recorded in Texas, there were errors in the spelling of her name and her mother’s name (not picked up by her mother, who did not read or write), and her birth was also registered in Mexico. In Mexico, Ms. de la Paz tried to apply for a U.S. passport, but over several months, the U.S. Consulate asked for successive pieces of evidence of her U.S. birth, including school records that included photos (which did not exist). Finally, in January 2014 and apparently “thinking that there was no other way to come to the United States to be with her family,” Ms. de la Paz attempted to cross into the United States but was caught, arrested, and detained by CBP.²⁷⁴ While in custody, she again explained that she was born in Texas; according to the petition, the CBP officer did not attempt to verify her claim before reinstating her prior expedited removal order and banning her from returning to the United States for 20 years.²⁷⁵ After her attorney, Jaime Díez, filed a habeas petition on her behalf, the U.S. Consulate in Mexico finally agreed to issue her a passport and allow her to return to the United States. She returned in July 2014.²⁷⁶

Some cases, like that of Ms. de la Paz, may be complicated by factual inconsistencies, even when they can be clarified and resolved. But as Ms. de la Paz’s case also suggests, some immigration officers may assume that citizenship is straightforward and always looks the same—and some may be resistant to the idea that a person who does not speak English or was not born in a hospital could be a U.S. citizen. In 2010, several U.S. citizens who were born in Texas with the assistance of midwives filed a federal lawsuit challenging the effective denial of their citizenship without a fair opportunity to defend their rights. The plaintiffs’ cases highlighted the coercion, intimidation, denial of counsel, and misconduct by border officials at ports of entry who abused their authority with ongoing consequences for both the U.S. citizens and their families.²⁷⁷

Two of those women, sisters Laura and Yuliana Castro, were born in Brownsville, Texas, in 1980 and 1984 but raised in Mexico by their Mexican-citizen mother, Trinidad. In 2009,

Laura and Yuliana were traveling to the United States with their mother, who had a valid tourist visa, and Yuliana’s infant daughter. Laura had her U.S. passport and Yuliana, who had applied for a passport but had not yet received it, showed her Texas ID, the receipt for her application for a U.S. passport, and the Texas birth certificate.²⁷⁸ When the CBP officer in Brownsville, Texas, noted that Yuliana had had a midwife birth, he detained and interrogated the women for over ten hours.²⁷⁹ Speaking later to a journalist, Trinidad said, “It was as if we had been kidnapped.”²⁸⁰ After hours of threats, the officer extracted a “confession” from Trinidad that the daughters had been born in Mexico; he then seized all their documents, treated Laura and Yuliana as having “withdrawn” their applications, and issued an expedited removal order for Trinidad, also charging her as inadmissible for fraud.²⁸¹ Although the U.S. government later recognized that Yuliana and Laura were U.S. citizens after their lawsuit in federal court, Trinidad is, to this day, banned from entering the United States given the erroneous fraud finding.

Another plaintiff in the case, U.S. citizen Jessica Garcia, lived in Mexico with her husband but worked in Texas. In 2009, she was trying to cross through the Brownsville, Texas, port of entry on her way to work when she was taken to secondary inspection, locked in a room, and accused by CBP officers of making false representations. When Ms. Garcia refused to sign any paperwork or “confess” to using a false birth certificate, the officer confiscated all of her documents, including her Texas birth certificate. Although a Notice to Appear (NTA) was issued and she should have been given the chance to see a judge, DHS never filed the NTA, so a hearing was not scheduled; instead, Ms. Garcia was stuck in limbo and lost her job.²⁸²

a. U.S. Citizens with Mental Disabilities

As the ACLU and Human Rights Watch previously documented in a joint 2010 report, *Deportation by Default*, individuals with mental disabilities may be at particular risk of erroneous deportation given the complexity of immigration law, the continued absence of appointed counsel in all immigration proceedings, and (in the absence of a lawyer) the reliance on a person’s own statements and admissions as the primary evidence.²⁸³ As that investigation



U.S. officials deported Mark Lyttle, a U.S. citizen with mental disabilities, through expedited removal after a prior unlawful deportation.

demonstrated, a person with a severe mental disability facing deportation must rely upon an immigration judge who is able to recognize that a person facing removal has a disability and does not understand the proceeding to try to help them—but sometimes this occurs quite late in the case and any assistance is limited in the absence of appointed counsel.²⁸⁴ However limited courtroom proceedings have proven to be, they at least provide some statutory and regulatory safeguards for people with mental disabilities.²⁸⁵ Individuals ordered deported through summary removal proceedings, which can be very quick and are handled by immigration enforcement officers, do not even have the limited safeguards available to individuals with disabilities in court. As a result, there have been several cases of U.S. citizens with mental disabilities deported from the United States.

In 2000, Sharon McKnight, a U.S. citizen with cognitive disabilities, was deported through expedited removal when

U.S. citizen Mark Lyttle was misidentified as Mexican and deported; he was deported again through expedited removal when he tried to return.

returning to New York after visiting family in Jamaica; CBP believed her passport was fraudulent.²⁸⁶ In 2007, Pedro Guzman, a 29-year-old U.S. citizen with developmental disabilities, was serving a sentence for trespassing in a jail in California when ICE misidentified him as a non-citizen and coerced him to sign a voluntary departure order. He was deported to Mexico, where he was lost for almost three months before he was found by family and able to return to his family in California.²⁸⁷ In 2008, U.S. citizen Mark Lyttle, diagnosed with bipolar

disorder and developmental disabilities, was misidentified by jail and ICE personnel as a Mexican citizen and deported to Mexico (and from there to Honduras and then Guatemala). Mr. Lyttle quickly attempted to return to the United States but was removed with an expedited removal order. It took four months for Mr. Lyttle to return home to the United States and even when he did, with a U.S. passport sent to the U.S. Consulate in Guatemala, his prior deportation raised a red flag with CBP at the airport.²⁸⁸ Fortunately, his attorney was present and able to ensure his release and return to his family.²⁸⁹

In 2003, U.S. citizen Michael C. was interviewed by ICE while serving a sentence for assault in a Texas state prison and deported through 238b as a non-citizen convicted of an aggravated felony. Although ICE contends he admitted to being a Mexican citizen, Michael's birth certificate from Texas demonstrates he was born in the United States,²⁹⁰ and on the notice of intent to issue a final administrative order, he contested his deportability and told ICE that he was a U.S. citizen.²⁹¹ Before the end of his sentence, he wrote to ICE wishing to know if they still intended to deport him even though he was a U.S. citizen; in response, DHS wrote that he had not produced any evidence of his citizenship while in prison.²⁹² He was removed to Mexico but managed to return to the United States; his case is ongoing.²⁹³

* * *

If there are any bright-line rules in U.S. immigration law, one of them is certainly that U.S. citizens cannot

be deported from the United States. Thus, an individual who claims to be a U.S. citizen when subject to expedited removal is entitled to a formal removal hearing before an immigration judge with the required safeguards, including the right to counsel (at one's own expense) and the right to appeal the immigration judge's order.²⁹⁴ After Pedro Guzman was erroneously deported and a lawsuit brought on his behalf by the ACLU, ICE issued guidance on citizenship claims by detainees; under this guidance, ICE officers must consult with the Office of Chief Counsel in cases with "some probative evidence" of citizenship and must "fully investigate the merits" of such claim.²⁹⁵ It is unclear whether CBP has similar guidance and what training, if any, exists to verify and investigate claims to U.S. citizenship.

The number of known cases of U.S. citizens deported from the United States remains low, and according to DHS data provided to The New York Times in response to a FOIA request and analyzed by the ACLU, in FY 2013, only 97 individuals were referred to an immigration judge for a claimed status review hearing, where individuals who claim U.S. citizenship can seek review of their expedited removal order.²⁹⁶ Individuals are supposed to be referred to an immigration judge if they claim "under oath or under penalty of perjury" to be a U.S. citizen, LPR, asylee, or refugee.²⁹⁷ There could certainly be many more U.S. citizens who were not referred for review. And there could be others who did not know about their U.S. citizenship because they have derivative or acquired status. Timothy D., a Canadian interviewed by the ACLU, believes he has a derivative citizenship claim; he did not raise that claim when issued an expedited removal order because he believed he was already lawfully in the United States on his business visa and the U.S. citizenship was not his foremost reason for being in the United States. Now that he has been deported and is separated from his U.S. citizen wife and two U.S.

citizen children, he is pursuing his claim that he is a U.S. citizen so he can at least visit his family.²⁹⁸

b. U.S. Residents with Valid Status

While the deportation of a U.S. citizen is the epitome of an unlawful deportation, other individuals such as lawful permanent residents (LPRs), refugees, asylees, and others on valid work or tourist visas are not supposed to be deported without seeing a judge. In some circumstances, these individuals may nonetheless lose their immigration status and be deported, for example, if convicted of certain criminal conduct; however, even in these circumstances, they are entitled to a hearing in immigration court to determine whether they are, in fact, removable and whether they are nonetheless eligible for relief from deportation.

As previously noted, sometimes removability is a complex determination, and it may not be obvious to an arresting immigration enforcement officer that a person has status that makes them non-deportable. The speed with which these removal procedures occur, combined with the lack of supervision and legal assistance, make errors in identification of a non-citizen inevitable.

In some cases, the individual's status is not so difficult to determine and can be easily verified; even in these cases, however, immigration officers have quickly deported individuals with lawful status in the United States—sometimes sending them to life-threatening situations. For example, Nydia R. is a 36-year-old transgender woman from Mexico with asylum in the United States who, since securing asylum, has twice been illegally deported through summary removal procedures. After years of threats and harassment for being transgender, Nydia fled to the United States in 2003. Three years later, her nephew in Mexico was dying of cancer, so she returned to see him; the danger and threats persisted, so she attempted to return to the United States. At the border, she told the immigration officers about the violence she experienced in Mexico but was nonetheless deported to Mexico without being referred for a credible fear interview. "I showed the officers the markings on my body from being beaten and they didn't seem to care," Nydia told the ACLU.²⁹⁹ She eventually managed to enter the United States without inspection

"I showed the officers the markings on my body from being beaten and they didn't seem to care."

Nydia had asylum in the U.S. when she was illegally deported—twice—at the border. Deported to Mexico, Nydia was kidnapped and raped.

and, in 2008, she applied for and received asylum. Nydia told the ACLU that she planned to apply to adjust her status and become a lawful permanent resident but did not have the money.

In 2010, Nydia's mother died, and Nydia returned to Mexico for the funeral. "I was afraid [to go back], but in the moment, I just blocked out everything that had happened to me; when I got there, I thought 'Oh my God, why am I here?' . . . All I could think about was how much I wanted to see my mother for the last time, but once I got there, I was terrified."³⁰⁰ In Mexico, Nydia says her family rejected her, and she was attacked by groups of men who tried to remove her breast implants, and then beat and raped her. Nydia was robbed of her money and all her documents and spent almost a year trying to find help in Mexico so she could return to the United States. Finally, on March 18, 2011, she tried to enter the United States through San Ysidro. Nydia recalls:

I was so desperate; all I wanted was to be here [in the United States]. In Tijuana I met someone who sold me an ID. I tried to enter and that's when they detained me. I explained my situation and asked to see a judge. . . . The officials were trying to find out if I was actually a woman "naturally." They were saying, "You look her over!" "No, you look her over!" Finally, they told me to take off my pants in front of two men. . . . Just imagine, you try so hard to be the person you want to be, you undergo surgery, which is incredibly painful. And then they don't even treat you like a person.³⁰¹



Nydia, a transgender Mexican immigrant, already had asylum when U.S. border officials deported her back to danger in Mexico.

Despite this terrifying treatment, Nydia did tell the officer, as documented in her interview, that she had asylum status and that she was afraid to go back to Mexico. According to the sworn statement, recorded during her interview with CBP, Nydia said she left Mexico because she was "discriminated against by my family and by people in the city. About a week and a half ago . . . some gang members grabbed me in the street. They tried to stab me and take out my implants. . . . They hit, beat, and raped me."³⁰² Close to 3 a.m., after hours of questioning, her statement was read back to her in Spanish, and she signed it. Minutes later, Nydia says, the officer told her that seeing a judge would be useless; still, Nydia recalls, "I said I would rather see a judge and stay in detention."³⁰³ At that point, she was brought more papers to sign—in English, which she could not read—and she signed them, assuming they were the same papers she just signed in Spanish. In fact, it was an expedited removal order. According to the form, the officer wrote, "At approximately 0445 hours, [] admitted to not having a fear and concern and requested to be returned to Mexico." Nydia, who was still bruised from her recent attack and rape, was placed in a van and dropped in

Even with a U visa and 15 years in the United States, Francisco was deported and then given an expedited removal order when he asked for help at the border.

Mexico, where she slept on the streets, afraid to go back to her hometown.

On April 26, 2011, Nydia again tried to return to the United States; when she was arrested by immigration officers, she tried to explain that she already had asylum in the United States. The officers ran a Central Index System check, which showed that Nydia was in fact an asylee.³⁰⁴ Nonetheless, she was processed through reinstatement and given a removal order prohibiting her from reentering the United States for 20 years. Deported again to Mexico, and immediately in danger on the streets, Nydia looked for work along with another transgender woman but faced abuse wherever she went. Says Nydia, “That is when the other transgender woman and I were kidnapped and forced to work for Los Zetas [cartel]. They made us prostitute our bodies for them.” Nydia was able to escape after several months and returned to the United States without being arrested. “I really like living here in the U.S. The thing I like the most is that I feel free. Obviously, I’m still afraid but the truth is that I feel protected.”³⁰⁵

Other individuals interviewed by the ACLU were also deported without a hearing when they were misidentified as having no status in the United States, and although their

deportations were not authorized by law, there was no immediate legal recourse to ensure their safe return.

Francisco N. G., a 21-year-old from Mexico, came to the United States with his family in 1999. He was six years old when his family settled in Texas, where he attended elementary, middle, and high school. When he was a senior in high school, his father attacked him and his mother. Francisco, who was trying to protect his mother, called the police and testified against his father in court; because of their cooperation, both he and his mother were able to apply for a U visa (a nonimmigrant visa for victims of crimes). Recalls Francisco, “A few months later, we attended court and won the case that put us on a path away from my dad.”³⁰⁶ In early 2014, Francisco was driving himself and coworkers to work at a construction site near San Antonio, Texas, when he was pulled over by police for having an expired registration sticker. The police called ICE, who arrested everyone in the car. Francisco was also arrested and handcuffed by an officer who, Francisco recalls, told him he was going “back to where I came from.”³⁰⁷ Francisco was detained and questioned by several officers about what he was doing in the United States. After approximately 12 hours, he was moved from San Antonio to Laredo, where



On the bridge between El Paso, Texas, and Ciudad Juárez, Mexico.

he says officers threw away his U visa ID and accused him of lying about his status:

The officer who had the forms told me that it didn't matter, that even if I was telling the truth the judge could overturn the decision and send me back to Mexico. . . . I had three or four officers telling me, watching, and waiting for me to give up and sign that sheet. . . . When I explained about my status and asked if I could call [my attorney at] American Gateways, they said no. When I asked to call my family, they said no. I kept asking but finally one of the officers told me to understand that I would get no call until they were finished with me. The only call I got to make was (as I was leaving) to my mother to let her know what had happened.³⁰⁸

The officers, Francisco says, told him he was being charged with smuggling, and the other men in the car wanted to be deported, so if he went to court there would be no one to testify in his defense and he would go to prison for many years. The next day, he was deported to Piedras Negras, Mexico, where he knew no one.

At the time of his deportation, Francisco was saving up for dentistry school and working to support his mother and brother. His deportation was incredibly difficult for his family in Texas. Recalls Francisco, "I was a really big help to my Mom in raising my younger brother and helping out with the bills. So financially and emotionally, they [were] going through some difficult times."³⁰⁹ After Francisco's deportation to Mexico, Francisco's father was also deported and started threatening to harm his son. Although he has valid U status, Francisco still needed authorization to reenter the United States after his removal; however, the normal route, consular processing (which includes fees and an interview with a U.S. consulate), would have been very lengthy and expensive, as he would also have had to apply and wait for a waiver. Because of the threats he was facing from his father, Francisco presented himself at the U.S. border, accompanied by an attorney, and asked to be paroled into the United States because he had U status.³¹⁰ CBP, however, refused to admit him and appears to have issued an expedited removal order. Fortunately, Francisco was able to explain his fear of being deported

to Mexico. Although his attorneys and family are in Texas, he was transferred to a detention center in Washington State to await his credible fear interview. After several days, Francisco was released from detention, his expedited removal order was terminated, and he returned to his family in Texas.

Guadeloupe was also deported despite having been approved for a U visa and after showing the approval paperwork to CBP officers.³¹¹ Guadeloupe, a 36-year-old mother of five U.S. citizen children, came to the United States when she was 15 after the death of her mother to join her U.S. citizen and LPR brothers, who were living in Texas. In Texas, where she has lived for almost 21 years, she raised five U.S. citizen children but was physically abused by both her partners; the first was a U.S. citizen and the second an LPR. Guadeloupe was twice deported at the port of entry in El Paso, Texas; both times, the forms were in English and she says she did not understand what was happening. On the second occasion, in 2011, Guadeloupe was prosecuted for illegal reentry and served 11 months in federal prison, but while in prison she was able to apply and receive approval for a U visa, based on the domestic violence she experienced. In 2013, during a routine check-in with her probation officer in El Paso, the probation officer called CBP to come and interview Guadeloupe. Guadeloupe explained that she had an approved U visa and presented the papers, but the CBP officer proceeded with her deportation. "He took [the visa paperwork] away and said it was no good," recalls Guadeloupe. "He then handed over my deportation order that had my signature already

Javier Pelayo, an LPR with mental disabilities, was deported by an officer who assumed he was undocumented. He died apparently trying to return to his family.

signed.”³¹² Guadeloupe was deported to Ciudad Juárez, Mexico, where she was homeless for over two months: “In Mexico, I had no ID, no money, no connections to start my life again, no way to get a job. I was legitimately afraid of dying there.”³¹³ Advocacy from her attorney and the American Immigration Council eventually secured her return to her children in Texas, but she remains afraid that at any moment, she could again be picked up and deported.³¹⁴

Javier Pelayo was an LPR with mental disabilities who came to the United States as a young child and grew up in Texas. Given his disabilities, his family encouraged him not to carry his LPR card with him so that he would not lose it. In April 2000, Mr. Pelayo went to a fast food restaurant and was arrested by Border Patrol agents who apparently assumed he was undocumented and deported him, after almost 20 years in the United States. His mother, also an LPR and a farm worker, searched for him at jails and hospitals to no avail. “At first when he disappeared I tried to find him, asking everybody for information,” she said. “That was for weeks. Then they told me he was dead.”³¹⁵ A month later, his body turned up in the river; he had apparently tried to swim back to his family in Texas.³¹⁶

Rocio and Nicolas L., a retired LPR couple originally from Argentina, had been LPRs for over 20 years; they lived in California near their daughter and her family. The couple was returning to the United States after seeking less expensive medical treatment abroad when a CBP officer pressured them to “abandon” their LPR status at the Atlanta, Georgia, airport. Under federal law, a lawful permanent resident (LPR) is not treated as an arriving non-citizen seeking admission when they return to the United States.³¹⁷ However, there are some exceptions, notably (1) if the individual “has abandoned or relinquished that status” or (2) if he or she “has been absent from the United States for a continuous period in excess of 180 days.”³¹⁸ In these circumstances, an immigration officer can treat the individual as having abandoned their status as an LPR.

Rocio, accompanied by her husband, who has some mental health difficulties, had been receiving cancer treatment in Argentina and was returning after four months abroad. After hours of detention and interrogation, they were allowed to call their daughter, Gabriela H., who explained

to the CBP officers that her mother was very ill and that her parents do not speak English. Gabriela recalls that the officer told her that her parents could either abandon their LPR status or go before an immigration judge. “[The officer] let me talk to my mom, and my mom said, ‘I don’t know what they are talking about, I don’t understand.’”³¹⁹ Gabriela and her mother decided she should ask to see a judge who could verify their right to return home to the United States, and Gabriela communicated this to the CBP officer. Gabriela says several hours went by before the CBP officer called her back and stated her parents were being processed for abandonment of LPR status.³²⁰ Although CBP did not ultimately issue a summary removal order while also stripping the couple of their LPR status, this couple is now in legal limbo and without a formal means to challenge this deprivation of their rights and status.

* * *

In all of these cases, while the person’s status might not have been obvious to the arresting and interviewing DHS officer, the claim should have triggered more serious review and at least an opportunity for the individual to speak to a lawyer and see a judge before more penalizing action was taken. Even for those deported who were eventually able to return to the United States, the emotional and financial costs to them and their families have sometimes been significant and yet have no redress.

2. Expedited Removal of Tourists and Business Visitors

Expedited removal allows immigration officers to remove non-citizens who are “inadmissible,” meaning they are attempting to enter the United States without valid travel documents or through fraud and misrepresentation. In practice, immigration officers at ports of entry sometimes remove individuals with seemingly valid entry documents whom an officer suspects of not complying with their visa. For example, if a border officer believes that someone on a valid tourist or business visa actually intends to immigrate, he or she might accuse the individual of fraud or misrepresentation. Or, according to advocates interviewed and cases documented for this report, if an officer suspects the individual is doing work not authorized by that specific

visa, the officer might cancel the visa and also immediately issue an expedited removal order.

Officers have enormous discretion to make these determinations, and there are no regulations specifying what facts and evidence an officer must consider and produce when deciding to cancel a visa and issue an expedited removal order. Courts have recognized the incredible power this gives to line officers at a port of entry (and beyond). In *Khan v. Holder*, the U.S. Court of Appeals for the Seventh Circuit, while recognizing limits on its authority to dissect an expedited removal order, observed:

The troubling reality of the expedited removal procedure is that a CBP officer can create the [] charge by deciding to convert the person's status from a non-immigrant with valid papers to an intending immigrant without the proper papers, and then that same officer, free from the risk of judicial oversight, can confirm his or her suspicions of the person's intentions and find the person guilty of that charge. The entire process—from the initial decision to convert the

For Mexicans and Canadians who lawfully work in the United States each day, expedited removal—or seizure of their visa—is a looming threat.

person's status to removal—can happen without any check on whether the person understood the proceedings, had an interpreter, or enjoyed any other safeguards. To say that this procedure is fraught with risk of arbitrary, mistaken, or discriminatory behavior (suppose a particular CBP officer decides that enough visitors from Africa have already entered the United States) is not, however, to say that courts are free to disregard jurisdictional limitations.³²¹

As with most expedited removal orders, there is no meaningful opportunity to challenge these orders or have them rescinded. In a recent decision, however, the U.S. Court of Appeals for the Ninth Circuit determined that despite limitations on reviewing whether a CBP officer correctly identified someone as inadmissible,³²² courts *do* have the ability to review the threshold question of whether CBP had legal authority under the statute to place a non-citizen in expedited removal proceedings.³²³ For example, if a person was, as a legal matter, incorrectly identified as inadmissible (and thus, given an expedited removal order), he or she should still have the opportunity to bring this to a court



Thousands of people enter and leave the United States each day. Many lawfully enter the United States to work or study while living in Mexico or Canada.

and dispute that CBP had the legal authority to place him or her into the expedited removal process in the first place. This is a new decision, however, and for most people, challenging an expedited removal order and its factual basis—however tenuous—will continue to be difficult.

Along the southern and northern U.S. land borders, where people from Mexico and Canada routinely and lawfully work or study in the United States and cross the international border as part of their daily commute, expedited removal remains a threat. Officers have enormous power to issue orders or take away a person's visa based on subjective assumptions and with limited evidence. Human rights advocate Crystal Massey, working in New Mexico at the Southwest Asylum & Migration Institute, has observed that people with valid visas who cross into the United States to visit family, go shopping, or attend church services can suddenly have their border crossing cards taken with no explanation and little recourse: "There is no investigation; the government doesn't have to share anything at all. And it's too late when they've taken your visa."³²⁴

Rosalba, a 56-year-old Mexican woman, has regularly traveled to the United States, always on a valid tourist visa that she has never overstayed. In 2010, she married a U.S. citizen who lives in Texas; they kept separate residences, Rosalba in Mexico and her husband Raoul in Texas, visiting each other every couple of weeks. Raoul is ill with throat cancer; he requires surgery every two months and his disability checks are his only source of income. On September 24, 2010, Rosalba was driving to Texas to see her husband and his sister, who was in the hospital. She recalls that the border officials stated they wanted proof her sister-in-law was in the hospital and took her into an office, searched her, and then pressured her to sign an expedited removal order: "The official was insisting and insisting, and telling me I lived in San Antonio, and that if I didn't admit [it], he could put me in jail. . . . I was scared, so I signed it."³²⁵ According to Rosalba's attorneys, even though staff at the U.S. Consulate in Mexico agree that Rosalba should not have been issued an expedited removal order, she must still apply for a waiver and remain outside of the United States for now.³²⁶

For years, Yolo Medical, a Canadian medical distribution company, had a distribution branch in Washington State,

where products under warranty could be inspected. Scott L., one of Yolo Medical's employees trained in highly specialized technical repair work, lives in British Columbia and would periodically drive to Washington State to perform routine repair work on Yolo products at the distribution center. Yolo Medical prepared a B-1 (business) visa application, which Scott brought to CBP, but it was rejected and he was told he could perform only warranty inspection work in the United States. Yolo Medical engaged a lawyer, adjusted the application, and brought it to CBP, which then said that Scott would need to pick up any products for repair and bring them to Canada for repair. One day, visiting the Washington distribution center, Scott picked up products for repair; before returning to Canada, he noticed that one customer's product needed only a small adjustment to be fixed, which he did at the distribution center. Scott says he did not think anything of it, but when he got to the border, he was questioned by an immigration officer: "CBP asked me if I did any work in the U.S., and I said no because I didn't consider that actual work; but they called the warehouse and asked if I had any tools, and [the] receptionist said yes, I had a screwdriver. Then they said I had intentionally lied to the border agent."³²⁷

Scott was detained for approximately 8 hours until he signed an expedited removal order. The result, says Scott's supervisor Lorenzo Lepore, is that Yolo Medical has closed its branch in the United States, laying off U.S. citizen employees, and added significant costs and time to its operations: "Customers pay a lot more to get their warranty work. . . . No one crosses the border anymore to do this work. It's really complicated the process, made it longer and much more expensive." For Mr. Lepore, it does not make sense to try again to get permission for an employee to cross the border, after their last experience, even though the company previously planned to expand operations in the United States:

We tried to comply with whatever we were told to do. . . . [E]ven after we did everything [CBP] told us to do, [Scott] still ended up with an expedited removal order. The biggest thing we take from this is that you, as an individual or a company, have no rights. We did everything by the books and we still lost. . . . It's just been one bad thing

“We did everything by the books and we still lost. . . . It’s just been one bad thing after another when we are just following the rules.”

after another when we are just following the rules. The ever-changing rules.³²⁸

For Scott, the expedited removal order has been particularly problematic because his siblings live in the United States and he has had to miss family reunions while waiting for the five years to pass so he can lawfully return.

Zayyed is a professional chef in Mexico; friends in California invited him to visit and asked if he would cook, for free, for a party during his stay. Zayyed, who always traveled to the United States on a valid tourist visa, which he claims never to have overstayed, was stopped at the airport upon his arrival in the United States. According to his brother Antonio, an LPR living in California, Zayyed was handcuffed, detained for two days, and repeatedly told to admit that he was working without authorization in the United States. Antonio says that Zayyed’s friends confirmed by phone to CBP that Zayyed was not being paid but was just going to help them out; nevertheless, he was forced to sign an expedited removal order and is banned from visiting the United States, where his siblings live, for five years.³²⁹

Misguided and unsupported assumptions by DHS officers can lead to unfair deportation orders that cannot be effectively rectified. To be sure, in some cases immigration officers may correctly identify a person attempting to enter the United States without authorization or by misrepresenting the purpose of their visit.³³⁰ Even in those situations, however, it is possible that some of the alleged “misuse” was not willful. In such cases, expedited removal is a blunt and drastic response; in addition to barring the individual from reentering for five years or more (with

no right to judicial review of the circumstances), some advocates report that once a person has been issued an expedited removal order, getting another visa to reenter the United States—even after the five years have passed—can be difficult. In cases where a person appears to be making a mistake and not willfully attempting to commit fraud or immigrate or work without authorization, allowing the individual to withdraw their application would be a more rights-protective and less punitive approach that also recognizes the realities of the interviews at ports of entry and the complexity of immigration law.

Roland J., a 41-year-old Indian national, works in the computer software field. He first came to the United States in 2003 on an H-1B visa (a work permit) and later converted to a different nonimmigrant work visa in 2013. Roland regularly traveled to Canada for his work and in September 2013, while his new visa was pending, he says he called several CBP offices to see if he could travel while his visa was being converted. Unable to get an answer by phone, Roland went to a port of entry and asked a CBP officer who, Roland recalls, told him that he could travel while the visa was pending. Roland went to Canada but on his return was told he could not reenter. “The supervisor came and he started laughing. He asked me to prove that I spoke to the [other] officer yesterday,” says Roland. “I went to another border crossing because I thought these officers were making a mistake.”³³¹ But the officers at the next border crossing said they could not help him either. He tried yet another port of entry where an officer approached his car. According to Roland,

I explained I didn’t want to gain entry but I wanted to find the solution to the problem. He said I had to turn over to the booth so he could talk to me. . . . I was there 3 hours and they started to fill out a lot of paperwork. They asked me to sign a paper—I asked if it was good or bad and, they said, “neither good or bad,” so I signed. But then he told me it was a removal order.³³²

Desperate and confused, Roland tried to get into the United States one more time, where his house, his job, and all his life savings were located. But immigration officers reinstated his prior expedited removal order. “The officer had checked with his own pen where I was supposed to

* * *

“From my experience, I’ve learned you can be a law-abiding person and this can happen for no reason.”

sign saying I didn’t want legal help. He said I could change my mind at any time. I didn’t know what I was signing.”³³³ CBP then referred him for prosecution for illegal reentry. Because he was able to show that he had not committed any fraud, his sentence was reduced from illegal reentry to illegal entry, and he was given time served. But with his reinstatement order, he is banned from the United States for 20 years. “From my experience, I’ve learned you can be a law-abiding person and this can happen for no reason.”³³⁴

Timothy D., a Canadian national, first came to the United States in 2001 on a TN (business) visa³³⁵ to teach at a university in Detroit, Michigan. He bought a home, married a U.S. citizen, and has a six-year-old U.S. citizen child; he and his first wife divorced, and Timothy remarried another U.S. citizen with whom he is expecting a child. In 2012, after spending the day in Canada, Timothy was crossing back into the United States when CBP officers at the port of entry in Detroit pulled him into secondary inspection and started inquiring into his work. Timothy explained that in addition to being a professor, he did some graphic design contract work (for which he had registered with the State of Michigan and was paying taxes). Timothy says the CBP officer told him he needed a different visa for that work, which Timothy says he did not realize.³³⁶ Getting a removal order was a shock: “The longer you’re present in the U.S., the less you think they are going to kick you out,” says Timothy.³³⁷ Timothy recognizes that despite his deportation and separation from his family, he is one of the fortunate ones; he has been twice allowed into the United States on parole to see his son, and his son has been able to spend summers with him in Canada: “I know plenty of people who don’t get parole. . . . For people who don’t have resources or education, this must be disastrous. I’m lucky.”³³⁸

In some instances, it is difficult for an immigration officer not trained in highly complex immigration law and with dozens of cases to process to determine whether an individual lacks lawful status in the United States and is removable. Summary removal procedures, in which immigration officers are the adjudicator and deporter, place enormous responsibility on a single officer to investigate and determine the facts and law in a short period of time. In cases where the facts and legal rights at issue are complicated, referring the individual to an immigration judge to have his or her case evaluated with a full hearing, and allowing him or her the opportunity to secure counsel and evidence to support his or her case, can make all the difference—and does not jeopardize an immigration enforcement officer’s ability to perform his or her duties. Unwinding and correcting an unfair and illegal deportation order—even in the limited cases where that is possible—is a long and difficult road.

*Cited in USA v. Peralta-Sanchez
No. 14-50393, archived on February 2, 2017*

C. LONGTIME RESIDENTS REMOVED WITHOUT A HEARING

The summary removal procedures created by IIRIRA have diverted hundreds of thousands of people away from court and funneled them through quick administrative processes. While expedited removal in particular was largely a political response to the large numbers of Cuban and Haitian migrants arriving in the United States in the early 1990s,³³⁹ expedited removal and related summary deportation procedures are not used only against “arriving” migrants with no ties to the United States. People who have lived in the United States for most of their lives and have U.S. citizen family are also swept up into these procedures that bypass not only the courtroom but also critical constitutional and statutory protections.

In the past, while recognizing that non-citizens have rights in the United States, federal law has drawn a distinction between the rights of immigrants who have entered the United States and those who are seeking entry at the border. Immigrants within the United States have due process rights under the U.S. Constitution to a fair hearing, the assumption

being that we owe more to non-citizens who are part of our community and have built ties and claims here. On the other hand, courts have held that non-citizens arriving at the U.S. border are not entitled to all the protections of U.S. constitutional law and, consequently, may have fewer claims that can be made when entry is denied. As the Supreme Court explained in one of the first U.S. cases on the rights of immigrants seeking admission explained:

It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicil[e] or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.³⁴⁰

In subsequent years, courts have reaffirmed the position that non-citizens at the border, seeking admission, have

Tijuana, Mexico. U.S. Border Patrol officers at the U.S. border near San Diego, California, look for migrants attempting to enter the United States without authorization.



Sam Frost

more limited due process rights.³⁴¹ Yet under the drastic changes brought about by the 1996 IIRIRA summary removal procedures, certain people who have entered the United States are nonetheless denied a removal hearing. Today, the people diverted from the courtroom and deported without a hearing are not all strangers without ties to the United States, and some might also win the right to remain here if given a fair hearing.

Almost a decade ago, when expedited removal was expanded beyond ports of entry, advocates warned that individuals who are eligible for discretionary relief (such as cancellation of removal) but were picked up within the United States could lose the opportunity to apply for relief if immigration officers treated any absence from the United States as invalidating that opportunity.³⁴² Unfortunately, these concerns have been corroborated. Many people interviewed by the ACLU were longtime residents with U.S. citizen children but were deported without a hearing and without *any* inquiry into whether or not they had family in the United States or how long they had been outside of the country. Indeed, it is not only individuals who left the United States and are returning whose lives in the United States are arbitrarily ignored; individuals arrested by immigration officials *anywhere* in the United States and coerced into accepting voluntary departure or removed because of a criminal conviction are also deported without seeing a judge.

In all these situations, DHS retains discretion to place individuals in formal removal proceedings before a judge; instead, DHS sometimes treats these individuals as outsiders with no claims, essentially erasing all their years in and ties in and to the United States. For undocumented longtime residents of the United States who may be eligible

for relief, defending their rights and winning relief is a matter of chance.

1. Deportations at the Border

At the border, most people arriving without authorization, including undocumented immigrants returning to their families in the United States, are processed through expedited removal and quickly repatriated. The one thing the expedited removal form requires border officers to ask when processing an individual for expedited removal is whether he or she is afraid of returning to his or her country of origin. As documented in previous chapters, this questioning is not always done and even when it does occur, is often superficial.

Although DHS's notice expanding expedited removal in 2005 stated that DHS does not *have to* place a person in "interior" expedited removal proceedings where the equities weigh against it, no guidance has been publicly issued that indicates how a DHS officer would make such a decision. Indeed, expedited removal does not require *any* further questioning by border officials or screening for possible claims to enter and remain in the United States; whatever equities a person may have—U.S. citizen children, long residence in the United States, etc.—often remain invisible throughout this process. The ACLU interviewed several people in migrant shelters in Mexico and others now in immigration proceedings who had been issued an expedited removal order at the border but had never been asked about their ties to the United States or referred for formal removal proceedings at the border. In some circumstances documented by the ACLU, individuals who had lived in the United States for many years left the country only briefly to see their families, attend funerals, or for other compelling reasons, and yet, upon their return, they were subjected to expedited removal. Not only has this practice separated families, but it has also returned some people, and their U.S.-based family, to very dangerous conditions in violation of U.S. and international law.

Wendy D. G., a 26-year-old woman from Honduras, came to the United States when she was 15. She attended high school in California and has two U.S. citizen children. In 2012, Wendy decided to return to Honduras to see her

“I was told I would be taken to see a judge the next day, but instead I was taken to the border and told to go.”

family: “I decided after so many years, I wanted to see my family. . . . I never thought my country would be worse than when I left. But it was. . . . There was so much violence in the streets. I was thinking, ‘Why did I come here?’”³⁴³ Wendy soon attempted to return to the United States, leaving her daughter with family in Honduras until she could safely be sent for. When Wendy crossed into Texas, CBP arrested and detained her, and issued an expedited removal order. “I regret that I went back [to Honduras]. I’ve been living here [so long].”³⁴⁴ Wendy was moved through several different detention facilities before being released on an order of supervision. She is now living in Miami with her two U.S. citizen children, working with a temporary permit, and reporting to ICE. But at any moment, she could be deported. Says Wendy, “I’m a mom that wants to work for my kids. I want to succeed.”³⁴⁵



Wendy, holding the passport of her U.S. citizen daughter, was ordered deported after she visited family in Honduras—her first time there in almost a decade.

“I said I don’t know how to read or write and so he shouldn’t give me any papers, but he just said, ‘Sign here on each page.’”

Inocencia C. came to the United States from Mexico when she was 12 years old and is the mother of three U.S. citizen children. After living in California for approximately 15 years, she left the United States under coercion from her abusive partner, the father of her children. The abuse only intensified when the family returned to Mexico, so after a few months, Inocencia sent her children back to the United States and then tried to cross herself. At the port of entry in San Ysidro, border officers told her she would lose her children and forced her to sign an expedited removal order. Inocencia recalls,

I said I don’t know how to read or write and so he shouldn’t give me any papers, but he just said, “Sign here on each page”. . . . The officer spoke Spanish and he yelled at me, “The government can keep your kids because you are illegal. It is a crime, what you did.” I didn’t know anything about the law. Here I know if you abandon your kids they will take them away from you.³⁴⁶

She made three attempts to return to the United States and escape her violent ex-partner; eventually, she was *not* referred to an asylum officer or for a hearing but was instead referred for prosecution for illegal reentry.³⁴⁷ After a federal judge gave her “time served” for illegal reentry and released her, and with intervention and advocacy from her federal public defenders, ICE agreed to place her in immigration proceedings, which are ongoing.

In January 2014, Maria D., who had lived in the United States for 23 years, left the United States to attend her father’s funeral in Mexico. According to her attorney, Maria’s U visa, based on an assault and attempted rape

she suffered in Los Angeles, was pending when she left. Returning home to California, she presented herself at the San Ysidro Port of Entry and was issued an expedited removal order, even though the interviewing officer noted that she had a pending U visa.³⁴⁸ Maria's daughter, Claudia, who lives in California, went to visit her in Tijuana after Maria was released from U.S. custody. Claudia recalls, "[Maria] was depressed and crying. Only she knows how she felt when she was in there. . . . They were being pressured to sign, and people were saying, 'If you say you are afraid, you will stay here for 3 months and not be able to talk to your family.' So she got afraid. All she wanted at that moment was to be released."³⁴⁹ Maria remains in Mexico, separated from her family in the United States.

Braulia A. is a mother of five (including four U.S. citizens) from Guatemala who entered the United States without inspection in 1991. She left Guatemala with her son, fleeing violence from both police and gangs: her father had been murdered and she had been raped by police officers as a teenager. Braulia moved to California, married, started a family, and sent money to her mother in Guatemala. Starting in 1999, the money attracted the attention of gangs that demanded money from Braulia's mother. In 2005, a friend of Braulia's recommended that she visit a dentist in Tijuana. Not realizing that she could not travel on her Employment Authorization Document ("EAD card"), Braulia, who is not literate in Spanish or English, went to Tijuana for the day. When she called her husband before returning to California, and he explained that she could not travel on her EAD card, Braulia says she panicked and attempted to reenter by hiding in a truck.³⁵⁰ Arrested at the San Ysidro Port of Entry, Braulia told immigration officers that she lived in the United States and was afraid to return to Guatemala, given the threats against her family. The officers wrote on her record of sworn statement that she had no fear and that she had gone to Tijuana for a party, both of which Braulia denies:³⁵¹

The officers said, "We don't care if you are killed there. Don't even think about coming back or we will put you in jail for a long time." They just said, "You don't have a right to anything, you are a criminal, you are worthless." The officer was reading some papers and wanted me to sign them. I said I can't read or write in English or

After almost 15 years in the United States, Braulia was deported without a hearing to Guatemala, where her son was killed. Then his murderers raped and shot her.

Spanish. The officer said well you've got to sign and I said no. The officer said I don't care if you sign. . . . look, I already signed for you.³⁵²

Braulia was detained at CCA Otay Mesa Detention Facility (an ICE detention center) and then deported with an expedited removal order. Almost immediately upon her arrival in Guatemala, Braulia says, she began to receive threats from gangs. Braulia's U.S. citizen children joined her in Guatemala when she was first deported, but it quickly became too dangerous, so she sent them home to California: "They were being followed. People were calling and threatening the children, saying offensive things about my 12-year-old girl. Gangs were shooting at our front porch."³⁵³ Her nephew, who was the head of a gang and was in prison for the murder of a family, started demanding conjugal visits from Braulia (his aunt) and sending her threats. Finally, she fled to Mexico; but around that time in 2006, her oldest son, Wilmer, who was living undocumented in California, missed her too much and attempted to rejoin her in Guatemala.

Recalls Braulia, "I said just come to Mexico and we will figure it out. He was going to come, but a week before his birthday he was killed [in Guatemala]." Devastated, Braulia returned to Guatemala for her son's funeral and begged the Guatemalan police to investigate his murder. Braulia says that the officers told her it was a police bullet that killed her son and demanded money to investigate further. Days later, Braulia herself was kidnapped, shown photos of her murdered son, gang-raped, her eyes and mouth taped, shot nine times, and left for dead. It has since been confirmed

by police and media sources that her nephew, who was released from prison, was behind the murder of her son and the rape and attempted murder of Braulia.³⁵⁴

With help from her family, Braulia eventually returned to the United States in October 2007 after a difficult journey through the mountains in Guatemala and then across Mexico. Even after returning to the United States, she says she continued to be harassed and threatened by gangs in Guatemala: “They called me at my home here in San Diego and they asked for money. They told me that if I did not give them money they would cut off my sister’s or my nephew’s head.”³⁵⁵ Several years later, in September 2011, immigration officers came to Braulia’s home looking for someone else and took her into custody when they realized she had a prior order of removal. After a few weeks, she was referred for a reasonable fear interview and remained in detention until January 2012, when she was released on bond. She finally won relief under the Convention Against Torture in March 2014.

As discussed above, since the expedited removal procedure was expanded horizontally and vertically across the entire border (within 100 miles of the U.S. international border), even individuals who are not at a port of entry and may not have left the country can be swept up by expedited removal. Under the regulations, individuals who have been in the United States for 14 days or more should be referred to an immigration judge, but our investigation suggests that in many cases, Border Patrol officers are not asking individuals when they first came to the United States. As a result, some individuals who have been in the United States for many years without leaving are also deported without a hearing.

For example, Cesar came to the United States in 2000 and has a U.S. citizen stepdaughter whom he has raised since she was five. In early 2014, Cesar, who worked as a landscaper and had lived continuously in the United States for 14 years, was stopped by local police in Weslaco, Texas, while driving with a colleague to a waste management facility. Weslaco is considered part of the border zone because it is within 100 miles of the U.S.-Mexico border. The police officers who stopped Cesar did not charge him or his colleague with any traffic violation; rather, they called CBP to arrest the two men. After many hours of interrogation and threats by CBP, Cesar signed a form,

which his attorney believes to be an expedited removal order. Cesar remembers, “When I was taken to the facility, I was given documents to sign and was told I would be taken to see a judge the next day, but instead I was taken to the border and told to go.” Cesar had not been back to Mexico in 14 years.³⁵⁶

Cesar’s inclusion in expedited removal is not exceptional even though it was unlawful given his long residence in the United States, but it may not be unique. A report published by the ACLU of New Mexico showed that many longtime undocumented residents are swept into these deportation processes, which deny them a hearing, *not* when they attempt to enter the United States but when arrested by Border Patrol in their “border” communities.³⁵⁷ For example, 16-year-old Sergio was picked up by Border Patrol on his way to harvest lettuce 70 miles from the border; he had lived in the United States for eight years (since he was eight) but was deported that same day and separated from his widowed mother and two younger siblings.³⁵⁸

Even beyond the border area, however, immigration officials have deported longtime residents of the United States without giving them the opportunity to see a judge through administrative voluntary departure (or “voluntary return”), stipulated orders of removal, or administrative orders of removal (“238b”). While 238b is supposed to be used exclusively against individuals convicted of certain enumerated offenses, voluntary departure can be—and is—applied to anyone, including individuals who would otherwise be eligible for discretionary relief such as non-LPR cancellation of removal.

a. Voluntary Return

While voluntary return is not considered a “formal” removal order like an expedited order of removal or a 238b order, it comes with consequences that may be just as severe, particularly for individuals who have been living in the United States without authorization for over six months and who are subject to bars on reentry. It may,

Cited in USA v. Peralta-Sanchez, 2017 WL 2000000, No. 14-50393, archived on February 2, 2017

2017 Peralta-Sanchez Apprehended and Deported in the Interior of the United States

however, have benefits for some individuals, as it preserves the ability to apply for relief in the future.³⁵⁹

Voluntary return is supposed to be given only at the request of the non-citizen after he or she has been made aware of all its consequences—notably, that a person who accepts voluntary return cannot make any claims for relief.³⁶⁰ For individuals who would be eligible to apply for relief from removal and might be able to formalize their status in a hearing, voluntary return is often *not* to their benefit, and it appears that this information is not communicated to individuals by immigration enforcement officers.³⁶¹ Moreover, although voluntary return is not a formal removal order, in practice it has many of the same consequences. In particular, individuals who have lived in the United States for more than one year without authorization are subject to a 10-year inadmissibility ban on reentry;³⁶² individuals who have lived in the United States for over 180 days but less than one year are subject to a 3-year ban.³⁶³ For parents of U.S. citizen children, the separation is often longer because a person applying for a waiver and to adjust status must wait until the “qualifying relative” is 21 years of age.

Veronica V. came to the United States when she was 19. She married a U.S. citizen and has three U.S. citizen kids, all of whom live in Texas; she had lived in the United States for 20 years. In 2013, Veronica and her husband were driving to a hardware store near San Antonio when they were pulled over by local police who asked her for identification. Veronica, who was the passenger, did not have any documentation with her, and the police officer asked if she was undocumented. She explained that she was in the process of applying to adjust her status, but the officer called ICE, which came to the scene two or three hours later. “I asked the immigration officer if this was correct, what the police officer had done. He said, ‘No, because you weren’t driving, you have no criminal history, and he has no reason to have done this,’” Veronica recalls, “but since the police officer had called, [the immigration officer said] he had to take me in.”³⁶⁴ Veronica’s husband immediately called an immigration attorney and went home to collect the paperwork showing that Veronica was applying for immigration status. Although the attorney immediately contacted ICE, Veronica was not allowed to speak to the

attorney or her husband. Instead, she was presented with a voluntary departure order:

I told [the ICE officer] I wasn’t going to sign because I wanted to see the judge. But he was really mean, and he kept insisting and insisting. When 3 hours had passed, I told them I wasn’t going to sign anything until my husband arrived so he could show the papers [that showed] we were applying for my status. And then the officer came back and said your husband came and showed me the papers, and the papers he showed me are useless to me. I told him I wanted to talk to my husband. He said, “You are not going to talk to your husband. What you are going to do is sign this *salida voluntaria* or you are going to jail.” That is when I signed because they said there were bad people in jail who could do something to hurt me.³⁶⁵

Although the voluntary return statute allows up to 120 days for the individual to leave the United States, 24 hours later, without the chance to speak to her children or husband or attorney, Veronica was taken to Nuevo Laredo, Mexico. She is trying to apply for a waiver so she can return to her children sooner, but for now, Veronica remains in Mexico, separated from her young daughters. Says Veronica, “Every day I remember the day that they stopped me. It’s been a year and it hurts a lot. My family, my husband, we have always been very close. It hurts me so much to be separated from them.”³⁶⁶

Emmanuel M., a 25-year-old from Mexico, came to the United States as a young child and lived in California continuously for approximately two decades. In 2012, as he was leaving his house in San Diego for work, he was stopped by ICE officers. “I kept on asking what was happening and they said they could not tell me.”³⁶⁷ The officers gave him several forms to sign, which turned out to be voluntary return, and said he would be released. Emmanuel says, “I was happy because I thought I was going to leave. I signed, they put me back in the cell, and then a few hours later they took me to Tijuana.”³⁶⁸ Emmanuel had not been back to Mexico since leaving as a small child. After two years, Emmanuel says he missed his family too much (“I’d never been this far away from them,” he says) and

tried to cross back to the United States for Thanksgiving but was arrested, detained, and driven to Arizona to be summarily deported. He now works for a call center in Tijuana, Mexico, and is applying for a U visa from Mexico (he was the victim of a violent hate crime prior to his deportation). “I would love to go back,” he said. “My whole family is there.”³⁶⁹

Laura S. came to the United States from Mexico as a teenager with her young son and was murdered soon after her deportation to Mexico. According to a complaint filed on behalf of her mother and children, Laura had two children with an increasingly violent and abusive man while living in Texas. Laura was able to get a protection order against him from local police in Texas, but he continued to threaten her until he returned to his native town in Mexico, according to Laura’s family’s attorney, and joined a drug cartel. In June 2009, several years after Laura first came to the United States, Laura and her cousin were stopped by police for an alleged traffic violation; Laura was turned over to DHS. Laura begged the officers not to deport her, as she feared being attacked by her ex-partner

if deported to Mexico, and because she had three young children in the United States, one of whom was scheduled for surgery at a U.S. hospital. Instead, the complaint alleges, DHS officers coerced her to sign a voluntary departure form and dropped her at the bridge to Reynosa, Mexico. Her ex-partner murdered her soon after her return to Mexico.³⁷⁰

Immigration attorney Marisol Pérez says she and her colleagues routinely see cases where the individual was coerced into signing a voluntary departure order without understanding its consequences. Immigration officers, she says, tell people “either you sign or you are going to jail.” Even individuals who already have attorneys are vulnerable when threatened, in the absence of a lawyer, with jail: “We don’t have control over what happens when we are not there, in the back room. The officers should be giving rights advisals . . . Instead, they tell them, you want your rights, you are going to go to jail.”³⁷¹

In June 2013, the ACLU filed a lawsuit in Southern California challenging the coercive use of voluntary departure and immigration officials’ failure to apply the necessary procedural safeguards.³⁷² For example, the lawsuit alleges that officers gave false information to non-citizens about their ability to stay in the United States and their ability to apply to return once they were in Mexico, and also used a misleading form that failed to notify individuals that taking voluntary departure meant they cannot apply for relief and lose the procedural protections that apply in court. Named plaintiffs in this lawsuit include:

- Isidora Lopez-Venegas, the mother of an autistic U.S. citizen son, who was arrested by CBP and told that if she refused to sign for voluntary departure, she could be detained for several months, thereby separating her from her autistic son. The agents further misinformed Ms.



Yadira Felix, with her grandmother Candelaria Felix, at their home in San Diego, California. Yadira, who has mental disabilities, was effectively kidnapped by CBP and left in Mexico.

Lopez-Venegas that it would be easier for her to obtain legal status through her son once in Mexico; in fact, her son's age made this impossible for years to come. She and her U.S. citizen son had to leave the United States after she was coerced into signing the form.

- Yadira Felix, appearing in the case through her grandmother, Candelaria Felix, has significant cognitive disabilities. Yadira Felix had lived in the United States for over 20 years when Border Patrol agents approached her at a bus stop, drove her to the U.S.-Mexico border, and pushed her, crying, across to Mexico.
- Marta Mendoza, appearing in the case through one of her six U.S. citizen daughters, Patricia Armenta, has bipolar disorder, as does her 16-year-old son, who depends on Ms. Mendoza for support. She had lived in the United States for over 30 years when police arrested her on suspicion of shoplifting and took her to a jail where ICE officers coerced her into signing the voluntary departure form.
- Ana Maria Dueñas, a mother and grandmother of U.S. citizens, who was arrested by ICE while waiting for a bus in California. A Border Patrol agent, knowing she spoke only Spanish, provided her with a voluntary departure form in English; incorrectly told her that she could *not* obtain relief from an immigration judge in the United States, but could easily and quickly obtain legal status once in Mexico; said she would be detained for months if she did not sign the form; and failed to allow her to speak with an attorney or the Mexican Consulate.

In August 2014, the ACLU reached a settlement with DHS, which allowed the named plaintiffs to return to the United States and their families and required DHS to make changes to its practices in using voluntary return in Southern California. However, the CBP practices and misconduct documented in Southern California are similar to those reported by immigration attorneys and non-citizens coerced to accept voluntary return in other parts of the country.

b. Administrative Removal Under 238b

Individuals all over the United States can also be deported without a hearing if they have particular criminal convictions. Under the INA, undocumented individuals who are convicted of an aggravated felony³⁷³ or a crime involving moral turpitude³⁷⁴ are subject to administrative removal, a summary removal procedure that bypasses the courtroom and allows immigration officers to determine that a person has been convicted of a qualifying offense and is removable. The determination that a particular conviction actually is an aggravated felony can require complex legal analysis and attention to the changing state of the law; it is a determination that can be erroneously made even by immigration judges but is exponentially more prone to error when undertaken by someone without legal training. Despite the limitations of a 238b proceeding, there are still some required safeguards that advocates report are too often ignored.

In 1990, when he was eight months old, Ricardo S. A. came to the United States from Mexico with his family. The next time he left the United States was at his deportation at age 20, in 2009. Growing up in Nevada, Ricardo completed the eleventh grade, played soccer for his high school, worked at night, and had planned to marry his U.S. citizen girlfriend. But when he was 19, Ricardo pleaded guilty to conspiracy to commit burglary, a misdemeanor for which he spent two days in jail and was originally sentenced to probation and a suspended sentence of one year.

On September 16, 2009, a few months after his conviction, Ricardo checked in with his probation officer and was arrested by immigration officials. "I explained to them right away about my case. I said, 'Let me see an immigration judge,'" Ricardo recalls.³⁷⁵ In fact, Ricardo *did* have the right to see an immigration judge and to have a regular immigration hearing, which would have allowed him to make claims to remain in the United States or at least to avoid a formal removal order. Instead, ICE issued a Notice of Intent to Issue a Final Administrative Removal Order and claimed that Ricardo was convicted of an aggravated felony.

At the time of his deportation, Ricardo's misdemeanor conviction was clearly not an aggravated felony under Ninth Circuit law, which governed his proceedings.

However, alone in detention, without an attorney's assistance, 20-year-old Ricardo did not know what his rights were or that he had not been convicted of an "aggravated felony." Initially, Ricardo insisted that he wanted to see a judge and checked off the box on the notice issued by ICE, indicating that he wanted to contest the removal order. "I explained I wanted to fight [my case]," recalls Ricardo. "The [ICE] officer said, 'You have no chance.' It was my first real time incarcerated and I was scared. I signed because she told me you don't have a chance to win because of your crime. She made it seem like I was wasting my time, and I would be incarcerated for no reason."³⁷⁶ Having been convinced by the ICE officer—who was not a lawyer or a judge—that his crime was an aggravated felony and appeal was futile, Ricardo withdrew his request for review on September 21, 2009.

However, after learning that Ricardo had been ordered deported because of his conviction, on September 29, 2009, Ricardo's defense attorney filed a motion for resentencing to lessen Ricardo's sentence so that it would indisputably be recognized that his crime was not an aggravated felony.³⁷⁷ But on September 30, 2009, Ricardo was deported back to Mexico, where he had no immediate family and which he had no memory of, having left as a baby. The Nevada state court subsequently reduced Ricardo's sentence to less than a year and noted that it might even have recommended diversion, if the immigration consequences had been presented at that time. All this came too late for Ricardo, who had been deported and remains separated from his

Ricardo came to the United States as a baby but was deported back to Mexico when an ICE officer incorrectly determined he had committed an "aggravated felony."

family while they are unable to leave the United States while they apply for status.³⁷⁸

Jose Gonzalez-Segundo came to the United States from Mexico in the 1960s as a young child; he has five U.S. citizen children, all born in Texas. From the third grade, Jose worked as a fruit picker alongside his mother and never learned to write in English or Spanish. In 2001, Mr. Gonzalez-Segundo was convicted of possession of a controlled substance, which, at the time, was considered an aggravated felony in the Fifth Circuit.³⁷⁹ While in prison, Mr. Gonzalez-Segundo was interviewed by an immigration officer in a mixture of Spanish and English, as the officer spoke limited Spanish. Mr. Gonzalez-Segundo later testified that the officer gave him only one of the two required pages and told him to sign it in order to be released. He could not read or understand the pages, nor did the officer translate them for him. He was deported to Mexico, which he had not returned to in more than 35 years.³⁸⁰

In both these cases, individuals in criminal custody relied upon ICE officers to make a complex legal determination and also to educate them on their rights. The threshold question as to whether a person was convicted of an aggravated felony and can even be processed through administrative removal (238b) is complex, and given the complexity and the volatility of the law on what constitutes an aggravated felony, this high-stakes question should not be delegated to an immigration enforcement officer. But the procedure is also problematic because it denies individuals the opportunity to apply for most forms of relief, and takes place while the individual is in criminal custody and without information on his or her rights in the immigration system.

Placement in 238b is not mandatory; a DHS officer can choose to place the individual in regular court proceedings where an immigration judge can undertake the more complex analysis as to whether a person has a conviction for an aggravated felony and whether he or she is nonetheless eligible for relief. For many non-citizens in 238b proceedings, the only available relief they will hear about is withholding of removal or CAT if the individual fears being removed to his or her country of origin. But that is not the only form of relief the individual may be eligible for: he or she may be eligible for a U or T visa or

may not even be removable. But while immigration officers in 238b are required to refer a person who claims fear of removal for a reasonable fear interview, they are not required to inform the individual of what other forms of relief he or she is entitled to.

In 1989, Ofelia H. came to the United States, where she raised her children and later adopted a U.S. citizen whose parents had been murdered (while also raising two of her grandchildren.) For years she worked at a factory using what she believed was a fake Social Security number so she could work and support her family. In 2007, it emerged that the Social Security number was real; she served eight months for identity theft. At the end of her sentence, she was transferred to immigration custody. “I was right at the exit of the jail and my daughter was waiting for me—I could see her,” she recalls. “Immigration handcuffed me without telling me why.” Ofelia was taken to a different immigration detention facility, where she was processed through administrative removal (238b) as an “aggravated felon” and deported. The forms were in English and Ofelia does not recall being given any information about her rights. After her deportation, her adopted daughter, then four years old, joined her in Mexico but could not adjust to life there; Ofelia and her adopted daughter therefore returned to the United States in 2008. Even at the time of her deportation, Ofelia was in fact eligible for a U visa after being attacked with a deadly weapon while working at an apartment complex, but without a lawyer and any assistance she was unable to apply and attempt to stop her removal. She is now working with an attorney and in the process of applying for a visa.

Although reliance on these summary removal tools has become routine—even the default, in many circumstances—immigration officers still have discretion to place a person in formal removal proceedings before a judge. In cases where the person has obvious equities—long residence and/or family in the United States, for example, or where it may be difficult to determine whether the individual has a claim (e.g., an individual with a severe mental disability, someone with a minor conviction that may or may not be an aggravated felony, etc.)—it makes sense to allow them to present their case in court where a judge can make those critical determinations. Placing a person in formal removal proceedings triggers

important procedural rights and many more opportunities to apply for relief from removal. It is unclear how often immigration officers use this authority, but there are certainly many cases where officers do not use their discretion to refer someone to a full hearing and instead condemn them to immediate deportation, which can have irreparable consequences for the individual and his or her family in the United States.

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D. CHILDREN ARRIVING ALONE

“We are talking about large numbers of children, without their parents, who have arrived at our border—hungry, thirsty, exhausted, scared and vulnerable. How we treat the children, in particular, is a reflection of our laws and our values.”

—Secretary Jeh C. Johnson, U.S. Department of Homeland Security³⁸¹

Being arrested, detained, interrogated, and deported by an immigration officer can be a harrowing experience. For children who come to the United States alone after a dangerous journey during which many are victimized, the need for additional protections when they arrive is acute. In recent years, the disastrous human rights situation in Central America—in Honduras, Guatemala, and El Salvador, in particular—has been reflected in the escalating number of children arriving in the United States. As recently documented by the United Nations High Commissioner for Refugees, the majority of these children are escaping violence, lawlessness, threats, and extortion,



A child and her family in their gang-plagued neighborhood in Tegucigalpa, Honduras.

and may have strong claims to protection under human rights law.³⁸²

In the past few years, the number of children arriving in the United States to seek protection (and, in some cases, to be taken care of by family) has risen dramatically, with an estimated 90,000 arriving in the United States in FY 2014.³⁸³ Recognizing the swelling numbers of children arriving alone and the violence they are fleeing, President Barack Obama declared the unfolding crisis to be a humanitarian situation;³⁸⁴ but at the same time, the response from the Obama administration and many in Congress has been to seek to dismantle, rather than reinforce, protections for non-citizen children seeking help in the United States.

Arrival at the U.S. border is not the end of the story. While Central American children are supposed to be brought before a judge, in some circumstances they are instead removed without a hearing, in violation of federal law,³⁸⁵ and seemingly without consideration for the humanitarian catastrophe into which they are being returned. For Mexican children, this is the status quo: unless (and even if they meet additional screening criteria, the majority of Mexican children are quickly returned to Mexico without the opportunity to see a judge. As such, these children are often treated not as kids in need of protection, but as a problem to be removed.

1. Legal Background

For years, unaccompanied children³⁸⁶ were regularly turned away at the U.S. border; if they did make it inside the United States and were apprehended by immigration officers, they were detained by the Immigration and Naturalization Service³⁸⁷ in adult detention facilities.³⁸⁸ In 1997, after over a decade of litigation, the *Flores v. Reno* settlement agreement (“the Flores settlement”) created nationwide standards on the treatment, detention, and release of children.³⁸⁹ The agreement requires the federal

government to provide unaccompanied children with basic necessities such as drinking water and medical assistance; to keep children separated from non-related adults; and to release children from immigration detention as soon as possible. If no release option is immediately available, children must be placed promptly in the “least restrictive setting” that is “appropriate to the minor’s age and special needs.”³⁹⁰

The Flores settlement marked the beginning of the U.S. government’s recognition (now unfortunately in decline) that unaccompanied children are entitled to due process rights. In particular, all unaccompanied children must be given (1) Form I-770, Notice of Rights and Final Disposition, which informs children of their rights and options; (2) a list of free legal services; and (3) an explanation of the right to judicial review in court.³⁹¹ A subsequent lawsuit, *Perez-Funez v. INS*, also established that unaccompanied children must be advised by DHS of their right to a hearing before they are presented with a voluntary departure form.³⁹² Children from Mexico and Canada must be given the *opportunity* to consult with an adult friend or relative, or a legal services provider, before accepting voluntary departure; this consultation is a mandatory prerequisite for children from countries other than Mexico and Canada.³⁹³ Once in immigration court, children can apply for several forms of relief from removal, including asylum and Special Immigrant Juvenile (SIJ) Status.³⁹⁴

In the years following *Flores* and *Perez-Funez*, Congress developed additional safeguards for unaccompanied children apprehended and detained in the United States. Notably, the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 codified that children arriving alone in the United States cannot be expelled through expedited removal,³⁹⁵ and the Homeland Security Act of 2002 transferred responsibility for unaccompanied children from the INS to the Office of Refugee Resettlement (“ORR”) within the U.S. Department of Health & Human Services (and thus outside of the newly formed Department of Homeland Security).³⁹⁶ This move provided additional protections for children awaiting an immigration hearing. Although human rights advocates have continuously found that the agencies that apprehend kids (DHS) and hold them during their hearings (ORR) have failed to fully implement the Flores settlement

agreement,³⁹⁷ by taking kids out of adult detention facilities and providing them with necessary social services, this system is significantly more rights-protective than the previous system and the existing adult system.

These humanitarian protections for children are necessary in and of themselves, given children’s inherent vulnerability and susceptibility to abuse and coercion.³⁹⁸ But these protections have also proved instrumental in safeguarding children’s legal rights in court. Detention has a strong coercive effect, so removing children from detention as soon as possible is important, not just to avoid unnecessary harm and trauma, but also to protect their rights to seek relief.

The experiences of Kevin G. and his brother Javier illustrate the negative impact of detention on a young non-citizen’s ability to pursue asylum, even when they have a bona fide claim. Kevin G. fled gang violence in Honduras, leaving home for the United States at age 16 and traveling by himself for most of the journey. “I would not want my brothers to travel like that; I don’t want them to go through what I did,” he told the ACLU.³⁹⁹ He was arrested crossing into the United States and, as a minor from Central America, placed in removal proceedings and housed in a shelter in Los Angeles. His brother Javier, who had been attacked with a machete by a gang—the same gang that threatened Kevin—when he refused to join them and participate in murders, followed Kevin in 2012; Javier was 23. As an adult, Javier was placed in a detention center where he spent several months waiting for an interview with an asylum officer. Finally, Kevin says, his brother decided to accept deportation rather than wait

Sixty-four percent of Mexican children coming alone to the United States have international protection claims according to the UNHCR.

in detention; Kevin says that soon after Javier returned to Honduras, he was murdered by the gang he had originally fled.⁴⁰⁰

The safeguards that the Flores settlement, *Perez-Funez*, and the Homeland Security Act initiated for unaccompanied children—diversion from detention and the right to a hearing—are essential to ensure that children like Kevin are able to present their cases and defend their rights. But these protections are triggered only when (1) a child is correctly identified as an unaccompanied minor and (2) the border officers who apprehend and question the child follow the law and ensure he or she is referred to the alternate ORR system and placed in formal removal proceedings. Unfortunately, this is not always the case.

2. Accessing the Protections of the System

While the ORR system is designed to be child-centered, the Border Patrol stations are not.⁴⁰¹ Even as decades of litigation eventually removed children from long-term detention in adult facilities, children continue to face abuse and threats while in short-term adult detention. In June 2014, a complaint to the DHS Office for Civil Rights and Civil Liberties and the Office of Inspector General (“CRCL/OIG complaint”), filed by several organizations including the ACLU, documented 116 cases of abuse by CBP against children, ages 5 through 17, including shackling, rape, death threats, and denial of medical care.⁴⁰² The investigation is ongoing, but the complaints raised are not new.⁴⁰³ It should come as no surprise, then, that some children, like adults, may forfeit their rights while in CBP custody—for example, by saying they are adults, have no fear of being deported, or want to be returned to their country of origin. In such an environment, it is unlikely that children would feel comfortable disclosing sensitive information about their lives, their families, or the violence they have fled.

The protections for children traveling alone are not automatically activated; often, children must claim those protections by volunteering personal information about themselves—starting with their age—without knowing what the benefits or consequences are of providing that information. Some children will be misidentified as adults,

Somers found 56 percent of repatriated Guatemalan children were misidentified as adults, detained in adult U.S. facilities, and deported without a hearing.

either due to their appearance or their own misstatements. For example, Maria, a 15-year-old Mexican girl deported to Agua Prieta, Mexico, was trying to reunite with her father in the United States when she was apprehended by Border Patrol; she told the officers that she was 19 years old “because I thought they would deport me easier and quicker [as an adult].”⁴⁰⁴ Mexican immigration staff in Nogales, Sonora, Mexico, reported that they had frequently seen kids who were presumed to be adults while in CBP custody.⁴⁰⁵

In 2012, attorney Aryah Somers interviewed unaccompanied children who had been repatriated to Guatemala. In one three-week observation period alone, Somers found that 34 of the 61 unaccompanied children who were repatriated had been classified as adults and, consequently, had been detained in adult detention facilities in the United States; two of those children, Ms. Somers said, “were immediately identified as potentially eligible for Special Immigrant Juvenile Status.”⁴⁰⁶ Some children claimed to be 18 or older out of “fear, pressure from immigration officers, misinformation from the *coyote* or *pollero* that children are treated worse than adults in the U.S., and a belief that they would be detained until their 18th birthdays.”⁴⁰⁷ Misidentified as adults, these children were not only detained in adult facilities, in violation of federal law, but were also deprived of the opportunity to apply for humanitarian protections and other forms of relief from deportation, or even to see a judge or consult with a lawyer.⁴⁰⁸

It is unclear to what extent CBP officers are trained in the significance of the procedural protections in place



A Border Patrol agent with Alejandro, 8, who traveled by himself across the Rio Grande.

*Cited in USA v. Peralta-Sanchez
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for children or why a valid waiver of those rights is so significant. But in some cases, it appears that border officials are deliberately interfering with those rights. For example, according to the CRCL/OIG complaint, CBP accused a 16-year-old of lying about his age, then strip-searched him and threatened that he would be made “the wife” of a male detainee for lying about his age.⁴⁰⁹ In another case documented in the same complaint, CBP officials confiscated a 16-year-old’s birth certificate, and instead of immediately referring him to ORR, attempted to force him to sign a form that he believes was for his deportation; when the child attempted to read the form, “officials tore up the document, offered a new one, and again told him to sign.”⁴¹⁰

Even when children are properly identified as minors and specifically request to see a judge, they are not always referred into ORR care and to the immigration court for a hearing. Deyvin S., a teenager from Honduras, had been

in the United States for three weeks when he was arrested by Border Patrol officers while walking near a checkpoint in Brownsville, Texas.⁴¹¹ He says he repeatedly asked if he could speak to a lawyer and that he wanted to see a judge. Deyvin says the officers told him “it was impossible that a judge or lawyer could do anything for me.”⁴¹²

While legal developments since the 1980s ensure that many children will be referred for a hearing, regardless of what happens in their interview with border officials, for Mexican children this initial interaction with Border Patrol is the most consequential. Unlike children from “noncontiguous countries,”⁴¹³ Mexican children are not automatically referred to an immigration judge and can be returned “voluntarily” upon apprehension in the border area. For Mexican children, then, this first interaction with border officials can make a decisive difference, leading to either the chance to be heard in court or immediate repatriation.

3. Mexican Children and the TVPRA

Mexican children are not exempt from the violence and other international protection concerns that plague children in Central America; a recent UNHCR study, which included interviews with 102 unaccompanied Mexican children, found that 64 percent had potential international protection needs, particularly from violence and coercion to assist smugglers.⁴¹⁴ Similarly, Refugees International recently recorded that in Mexico, violent activities such as kidnappings and extortions are at “their highest levels in more than 15 years,” and found that children in particular have been victims of kidnapping, assassination, extortion, and disappearances.⁴¹⁵

In the years after the Flores settlement and the Homeland Security Act of 2002, despite heightened safeguards for unaccompanied kids, Mexican children continued to be routinely turned around at the border, just like most adults, without any evaluation of the risks they face if repatriated. Partly in response to this ongoing problem, Congress passed the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), which strengthened some of the *Flores* and HSA provisions on children’s rights in custody while also adding additional screening requirements for Mexican children.

The TVPRA requires that any border officer who apprehends an unaccompanied Mexican child must interview the child and confirm that he or she (i) is *not* a potential victim or at risk of trafficking, (ii) has *no* possible claim to asylum, and (iii) can (and does) voluntarily agree to go back home.⁴¹⁶ Only if all three criteria are

UNHCR found that most interviews involved “merely perfunctory questioning of potentially extremely painful and sensitive experiences for children.”

met, and the CBP officer is convinced the child has no potential asylum or trafficking claim and also has the capacity to consent to his or her return to Mexico, may the unaccompanied Mexican child be repatriated without a hearing.⁴¹⁷ This places considerable authority in the hands of the CBP officer, who must screen the child and determine whether or not he or she can be removed. To ensure that eligible Mexican children are able to benefit from the TVPRA’s protections, the statute requires that “[a]ll Federal personnel . . . who have substantive contact with unaccompanied alien children” must receive “specialized training,” including training in “identifying children who are victims of severe forms of trafficking in persons, and children for whom asylum or special immigrant relief may be appropriate.”⁴¹⁸ But fundamentally, the TVPRA as written presumes that an unaccompanied Mexican child cannot be immediately returned to Mexico and is in a vulnerable position; the required screening places the burden on the examining officer to determine that a child can safely be repatriated and is able to understand that decision. In practice, however, the burden is on the child to speak up and be heard while in detention and while being interviewed by a law enforcement officer. For Mexican children, removal has become the default.

4. The TVPRA in Practice

When the TVPRA was introduced, advocates expected a deluge of unaccompanied Mexican kids into temporary shelters within the United States; in fact, this never happened. According to CBP statistics on FY 2013 apprehensions, 17,240 Mexican unaccompanied children were apprehended at the border;⁴¹⁹ similarly, figures from official Mexican immigration sources estimate that in 2013, 14,078 Mexican unaccompanied children were repatriated from the United States.⁴²⁰ And yet, during the same time period, ORR reported only 740 Mexican unaccompanied kids in its custody.⁴²¹ This figure reflects all Mexican children in ORR custody, including those apprehended far from the border anywhere in the United States, and so likely significantly overestimates the number of Mexican unaccompanied children in ORR custody. Even so, these figures suggest that the overwhelming majority of Mexican children arriving alone—around 96 percent—are turned around when CBP apprehends them at the border.

UNHCR has similarly estimated that 95.5 percent of Mexican children are returned without seeing a judge.⁴²²

Thus, despite the additional protections the TVPRA was supposed to enable, Mexican unaccompanied children continue to be turned away from the United States. The additional screening requirements operate like a sieve, creating procedural and substantive hurdles for Mexican children to overcome before they can get before an immigration judge and win relief. At the substantive level, under the TVPRA, a Mexican child's right to a hearing is triggered *only* if he or she presents an asylum- or trafficking-based claim, or if the government chooses to pursue a formal removal order (as opposed to voluntary return). Other valid claims for relief will not get a Mexican child arrested in the border zone into court. For example, Arturo, a 15-year-old from Tabasco, Mexico, was attempting to come to the United States and reunite with his mother and two U.S. citizen siblings when he was caught by DHS officers in Arizona. His father had abandoned him in Mexico: "There is no reason for me to stay [in Mexico] if my dad doesn't want me here."⁴²³ Because he had been abandoned by at least one parent, Arturo might have qualified for Special Immigrant Juvenile status (SIJ) and, if successful in court, been able to remain in the United States and one day adjust his status. But even if Arturo were eligible for SIJ, he would not have the opportunity to present that claim because it does not trigger a right to go to court and be heard under the TVPRA.⁴²⁴ By contrast, non-Mexican children arrested at the border with the exact same claims are not pre-screened by CBP and will have the opportunity to raise *any* claim for relief in their removal proceeding. As such, the TVPRA screening effectively narrows the grounds of eligibility for unaccompanied Mexican children to enter and remain in the United States.

Yet even children who *are* eligible under the TVPRA to enter the country and see a judge are routinely denied that opportunity when CBP officers fail to conduct the TVPRA



Sam Frost

Tijuana, Mexico. Stenciled on the Mexico side of the fence between the United States and Mexico are families being lifted to freedom by balloons.

screening. Of the 11 Mexican unaccompanied children the ACLU interviewed in Sonora, Mexico, ranging in age from 11 to 17, only one, Hector, said that he had been asked any questions about his fear of returning to Mexico. Hector recalls: "I asked if there was any benefit and the *migra* said, 'No, there is probably no benefit. You just crossed through the desert so you're going to be deported.'"⁴²⁵ Brian, an unaccompanied child from Nogales, Mexico, whose father is in Tucson, said he had been trying to enter the United States since age 14 but in his three attempts, he had never been asked about his fear of returning to Mexico or if he wanted to see a judge.⁴²⁶

Even when Mexican children attempt to explain their need for protection, in at least some instances border officials apparently refuse to believe them. For example, 16-year-old M. E. is a Mexican girl who sought asylum in the United States after her family received multiple death threats and demands for money from a gang, which she believes led to her brother's disappearance in early 2014. M. E. recalls, "Then they said that if we could not negotiate with money we may as well buy bulletproof vests for the whole family because they were going to kill us."⁴²⁷ According to what M. E. related to her attorney, and as explained in the CRCL/OIG complaint, an immigration official asked M. E., "What right do you have to come to our country?" When M. E. tried to explain the danger she fled, according to her

statement and the CRCL/OIG complaint, “the official told her she would not get through with her *pinche mentira* [fucking lie] because he knew how to detect a liar like her.”⁴²⁸ M. E. continually returned to the U.S. border to seek asylum and was returned to Mexico multiple times before she was ultimately allowed into the United States and transferred to an ORR shelter.⁴²⁹

Beyond requiring affirmative screening for asylum and trafficking claims, the TVPRA requires that immigration officials ensure that children voluntarily choose to go back to the Mexico, but children interviewed by the ACLU did not appear to have been subject to this inquiry. Jesús, a 16-year-old unaccompanied Mexican child, said, “They just put [the form] in our face and said sign. They wouldn’t give us any information. . . . They didn’t give us [the] opportunity to ask anything; they just called us up to sign.”⁴³⁰ Hiram, 11 years old, and his brother Pepe, 16 years old, said they had not been asked anything except their age when Border Patrol agents detained them.⁴³¹ Federal regulations and the Flores settlement further require that any child under the age of 14 be read the I-770 form in a language that he or she understands.⁴³² This did not appear to take place for Hiram.

In interviews conducted by the ACLU, it was clear that the children had no idea what rights—if any—they had, or what was happening in the process. Similarly, in interviews by the Center for Public Policy Priorities (CPPP) with children who had been turned away at the U.S. border, some children did not even understand that they had been in the United States when arrested and removed.⁴³³ Mexican immigration staff told the ACLU that in some cases, Central American children claim to be Mexican, not knowing that there are additional protections in place for Central American children at the moment.⁴³⁴ In its study, CPPP regularly encountered such children in Mexican shelters; one child, Daniel, had fled gang violence in Honduras only to be quickly turned around and sent to Mexico by CBP without being asked about his fear of returning.⁴³⁵

In the absence of a designated professional advocating for the child in CBP custody or providing any meaningful information to the child about their rights, the burden is on the child, who has just made a difficult and dangerous journey, to volunteer information. That children would be

afraid or hesitant to volunteer information to an armed U.S. law enforcement officer, while in detention and without any assistance (and often without an interpreter), is unsurprising. And yet, this is the context in which children, arriving alone, are required to vindicate their rights or else, if Mexican, be quickly deported. Responding to proposals to put Central American children through the same screening and summary removal system as Mexican children are, Lawrence Downes of The New York Times wrote,

There are several reasons why this is a terrible idea. It starts with handing the responsibility for humanitarian interviews to a law-enforcement agent with a badge and a gun, whose main job is to catch and deport illegal border crossers, and who may not even speak Spanish. This is not the person you want interviewing a traumatized 15-year-old Honduran girl to find out whether the abuse she endured at home or the rape she suffered en route qualifies her for protection in the United States. . . . It would be criminal to subject Central American refugees to the same system. They need lawyers and victim advocates, clean, safe shelter and the chance to be heard in court.⁴³⁶

In addition to ACLU interviews with unaccompanied children conducted in Sonora, Mexico, two thorough investigations by the UNHCR and Appleseed into TVPRA compliance across the entire southern U.S. border demonstrated that screening failures are widespread and routine.

The 2013 UNHCR investigation included in-person observation of TVPRA interviews at four locations and was conducted at the request of the federal government. According to this report, 95.5 percent of unaccompanied Mexican children apprehended by CBP are returned across the border—not because they did not have claims but because “CBP’s practices strongly suggest the presumption of an absence of protection needs for Mexican UAC [unaccompanied children].”⁴³⁷ This is the exact opposite of what the TVPRA was designed to do—namely, to put the burden on U.S. immigration officials to show that a child would *not* be in danger if removed from the United States.

CBP is unable to complete this mandate, however, as most agents appear unfamiliar with many of the issues

they are screening for—risk of trafficking, asylum claims, and ability or inability to consent to voluntary return. The mandatory screening forms, the UNHCR found, were not only inscrutable to the children, but also to the officers doing the questioning, often in public settings and sometimes without an interpreter. Overall, the investigation concluded, “The majority of the interviews observed by UNHCR involved what was merely perfunctory questioning of potentially extremely painful and sensitive experiences for the children. And in the remainder, the questioning, or lack of questioning, was poorly executed.”⁴³⁸

The “virtual automatic voluntary return” of Mexican unaccompanied children, the UNHCR found, was not due to officer callousness but a lack of education and systematic failures to understand and implement the TVPRA screening. According to the UNHCR report, CBP officers failed to ask several (or sometimes any) of the required screening questions; sometimes conducted an interview without an interpreter; by default, interviewed children in public places about sensitive issues; had no training in child-sensitive interviewing techniques; and did not understand the legal background and rationale for the screening activities. In some cases, children were told to sign forms that had already been filled out.⁴³⁹

Perhaps most disturbingly, the investigation found that CBP officers do not understand what human trafficking means and are unable to identify child victims of human trafficking—which includes recruitment and coerced participation in the human trafficking industry. Although the U.S. Department of State recognized Mexico as one of the top countries of origin for victims of human trafficking in FY 2012, according to the UNHCR, “None of the agents or officers interviewed

said they had ever identified a child trafficking victim or one at risk of trafficking.”⁴⁴⁰ Rather, the UNHCR found, some officers expressed concern that they could not refer these children, who may have been coerced by gangs to participate as guides in the human trafficking industry, for criminal prosecution.⁴⁴¹

From 2009 to 2011, Applesseed interviewed children on both sides of the U.S.-Mexico border, as well as U.S. and Mexican government officers, and found similarly that the majority of Mexican children arriving alone are quickly returned due to significant failures in the TVPRA screening.⁴⁴² Applesseed found that the few unaccompanied Mexican children who *do* make it into the ORR system are

Mexican immigration office on the Mexican side of the border with Nogales, Arizona. Mexicans deported from the United States to Nogales, Mexico, are interviewed by Mexican immigration officers who assist them in their journey on to their hometown. Unaccompanied Mexican children are briefly held here before being transferred to shelters, which contact their parents or guardians to come and pick them up.



“A lot of [these children] should be asking for asylum in the United States; they’ve been abused before.”

children caught in the interior of the United States who cannot automatically be repatriated.⁴⁴³ Mexican children at the border, however, are inconsistently and inadequately screened under the TVPRA:

Roughly half of the children we interviewed [...] were not asked any questions that might elicit information about whether they have a credible fear of persecution upon return. Likewise, approximately half of the children stated that they were not asked any questions that would touch upon the trafficking indicators set out in the form. ... Even though Form I-770 explicitly states that “no [minor] can be offered or permitted to depart voluntarily from the United States except after having been given the notice [of their rights],” approximately three-quarters of the children we interviewed [...] stated that they were not informed of their rights. Notably, many children stated that they were never asked whether they wanted voluntary departure; they were simply told that they would be returning to Mexico.⁴⁴⁴

Mexican immigration officials in Sonora, Mexico, told the ACLU that while they see approximately 20 unaccompanied children deported to Nogales every day, it is extremely rare to find a child who has been before a judge.⁴⁴⁵ That Mexican children are rarely referred for a formal hearing does not mean that these children have no claims to relief. One Mexican immigration official who sees unaccompanied kids every day observed, “A lot of [these children] should be asking for asylum in the United States; they’ve been abused before.”⁴⁴⁶ Dr. Alejandra Castañeda, an investigator at the Mexican think tank El Colegio de la Frontera Norte, similarly observed that under the current

system, Mexican children face the same risks as Central American children but are quickly deported: “A lot of unaccompanied minors from Mexico share the same conditions of risk, of already being victims. They should be given a chance to prove that.”⁴⁴⁷

It is unclear what questions CBP officials are asking kids apprehended at the border—and what questions are actually required, under the TVPRA or by CBP policy, to effectuate the screening. Indeed, DHS has not promulgated regulations on the types of questions that should be included to screen for a trafficking or asylum claim, and it does not appear that DHS has developed any specific guidelines on the issue either.⁴⁴⁸ The UNHCR and Appleseed both found, however, that even the minimal forms that exist to screen for trafficking or asylum claims are either not used or are so formulaic and incomprehensible to a child that their utility is marginal at best.⁴⁴⁹

In addition to these predictable inconsistencies in screenings and referrals, DHS lacks regulations on how to assess whether a decision to return to Mexico and withdraw the application for admission is “independent” or voluntary—or whether the child, who may be as young as four years old, has the capacity to make that decision alone. Explaining this prong of the TVPRA, one reporter noted that the question has been reduced to this: “[C]an they decide on their own to turn around and go back home after making a long, scary journey by themselves? If the Border Patrol agent thinks the answer is yes, off they go.”⁴⁵⁰ Wendy Cervantes, Vice President of Immigration and Child Rights Policy at First Focus, observes, “[M]ost people would argue that no child should make that decision.”⁴⁵¹

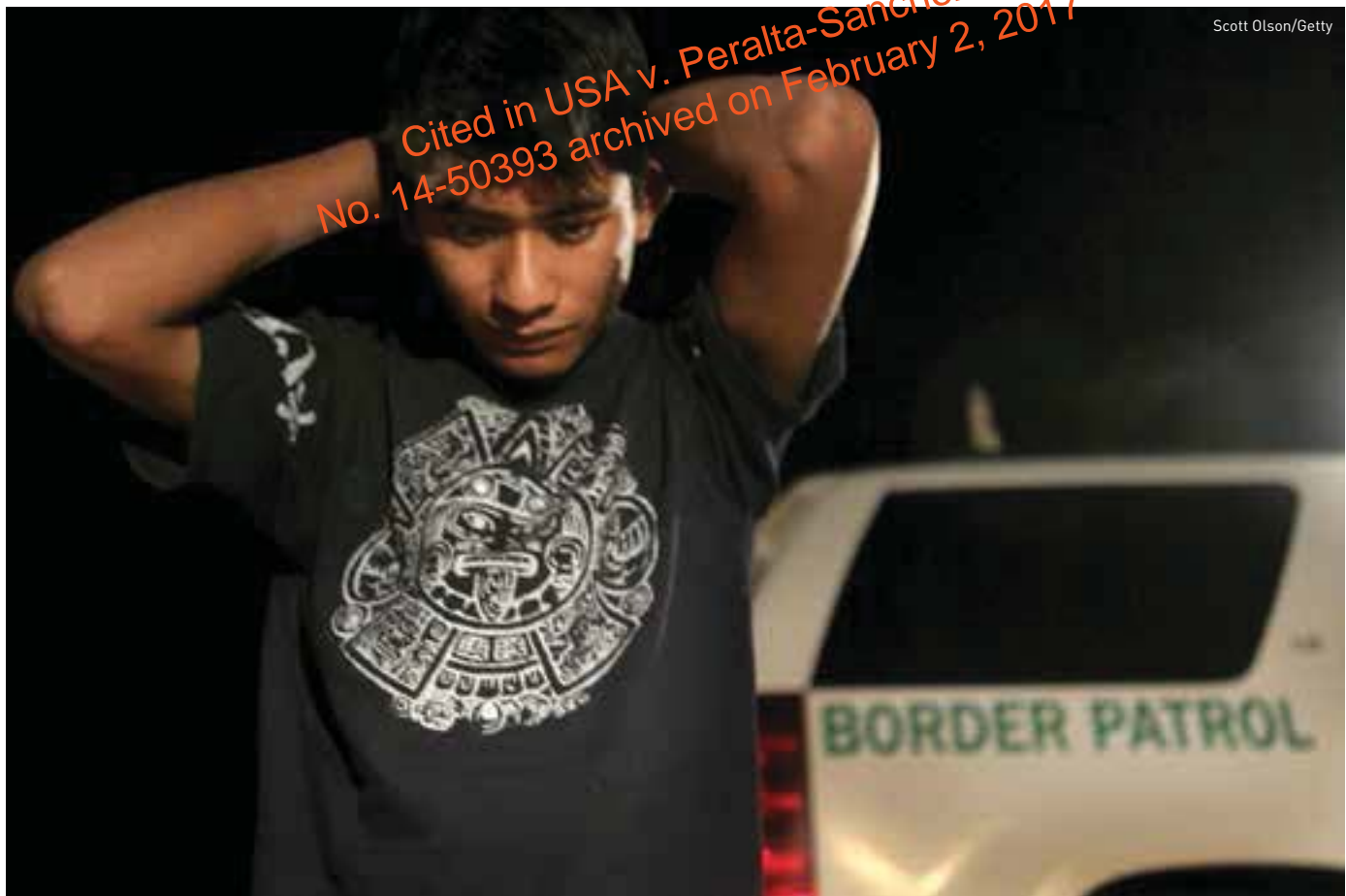
The existing regulations do require that all unaccompanied children, including Mexican children, be explained their rights and provided with a Notice of Rights and Disposition (Form I-770).⁴⁵² Mexican children are supposed to be given the *opportunity* to consult with a relative or free legal services provider prior to even being given the voluntary departure form⁴⁵³; in practice, this opportunity is often illusory. None of the children interviewed by the ACLU recalled being asked if they wanted to use the phone to call their families or to seek help from a lawyer; none said the I-770 form was read or explained to them; and while one was told he might be able

to see a judge, none were told that there were options for them except to return to Mexico.

CBP officers are supposed to use Form 93, a screening form to determine if the child is a potential trafficking victim or has an asylum claim. Applesseed notes this form is rarely used by CBP officers, but even when it is used, the form questions are formulaic and are not designed to help the agent draw out the details and history necessary to determine whether the child has a claim.⁴⁵⁴ The form includes no guidance or test for whether the child has the capacity to accept voluntary return, as required under the TVPRA. Only one child interviewed by the ACLU recalled being asked anything except for their name and, in some cases, their age, and while part of this may be attributable to the language barriers, it is also likely that the nature of the questioning—when and if conducted—did not suggest to the child that this was an opportunity to share their story.

“Informed consent” in this context has been reduced to a set of mechanical questions on a form that children interviewed were not given the chance to review, and which Applesseed found to be anyway facially inadequate.⁴⁵⁵ The whole rationale behind the TVPRA was to interrupt the practice of immediately returning Mexican children and to provide procedures that would ensure these children were screened for and made aware of their rights; instead, it appears that the TVPRA, as implemented by CBP, has done neither. Since the TVPRA went into effect in March 2009, Applesseed observes, Form 93 and the short accompanying memo constitute, to date, “the only significant change in practice adopted by the CBP in response to the TVPRA.”⁴⁵⁶ Nonetheless, in Applesseed’s assessment, “[n]either the memo nor the form itself could be characterized as ‘specialized training’ that would equip CBP officers to deal with and screen detained Mexican minors. Senior CBP officials do not contend otherwise.”⁴⁵⁷

An undocumented immigrant apprehended in the desert near the U.S.-Mexico border is processed before being transported to a detention center on June 1, 2010, near Sasabe, Arizona.



The inadequacies of the forms and formal procedures place additional responsibility on the individual border officer to adequately and sensitively question each child. Although the statute requires specialized training for officers interviewing unaccompanied children, it is unclear what that training entails or how regularly it is provided. The training materials and any related guidance is not publicly available, and although ACLU FOIAs requesting this information have not yet been answered, responses to similar requests by Appleseed demonstrated “no indication of any specialized training.”⁴⁵⁸

Even where officers are attempting to conduct the screening, many do not speak Spanish despite working with a largely Spanish-speaking population. Most children interviewed by the ACLU said the CBP officers spoke only English and did not use an interpreter. None of the unaccompanied children interviewed by the ACLU for this report spoke any English at the time of their apprehension. Two of the unaccompanied minors interviewed in Agua Prieta, Mexico, spoke an indigenous language and knew very little Spanish.⁴⁵⁹

* * *

For most Mexican children traveling alone, the closest they get to the U.S. justice system is an interview with a CBP officer and a night in a detention facility. It is unlikely that children arriving alone and seeking protection have any idea what their rights are, and their experience with CBP, in many cases, is unlikely to encourage them to volunteer traumatic or difficult facts about their experiences—even when that information is the only key to getting into court.

After examining where CBP interrogates children, Appleseed found that while the interview/interrogation setup varied, in every location the environment was uniformly distressing and antithetical to providing children with security:

Everything about this experience tells these unaccompanied children that they are in a detention center run by a powerful U.S. law enforcement agency and that the alternative to repatriation is to be “locked up” in the United States. It is unreasonable to expect that most children in this

environment would divulge sensitive information that would indicate that they had been trafficked or otherwise feared abuse. Indeed, one CBP agent we spoke with told us that he does not expect Mexican minors to trust him or his colleagues in this “police station” environment.⁴⁶⁰

This interrogation is the only chance a Mexican child has to get into the immigration court system and be heard. But for many children, this experience is too intimidating to help them. While CBP questioning appears too short and automated to elicit or provide any meaningful information, the children interviewed by the ACLU all said they just wanted to get out of detention. Once returned to Mexico, they talked about being yelled at, kept in freezing and dirty cells that they were forced to clean, and then, right before their removal, told to sign a form (in English) they did not understand before being bussed back to Mexico. They described brief interviews during which most were asked only their names and age, with no real questions that could determine whether they had claims that the TVPRA was designed to screen for, or that would suggest the decision to return to Mexico was voluntary. The escalating number of children arriving alone and passing through CBP detention may exacerbate the current systemic failures, given the strain on resources and focus on non-Mexican arrivals. But the result is that an increasing number of children who *do* have claims to enter the United States have been and will be turned away and returned to danger.

III. AFTER DEPORTATION: THE AFTERMATH OF AN UNFAIR REMOVAL ORDER

A. ERRONEOUS DEPORTATIONS AND THE LACK OF OVERSIGHT

Summary expulsion procedures are extolled as a swift means of removing people from the United States, but speed can come at the expense of accuracy. While an immigration officer can order a person deported in a matter of minutes or hours, the effects of that deportation order can last a lifetime. In most cases, a deportation order—even an unlawful one—cannot be easily cured and set aside. Some errors by DHS officers can be reviewed and corrected (albeit at significant cost to the person seeking review); for example, a U.S. citizen unlawfully deported through expedited removal is entitled to judicial review. But for many common errors—such as an officer’s failure to refer an asylum seeker for a credible fear interview or to verify that a person taking voluntary departure understands the rights he or she is waiving and penalties he or she accepts—there is no meaningful review before or after deportation.

The lack of formal review matters because the internal or informal avenues appear to be insufficient. When these orders are issued at the border, there is little time for an individual to get legal assistance and stop the process before the order is finalized. Attorneys told the ACLU that getting an expedited order rescinded by the issuing officer is rare, even when an individual enlists an attorney and is able to identify the officer who ordered him or her removed.

Attorney Len Saunders estimates that in his 12 years as an attorney, he has seen four or five expedited removal orders, out of hundreds, rescinded; when these orders include a lifetime ban or other significant penalties, the lack of review and reliance on a single officer’s sympathy is particularly troubling: “It shouldn’t be so discretionary. . . . There has to be more review. You can’t have one or two officers deciding whether someone is going to get a lifetime bar with no review and no appeal process.”⁴⁶¹

Attorney Greg Boos, who has represented many individuals who received expedited removal orders along the northern U.S. border, notes that “there are some supervisors who are more amenable to reviewing and recognizing the orders are defective,” but in other cases, supervisors refuse to speak with the individual getting an expedited removal order, and after the fact, getting an order removed requires significant advocacy.⁴⁶² In one case, Mr. Boos represented actor Chad Rook and was finally able to get Mr. Rook’s wrongful expedited removal order rescinded after nine months of advocacy. Mr. Rook had been in the United States for auditions and the premiere of a television show he was in, but upon his return to Canada, he was held for almost nine hours at a port of entry, accused of working unlawfully in the United States, charged with material fraud, and issued an expedited removal order in 2013.⁴⁶³ The letter vacating Mr. Rook’s removal order stated that it had been reviewed as part of a “periodic review” but gave no further facts as to why the order was rescinded or what facts were reviewed.⁴⁶⁴

Attorney Len Saunders similarly observes that some officers are approachable and willing to discuss the circumstances of an expedited removal order—although he has only rarely seen an officer agree to rescind an order—but that

“You can’t have one or two officers deciding whether someone is going to get a lifetime bar with no review and no appeal process.”



Sam Frost

Carlos S., whom the ACLU encountered on the beach in Tijuana, Mexico, looking across the fence to the United States and holding photos of his children. He is separated from his son and daughter, who are both U.S. citizens living in California.

new or untrained officers should not be allowed to issue these orders absent strong evidence to support them.⁴⁶⁵

In Washington State, advocates note, additional review and quality controls appear to have been introduced after CBP Officer Joel Helle was convicted of assaulting a Canadian teenager while off-duty.⁴⁶⁶ Subsequently, the Seattle CBP field office undertook a review of the removal orders issued by Mr. Helle, and the overall number of expedited removals at that port of entry has plummeted.⁴⁶⁷ In the absence of a notorious event and media attention, the same thorough examination of expedited removal orders—which, along the southern U.S. border, are routine—may be rare. But attorneys around the country agree that the lack of internal and external oversight and review is at the heart of the problem. As attorney Cathy Potter in Texas observes, “The real problem is too much power with too little review. . . . You’re out and then you’re stuck.”⁴⁶⁸

* * *

Despite the speed and informality of these procedures, summary removal orders are treated as just as final and authoritative as a deportation arrived at after a full

hearing, in front of a judge, where evidence was presented, contested, and weighed. In the absence of these safeguards, removal orders issued by DHS officers—the same agency that is arresting, detaining, charging, and deporting the individual—may need *more* review and oversight both before and after the order has been issued. Instead, these orders are often shielded from judicial scrutiny by explicit restrictions in federal law so that few errors can be scrutinized and corrected by an independent judicial authority.⁴⁶⁹

While federal courts stress the “finality” of a deportation order,⁴⁷⁰ for those deported without a hearing, this focus on finality comes at the expense of basic fairness. And however final the order may be legally, from the perspective of a court deportation is not the final event for the person ordered removed, as they continue to face ongoing bars from reentering the United States and are rendered ineligible for or deprived of status going forward. As legal scholar Rachel Rosenbloom observes, “From the perspective of the deportee, departure from the United States is not the end of the story but rather the beginning. An order of removal imposes an ongoing—potentially lifetime—restriction on a deportee, depriving her of the status she once held and barring her from reentering

the United States.”⁴⁷¹ Absent a meaningful procedure by which people can raise these defects and have their rights restored, some people will continue to risk apprehension, detention, and prosecution to be safe in the United States and be with their families.

Many individuals interviewed by the ACLU after their deportation said they were the primary breadwinners or caregivers for their family in the United States; they told the ACLU that accepting years of separation from their families was simply not an option. While some people do attempt to reopen their cases or apply for waivers and other forms of permission to reenter the United States, these options are not available to everyone, can require considerable expense, and are discretionary and thus not guaranteed. Even when a person has the right to judicial review, once deported he or she might not be able to get before a court, given both the practical difficulties (of learning about rights one may have had and collecting evidence within the available statute of limitations for challenging an order) and some substantive limitations on filing for review from abroad.⁴⁷² Thus, many individuals who have ties to the United States will continue to attempt to return with or without authorization. In returning without permission, these individuals face prosecution and imprisonment for illegal reentry and successive deportations with heightened consequences; these are daunting penalties but not when compared with separation from family.

Carlos S., who came to the United States from Mexico when he was 14, was standing in Mexico, staring at the high fence separating him from the United States and his family, when he spoke to the ACLU. Eight months ago, Carlos says, he was arrested for a traffic ticket and deported to Mexico; since then, he has tried three times to return to his U.S. citizen children. The first time, he said, “I wanted to see a judge. The immigration officer said he guessed the judge didn’t want to see me. . . . The last time, I signed a form—it



A migrant shelter in Reynosa, Mexico, provides services to individuals hoping to reach the United States or already deported at the U.S. border.

said I was deported for life. But that’s not going to happen.

I have two U.S. citizen kids.”⁴⁷³

Juan C. came to the United States 30 years ago as a teenager and now has three U.S. citizen children. In 1991, he was arrested for a DUI and was granted voluntary departure, but he quickly returned to take care of his young kids. In March 2014, Juan says, he was arrested for sleeping in the street and deported without a hearing. Alone in a shelter in Tijuana, Juan said, “I’m in the middle of nowhere. What am I going to do?”⁴⁷⁴

There are individuals for whom deportation is *not* the most traumatic experience in their lives and who are able to rebuild and start a future in the countries they left, rejoining the families they left behind. Guillermo L., an employee at a migrant shelter in Reynosa, Mexico, described how his deportation many years ago from the United States, where he had no family, was not the defining experience in his life; working in Mexico for migrants to support their safety, it turns out, was. “At that time, I wanted the American Dream. . . . But now, I want to continue the mission here,” says Guillermo.⁴⁷⁵ But for others, there is no closure from deportation, particularly when it separates them from their families in the United

States, and when those deported never had their removal (and its reasons and consequences) explained to them.

B. REINSTATEMENT OF REMOVAL

When a person returns to the United States after being deported without authorization, his or her prior removal order is frequently “reinstated” with additional consequences if he or she again attempts to enter the United States. In FY 2013, 39 percent of individuals removed from the United States were processed through reinstatement, where their earlier orders of removal were essentially reissued without further review.⁴⁷⁶ Individuals who reentered illegally after April 1, 1997, after a prior order are inadmissible and are not eligible to apply for a waiver to reenter the United States for another 10 years after their deportation.⁴⁷⁷

The reinstatement process, at the border in particular, can be incredibly quick; the officer need only verify the individual’s identity and their prior removal order and ask about fear of returning to the country of origin. As attorney Lance Curtright observes, “In reinstatement, you get one ICE officer who is going to talk to people, and there is basically no right to a lawyer, no record. Officers tell them, ‘You need to sign this or you are going to jail.’ It happens really fast.”⁴⁷⁸ The speed with which reinstatement occurs means that some individuals, even if they have a new claim to be in the United States or could challenge their old removal order, will not get that opportunity because they do not have the time and resources to get legal assistance.

Due to the speed of reinstatement, individuals who have a new claim or could challenge their old order are quickly deported again.

In some cases, individuals return to the United States after a prior removal either because they do not know they have a final deportation order since they did not see a judge or because the consequences of returning were never explained to them. Attorney Nancy Falgout observes, “There are harsh, harsh consequences for coming back. But people aren’t told about that.”⁴⁷⁹ Someone with multiple removal orders may look like a priority for deportation, but in some cases, the individuals who return may have strong claims to be in the United States but never get the opportunity either to make those claims or to unpack and challenge the accumulating deportation orders. As attorney Ken McGuire observed, these can be complicated cases, but that does not mean the claims are not valid: “It is hard to figure out if you have a claim—I don’t know how any immigrant, especially one who doesn’t speak English, can figure this stuff out. Without a lawyer who is well versed in immigration law, you don’t stand a chance. If someone has relief . . . by the time I’ve seen them, they have been deported a couple of times, and undoing that is really difficult.”⁴⁸⁰

As in other summary removal procedures, the informality of the process belies the significance of the proceeding. Enrique, who first came to the United States at age 13 after his father was murdered, has been deported and prosecuted for illegal reentry on multiple occasions; all he knows about his reinstated order is that there is a 20-year ban on readmission: “They tell us that we have to sign [the form]. It was in English; everything is in English. There were things I understood and others I didn’t. You can’t ask any questions—you just sign where they tell you to sign.”⁴⁸¹ Marcos V. was deported from the United States with an *in absentia*⁴⁸² order and then was removed again at the border when he tried to return to his six- and three-year-old U.S. citizen children: “So much pain it brings to my heart, not seeing them. . . . The forms were in English. They didn’t give me time to understand them and they didn’t explain the forms.”⁴⁸³

Attorney Ken McGuire observed that LPRs who were previously erroneously deported based on an incorrect or now invalid reading of the law are stripped of their status but will come back to their families and probably get reinstatement orders.⁴⁸⁴ However, the reinstatement process does not provide a meaningful opportunity to explain the

unlawfulness of their prior deportation: “A lot of these guys come back because they don’t know how to live anywhere else. We see reinstatements left and right, but how can you unwind all of this in 24 hours?”⁴⁸⁵

The reinstatement statute not only permits the abbreviated procedures that characterize all the summary removal procedures in this report, but it also limits the relief a person can apply for once they have a prior removal order. Individuals with strong equities—ties to the United States, a lack of criminal history, etc.—cannot apply for discretionary relief such as cancellation of removal.

Pancho came to the United States when he was five years old; when he was in middle school, he found out that he was not a United States citizen like his brother. In 2007, when he was 22 years old, he was arrested for driving without a license, an offense that falls outside of ICE’s explicit enforcement priorities,⁴⁸⁶ and eventually took voluntary departure, returning to Nogales, Mexico. “It was like a whole new world to me. I lasted 6 months,” he recalls.⁴⁸⁷ He reentered the United States twice and both times was given a reinstatement order to sign; the second time, he recalls, “They had me sign some papers and then the officer said, ‘Why are you here? It seems like you had a pretty good case.’ But by then it was too late. There are a lot of people who are misinformed [in detention]. You only find out [about your rights] after you’ve been deported and after you’ve signed.”⁴⁸⁸ Pancho’s U.S. citizen wife and young daughter, who has a serious illness causing paralysis, have joined him in Mexico; his daughter, Pancho says, is unable to get the medical care that she needs and would be entitled to under state health care programs in the United States.⁴⁸⁹

Norma B. had lived in the United States since she was 15; two of her sisters are LPRs and a third is a U.S. citizen. She is the mother of four U.S. citizen children, ranging in age from two to 16 years old. In 2003, she was removed through voluntary departure but returned immediately to be with her children. According to Norma’s sister Alex, in the fall of 2013, 10 years after returning from Mexico, Norma was hiking with her children when police stopped her near a railroad crossing, said she was on private property, and asked her name. Terrified, she apparently gave a false name but quickly admitted it was not her real name. The police arrested her and, according to Alex, Norma pleaded guilty to providing

“You only find out [about your rights] after you’ve been deported and after you’ve signed.”

false information. After ICE picked her up, she was gone and deported to Mexico within 24 hours. Her sister Alex recalls, “I called to check up on her case and the immigration officer said, ‘There is nothing you can do for her because she signed a voluntary departure back in 2003.’”⁴⁹⁰

One of the few claims a person *can* make after a prior removal order is a claim to withholding of removal or protection under the Convention Against Torture (CAT). In the government’s view, non-citizens in the reinstatement process are not eligible for asylum, so to claim protection in the United States, they must meet a higher standard in demonstrating their fear of persecution. If successful, they are still not able to access many of the benefits of asylum. Unlike asylees, they cannot petition to bring their children and family to join them in safety in the United States, and they cannot adjust their status to have permanent protection here as a lawful permanent resident or, eventually, as a U.S. citizen. But because fear of returning to one’s country of origin is one of the few claims a non-citizen *can* make in reinstatement proceedings, withholding of removal and CAT remain important protections.

As legal scholar Shoba S. Wadhia observes, the significant growth in the number of cases referred for withholding-only proceedings—from 240 cases in 2009 to 2,269 cases in 2013—may suggest that DHS has improved its screening of individuals with fear of persecution in reinstatement or administrative removal proceedings.⁴⁹¹ It might also be reflective of the growth in reinstatements and administrative removals, “which itself may be associated with a change of policy by DHS, under which the department will now throw into a speed removal program people who might have ordinarily been issued a Notice to Appear and placed in normal removal proceedings.”⁴⁹²

Similarly, U-visa claims can be raised in the reinstatement process; if approved, a U visa will cancel a removal order.⁴⁹³ While the number of U-visa applications has increased in recent years—from 10,937 applications in FY 2009 to 39,894 in FY 2012—the *rate* of approvals has actually decreased (from 79 percent in FY 2009 to 44 percent in FY 2012).⁴⁹⁴ The growth in these protective claims as a claim of last resort does not mean that the applications are fraudulent or suspect, however. For some individuals interviewed by the ACLU, these are claims they had before being deported from the United States, but they never knew about these claims or had the chance to present them because they never saw a judge or lawyer who could explain their options and evaluate their case.

In reinstatement proceedings, the DHS officer is not required to make any inquiry that would elicit information suggesting that a person facing reinstatement is eligible for a U visa. A 2013 USCIS manual on reinstatement, acquired by the ACLU through a FOIA request, mentioned only in an asterisked comment on a single page that reinstatement should not be applied to individuals with VAWA, T, or U visas; none of the other training materials received from

USCIS in response to the ACLU FOIA request made any further mention of the fact that reinstatement should not be applied to individuals with these visas.⁴⁹⁵ Nor did any of the materials provided suggest that a DHS officer processing an individual for reinstatement could or should inform a non-citizen about applying for a VAWA, T, or U visa. Thus, even learning about these visa options, in most cases, will require some contact with a legal services attorney who can identify the claim and inform the individual of their rights. For many individuals at the border, that prospect is unlikely.

Demetrio, an indigenous man from Guatemala, has been deported three times; the first time, he spoke little English or Spanish (he is a native Quiché speaker) and was unable to ask for help, as there was no Quiché interpreter available. The second and third times, he was given a reinstatement order: “They said, ‘You’ve been deported, just sign. You’re deported again.’”⁴⁹⁶ He reentered the United States after his last deportation to join his wife, but in January 2013, he was robbed and shot in California. The detective investigating the crime agreed to certify his application for a U visa and Demetrio went to get fingerprinted. However, his

Undocumented immigrants from El Salvador boarding a deportation flight in Mesa, Arizona, on December 8, 2010.

John Moore/Getty



“They said, ‘You’ve been deported, just sign. You’re deported again.’”

appointment for the U visa led to his arrest and detention by ICE. Demetrio says he was told that because of his prior deportations, he had no right to see a judge: “They closed my case. Everything is done. I filed an appeal so I won’t be deported yet. That’s all I know. It’s all been difficult being here, knowing it’s because I turned myself in.”⁴⁹⁷

Emmanuel M., who had lived in the United States since childhood, was coerced into signing a voluntary departure form and was quickly deported to Mexico even though he was eligible for a U visa as the victim of a hate crime. He attempted to return to the United States in 2011 but was quickly returned to Mexico with an expedited removal order. Emmanuel has now been in Mexico for approximately two years while applying for a U visa with an attorney’s assistance so that he can rejoin his family in California.⁴⁹⁸

Adriana, an Ecuadorian national and the mother of two U.S. citizen children, had been living in the United States for five years without authorization when her abusive partner was arrested for attacking her and was subsequently deported to Ecuador. Once in Ecuador, Adriana’s attorney says, he lied and told Adriana that one of their children, who had remained in Ecuador, was very ill; but when Adriana arrived with her two U.S. citizen children, she found her child healthy but herself once again in danger.⁴⁹⁹ Adriana sent her older U.S. citizen child back to the United States and tried to flee to the United States as well but was apprehended twice at the U.S. border and deported. According to her attorney, Adriana, who speaks Quechua, does not appear to have been asked much or anything by CBP in a language she understood about her fear of being in Ecuador, and on her first attempt to reach the United States, she was also on heavy pain medication after being beaten by the partner she was fleeing. On her final attempt to enter the United States, she was placed in reinstatement proceedings and able to apply for withholding of removal.

But, despite her conditional approved U visa and strong withholding claim, her attorney observes that Adriana cannot bring her remaining children to the United States, including her youngest U.S. citizen child, because Adriana’s ex-partner will not take the child to have her U.S. passport reissued and Adriana cannot now leave the United States.⁵⁰⁰ If Adriana was not in reinstatement and won asylum, she would be able to travel to see her child and potentially bring her to the United States.

For individuals who did eventually get a hearing and the chance to make claims in court, these opportunities came only after the person had been separated from family, exposed to danger, and in some cases, incarcerated for illegal reentry. For individuals who win asylum (and for all seeking asylum under international human rights law), their manner of entry did not violate the law; for those in reinstatement or who were prosecuted before being allowed to claim asylum, their entry means prosecution and, potentially, a lengthy incarceration.

Cited in USA v. Peralta-Sanchez
No. 14-50393 archived on February 2, 2017

C. PROSECUTION FOR RETURNING

In some cases, individuals who return to the United States after a removal order are apprehended by DHS and then referred for prosecution in federal court for illegal entry or reentry into the United States. Entering the United States without inspection is a federal misdemeanor punishable by up to six months in prison. In the four judicial districts where Operation Streamline is in effect, individuals prosecuted for illegal entry under 8 U.S.C. § 1325 plead guilty in mass hearings after only briefly consulting with an appointed criminal defense attorney, with little opportunity to discuss potential claims for immigration relief or challenges to their removability with the attorney, let alone present such claims to a court.⁵⁰¹

Under 8 U.S.C. § 1326, reentering the country after being deported is a felony, and while federal public defenders representing individuals in these proceedings have more time for consultation and investigation, the consequences of a conviction are stark: conviction for illegal reentry can lead to two years of imprisonment for people with no prior criminal histories, and up to 20 years for people with more significant criminal records (including individuals who have been prosecuted more than once for returning to the United States).⁵⁰²

In setting its national prosecutorial priorities, the U.S. Department of Justice emphasizes, “Given scarce resources, federal law enforcement efforts should focus on the most serious cases that implicate clear, substantial federal interests” and has urged U.S. Attorneys to “focus[] resources on fewer but the most significant cases, as opposed to fixating on the sheer volume of cases.”⁵⁰³ But today, many U.S. Attorneys appear to do exactly the opposite, pursuing a high volume of prosecutions rather than prioritizing specific cases that serve the Department of Justice’s stated priorities of national security, violent

The number of people prosecuted for federal immigration offenses rose by 367 percent between FY 2003 and 2013.

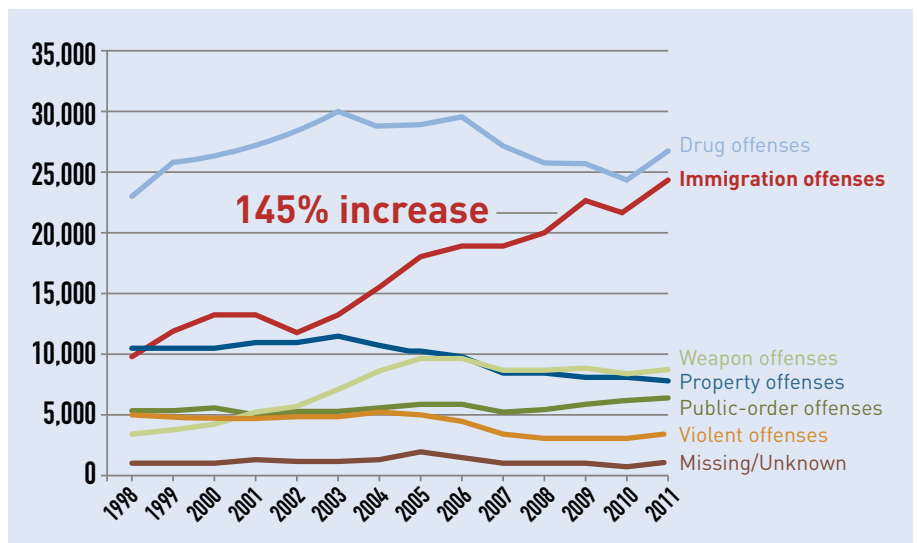
crime, financial fraud, and protecting the most vulnerable members of society.

While many federal judges have expressed concern that these cases are overwhelming their dockets for no good reason,⁵⁰⁴ illegal entry and reentry are now the single most prosecuted federal crimes and, each year, have accounted for more federal prison admissions than violent, weapons, and property offenses combined.⁵⁰⁵ Some estimates put the cost of illegal entry and reentry prosecutions, for incarceration alone, at \$1 billion per year.⁵⁰⁶ In 2013, more than half of federal prosecutions initiated were for illegal entry or reentry; 97,384 people were prosecuted for federal immigration offenses in FY 2013, an increase of 367 percent from 2003.⁵⁰⁷

Cited in USA v. Penalta-Sanchez, No. 14-50393 archived on February 2, 2017

FIGURE 5

Prisoners Entering Federal Prison, 1998–2011 (by offense)



Source: Bureau of Justice Statistics, Federal Justice Statistics Program, <http://bjs.ojp.usdoj.gov/fjsr/> (last visited Feb. 7, 2014)

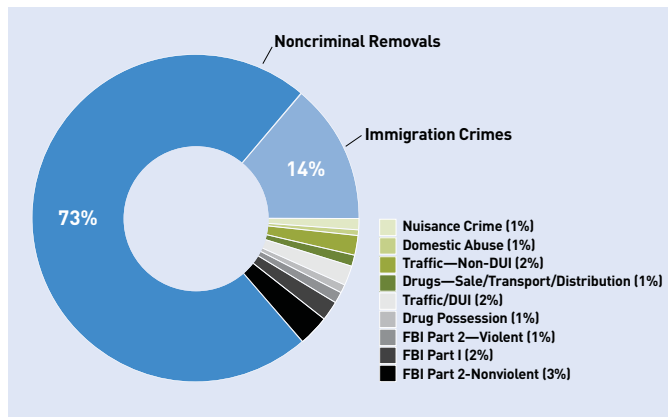
This shotgun strategy also includes prosecutions of children: between 2008 and 2013, 383 children were prosecuted for illegal entry or reentry and had no more serious criminal history; 301 of those children were Mexican.⁵⁰⁸ Attorney Victoria Trull, who represents defendants in illegal reentry proceedings, said the majority of people she sees have been removed without ever seeing a judge, through expedited removal or reinstatement.⁵⁰⁹ “You have people who don’t even speak Spanish, they grew up here, have lived here for an extended period of time but left briefly and got [expedited removal],” Ms. Trull says, “and then they try to come back again and get prosecuted for illegal reentry.”⁵¹⁰ Ms. Trull says she has also represented young non-citizens who might have been eligible for DACA but were deported before that program was initiated: “They came back because this is all that they know; it’s really heartbreaking.”⁵¹¹

Prosecution for illegal entry or reentry has been promoted as part of the “Consequence Delivery System” and as a way to deter individuals who have been deported from returning without authorization. But particularly for people with family in the United States or a genuine asylum claim, prosecution for illegal entry or reentry may further complicate their immigration future without being a meaningful deterrent. An NPR survey of individuals

For many people, there is no mechanism to address and correct procedural violations or factual errors in their deportation orders.

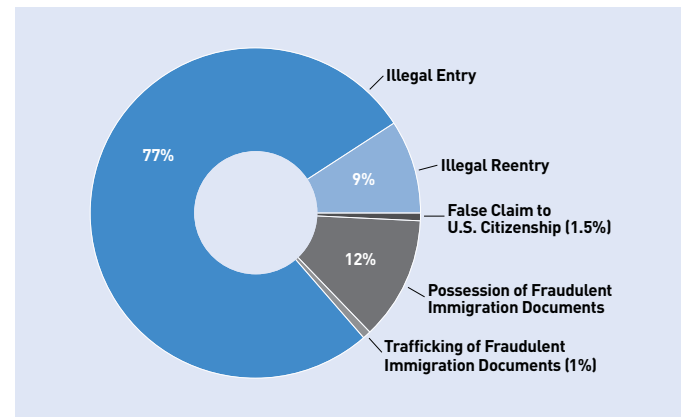
deported through Operation Streamline found that 85 percent of those interviewed said they would cross again.⁵¹² Similarly, a study by the University of Arizona tracking 1,200 individuals deported following Operation Streamline sentences found no statistically significant difference between those who went through Operation Streamline and those who did not in terms of reentry.⁵¹³ While the Yuma and El Paso sectors prosecute every apprehended migrant through Operation Streamline, they have re-apprehension rates almost identical to those of nearby sectors (respectively, Tucson and Del Rio/Laredo) that prosecute only a fraction of apprehended migrants through Operation Streamline.⁵¹⁴

FIGURE 6
Border Removals in FY 2013



Border Removals in FY 2013 By Most Serious Lifetime Criminal Conviction. While the majority of individuals deported at the U.S. border had no criminal history, of those removed who had been convicted of a criminal offense at some point, the principal category was immigration crimes. Between FY 2003 and 2013, 9 percent of border removals were individuals with a conviction for an immigration crime; in FY 2014 alone, 14 percent of border removals had been convicted at some point for an immigration crime. *Source:* Marc R. Rosenblum & Kristen McCabe, MIGRATION POLICY INSTITUTE, DEPORTATION AND DISCRETION: REVIEWING THE RECORD AND OPTIONS FOR CHANGE (2014) (based on DHS data analyzed by Migration Policy Institute), available at <http://www.migrationpolicy.org/research/deportation-and-discretion-reviewing-record-and-options-change>. *Note:* Total may not equal 100% because of rounding.

FIGURE 7
Immigration Crimes FY 2003–2013



The overwhelming majority of individuals removed at the border between FY 2003 and 2013 (77 percent) had no criminal convictions. Of the remaining 23 percent who had a criminal conviction, the single largest category of criminal offenses (9 percent) was “immigration crimes.” The convictions that are considered immigration crimes are shown in this graph. Between FY 2003 and 2013, DHS removed 193,790 individuals at or within 100 miles of the U.S. border whose most serious lifetime criminal offense was an immigration crime. *Source:* Marc R. Rosenblum & Kristen McCabe, MIGRATION POLICY INSTITUTE, DEPORTATION AND DISCRETION: REVIEWING THE RECORD AND OPTIONS FOR CHANGE (2014) (based on ICE data analyzed by Migration Policy Institute), available at <http://www.migrationpolicy.org/research/deportation-and-discretion-reviewing-record-and-options-change>. *Note:* Total may not equal 100% because of rounding.



Reynosa, Mexico, April 2014. A cross on the Mexico side of the border with the United States (Texas) marks a memorial to migrants who have died trying to reach the United States. Coahuila, on the Mexican side of the Rio Grande Valley, has one of the highest rates of murders and disappearances in Mexico, along with the neighboring states of Nuevo León and Tamaulipas.

Felipe R., who was pressured to take voluntary departure in 2003, has repeatedly tried to come back to reunite with his U.S. citizen daughters and was convicted of illegal entry and later illegal reentry. Although Felipe was kidnapped by a gang in Mexico, CBP has never referred him for an interview with an asylum officer and has simply reinstated his removal. Says Felipe, “[The officers] said if I didn’t sign, they could leave me there.”⁵¹⁵ Although Felipe already spent time in prison after returning without authorization, he says he will try again to be with his daughters and seek safety in the United States: “There are a lot of people fighting for asylum who have their lives in the United States. They don’t want to put their families in danger. I would rather spend my life in jail than go back to Mexico.”⁵¹⁶

Similarly, Francisco first came to the United States in 1989 and has been deported multiple times; when interviewed in a migrant shelter in Tijuana, Francisco had just served 16 months in federal prison for illegal reentry before being processed through reinstatement by ICE and deported to Mexico. His two U.S. citizen children are in California and despite just being released from prison, Francisco wanted to return to his family in the United States: “I can’t wait too long.”⁵¹⁷

Ironically, for some individuals, prosecution—or more accurately, representation by a federal public defender—

provides the first opportunity for an individual to learn about and raise defects in their original deportation order, including claims they should never have been in removal proceedings in the first place.

In an illegal reentry case, the government has to demonstrate that the defendant (a) is not a citizen of the United States; (b) was previously removed from the United States; and (c) entered, attempted to enter, or was found back in the United States without authorization.⁵¹⁸ But the U.S. Supreme Court has held a conviction for illegal reentry cannot be based on a prior deportation order that

violated due process.⁵¹⁹ In response, Congress explicitly amended the illegal reentry statute to incorporate a three-part test for when a defendant can collaterally challenge a prior deportation in a prosecution under section 1326. Now, under 8 U.S.C. § 1326(d), a defendant can challenge the validity of their underlying removal order in a criminal prosecution for illegal reentry if (1) he or she exhausted available administrative remedies to seek relief from the prior removal order;⁵²⁰ (2) he or she was deprived of the opportunity for judicial review; and (3) the order was fundamentally unfair. To show fundamental unfairness, the defendant must show both that his or her due process rights were violated by defects in the underlying deportation order, and that he or she was prejudiced as a result of the defects.⁵²¹

For example, Jose Arteaga-Gonzales came to the United States in 1987 when he was three years old and in 2005 received an approved I-130 petition (which establishes the relationship between a U.S. citizen or lawful permanent resident and a non-permanent resident for immigration purposes⁵²²). In 2008, when Mr. Arteaga-Gonzales was 21 years old, CBP deported him to Mexico with an expedited removal order at the San Ysidro Port of Entry in California when he was en route to see his newborn U.S. citizen son. CBP also charged him with making a false claim to U.S. citizenship—which includes a permanent bar to reentry—despite contrary evidence in his sworn statement, which

shows he said he was *not* a U.S. citizen. Because there is no mechanism for requesting judicial review of an expedited removal order in such circumstances, he could have been permanently prevented from visiting his child without a way to undo the order. However, during his prosecution for illegal reentry, a federal court examined his expedited removal order and found that it violated due process.⁵²³ Similarly, Jose Luis Gonzalez-Segundo's attorney was able to successfully challenge his prior 238b deportation order in federal court by demonstrating that the order violated due process where Mr. Gonzalez-Segundo had not waived his right to an attorney and was not read or explained the 238b order in a language that he understood.⁵²⁴ Mizael Padilla Hernandez was wrongfully stripped of his LPR status and deported because immigration authorities



Closeup of a mural at a migrant shelter in Nogales, Mexico, run by the Kino Border Initiative. Many individuals are deported from the United States without their money, phone, or a change of clothes. The shelter provides individuals recently deported from the United States with meals, clothing, and other personal items and helps migrants find government services.

believed, incorrectly, that he had been convicted of a drug offense that constituted an aggravated felony. In fact, he had not yet been sentenced when he was deported by an immigration judge, and upon his return to the United States, he was processed through reinstatement and prosecuted for illegal reentry. His attorney successfully demonstrated that his deportation as an aggravated felon was unlawful, and the prosecution joined the defendant in moving to dismiss the indictment.⁵²⁵

* * *

Individuals who are unfairly deported without a hearing are not only denied a chance to defend their rights during the initial deportation but, when and if they return, can also be processed through the criminal justice system instead of given the chance to rectify and explain the unfairness of their prior removal. Many individuals interviewed by the ACLU did not appear to have knowingly or voluntarily waived what rights they had at the time of their deportation, nor did they recall immigration authorities ever explaining their deportation orders to them. Others have been unlawfully removed due to a mistake about the (constantly evolving) law on aggravated felonies. However, for many of these individuals, there is no mechanism in the immigration system to address and correct the procedural violations or factual errors in their deportation orders. Without an attorney and out of the United States, individuals who *do* have claims to reopen their cases will find the path to doing so logistically complex, expensive, and still uncertain. A prosecution for illegal reentry is hardly a boon. For one thing, collaterally attacking the underlying removal order is only a defense to the criminal prosecution. It may not be enough to ensure that the individual can remain in the United States and finally have their claims considered.

Moreover, the person's right to a public defender ends once the criminal prosecution is over, leaving the person without an attorney to help in the often complicated immigration proceedings that follow. Federal public defenders and immigration attorneys told the ACLU that in practice, once a person has successfully collaterally attacked a prior deportation order, ICE does not always reinstate the prior order—however, even if they do not choose to reinstate, ICE may issue a new summary removal order such as an



Soledad H. R., seen here with her attorney, Ana Herrera, tried to seek asylum in the United States. Instead, she was prosecuted for illegal reentry and spent two years in criminal and then immigration detention. San Francisco, California.

expedited removal order, so that the individual once again will be deported without a chance to present his or her claims in court. Getting a hearing before an immigration judge continues to be a matter of luck.

1. Asylum Seekers and Criminal Prosecution

In addition to individuals with family in the United States, asylum seekers who are deported without a hearing will inevitably return and try again to seek protection, if they can. But the next attempt to claim asylum may lead them first into the criminal justice system. A 2013 report by Human Rights Watch concluded that “prosecutions for illegal entry or reentry may include a number of defendants with a colorable claim to asylum,” and these prosecutions interfere with an individual’s ability to seek asylum and win protection.⁵²⁶ Such prosecutions unjustly and unlawfully punish a person for pursuing his or her right to seek asylum.⁵²⁷ Several asylum seekers interviewed by the ACLU were prosecuted for illegal reentry when trying to seek sanctuary, and one was also prosecuted for use of a fraudulent visa, which she used to escape abuse and seek protection in the United States. While these individuals

were later able to apply for relief from removal and for protection through withholding of removal or asylum, they spent unnecessary time in prison and, in some cases, received felony convictions for attempting to seek asylum.

Soledad H. R., a 58-year-old woman from Mexico, came to the United States in 2007, fleeing two decades of physical and psychological abuse by her husband, Jesus.⁵²⁸ Soledad says Jesus repeatedly tried to murder her—on one occasion, he poured gasoline over the house and locked her inside, and on another he attempted to run his truck over her—but police officers repeatedly refused to arrest him. Finally, after two of her three children had been murdered in Mexico, Soledad escaped to California to join her only remaining son. In 2010, the aunt who raised Soledad was dying, and Soledad returned to Mexico to see her; however, Soledad’s husband learned of her return, found her, and threatened to kill her. Fearing for her life, Soledad attempted to return to the United States using a false visa and was arrested by CBP. Although the officers did ask if she was afraid to return to Mexico, and Soledad said yes, she was not referred for a credible fear interview. Instead, she was prosecuted for use of a false visa. “I had brought a lot of papers of the complaints about my husband. They asked why I had brought all that,” recalls Soledad. “I would

try to ask questions and [the officer] just told me to shut up.”⁵²⁹ Soledad told her federal public defender, the federal judge, and immigration authorities that she was afraid to be deported; nevertheless, at the end of her sentence for illegal reentry, Soledad was deported to Ciudad Juárez, Mexico, on February 11, 2011. Soon after, she reentered the United States on May 27, 2011, was caught by CBP, and again explained her fear of being murdered by her husband. Once again, instead of seeing an asylum officer, Soledad was prosecuted for and convicted of illegal reentry; she was sentenced to one year and one day (later reduced to 10 months).

In April 2012, Soledad was transferred to ICE custody, where she once again reiterated her fear of being deported. Finally, an ICE official did refer her for a reasonable fear interview, which she passed. As the social workers evaluating Soledad observed, “the traumas remain fresh in her memory, so that she relives them rather than simply remembering, and experiences again all the anguish engendered by the original events. For this reason, she has felt very threatened by the asylum process and has delayed her application because it necessitates confronting her history once again.”⁵³⁰ Soledad continued to be detained by ICE during her proceedings for 14 months until she was released after a Rodriguez bond hearing.⁵³¹ Because she was in reinstatement proceedings, she no longer qualified for asylum but is pursuing withholding and a U visa. In total, Soledad spent two years in detention for the criminal and civil immigration charges; if she had been referred for a credible fear interview upon her first attempt to return to the United States, she would probably not have been prosecuted, imprisoned, and separated from her son, her sole surviving family, for so long.

Inocencia C. came to the United States from Mexico when she was 12 years old. At a young age, she became entrapped in a physically and psychologically abusive relationship with a man who raped and beat her over the course of a decade. In 2010, Inocencia recalls, her partner, who was also from Mexico, decided to leave the United States and convinced Inocencia and their three young U.S. citizen children to join him, claiming he would stop using drugs and alcohol.⁵³² But once in Mexico, the violence quickly resumed, Inocencia says, and she felt *more* in danger in Mexico, where her partner had many friends among the

“I feel more fear [of being deported] because of my children. The oldest two tell me if we go back to Mexico, it would be our death.”

police. Finally, Inocencia sent her children back across the border to family in California. Then she tried to cross by herself.

“The first time,” Inocencia recalled, “the officer said, ‘The government can keep your kids because you are illegal. It is a crime, what you did.’”⁵³³ Inocencia says she did not understand what was happening and explained that she could not read the forms they were giving her because she is illiterate: “Because I told them I didn’t know how to read, I felt immigration was making fun of me. I didn’t know anything about the law.” The officer told her to sign several papers, even after she explained that she could not read or write. She was immediately ordered deported by Border Patrol agents at San Ysidro, who did not ask about her fear of being returned to Mexico.

Inocencia made a second attempt to rejoin her children; she says she was stopped again and questioned by an officer who spoke very little Spanish (and she understood little English). Inocencia says the officer joked that if she married him, he could help her. Once again, she was deported. Inocencia tried for a third and final time in 2012. This time, she was referred for prosecution for illegal reentry and put in prison. “The third time, thank God, they put me in jail so he couldn’t touch me,” says Inocencia. Inocencia’s federal public defender met her in jail and asked if she had any fear of returning to Mexico. “He asked me if I knew about asylum, and I said no, so he explained to me what asylum is,” says Inocencia.⁵³⁴ The judge presiding over her illegal reentry case ordered her released, and her federal public defenders immediately contacted ICE and explained that Inocencia was afraid to be deported to Mexico. Inocencia was taken to an immigration detention

facility but managed to find an immigration attorney, explain her fear of being deported, and finally get before an immigration judge. She was eventually released on bond and able to reunite with her children. “I feel more fear [of being deported] because of my children,” she says. “The oldest two tell me if we go back to Mexico, it would be our death.”⁵³⁵

Ericka E. F., a 33-year-old from Honduras, first came to the United States in April 2013, fleeing from both domestic violence and gangs that she says had tried to kill her and burn down her home. When she arrived in Texas in 2013, she says she asked for help from the border officials: “I told [the officers] I was fleeing for protection, because of the violence. They said women always come here with lies. I told them it was true. He just laughed and laughed.”⁵³⁶ She was deported, but still in danger, came back to the United States. When she returned later that year, she was referred for prosecution for illegal entry and sentenced to 30 days. After serving her sentence, Ericka says, she was finally able to request help and get a reasonable fear interview, which she passed. Two of her children are still in Honduras—one is hiding from Ericka’s ex-partner, who threatened to kill them. Even if she wins her case, she cannot petition to bring her daughters over.

Currently, when an individual applies for asylum, the U.S. government’s policy appears to be to put the asylum issue on hold when the individual was previously deported even though, regardless of the merits of that deportation order, it may not impact whether the person has a bona fide asylum claim. Training materials provided to the ACLU in response to a FOIA request state that when asylum officers determine that an asylum seeker has a prior order of removal, the officer must inform ICE.⁵³⁷ Further, “[t]he processing of the asylum application stops until the Asylum Office is notified either that the prior order has been reinstated or that the [ICE Special Agent in Charge] will not reinstate the order.”⁵³⁸ Even if the individual has already applied for asylum, the guidance notes, he or she is not “automatically entitle[d]” to an interview with an asylum officer unless he or she is “specifically referred to an Asylum Office by the office that reinstated the order.”⁵³⁹ In some cases, not only is the asylum process suspended, but an individual, brought to the attention of a DHS officer, can be referred for prosecution.

Soon after Ricardo E. was deported to El Salvador, he was assaulted and threatened both by gang members and local police. Ricardo believes that he was targeted by the police after he stood up to local police officers who were threatening his girlfriend and that, to punish him, police officers sent gang members to threaten him and demand money. According to his attorney, Jacqueline Bradley Chacon, the gang, colluding with police, threatened to kill him unless he continued to give them money; eventually, he could no longer afford to pay them and pay the medical bills for his ill parents.⁵⁴⁰ Ricardo’s cousin was trying to help pay the gang but also ran out of money and was murdered, apparently because of his inability to meet the gang’s extortion demands. Fearing for his life, Ricardo returned to the United States but was apprehended by ICE and placed in reinstatement proceedings. When he claimed fear of returning to El Salvador, he was referred to an asylum officer. But after the reasonable fear interview and after the asylum officer had completed the assessment, the asylum officer told Ricardo and his attorney that while he was inclined to find in favor of Ricardo, he no longer had jurisdiction over the case because Ricardo had been referred for prosecution for illegal reentry. Ms. Bradley Chacon observed that had her client received the favorable finding *before* being referred for prosecution, he would have had strong grounds to reopen the prior removal order. Ms. Bradley Chacon noted that, as a policy matter, this prosecution was nonsensical: “Why refer someone for prosecution when he is a prima facie case of eligibility for withholding? Wouldn’t our obligations under *non-refoulement* [not to deport a person to a place where he faces persecution] trump everything?” Ricardo was sentenced to a year in prison for illegally reentering the United States, which he was still serving at the time this report was written; his immigration proceedings have been on hold while he serves his criminal sentence and his withholding claim has not yet been adjudicated.

D. AMERICAN FAMILIES LIVING IN THE SHADOWS

Deportations affect entire families, and in recent years, there has been increased attention paid to the impact of deportations on U.S. citizen children; some are left behind with relatives, some become part of the state foster care system, and others are effectively deported alongside their parents. ICE reports that in 2013 alone, 72,000 parents of U.S. citizens were deported from the United States.⁵⁴¹ According to a 2013 report by Human Impact Partners, 4.5 million U.S. citizen children have at least one parent who is undocumented⁵⁴²; thus, the number of children who could see a parent deported, absent assistance from immigration reform, is even higher. For parents who are deported, returning to the United States without waiting for authorization may seem necessary in order to take care of their families and in the absence of a quick, affordable, and certain way to return.

Summary removal procedures, as discussed in previous chapters, are problematic because they do not take individual equities into account; are prone to risk in the absence of a lawyer and judge; do not provide families with the opportunity to prepare for the separation; and offer few opportunities for the individual to get judicial review, even if he or she might have been eligible for relief if he or she saw a judge and had an immigration hearing.

For many individuals, the lack of accountability and review for unfair removal orders is compounded when those orders include a finding of fraud or a false claim to U.S. citizenship, which may mean a permanent bar to returning to the United States and cutting off avenues of adjusting status in the future. As attorney Jaime Díez observes, “When [immigration officers] give fraud bars to people with U.S. citizen kids, they are screwed for the rest of their

In 2013 alone, 72,000 parents of U.S. citizens were deported from the United States.

lives because they cannot adjust. [CBP officers] are not educated about the consequences of these orders.”⁵⁴³ As attorney Marisol Pérez observed, in communities along the southern U.S. border, where people have had family on both sides of the border for decades, these orders create severe ruptures in families and whole communities: “It’s detrimental, especially for South Texas individuals, because the consequences that attach to [expedited removal] are horrible—10 years outside the U.S.? No one can accomplish that if they are married to a U.S. citizen and have children.”⁵⁴⁴

There is no publicly available guidance on how CBP determines whether someone is purposefully committing fraud or misrepresentation, and when to charge or refrain from charging a non-citizen on one of these grounds. Overcoming a deportation order and its bars on reentry is sufficiently difficult for most people; waivers, even when available, can be expensive and are not guaranteed.⁵⁴⁵ Most people who were unrepresented when deported will face the same or greater difficulties in learning about and applying for any opportunities to reenter the United States once outside its boundaries.

For individuals who have family in the United States—parents of young children, in particular—the temptation to return without waiting for permission may be too great to resist, particularly where no other option appears feasible. As community organizer Lesley Hoare in Washington State said, individuals deported and separated from their families are likely to come back, whatever the cost: “I think it feels like there is no other option where their whole family is here,” says Ms. Hoare. Although, Ms. Hoare notes, apprehensions by Border Patrol are decreasing in the Forks area of Washington State where she works, families are still contending with the effects of having a relative deported without a hearing: “Things are going better now, but there are so many people who had no chance. They should be able to come back and have a chance. ... It would do a lot of good for a lot of people and for our country and our community if people could come back.”⁵⁴⁶

Katie R., a U.S. citizen, and her husband Jorge have been together for 18 years; they have two U.S. citizen children. But her husband’s immigration status and prior deportation order are a constant cause of anxiety for

“It’s like there is an underlying lie you have to keep and you want to shout out that this isn’t a bad thing.”

the family. Jorge came to the United States in 1996 after separating from his wife in Mexico. He met Katie and, in 2000, after the birth of their first child, returned to Mexico to finalize his divorce so that he and Katie could marry. When he returned to the United States, Jorge was put in secondary inspection at a port of entry in Texas and questioned for several hours. The officers went through his wallet and found his Mexican ID but claimed Jorge fraudulently claimed to be a U.S. citizen. He was deported without the chance to call his family. Katie went to Mexico to marry Jorge and they both returned to the United States with their baby (they now have two U.S. citizen children). Katie says that it was only after consulting with attorneys that the family found out about the alleged false claim to U.S. citizenship. This charge, which Jorge denies, means he cannot adjust his status based on his marriage to a U.S. citizen, his U.S. citizen children, or his years in the United States under current immigration law. For Katie, the strain of keeping her husband’s status a secret to keep the family together is enormous: “I’m a really honest person and hate not telling the whole truth. It’s incredibly stressful. It’s like you’re living a lie, but the alternative is to not have my husband.”⁵⁴⁷ Jorge is the main breadwinner for his family, but with his status he is in a permanently delicate position. Says Katie, “The simple things like health insurance for your children . . . or getting car insurance; you say you’re married and then they want your husband’s name and drivers’ license, and I can’t tell them. It’s like there is an underlying lie you have to keep and you want to shout out that this isn’t a bad thing.”⁵⁴⁸

When Consuelo first came to the United States from Peru to visit her sister, her parents went through a known travel agent and applied and paid for a tourist visa. Consuelo recalls, “We thought we could trust them. They told me to go to the interview at the U.S. embassy, and when I got

there, one of the [travel agency] employees came out of the embassy and said there was no need to go in; ‘I have your passport here.’”⁵⁴⁹ Consuelo says it did not occur to her that the visa was fraudulent because it was in her own name and in her passport. When she arrived in the United States, however, she was pulled aside for additional questioning. “[The officer] said, ‘You are under arrest; this is a fraudulent visa.’ At that point I was so scared, I was in shock; I couldn’t believe what he was saying.”⁵⁵⁰ Consuelo recalls that she was detained for many hours while numerous officers questioned her, accusing her of using a fake passport, asking who she had bought her passport from, and telling her she would go to jail for many years: “I would do anything to get out of there. When I heard ‘jail,’ I thought about the jails in my country where you get stabbed, raped, killed. . . . I said I want to call my embassy or my sister, and they said, ‘No, you have no right.’ I told them again what happened. He didn’t want to write down my story—he would only start from where the guy came out of the embassy. He didn’t believe or write down the rest.”⁵⁵¹ The questioning continued for several days while Consuelo was in a detention center waiting for a plane to return her to Peru, and started again when she was brought back to the airport. As Consuelo remembers, on that last day,

They said, “You have to tell us your name,” but I kept telling them and they wouldn’t believe it. When you are so depressed and tired, at some point you think saying another name will free you, even if it’s not your name. You think it will be over, you just want the nightmare to be over. I said, “Put whatever name you want.” . . . Even now I think, how would I do that, why did I do that, it was stupid it was done, but at the time I just wanted it to be over. Then they brought a set of papers they wanted me to sign first. They said, “It’s so you can go to your country and this is because you committed a crime; you committed fraud.” I said, “No, I’m not going to sign.” He grabbed my hand, he slammed my arm because I wouldn’t let him force me to sign. The others were banging the table with their hands, pushing my shoulder. It was very intimidating—three or four people screaming, “You are a criminal, sign the fucking paper, you are going to jail.” Then

they said, “We’re going to put you in jail,” so I signed the paper they put in front of me.⁵⁵²

Consuelo eventually came back to the United States without authorization to help her sister, who was being abused by her partner. She has since married a U.S. citizen and has two U.S. citizen children. But she has been living in the shadows for over a decade, unable to adjust her status and terrified of being separated from her family. She says she has been to several attorneys but is always told the same thing: that because of the fraud bar, she is permanently banned from immigration relief.⁵⁵³

* * *

The consequences of a deportation order are severe, as is the price of returning to the United States without permission, whatever the motive. The costs may be disproportionately borne by people with strong ties to the United States. There are undoubtedly circumstances where the deportation order is lawful and justified, but where an individual is ordered deported without a hearing and by an immigration officer, there is more risk that the order will be erroneous or unfair. The existing system offers few (or fewer) avenues to rectify an unfair deportation order, providing as few safeguards in the aftermath of deportation as exist during the summary expulsion process. These procedures are quick, but not quickly undone, even when the law and the facts of a case make clear that an error was made. Under human rights law, a person facing deportation not only has the right to be heard before a competent and independent adjudicator, but also has the right to a remedy. Both rights are frequently illusory for the majority of people deported from the United States today.

Cited in USA v. Peralta-Sanchez
No. 14-50393 archived on February 2, 2017

IV. INTERNATIONAL LAW AND RESTRICTIONS ON SUMMARY REMOVALS

International human rights law has developed explicit protections for non-citizens facing expulsion or seeking admission to another country. In addition to human rights law's strong protections for individuals seeking asylum, adopted into U.S. law through the Refugee Convention and the Convention Against Torture, international law requires that all individuals facing deportation have an opportunity to be heard, to advocate for their rights (including their family rights), and to be treated humanely. International law does not require states to admit all non-citizens; as the Inter-American Court of Human Rights has held, "States may establish mechanisms to control the entry into and departure from their territory of individuals who are not nationals, as long as they are compatible with the norms of human rights protection."⁵⁵⁵ Thus, when a state chooses to deport non-citizens, human rights law requires that it also provide them with a fair opportunity to be heard and have their case reviewed; the chance to seek asylum, if relevant;

Human rights law requires that all persons appearing before a judicial proceeding receive "a fair and public hearing by a competent, independent, and impartial tribunal."

protections from arbitrary or prolonged detention; and particular protections for children and families.

A. ACCESS TO JUSTICE AND THE RIGHT TO A FAIR HEARING

An individual cannot assert and protect his or her rights without the right to be heard. International human rights law specifically recognizes the right of a non-citizen facing deportation to have a hearing about his or her claims in front of a competent authority. The International Covenant on Civil and Political Rights (ICCPR), which was ratified by the United States, provides that an individual "lawfully in the territory of a State party" must "be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."⁵⁵⁵ The U.N. Human Rights Committee, the body that monitors state compliance with the ICCPR, has determined that non-citizens who want to challenge a deportation order against them are "lawfully in the territory" and, should the legality of their presence or entry be in question, "any decision on this point leading to his expulsion or deportation ought to be taken in accordance with article 13 ... an alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one."⁵⁵⁶

The U.N. Secretary General recently warned against arbitrary forced returns that may lead to additional human rights violations, and reiterated the right of every migrant "to an individual and proper assessment of her or his circumstances by a competent official, including protection needs and human rights and other considerations, in addition to reasons for entry."⁵⁵⁷

Human rights law further recognizes the right of an individual facing expulsion to legal assistance,⁵⁵⁸ and some individuals—for example, persons with disabilities⁵⁵⁹ or children⁵⁶⁰—may need particular assistance. The U.N. principles governing all detainees state that a detainee

should receive legal assistance if he or she is unable to afford a lawyer.⁵⁶¹

Under international law, it is not enough to provide a person with a hearing in front of a law enforcement agent while in detention. Rather, human rights law requires that all persons appearing before a judicial proceeding receive “a fair and public hearing by a competent, independent, and impartial tribunal.”⁵⁶² Similarly, Article 8(1) of the American Convention on Human Rights, signed by the United States in 1977, provides each person with “the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law” in the determination of their rights.⁵⁶³ Interpreting the American Convention on Human Rights, the Inter-American Commission on Human Rights has stated that deportation proceedings require “as broad as possible” an interpretation of due process requirements, and that they include the right to a meaningful defense and to be represented by an attorney.⁵⁶⁴

These numerous protections and rights are absent in the current U.S. system of summary removal, in violation of human rights law. Summary deportations without a hearing violate these laws by denying a non-citizen the opportunity to present claims and defenses against removal; the opportunity to be represented by an appointed attorney; a meaningful opportunity for judicial review; and the opportunity to have their case reviewed by a competent and neutral arbiter. In the proceedings discussed in this report, most people will have their case examined only by an officer of the Department of Homeland Security, the same agency that is arresting, interrogating, detaining, and deporting them. The charging and reviewing officers are not required to be attorneys, let alone judges, and yet rights determinations, even at the border, can be complex and require sophisticated legal analysis. Under human rights law, this limited proceeding does not qualify as a hearing before a competent or independent tribunal; indeed, the extent to which these summary procedures constitute “hearings” at all is suspect.

Individuals processed through these summary expulsion mechanisms rarely have the opportunity to speak with an attorney before being deported. Expedited removal does not include the right to an attorney, and individuals arrested

in the border zone, in particular, are generally detained in a holding cell, where they have no way of finding a lawyer and sometimes without knowing where they are. The rapidity with which they are deported makes it even more challenging to obtain legal assistance before deportation. Even beyond the border, individuals coerced to accept voluntary departure have been prevented from contacting or conferring with their attorneys prior to removal.

Moreover, under human rights law, access to justice does not only mean procedural fairness, but also includes the right to an effective remedy for victims of human rights violations. Article 2 of the ICCPR requires the government to “ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy . . .”⁵⁶⁵ This same principle is enshrined in numerous other human rights instruments, including Article 8 of the Universal Declaration of Human Rights,⁵⁶⁶ Article 14 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment,⁵⁶⁷ Article 6 of the Convention for the Elimination of All Forms of Racial Discrimination,⁵⁶⁸ Article 25 of the American Convention on Human Rights,⁵⁶⁹ and Article 13 of the European Convention on Human Rights.⁵⁷⁰

The current U.S. system of summary deportations denies many people a meaningful way to challenge unlawful deportation orders that violated their human rights. For example, an asylum seeker unlawfully returned to a country where he or she was subsequently tortured cannot easily challenge that deportation order and has no immediate remedy for the harm he or she experienced resulting from a violation of human rights law requirements under *non-refoulement* (prohibiting a state from returning a person to a place where he or she faces persecution).

In the absence of these critical protections required by human rights law, many individuals deported today through a summary removal procedure are denied access to justice both before and after their deportation from the United States.

B. THE RIGHT TO APPLY FOR ASYLUM AND THE RIGHT TO PROTECTION FROM PERSECUTION

Article 14 of the Universal Declaration of Human Rights (UDHR) provides that “[e]veryone has the right to seek and to enjoy in other countries asylum from persecution.”⁵⁷¹ Similarly, the American Convention on Human Rights explicitly provides for the right of an individual “to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes.”⁵⁷² Thus, while not everyone may be eligible for asylum, all persons seeking such protection have the right to request it and, if eligible, to receive its benefits.

Recognizing the danger that asylum seekers may be deported when they arrive at an international border seeking assistance, the Office of the High Commissioner for Human Rights (OHCHR) recently reiterated states’ obligations to ensure that migrants are given “access to information on the right to claim asylum and to access fair and efficient asylum procedures.”⁵⁷³ Supporting this right to claim asylum, the OHCHR specifically called upon States

to ensure that asylum seekers can access this protection by (1) adequately training border officials who apprehend and screen arriving migrants; (2) providing migrants with information in their own language about their right to seek asylum; and (3) investigating and disciplining officers who “obstruct access to protection and assistance services by failing to refer migrants to appropriate protection and assistance services.”⁵⁷⁴

International human rights and refugee law contain an absolute prohibition on returning an individual where he or she faces torture, persecution, or other degrading treatment.⁵⁷⁵ While the United States has adopted the Refugee Convention into domestic law, human rights law continues to recognize stronger substantive protections than the United States has. For example, in *Sale v. Haitian Ctr. Council, Inc.*, the U.S. Supreme Court held that the United States was not in violation of its *non-refoulement* obligations in returning Haitians interdicted on the high seas because the Haitians were not within U.S. territory (and so the *non-refoulement* provision did not apply).⁵⁷⁶ By contrast, the Inter-American Commission on Human Rights rejected the U.S. Supreme Court’s reasoning, finding that the United States had indeed violated these Haitian migrants’ rights to seek asylum as well as their right to life, liberty, and security of the person by summarily returning interdicted Haitians without first providing them a meaningful opportunity to have their claims heard and adjudicated.⁵⁷⁷

Currently, even within the United States territory, many asylum seekers arriving in the United States are effectively denied the opportunity to seek protection when border officials fail to inform them of that right and ignore or screen out claims of fear of persecution. In so doing, these officers not only deprive individuals of their rights under human rights and U.S. law to request protection, but also risk violating binding human rights obligations to ensure that individuals are not returned to countries where they are in danger. Several individuals



A migrant shelter in Nogales, Mexico, provides food and assistance to those recently deported from the United States.

Criminalizing, prosecuting, and imprisoning asylum seekers for entering without authorization directly contravenes their right to apply for asylum.

interviewed by the ACLU said they had asked for protection at the U.S. border, were instead deported, and were subsequently assaulted, kidnapped, raped, or killed. Many U.S. immigration officers appear to believe, incorrectly, that violence from gangs and other non-state actors will not trigger protection in the United States; however, threats and violence from these non-state actors are also grounds for international protection under human rights law.⁵⁷⁸ These are exactly the dangers that human rights law was designed to address and prevent.

Instead of receiving these necessary protections, some asylum seekers who arrive without prior authorization or travel documents are prosecuted in the United States for illegal entry or reentry, and sentenced to prison in violation of human rights law. The Refugee Convention, recognizing that asylum seekers often must arrive without prior authorization or valid travel documents, provides that asylum seekers shall not be penalized for their illegal entry or presence.⁵⁷⁹ The UNHCR's Detention Guidelines also require that detention not be "used as a punitive or disciplinary measure for illegal entry or presence in the country,"⁵⁸⁰ and yet that is exactly what prosecutions for illegal entry or reentry do. Criminalizing, prosecuting, and imprisoning asylum seekers for entering the United States without authorization directly contravenes their right to apply for asylum and to not be punished for the way they arrive when fleeing danger.

C. SPECIAL PROTECTIONS FOR CHILDREN

Human rights law recognizes the vulnerability of child migrants, particularly those traveling alone. Under the U.N. Convention on the Rights of the Child, which the United States has signed but not ratified, states are obliged to provide protection and care for unaccompanied children and to take into account a child's best interests in every action affecting the child.⁵⁸¹ The decision to return a child to his or her country of origin, under international law, must take into account the child's best interests, including his or her safety and security upon return, socio-economic conditions, and the views of the child.⁵⁸² If a child's return to their country of origin is not possible or not in the child's best interests, under human rights law states must facilitate the child's integration into the host country through refugee status or other forms of protection.⁵⁸³



Brownsville, Texas, April 2014. The border fence separating Mexico and the United States near a children's playground.

While human rights law, in general, limits the use of detention for immigration violations, the U.N. High Commission for Refugees has specifically advised that unaccompanied children “should not be detained.”⁵⁸⁴ In exceptional circumstances where children are in detention, detention must be used only as a last resort, for the shortest appropriate time, and with additional safeguards to ensure a child’s safety and welfare.⁵⁸⁵

To ensure that unaccompanied children are able to seek asylum, human rights law recognizes that states must provide a meaningful way for children to seek protection and that children must be screened by officers with particular training. Examining Portugal’s treatment of unaccompanied minors, the U.N. Committee on the Rights of the Child specifically expressed concern that unaccompanied children face “lengthy and inadequate procedures” conducted by persons without adequate training to address the specialized needs of unaccompanied minors.⁵⁸⁶

The Committee has also raised concerns where unaccompanied children with possible international protection needs are automatically turned away as “economic migrants” based on national origin and without assessment of the risks they may face (thus potentially violating *non-refoulement* obligations).⁵⁸⁷ For Mexican children who are summarily repatriated without a hearing, the right to be free from discrimination on the basis of national origin should ensure those children have an equal opportunity to claim protection in the United States and are not unfairly expelled on the basis of national origin. This issue of unfair treatment in access to immigration relief, based on national origin, has previously been considered by the Inter-American Commission for Human Rights (IACHR). Evaluating the interdiction and summary return of Haitians by U.S. authorities, the IACHR held that the United States had violated their right to freedom from discrimination, as a significantly more favorable policy was applied to Cubans and Nicaraguans.⁵⁸⁸

For children who *are* able to get an immigration hearing, U.S. law provides insufficient safeguards to ensure they can actually present their case and defend against deportation, although U.S. constitutional law acknowledges that children need additional assistance and protections when

Today, many children are alone, without representation, while facing incredibly complex legal proceedings.

interacting with the legal system. As the U.S. Supreme Court has stated, in addressing the right to appointed counsel in juvenile delinquency proceedings, a child “needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child ‘requires the guiding hand of counsel at every step in the proceedings against him.’”⁵⁸⁹ Although international human rights law requires that unaccompanied children be provided with legal assistance,⁵⁹⁰ in U.S. immigration proceedings there is no right to appointed counsel under domestic law. As a result, many children are alone, without representation, while facing incredibly complex legal proceedings. Without legal assistance, even children who have strong asylum claims may be unjustly deported and unlawfully returned to danger if they cannot express and defend their claims in court.

Cited in USA v. Perata-Sanchez, No. 14-50393 archived on February 2, 2017

D. LIMITATIONS ON DETENTION

Although many people processed through a summary removal procedure are quickly deported and will not remain in detention for long, other may be detained for weeks or months awaiting removal and without the opportunity to request release or review of their case. For example, individuals applying for asylum or individuals who are awaiting repatriation but where the United States is having difficulty securing travel documents are subject to mandatory detention.

International law requires that any person detained should be provided with a prompt and effective remedy before an independent judicial body to challenge the decision to detain him or her.⁵⁹¹ Every decision to keep a person in detention should be open to review periodically.⁵⁹² The Human Rights Committee, which interprets the ICCPR, has explicitly held that the right to be free from arbitrary deprivations of liberty includes immigration detention.⁵⁹³ Human rights law prohibits the mandatory application of detention to immigrants without individualized review.⁵⁹⁴ The state bears the burden of demonstrating that detention is necessary for the particular immigrant detained, given that individual's circumstances.⁵⁹⁵

The United Nations Working Group on Arbitrary Detention recognizes “the sovereign right of states to regulate migration” but recommends that “immigration detention should gradually be abolished.... If there has to be administrative detention, the principle of proportionality requires it to be a last resort.”⁵⁹⁶ The recent move by the U.S. government to create more detention for families and children is a move in the opposite direction.

While many people processed through summary removal procedures will not be detained for a long period of time and are quickly removed, those with claims that they defend—for example, asylum seekers—may spend months or years in detention even if they pose no risk or danger. Individuals who are referred for a credible or reasonable fear interview are detained while they await an interview and then while their case is adjudicated. The prolonged detention of asylum seekers awaiting credible or reasonable fear interviews and then a date in court violates international human rights law, particularly when those individuals are not permitted to apply for release and have their individual circumstances reviewed.⁵⁹⁷

E. THE RIGHT TO FAMILY UNITY

For non-citizens deported after many years in the United States, where they have formed families and other community ties, deportation is a harsh event whose effects ricochet through the family.⁵⁹⁸ Human rights law recognizes the central importance of the family and that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”⁵⁹⁹

Children residing in the United States whose parents are non-citizens deported without a chance to defend against deportation are also harmed by these processes. Article 9 of the CRC requires that “State Parties shall ensure that a child shall not be separated from his or her parents against their will, except when ... such separation is necessary for the best interests of the child.”⁶⁰⁰ In summary removal procedures, it does not appear that DHS officials are even inquiring whether a person has children in the United States or taking that information into account to refer the person for a hearing in which the equities can be weighed. Several individuals profiled in this report were the parents of U.S. citizen children; deportation forced them to choose between defying the order, separation from their children, and taking their children with them to a place that may have been dangerous. Some parents we spoke with said they could not bring their children to the dangerous countries to which they were deported and, as a result, felt they had to return to United States even without permission.

Article 17(1) of the International Covenant on Civil and Political Rights (ICCPR) further requires that no one shall be “subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence.” Article 23 of the ICCPR recognizes that “[t]he family is the natural and fundamental group unit of society and is entitled to

The Human Rights Committee has recognized an explicit limitation on deportations that would separate a family.

protection by society and the state,” and that all men and women have the right “to marry and to found a family.” The right to establish a family includes the right “to live together.”⁶⁰¹ The Human Rights Committee, interpreting the ICCPR, recognized an explicit limitation on a state’s ability to deport and so separate a family.⁶⁰² In *Winata v. Australia*, for example, the Human Rights Committee held that the deportation of an Indonesian couple who had an Australian citizen child violated human rights law, noting that the family’s ties to Australia and the impact on the Australian-born son from deportation would implicate the family’s right to be free from interference under international law—and the child’s right to necessary protective measures.⁶⁰³

While all deportation processes may lead to a rupture in family life for individuals with family in the country expelling them, deportations that occur without a hearing are more likely to disrupt families, in part because of the speed with which these deportations occur but also because these processes do not recognize family unity as factor affecting either relief from deportation or eligibility for a hearing. Summary removal procedures that do not allow consideration of the equities of an individual’s case—in particular, their family ties in the United States—violate human rights law both in denying the individual the opportunity to present defenses and in discounting family relationships completely. As a result, some individuals who might win relief from removal in immigration court, where they can also present evidence of their family ties and where those ties may make them eligible for discretionary relief, are instead deported with significant consequences for the individual deported and the children left behind.

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RECOMMENDATIONS TO THE DEPARTMENT OF HOMELAND SECURITY (DHS)

A. General Recommendations

1. Regarding the Use of Summary Removals
 - a. DHS should institute a basic screening tool to apply to all non-citizens, regardless of where or by which agency they are apprehended, that will identify individuals:
 - i. Who have U.S. citizen or lawful permanent resident family or family with other lawful status, including Deferred Action for Childhood Arrivals (DACA);
 - ii. Who may have non-frivolous claims to U.S. citizenship;
 - iii. Who have mental disabilities;
 - iv. Who may be eligible for asylum, withholding of removal, protection under the U.N. Convention Against Torture, Temporary Protected Status, or U or T visas;
 - v. Who may be eligible for prosecutorial discretion;
 - vi. Who may be eligible for DACA; and
 - vii. Who are children (i.e., under 21 years of age; see INA § 101(b)).
 - b. For individuals who are identified under this basic screening tool, DHS should either exercise discretion not to initiate any enforcement action or refer them for an immigration hearing under INA § 240.
 - c. DHS should train and retrain its officers against using threats, misinformation, or coercion to force an individual to sign a summary removal order; discouraging an individual from pursuing a claim for relief; or convincing an individual to waive his or her right to a hearing before a judge or to an appeal, where such right exists. DHS officers should not provide any legal information or advice beyond that required on the relevant forms or under applicable law. In particular, DHS officers should not:
 - i. Speculate about the strength or weakness of an individual's claim;

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- ii. Engage in misrepresentation or misinformation regarding an individual's eligibility for relief or ability to apply for relief from outside of the United States;
 - iii. Provide information about U.S. law such as what claims qualify for asylum, whether or not asylum exists, and whether an asylum claim can be made by an individual from a certain country;
 - iv. Make threats or claims about the impact on an individual's family in the United States should the individual fail to sign a removal order; or
 - v. Speculate about the length of time an individual will spend in detention should he or she apply for relief.
- d. DHS should have a stringent disciplinary process in place for officers who engage in any of the activities mentioned in A.1.c. Officers accused of engaging in these coercive and inappropriate activities should be reassigned to duties where they will not have contact with non-citizens to determine their removability, pending the outcome of an internal investigation. Officers found to have knowingly engaged in these activities should be terminated. In cases where an officer is found to have engaged in these practices, DHS should withdraw the removal order, inform persons affected, and reassess individual cases, even if individuals have already been deported.
- e. DHS should video-record all summary removal proceedings, and a copy of that recording should be maintained in the individual's A-File. DHS officers must inform individuals that their statements are being recorded and could potentially be used against them.
- f. DHS should promulgate regulations requiring that all summary removal orders be promptly provided in writing in the primary language spoken by the person subject to the order and that the order and its consequences be explained to the individual by an independent interpreter, where necessary, or, if interpretation is not necessary, by a DHS employee who is not affiliated with an enforcement agency.
- g. DHS should not demand that individuals sign forms that have already been filled out to accept a summary removal order or otherwise waive their right to a hearing before a judge or to an appeal.
- h. DHS should provide individuals with current contact information for their consulates and for legal services providers, and must ensure that individuals are permitted to call at no charge and consult with their consulates and a legal services provider prior to signing a summary removal order.
- i. DHS supervisors should be involved in determining whether each individual signing a removal order is competent to understand the order and the rights waived. If there is any question as to a person's competence to sign a removal

order and waive his or her rights, based on age, disability, medical condition, or any other factor, DHS should refer the individual for a full immigration hearing.

- j.** DHS should develop a complaint process for individuals who allege unfair or abusive treatment, which would provide for a prompt and detailed response to the complaint and would also analyze complaints to identify problematic trends and practices that need to be addressed through training or other corrective action.
- k.** Periodic audits by an independent monitor should be ordered to ensure compliance with applicable law and the above screening, and to identify individual officers who consistently fail to comply with the law, regulations, and policies for implementing the screening tool and ensuring fair and appropriate conduct. The monitor should have access to a statistically significant sampling of video-recordings and summary removal orders in conducting his or her review.

2. Detention of Individuals Facing Summary Removal

To ensure that individuals facing summary removal from the United States are able to exercise their rights and are not compelled to abandon them due to a coercive and harmful environment, DHS must do the following:

- a.** Create an office for CBP detention operations, planning, and oversight, and implement routine and transparent independent monitoring of short-term detention facilities. This office should make reports based on these inspections available to the public and Congress.
- b.** Create enforceable detention condition standards for CBP facilities and make those standards publicly available.
- c.** Detain individuals only as a last resort and for the shortest time necessary, with regular review of the necessity and appropriateness of continued detention.
- d.** Release asylum seekers who have passed their credible fear interviews as soon as possible.
- e.** Remove unaccompanied children and families with children from detention as soon as possible, and place requests for additional funds to expand alternatives to detention of families.
- f.** Ensure that all individuals are provided with humane treatment and basic necessities when detained, including the following:

 - i.** Adequate food and water.
 - ii.** Medical care, including adequate medical screenings in both CBP and ICE detention and prescription medications for preexisting conditions.

- iii. Appropriate temperature control and lighting, taking into account the clothing individuals are wearing, their physical activity levels in detention, and any requests detainees make for temperature changes.
 - iv. Access to toilet and shower facilities, with sufficient privacy to prevent avoidable viewing of detainees while showering, performing bodily functions, or changing clothing.
 - v. Blankets and bedding.
 - vi. Hygiene and sanitary items.
- g. Address immediate physical and mental health needs using qualified medical professionals.
 - h. Ensure that all facilities where DHS detains individuals, for whatever length of time, should be publicly identified and subject to regular independent inspections.
 - i. Fully implement the Prison Rape Elimination Act (PREA) at all CBP facilities and expedite the PREA requirement of comprehensive training for all officers and agents who encounter detainees in holding cells.
 - j. Ensure detainee access to telephones within two hours of arrival at any DHS facility and at all other times an individual is detained, except during counts, meals, and the time designated for sleeping; calls to legal services providers and consulates should be provided at no cost to detainees.
 - k. Ensure that attorneys are given broad access to detainees, including current and potential clients, and a private space in which to interview them; access should be provided at all times other than during counts, meals, and the time designated for sleeping.
 - l. Require CBP to develop a detainee locator system for short-term custody, similar to the ICE detainee locator system, to allow counsel and family members to determine where individuals are being held.
 - m. Create a free, confidential emergency hotline in each facility so that individuals can call to report abuse 24 hours a day, including sexual assault by CBP, ICE, or any other DHS official; the hotline number should be publicly displayed in a location consistently visible to detainees, along with information on reporting assaults, which should be posted in multiple languages reflecting those spoken by the detainee population. Ensure that lawful, nonperishable personal belongings of an individual in CBP custody are returned to the individual upon the individual's removal or release from CBP custody.

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B. Expedited Removal

1. To the extent DHS continues to use expedited removal, it should cease to use expedited removal against the following:
 - a. Individuals who are prima facie eligible for relief from removal or prosecutorial discretion and, instead, parole such individuals into the United States for removal proceedings before an immigration judge;
 - b. Children; and
 - c. Individuals who have entered the United States.
2. DHS should record all expedited removal proceedings, including credible fear interviews.
3. DHS should train its staff that an expedited removal order should never be issued against an individual arriving in the United States with facially valid travel documents that authorize entry to the United States. If the examining DHS officer believes the individual intends to immigrate or act in some way that contravenes their facially valid visa, the officer should allow the person to withdraw their application for admission or refer the individual to an immigration judge for regular removal proceedings.
4. DHS should refrain from issuing an expedited removal order that includes a finding of fraud or a false claim to U.S. citizenship. If DHS chooses to pursue those charges, it should refer the individual so charged to an immigration judge for a removal hearing under INA § 240.
5. Promulgate regulations requiring that expedited removal orders be promptly provided in writing in the primary language spoken by the person subject to the order and that the order and its consequences be explained to the individual by a competent interpreter, where necessary, in a language they understand.

C. Reinstated Orders of Removal

1. In addition to persons who, under the basic screening tool, DHS should not be processing through reinstatement, DHS should also decline to reinstate orders of removal, and instead refer individuals for full hearings under INA § 240 when the non-citizen meets any of the following:
 - a. Is under 21 years of age or was not yet 21 at the time of his or her prior deportation;
 - b. Has lived in the United States for 5 years;
 - c. Has U.S. citizen, LPR, or DACA-approved children, parents, or a spouse;

- d. Is being subjected to reinstatement for a removal order that was previously issued in a summary removal;
 - e. Is an asylum seeker or may possess a non-frivolous claim to withholding of removal and/or protection under the U.N. Convention Against Torture;
 - f. Has a significant mental disability; or
 - g. May be eligible for other relief from removal or prosecutorial discretion.
2. DHS should adopt a formal policy, and issue guidance, that if an underlying removal order has been invalidated in a U.S. court, including but not limited to illegal reentry proceedings under 8 U.S.C. § 1326, the prior order will not be reinstated.
 3. DHS should adopt a formal policy, and issue guidance, that if the legal basis for the underlying removal order has subsequently been invalidated through a change in law, the prior order will be vacated, not reinstated.
 4. DHS should recognize that, consistent with INA § 208, individuals in reinstatement of removal proceedings are eligible to apply for asylum as well as withholding of removal.
 5. DHS should promulgate regulations requiring that reinstatement orders be promptly provided in writing in the primary language spoken by the person subject to the order and that the order and its consequences be explained to the individual by a competent interpreter, where necessary, in a language the individual understands.
 6. DHS should require that when its officers ask individuals facing removal if they fear returning to their country of origin, they do so in the primary language the person understands.
 7. Before a reinstatement order is issued, DHS should allow the non-citizen an opportunity to file a non-frivolous motion to reopen the underlying removal order.

D. Administrative Voluntary Departure (Voluntary Return)

1. DHS should create a multilingual informational video, with input from nongovernmental stakeholders, that an individual must watch before accepting voluntary return.
2. DHS should modify the forms used in the voluntary return process to include information about all legal consequences of voluntary return and ensure that all individuals are provided such forms in the primary language they understand.
3. DHS should provide oral notice of rights and advisals of voluntary return's consequences in the primary language that the individual understands.

4. Before completing processing of an individual for voluntary return, DHS should provide a two-hour window for that individual to use a phone at no charge to attempt to contact a family member, a legal services provider, or the consulate of their country of origin.
5. DHS should prominently post a multilingual notice of rights and current phone numbers for legal services providers in all facilities where individuals are processed for voluntary return, and it should do so in a manner that is regularly accessible to those individuals.
6. All immigration enforcement officers should recognize they have discretion to allow individuals taking voluntary return to have up to 120 days to depart from the United States, and they should exercise that discretion unless individual circumstances deem otherwise.
7. DHS should train and retrain officers to emphasize that they may not attempt to influence the decisions of individuals being given the option of voluntary return.
8. DHS should create a meaningful way for individuals who believe that their voluntary returns were unfair to have their cases reexamined and, if substantiated, for the individuals to be returned to the United States and placed in the situation they were in before taking voluntary return.

E. Administrative Orders of Removal (INA § 238(b), or “238b”)

1. DHS should initiate the administrative removal process only after a person has completed his or her criminal sentence and been transferred to ICE, or alternatively ensure that the individual has the opportunity to meet with immigration legal services and complete any appeals of his or her criminal conviction prior to the initiation of the administrative removal process. To the extent that an individual is eligible for early release from a criminal sentence on condition that he or she agrees to administrative removal, DHS must provide the individual with an advisal of the consequences of such a removal order and a list of immigration legal services with which he or she can consult prior to making such a decision so he or she is aware of any potential challenges to removal he or she may be forfeiting.
2. Given the complexity of immigration law and the unstable list of crimes considered an aggravated felony, DHS should require that an individual placed in 238b proceedings be given a meaningful opportunity to consult with an expert in criminal immigration law who can help the individual evaluate whether his or her crime is an aggravated felony or other designated removable offense such as a crime involving moral turpitude (CIMT).
3. DHS should decline to use administrative removal and instead refer an individual to removal proceedings under INA § 240 whenever (1) there is a non-

frivolous basis for questioning whether the underlying crime is an “aggravated felony” or other designated offense that triggers administrative removal; (2) conviction records are either inconclusive or unavailable; or (3) the individual would be prima facie eligible for discretionary relief from removal were he or she placed in regular removal proceedings under INA § 240.

4. DHS should provide individuals in 238b proceedings with information both verbally and in writing, in the primary language that they speak, about forms of relief they may be eligible for as well as the categories of individuals who are statutorily exempt from removal under INA § 238(b).
5. DHS should ensure that a full record of the administrative removal proceeding is created, maintained, and provided at no charge to the individual.
6. DHS should ensure that all officers involved in the administrative removal process are given regular, specialized training on what crimes constitute aggravated felonies or the other offenses designated as triggering administrative removal, and additional training and materials whenever the relevant law changes.

F. Stipulated Orders of Removal

1. DHS should refrain from issuing stipulated orders of removal to immigrants unless they have a hearing before an immigration judge to assess for relief eligibility and ensure that they have agreed to the order knowingly and voluntarily.
2. DHS should advise all individuals of their entitlement to request a prompt bond hearing before an immigration judge whether or not they elect a stipulated removal order.
3. DHS should refrain from issuing stipulated orders of removal where an individual is prima facie eligible for relief from removal or prosecutorial discretion, unless such individual is represented by counsel and explicitly waives in writing, knowingly and voluntarily, his or her opportunity to seek such relief or exercise of discretion.

G. Special Protections for Children

1. DHS should ensure that unaccompanied children, in keeping with federal law, are transferred out of DHS custody and into ORR care, optimally within 24 hours but no later than 72 hours after their apprehension.
2. DHS should develop a multilingual informational video for children that explains to them what their rights are when they are apprehended and facing removal, and DHS should require its officers to show the video to children before accepting their voluntary return.

3. DHS should use an outside agency or local nongovernmental organization with specialized experience in working with immigrant children to undertake the immediate screening and interviewing of unaccompanied minors from Mexico or Canada that is required under current law within 48 hours of their apprehension by DHS. In the interim, USCIS staff can undertake this responsibility. In consultation with child protection experts and child psychologists, DHS should revise CBP Form 93 and Form I-770 and create a uniform, mandatory, and comprehensive list of screening questions for children from Mexico or Canada who, under the TVPRA, can take voluntary return only if DHS makes an individualized determination pursuant to 8 U.S.C. § 1232(a)(2) that each child (1) has not been a victim of a severe form of trafficking in persons, and there is no credible evidence that such child is at risk of being trafficked upon return to his or her home country; (2) does not have a credible fear of persecution in his or her home country; and (3) is able to make an independent decision to withdraw his or her application for admission to the United States.
4. DHS should employ child welfare experts and/or child psychologists to conduct one-on-one screenings of Mexican and Canadian unaccompanied minors within 48 hours of their apprehension in order to assess each of the three factors listed in § 1232(a)(2) (regarding trafficking, credible fear, and independent withdrawal).
5. DHS, in conducting such screenings, should bear the burden of affirmatively demonstrating each of the three factors listed in § 1232(a)(2), and should require that, in cases where there is any doubt with respect to any of the three factors, its officers transfer the child to ORR care and refer the child for an immigration hearing.
6. With respect to the third factor listed in § 1232(a)(2) (independent withdrawal), DHS should ensure a child is not deemed competent to make an independent decision to return to their home country unless he or she is informed and understands that (a) he or she will be transferred to ORR custody and receive appropriate shelter, care, and services if he or she chooses to refuse return; (b) he or she has a right to see a judge if DHS chooses to pursue removal; and (c) he or she will have an opportunity to apply for forms of relief that may permit him or her to stay in the United States.
7. In the event that screening of an unaccompanied minor from Mexico or Canada pursuant to § 1232(a)(2) cannot or does not take place within 48 hours of the child's apprehension, DHS must, under the TVPRA, transfer that child to ORR custody, and if it wishes to pursue removal of that child, it must refer him or her for an immigration hearing.
8. DHS should ensure that any screenings or interviews with children take place in an appropriate, child-friendly setting that is designed to make children feel safe and comfortable, and that does not resemble a typical jail cell or law enforcement interrogation room.

9. DHS should provide regular and specialized training for all officers who interact with unaccompanied minors on children's rights in the immigration system, the appropriate way to interact with children, and language that should not be used with children that may deter them from seeking protection in the United States or that may create an atmosphere of mistrust, fear, coercion, or misunderstanding.
10. DHS should expand the jurisdiction of the existing USCIS ombudsman and require that he or she routinely inspect the facilities in which children are held and ensure children are treated humanely by DHS staff and not subject to any threats, misrepresentation, or coercion.
11. DHS should ensure that all children have the opportunity to speak with a parent, guardian, or other adult advocate in a confidential setting before they are given any forms to sign or permitted to accept voluntary return.
12. DHS should ensure that all children have the meaningful opportunity to consult, in person or via phone, with a person entitled to represent others in immigration proceedings, as defined in 8 C.F.R. § 1291.1, an employee of a nonprofit services provider, or a child welfare specialist—prior to being permitted to accept voluntary return.

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TO THE DEPARTMENT OF JUSTICE (DOJ)

A. On Prosecutions for Immigration Crimes

1. Asylum seekers should not be punished for seeking admission to the United States. To that end, the Department of Justice should do the following:
 - a. Ensure that individuals referred for a credible fear or reasonable fear interview or who claim fear of returning to their country of origin before or during their prosecution for illegal entry or reentry are not prosecuted until after they have completed a credible fear or reasonable fear interview, pursued their asylum claim in immigration court, and exhausted the appeal process, should they wish to do so.
 - b. Ensure that asylum seekers are not prosecuted for use of false documents by ensuring that asylum seekers are first allowed to pursue asylum relief; if and only if they are found not to have an asylum claim (after an asylum interview, pursuing relief in immigration court, and exhausting appellate remedies) should a person making a frivolous or fraudulent asylum claim be prosecuted for use of false documents to obtain admission.
2. To ensure a more judicious use of prosecutorial resources, the Department of Justice should:
 - a. Direct U.S. Attorneys to de-prioritize 8 U.S.C. § 1325 (illegal entry) and 8 U.S.C. § 1326 (illegal reentry) prosecutions except in specific cases where such charges advance one of the Department's current prosecutorial interests: national security, violent crime, financial fraud, and protection of the most vulnerable members of society.
 - b. Direct U.S. Attorneys not to initiate § 1325 or § 1326 charges against individuals who are currently under the age of 18 or who were under the age of 18 at the time of their prior removal from the United States.
 - c. In the case of violent crime, direct U.S. Attorneys to pursue § 1325 or § 1326 charges only against individuals who have convictions for serious, violent felonies and whose sentences for those felonies were completed within the previous five years.

- d. Prosecutors should exercise discretion not to pursue a § 1326 charge when the nature of the prior removal order, prior entry conviction, or prior reentry conviction that justifies such a charge presents significant due process concerns.
- e. Prosecutors should not pursue a § 1326 charge where the individual's prior removal order was a summary removal order.
- f. Prosecutors should exercise discretion not to pursue § 1325 and § 1326 charges against certain vulnerable categories of individuals (for example, victims of domestic violence and the elderly) or against individuals with significant U.S. ties (for example, individuals with U.S. citizen or lawful permanent resident spouses, parents, or minor children, and individuals who are or are related to veterans and members of the U.S. Armed Forces).
- g. DOJ and DHS should end the practice of appointing Border Patrol attorneys or other DHS employees to act as Special Assistant U.S. Attorneys, or in any prosecutorial capacity, in § 1325 and § 1326 cases.

B. Executive Office for Immigration Review

1. Consistent with INA § 208, permit individuals in the reinstatement of removal or administrative removal process to apply for asylum, not just withholding of removal or CAT relief.
2. Ensure that all individuals who accept stipulated removal orders be brought before an immigration judge within 48 hours—or at most within 7 days—to ensure that they are knowingly and voluntarily waiving their right to a removal hearing before an immigration judge.
3. Provide regular and specialized training for all court officers who interact with unaccompanied minors on children's rights in the immigration system, the appropriate way to interact with children, and language that should not be used with children that may deter them from seeking protection in the United States.
4. Provide appointed counsel to all children facing removal from the United States who go before an immigration judge.

TO THE DEPARTMENT OF STATE

1. Issue guidance for all consular processing offices clarifying that for individuals who have been unlawfully deported from the United States, consular offices are authorized to immediately issue travel documentation and proof of residency so those individuals may return to the United States.
2. Issue guidance for all consular processing offices explicitly authorizing consular officers to (1) review and override an expedited removal order, where officers believe the expedited removal order was erroneous; and (2) to immediately issue both a new visa and a I-212 waiver for the individual.

TO CONGRESS

A. Expedited Removal

1. Amend INA § 235(b) to expressly prohibit the use of expedited removal against children, persons with disabilities, individuals apprehended within the United States (including individuals apprehended within 100 miles of the border), and individuals arriving at ports of entry after a brief trip outside the United States but who have been in the United States for at least two years prior to their departure.
2. Amend INA § 235(b) to expressly allow an individual placed in expedited removal proceedings to be represented by counsel during all stages of the process and to require immigration officers to inform the individual of that right before subjecting them to the process.
3. Amend INA § 235(b) to permit review commensurate in scope with that provided for removal orders in the Court of Appeals by petition of review.
4. Amend INA § 242(a)(2)(D) (8 U.S.C. § 1252(a)(2)(D)) to clarify that nothing in Section 242(a)(2)(A) precludes judicial review of constitutional claims or questions of law relating to an expedited removal order, including challenges to unwritten policies and procedures.
5. Amend INA § 242(e)(3) to clarify that the 60-day deadline runs from the time an expedited removal order is applied to an individual.

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B. Special Protections for Children

1. Expressly provide for appointment of counsel to all children facing removal from the United States.
2. Expressly require that all children see an immigration judge prior to removal, voluntary or otherwise, from the United States and that they be given adequate time and resources to prepare their cases.
3. Expressly require that children arriving in the United States with or without their parents be released to less restrictive alternatives to detention while going through the immigration enforcement process. Require that children be transferred out of CBP custody as quickly as possible and that in no case they be held in CBP custody beyond 72 hours. Clarify that an increase in the number of children arriving in the United States is not an “exceptional circumstance” under the TVPRA that can justify extending the detention of a child in CBP custody and delaying their transfer to ORR custody beyond 72 hours.
4. Amend 8 U.S.C. § 1232(a)(2) of the TVPRA so that all unaccompanied children, including those arriving from contiguous countries, are treated equally and fairly, with automatic transfer into ORR custody within 72 hours and the right to a hearing before an immigration judge. Expressly prohibit DHS from allowing unaccompanied children from any country to accept voluntary return without a hearing at which the child is represented by counsel.
5. Expressly require that children who state a desire to return to their home country to DHS or ORR officials receive a prompt hearing before an immigration judge within 48 hours of such statement. Require that the immigration judge fully advise the child of his or her rights and of the availability of forms of immigration relief, including but not limited to a T visa, U visa, SIJS, or asylum. Provide that if the child, following such advisal by the immigration judge, makes an informed and independent decision to return to his or her home country, the immigration judge may grant voluntary departure.

C. Other Recommendations to Improve Fairness in Removals

1. Amend INA § 240(d) to explicitly require that any individual who signs a stipulated order of removal be brought before an immigration judge before the order is entered.
2. Appropriate funds to EOIR to provide appointed counsel to all children facing removal.
3. Appropriate funds to EOIR to hire additional immigration judge teams in order to clear the nationwide backlog in immigration courts.
4. Create a pilot project that assigns immigration judges to designated international airports in the United States, including but not limited to airports serving New York City, Los Angeles, Houston, Miami, and Detroit, so that immigration judges could immediately conduct hearings for individuals whom CBP officers suspect are inadmissible, rather than having CBP issue expedited removal orders.

GLOSSARY OF TERMS

Administrative Removal (or “238b removal”), authorized by INA § 238(b), is a summary removal procedure that can be used to issue a removal order to a non-citizen who is not a lawful permanent resident in the United States and who has been convicted of an aggravated felony or other qualifying offense under immigration law. These orders are issued by an immigration officer, sometimes while the individual is still in criminal custody.

Aggravated Felony is a category of crimes, listed in the Immigration and Nationality Act (INA) at 8 U.S.C. § 1101(a)(43), that trigger severe penalties for non-citizens, making them deportable and ineligible for most forms of relief from removal. The crimes considered “aggravated felonies” include crimes that, under state criminal laws, are not necessarily felonies and may not even include a term of imprisonment. The INA identifies 21 types of crimes in the aggravated felony category ranging from tax evasion to rape, and what is considered an aggravated felony varies in accordance with state law. Some aggravated felonies do require that the individual was sentenced for a period of 365 days or more for the crime to constitute an aggravated felony—for example, burglary, a crime of theft, or a crime of violence. Even if the person never actually served any time in prison for the offense—for example, if the person receives a “suspended sentence” from a criminal court but is not required to serve all or any part of that sentence in prison—his or her crime can be considered an aggravated felony.

Asylum is a type of relief from deportation; it is given to qualified applicants who fear returning to their country of nationality because of past persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. Individuals granted asylum can petition for their family members to come to the United States and may apply for lawful permanent residence and, ultimately, citizenship.

Consequence Delivery System (CDS) describes several instruments utilized by the Department of Homeland Security to deter unauthorized entry and reentry to the United States through civil and criminal penalties. Some of these mechanisms include the use of summary removal orders; referral for criminal prosecution for illegal entry or reentry; and “lateral deportation” or “remote repatriation,” where a Mexican national arrested at the U.S. border is deported to a location far from where he or she entered the United States.

Convention Against Torture (CAT) is an international human rights treaty, signed and ratified by the United States in 1994, that obligates countries that have signed it to prohibit and prevent torture and cruel, inhuman, or degrading treatment or punishment in all circumstances. In immigration proceedings, CAT protections such as withholding of removal and deferral of removal ensure that individuals are not returned to places where they would face torture.

Convention Relating to the Status of Refugees (Refugee Convention) is an international human rights treaty that has been implemented into U.S. law through INA § 208. The Refugee Convention requires that asylum seekers not be penalized for their illegal entry or presence and that they be given the opportunity to seek asylum; it prohibits the expulsion of asylum seekers to places where they face persecution.

Credible Fear Interview (CFI) is a threshold interview conducted by an asylum officer for individuals subject to expedited removal who claim fear of persecution or torture if returned to their country of origin. The asylum officer then determines whether the claim is sufficiently meritorious that the individual can receive a full asylum hearing in court; if the officer decides the non-citizen’s fear is not “credible,” the non-citizen can be removed through expedited removal.

Customs and Border Protection (CBP) is a law enforcement agency within the Department of Homeland Security and includes several components, including the Office of Field Operations (OFO) and Customs and Border Patrol (“Border Patrol”). OFO is responsible for border security, including screenings, inspection, and admission at ports of entry. Border Patrol, which operates beyond ports of entry within 100 miles of U.S. international borders, arrests individuals whom it suspects of unlawfully entering the United States. Both Border Patrol and OFO arrest, detain, and deport individuals through summary removal procedures like expedited removal.

Deportation or “removal” under the Immigration and Nationality Act is the forcible expulsion of a deportable or inadmissible non-citizen from the United States with a formal removal order issued either by an immigration officer or an immigration judge. Throughout this report, the terms “deportation” and “removal” are used for individuals deported with a removal order; individuals who take voluntary return, which requires he or she leave the country and also comes with civil consequences should the individual return to the United States, are referred to as “returning” or being “repatriated” to their countries of origin.

Expedited Removal, authorized under INA § 235, is a summary removal procedure that applies to all unauthorized immigrants at ports of entry and unauthorized immigrants found within the United States and within 14 days of arrival if arrested within 100 miles of the U.S. international border. Expedited removal involves a formal removal order issued by an immigration officer or Border Patrol agent and includes a minimum five-year ban on reentering the United States.

Illegal Entry is a federal crime and is the unauthorized entry into the United States without being inspected and admitted by an immigration officer. It is a misdemeanor under 8 U.S.C. § 1325 and is punishable by up to 6 months in federal prison.

Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) is a federal law that significantly altered immigration law and procedures. One of its most consequential changes was to create expedited removal at the U.S. border so that individuals who previously would have been given an immigration hearing if they arrived without proper travel documents could instead be deported by immigration officers without a hearing.

Illegal Reentry is a federal crime and is the reentry into the United States of an individual who has previously been deported and has not been given permission to reenter the United States. Illegal reentry is a felony under 8 U.S.C. § 1326 and is punishable by up to 20 years in prison.

Immigration and Customs Enforcement (ICE) is an agency under the Department of Homeland Security responsible for arresting, detaining, and prosecuting non-citizens accused of violating immigration law in immigration courts.

Immigration and Nationality Act (INA) is the basic body of immigration law in the United States. Passed in 1952 and amended numerous times since then, the INA collected, codified, and structured the extant U.S. immigration laws.

Inadmissible is an immigration law term that describes a non-citizen who is not eligible to be admitted to the United States under U.S. immigration law because he or she lacks valid admission documents or based on certain characteristics such as prior immigration violations, criminal history, or medical conditions.

Lawful Permanent Resident (LPR) (also known as a “green card holder”) is a non-citizen authorized to live and work in the United States on a permanent basis.

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Non-Refoulement Obligation (“non-refoulement”) under Article 3 of the Convention Against Torture is a legal requirement, binding on the United States through the Foreign Affairs Reform and Restructuring Act of 1998 (“FARRA”). Non-refoulement requires that the U.S. government not expel, extradite, or involuntarily return a person to a country in which there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

Notice to Appear (NTA) is the “charging document” issued by Immigration and Customs Enforcement to a person whom the U.S. government seeks to deport from the United States by means of a regular removal hearing before an immigration judge. The NTA starts the immigration case, in court, against a non-citizen.

Operation Streamline, currently in effect in four judicial districts, is a “zero-tolerance” program that requires the federal criminal prosecution and imprisonment of all unlawful border crossers. Judges combine the initial appearance, arraignment, plea, and sentencing into one mass hearing for the 70–80 defendants processed daily. Attorneys are often not provided until courtroom appearances.

Reasonable Fear Interview (RFI) is an interview conducted by an asylum officer for non-citizens who have a fear of persecution or torture in their country of origin but who have either a prior order of removal or have been convicted of certain offenses. These individuals, in the government’s view, are not entitled to asylum and can receive only less permanent protection with fewer benefits. As in the credible fear process, an asylum officer determines whether the non-citizen’s claim is sufficiently meritorious that he or she should receive a hearing in court on his or her claim for protection.

Reinstatement of Removal, authorized under INA § 241(a)(5), is a summary removal order that may be issued to individuals who previously received a formal removal order, departed the United States, and subsequently returned to the United States without permission from the U.S. government. These orders are issued by immigration officers, not judges.

Relief from Removal is a type of immigration benefit granted to an individual, although technically “removable” because of his or her immigration status and other factors, when the government determines he or she should not be deported and should be allowed to stay in the United States based on equitable factors recognized in the INA such as length of residence and family ties. While relief is discretionary, some individuals cannot be deported even if they are “removable” (e.g., an unauthorized immigrant or a lawful permanent resident who has been convicted of certain crimes) because he or she would face persecution or torture if removed to his or her country of origin. This is not considered “relief,” as it is mandatory in keeping with U.S. law and obligations.

Stipulated Order of Removal, authorized under INA § 240, is a type of summary removal in which a non-citizen accepts his or her deportation and waives arguments to relief or to dispute his or her removability. It is reviewed and signed by an immigration judge; however, immigration judges are not required to meet with the individual taking a stipulated order or to question him or her in person.

Summary Removal Procedures are processes by which immigration enforcement officers of the Department of Homeland Security order a non-citizen deported from the United States or process a non-citizen to be returned, without a formal removal order, to their country of origin. These procedures do not involve a judge or a full hearing but in many cases have the same consequences—deportation, bars on reentry, and penalties for returning without authorization—as a removal order issued by a judge from the Department of Justice after a full hearing. Summary removal procedures include expedited removal, reinstatement of removal, administrative removal (238b), stipulated orders of removal, and voluntary return.

Trafficking Victims Protection Reauthorization Act (TVPRA) is a federal law that provides several protections for victims of trafficking and includes critical safeguards for unaccompanied children entering the United States. In particular, the TVPRA requires that unaccompanied children from “noncontiguous countries” go before an immigration judge to have their cases heard. Children from the contiguous countries of Mexico and Canada must be screened to determine whether they have an asylum claim, whether they are at risk of or a victim of trafficking, and whether they have the capacity to choose to return to their country of origin. If not, they must see an immigration judge.

T Nonimmigrant Visa (T visa) is a visa for individuals arriving or already inside the United States who are or have been victims of human trafficking and who are willing to assist in an investigation or prosecution of human trafficking.

U Nonimmigrant Visa (U visa) is a visa for victims of certain crimes—ones that either occurred in the United States or violated U.S. laws—who are willing to help in an investigation or prosecution of that crime. Some of the qualifying crimes include domestic violence, kidnapping, and rape.

Violence Against Women Act (VAWA) allows a battered spouse, child, or parent to apply for a visa petition under the INA if the abuser was a U.S. citizen or lawful permanent resident.

Voluntary Return/Administrative Voluntary Departure is a tool that allows non-citizens to “accept” repatriation to their country of origin without a formal removal order; as such, it does not incur all of the penalties associated with a formal removal order. However, it does require the individual to waive a hearing and the opportunity to make claims for relief, to depart from the United States, and to wait outside the United States, in some cases for many years, until he or she can apply to return.

Withholding of Removal is a form of protection stemming from U.S. obligations under the Convention Against Torture and the Refugee Convention that prevents the return or removal of a person to a country where he or she faces torture or persecution. This protection does not include all the benefits of asylum, such as the right to petition for one’s children to come to the United States, and is not a permanent status, nor does it lead to permanent status in the United States.

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Over one hundred individuals who had been deported or were facing deportation shared their stories with the ACLU, including intimate details about violence they had faced and their fears for their families on both sides of the border. The ACLU thanks all the individuals and their families who were interviewed for this report for their courage and generosity in sharing their stories.

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ENDNOTES

1. Interview with Hilda, Los Angeles, California, March 20, 2014 (on file with the ACLU).
2. Department of Homeland Security, Office of Immigration Statistics, Annual Report, *Immigration Enforcement Actions: 2013*, September 2014, available at http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf. The remaining 75,142 removal orders could include orders issued by immigration judges such as voluntary departure (where the judge may not actually see the individual in person) as well as other summary removal orders issued by an immigration officer, including administrative removal or stipulated orders of removal. The ACLU has requested the number of these removals through a Freedom of Information Act request but has not received a response from the Department of Homeland Security, which conducts these removals.
3. *Id.*
4. Throughout this report, the terms “removal” and “deportation” are used interchangeably to refer to the compulsory repatriation of an individual with an order requiring their departure issued by the U.S. government. As discussed later in this report, “summary removal procedures” may also include administrative voluntary departure or “voluntary return” where an individual agrees to leave the United States without a formal order of removal.
5. Throughout this report, the phrase “summary removal procedures” will be used to describe the various administrative removal processes where a person can be removed or returned from the United States without seeing a judge. These processes include expedited removal, reinstatement, administrative removal, voluntary return, and stipulated orders of removal. Their differences, including the claims that can be made and their consequences, are explained at length in the legal background section of this report.
6. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (hereinafter “IIRIRA”), enacted as Division C of the Defense Department Appropriations Act, 1997, Pub. L. No. 104–208, 110 Stat. 3008 (Sept. 30, 1996).
7. TRACIMMIGRATION, *ICE Targeting: Odds Non-Citizens Ordered Deported by Immigration Judge through March 2014*, (“Immigration and Customs Enforcement (ICE) has had diminishing success in convincing Immigration Judges to issue removal orders. Such orders are now granted only about 50 percent of the time, the lowest level since systematic tracking began more than 20 years ago...During FY 2011 that rate had fallen to 70.2 percent; by FY 2012 it had slipped to fewer than 2 out of 3 (62.6%). Last year court records indicated a 52.9 percent success rate, and during the first four months of the current fiscal year 2014 (October 2013 - January 2014) it was down to only 50.3 percent.”).
8. Department of Justice, “Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures; Final Rule,” 62 Fed. Reg. 10313, March 6, 1997.
9. In fact, the authorizing statute requires that DHS officers use a form that includes a paragraph explaining asylum to individuals processed for expedited removal. 8 C.F.R. 235.3(b)(2)(i).
10. United States Commission on International Religious Freedom, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL, Feb. 8, 2005, available at http://www.uscirf.gov/index.php?option=com_content&task=view&id=1892&Itemid=1.
11. This figure includes only individuals with whom the ACLU spoke directly and who had a (prior or current) removal order when interviewed; it does not include additional cases where the ACLU conducted a file review or interviewed only the individual’s relatives, nor does it include individuals who were *not* deported by CBP at the border (for example, individuals arrested by ICE in the interior of the United States, including individuals who were soon after serving a criminal sentence or being arrested by local police anywhere in the United States).
12. As explained in the Methodology section of this report, full names are not used for individuals interviewed for this report in order to respect the sensitivity of the information communicated and because several of these individuals have on-going immigration cases. Full names are provided for individuals whose stories are already in the public domain.
13. See generally, Jennifer Koh Lee, *Rethinking Removability*, 65 FLA. L. REV. 1803 (2013).
14. A U visa is a nonimmigrant visa given to crime victims who assist law enforcement with the investigation and prosecution of crimes.
15. Customs and Border Protection operates within 100 miles of any international land or sea border, maximizing its interpretation of “reasonable distance” in INA Section 287(a)(3). ACLU, “Customs and Border Protection’s (CBP’s) 100-Mile Rule,” available at <http://legalactioncenter.org/sites/default/files/CBP%20100%20Mile%20Rule.pdf>.
16. UNHCR, Confidential Report, FINDINGS AND RECOMMENDATIONS RELATING TO THE 2012-2013 MISSIONS TO MONITOR THE PROTECTION SCREENINGS OF MEXICAN UNACCOMPANIED CHILDREN ALONG THE U.S.-MEXICO BORDER (“UNHCR CONFIDENTIAL REPORT”), June 2014 (on file with the ACLU).
17. Interview on file with the ACLU, March 3, 2014, Nogales, Sonora, Mexico.
18. Memorandum for the Heads of Executive Departments and Agencies, *Response to the Influx of Unaccompanied Alien Children Across the Southwest Border* (June 2, 2014) (on file with the ACLU).
19. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, CHILDREN ON THE RUN: UNACCOMPANIED CHILDREN LEAVING CENTRAL AMERICA

AND MEXICO AND THE NEED FOR INTERNATIONAL PROTECTION (May 2014), 39 (hereinafter “UNHCR Report”), available at http://www.unhcrwashington.org/sites/default/files/UAC_Children%20on%20the%20Run_Full%20Report_May2014.pdf.

20. U.S. Senate, Committee on the Judiciary, “The Southern Border in Crisis: Resources and Strategies to Improve National Security,” S. Hrg. 109-1018 (June 7, 2005).

21. This strategy is known as the “Consequence Delivery System” and includes several programs such as the use of formal summary removal orders, criminal prosecution for illegal entry and reentry, and remote repatriation. See generally Marc R. Rosenblum, Congressional Research Service, *Border Security: Immigration Enforcement Between Ports of Entry*, Jan. 6, 2012, available at <http://fpc.state.gov/documents/organization/180681.pdf/>.

22. To date, DHS has failed to provide complete data regarding recidivism rates, so evaluating the “success” of these Consequence Delivery System programs, on DHS’s terms, is not currently possible.

23. U.S. Congress, Committee on the Judiciary, U.S. Senate, “The Southern Border in Crisis: Resources and Strategies to Improve National Security,” S. Hrg. 109-1018 (June 7, 2005); Vice President Joseph Biden, Remarks to the Press and Question and Answer at the Residence of the U.S. Ambassador, Guatemala City, Guatemala (June 20, 2014) (“none of these children or women bringing children will be eligible under the existing law in the United States.”), available at <http://www.whitehouse.gov/the-press-office/2014/06/20/remarks-press-qa-vice-president-joe-biden-guatemala>; Interview with Secretary of Homeland Security Jeh Johnson, NBC NEWS, MEET THE PRESS, July 6, 2014 (video) (“The goal of the Administration is to stem the tide and send the message unequivocally that if you come here you will be turned around.”); Background Briefing from the Senior U.S. Department of State Official on Secretary Kerry’s Trip to Panama (July 1, 2014) (stating incorrectly that people who are not fleeing war zones can be returned to dangerous locations), available at <http://m.state.gov.md228646.htm>.

24. *Yamataya v. Fisher*, 189 U.S. 86, 100-01 (1903).

25. *Ng Fung Ho v. White*, 259 U.S. 276, 284-85 (1922). See also *Padilla v. Kentucky*, 130 S.Ct. 1473, 1481 (2010) (“deportation is a particularly severe penalty”).

26. *Woodby v. INS*, 385 U.S. 276, 285 (1966).

27. One federal appellate court compared the immigration code to King Minos’s labyrinth in ancient Crete, while another deemed it second only to the federal tax code in its complexity. See *Lok v. INS*, 548 F.2d 37, 38 (2nd Cir. 1977); *Castro O’Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1987).

28. VERA INSTITUTE FOR JUSTICE, IMPROVING EFFICIENCY AND PROMOTING JUSTICE IN THE IMMIGRATION SYSTEM: LESSONS FROM THE LEGAL ORIENTATION PROGRAM, May 2008, 1, available at http://www.vera.org/sites/default/files/resources/downloads/LOP_Evaluation_May2008_final.pdf. Texas Appleseed, a non-profit legal services organization, found that 86 percent of immigration detainees in

Texas were unrepresented in 2009. Texas Appleseed, *Justice for Immigration’s Hidden Population: Protecting the Rights of Persons with Mental Disabilities in the Immigration Court and Detention System*, March 2010, p. 13, available at http://www.texasappleseed.net/index.php?option=com_docman&task=doc_download&gid=313.

29. Julie Myers Wood & Wendy Young, *Children Alone and Lawyerless in a Strange Land*, THE WALL STREET JOURNAL, Sept. 22, 2013, available at <http://online.wsj.com/news/articles/SB10001424127887324492604579083400349940432> (“We’ve seen children as young as 5 facing an immigration judge with no representation.”). See generally *J.E.F.M. v. Holder*, No. 2:14-CV-01026 (W.D.Wash. July 9, 2014), available at https://www.aclu.org/sites/default/files/assets/filed_complaint_0.pdf.

30. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (hereinafter “IIRIRA”), enacted as Division C of the Defense Department Appropriations Act, 1997, Pub. L. No. 104–208, 110 Stat. 3008 (Sept. 30, 1996). The various processes created in 1996 include expedited removal, administrative voluntary departure, reinstatement, administrative removal, and stipulated orders of removal. Each is discussed at length in subsequent sections of this report.

31. The ACLU submitted FOIA requests to ICE and CBP that are currently being litigated requesting information as to the number of people considered a recent illegal entrant by virtue of where they were apprehended, and within that number, how many people were actually longtime U.S. residents rather than first-time arrivals. This information has not been released to date.

32. Marc R. Rosenblum and Doris Meissner, MIGRATION POLICY INSTITUTE, THE DEPORTATION DILEMMA: RECONCILING TOUGH AND HUMANE ENFORCEMENT, (April 2014) at 21 (“MPI Report”) available at <http://www.migrationpolicy.org/research/deportation-dilemma-reconciling-tough-humane-enforcement>.

33. *Id.* at 4.

34. *Id.* at 25.

35. 1967 United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 6276.

36. Immigration judges are administrative judges within the Executive Office for Immigration Review, under the Department of Justice. While they are “administrative” actors, they nonetheless are considered to have more independence than an immigration officer conducting the summary removal process. An immigration officer is part of the agency (DHS) that is responsible for apprehending, detaining, prosecuting, and removing non-citizens.

37. See, e.g., *Matter of E-R-M-F- & A-S-M-*, 25 I&N Dec. 580, 588 (BIA 2011).

38. Memorandum from John Morton, Director, ICE, “Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens,” June 17, 2011.

39. *Id.* Prosecutorial discretion, which can be exercised in the charging process, during the litigation, and/or to settle a case, is a tool that applies to ICE. It does not appear that there is any such guidance for CBP.
40. 8 U.S.C. § 1229a(b)(4)(A)-(B).
41. 8 U.S.C. § 1229a(b)(4)(C).
42. See Daniel Costa, *Overloaded Immigration Courts*, ECON. POL. INST., July 24, 2014, available at <http://www.epi.org/publication/immigration-court-caseload-skyrocketing/>; Ana Campoy, *Immigration Courts' Backlogs Increase*, WALL ST. J., Aug. 12, 2014, available at <http://online.wsj.com/news/articles/SB40001424052702304070304580077491244309462>. See also Eli Saslow, *In a Crowded Immigration Court, Seven Minutes to Decide a Family's Future*, WASH. POST, Feb. 2, 2014, available at http://www.washingtonpost.com/national/in-a-crowded-immigration-court-seven-minutes-to-decide-a-familys-future/2014/02/02/518c3e3e-8798-11e3-a5bd-844629433ba3_story.html?hpid=z4; Dana Leigh Marks, *Immigration Judge: Death Penalty Cases in Traffic Court Setting*, CNN (June 26, 2014), <http://www.cnn.com/2014/06/26/opinion/immigration-judge-broken-system/>.
43. See, e.g., Kirk Semple, *Advocates in New York Scramble as Child Deportation Cases Are Accelerated*, N.Y. TIMES, Aug. 4, 2014, available at <http://www.nytimes.com/2014/08/05/nyregion/advocates-scramble-as-new-york-accelerates-child-deportation-cases.html>; Julia Preston, *Young and Alone, Facing Court and Deportation*, N.Y. Times, Aug. 25, 2012, at A1, available at <http://www.nytimes.com/2012/08/26/us/more-young-illegal-immigrants-face-deportation.html?pagewanted=all> (describing six-year-old child in removal proceedings without counsel); see also Julie Myers Wood & Wendy Young, *Children Alone and Lawyerless in a Strange Land*, The Wall Street Journal, Sept. 2, 2013, available at <http://online.wsj.com/news/articles/SB10001424127887324492604579083400349940432> (“We’ve seen children as young as 5 facing an immigration judge with no representation.”). See generally, HUMAN RIGHTS WATCH/AMERICAN CIVIL LIBERTIES UNION, DEPORTATION BY DEFAULT: MENTAL DISABILITY, UNFAIR HEARINGS, AND INDEFINITE DETENTION IN THE US IMMIGRATION SYSTEM (July 2010), available at: https://www.aclu.org/files/assets/usdeportation0710_0.pdf. The ACLU subsequently filed a class action lawsuit on behalf of immigrants with mental disabilities on the right to counsel, which resulted in a permanent injunction in California, Arizona, and Washington State in May 2013.
44. See, e.g., Jaya Ramji-Nogales, Andrew Schoenholtz, and Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 345 (2008) (finding that an immigration judge’s prior work experience had a statistically significant impact on his or her rate of granting asylum); Perla Trevizo, *Who Gets Detained, Released Sometimes Just Luck*, Ariz. Daily Star, Aug. 23, 2014, available at http://tucson.com/news/local/border/who-gets-detained-released-sometimes-just-luck/article_a42169bf-6399-51be-ae1d-3c0feed6ecf3.html. See, e.g., Julia Preston, *U.S. Faces Suit Over Tactics at Immigrant Detention Center*, N.Y. Times, Aug. 22, 2014, available at <http://www.nytimes.com/2014/08/23/us/us-faces-suit-over-tactics-at-immigrant-detention-center.html>; *Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings*, Study Group on Immigrant Representation 4 (Dec. 2011) (finding that 74 percent of represented non-detained non-citizens received favorable outcomes, as opposed to 13 percent of unrepresented non-detained non-citizens).
45. U.S. Congress, Committee on the Judiciary, U.S. Senate, “The Southern Border in Crisis: Resources and Strategies to Improve National Security,” S. Hrg. 109-1018 (June 7, 2005).
46. MPI report at 18.
47. *Id.* at 4-5. The ACLU has requested information from CBP, through FOIA, on how agents determine whether to allow someone to withdraw a request for admission, to be referred to regular removal proceedings, or to place someone in a summary removal proceeding such as expedited removal.
48. Department of Homeland Security, FY 2013 ICE Removal Statistics, available at <http://www.ice.gov/removal-statistics/>.
49. Under the INA, a person who is “inadmissible” is ineligible for a visa or for admission to the United States based on health grounds, their criminal record, or, under some circumstances, a prior removal order.
50. 8 U.S.C. § 1225(b)(1)(A)(i).
51. 8 C.F.R. § 235.3 (b)(2)(ii).
52. INA § 235(b); 8 C.F.R. § 235.3(b)(1)(ii); Department of Homeland Security, “Designating Aliens for Expedited Removal,” 69 Fed. Reg. 48877-01, 48879 (Aug. 11, 2004) (“[T]his notice applies only to aliens encountered within 14 days of entry without inspection and within 100 air miles of any U.S. international land border.”), available at <http://www.gpo.gov/fdsys/granule/FR-2004-08-11/04-18469>.
53. INA § 212(a)(9)(A)(i), 8 U.S.C. § 1182(a)(9)(A)(i).
54. INA § 212(a)(6)(C).
55. See INA § 235.3(b)(1)(A)(i) and (ii); 8 C.F.R. §§ 235.3(b)(4) and (b)(5). Unaccompanied minors may also not be issued an expedited removal order; instead, unaccompanied minors from Mexico and Canada may be brought to an immigration judge or, under certain circumstances, permitted to take voluntary return. All other unaccompanied minors are given a full immigration hearing. Federal regulations recognize only the right to review for verification of status of U.S. citizens, LPRs, and refugees and asylees to whom DHS issues an expedited removal order. See 8 C.F.R. §§ 235.3(b)(5).
56. 8 C.F.R. § 235.3(b)(5)(i).
57. 8 U.S.C. § 1225(b)(1)(A)(ii).
58. *Khan v. Holder*, 608 F.3d 325 (7th Cir. 2010); *Garcia de Rincon v. DHS*, 539 F.3d 1133 (9th Cir. 2008); *Brumme v. INS*, 275 F.3d 443 (5th Cir. 2001).

59. In testimony in 2005, shortly after the expansion of expedited removal went into effect, David Aguilar, Chief of the Office of Border Patrol, explained to the Senate Committee on the Judiciary that expedited removal sped up the process: “That is why we are using expedited removal. They don’t have to go in front of a judge with expedited removal. . . . Under ER [] basically, the agent on the ground will make that determination as to whether that person has any claim to be in the United States or right to be in the United States. . . . [O]nce that determination is made, these people are rapidly removed out of the country without an immigration judge coming into play.” U.S. Congress, Committee on the Judiciary, U.S. Senate, “The Southern Border in Crisis: Resources and Strategies to Improve National Security,” S. Hrg. 109-1018 (June 7, 2005).
60. 67 Fed. Reg. 68924-01 (Nov. 13, 2002) (“The Service believes that the expedited removal provisions, and exercising its authority to detain this class of aliens under 8 C.F.R. part 235, will assist in deterring surges in illegal migration by sea, including potential mass migration, and preventing loss of life.”).
61. Mark Hetfield, *The Wall Street Journal Misplays the ‘Asylum Card’*, THE HUFF. POST, Oct. 28, 2013, available at: http://www.huffingtonpost.com/mark-hetfield/the-wall-street-journal-misplays_b_4158840.html.
62. 69 Fed. Reg. 48877-01 (Aug. 11, 2004).
63. *Id.*
64. 8 U.S.C. § 1225(b)(1)(A)(ii).
65. 8 U.S.C. § 1225(b)(1)(B)(iii)(III); 8 C.F.R. § 208.30(g).
66. 8 C.F.R. § 1208.30(g)(2)(iv)(A) (“If the immigration judge concurs with the determination of the asylum officer that the alien does not have a credible fear of persecution or torture, the case shall be returned to the Service for removal of the alien. The immigration judge’s decision is final and may not be appealed.”).
67. Expedited removal was first proposed in the 1980s in response to the large number of migrants from Cuba and Haiti who fled to Florida in 1980. Some legislators proposed a program of “summary exclusion,” which would eliminate the ability of arriving non-citizens to get a hearing and appeal a denial of relief even if they did not have proper immigration documentation. While summary exclusion was not adopted in the 1980s, it reemerged in 1995 as “expedited removal of arriving aliens” and became law as part of IIRIRA in 1996. *See generally* Philip G. Schrag, A WELL-FOUNDED FEAR: THE CONGRESSIONAL BATTLE TO SAVE POLITICAL ASYLUM IN AMERICA, (Routledge 2000); CONGRESSIONAL RESEARCH SERVICE, IMMIGRATION POLICY ON EXPEDITED REMOVAL OF ALIENS (Sept. 30, 2005), at 3, available at: <http://trac.syr.edu/immigration/library/P13.pdf>; UNITED STATES COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL, (Feb. 8, 2005) available at: http://www.uscirf.gov/index.php?option=com_content&task=view&id=1892&Itemid=1.
68. After the dissolution of the INS in 2003, the newly created Department of Homeland Security (DHS) took over responsibility for numerous immigration enforcement and removal programs, including expedited removal.
69. Department of Justice, “Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures; Final Rule,” 62 Fed. Reg. 10312-01 (March 6, 1997).
70. Mary Kenney, American Immigration Law Foundation, “DHS Announces Unprecedented Expansion of Expedited Removal to the Interior: Practice Advisory,” (Aug. 13, 2004) at 2, available at <http://shusterman.com/pdf/ailf81304.pdf>.
71. *Matter of E-R-M- & L-R-M-*, 25 I&N Dec. 520 (BIA 2011) (“[W]e find that the statutory scheme itself supports our reading that the DHS has discretion to put aliens in section 240 removal proceedings even though they may also be subject to expedited removal under section 235(b)(1)(A)(i) of the Act. Section 235(b)(2)(A) of the Act provides that ‘in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 240’”); *see also*, Shoba S. Wadia, *The Rise of Speed Deportation and the Role of Discretion* 5 COLUM. J. RACE L. 1 (2014).
72. Wadia at 5.
73. Mary Kenney, *supra*, at 5.
74. Eric Schmitt, *Senate Votes Bill To Reduce Influx of Illegal Aliens*, N. Y. TIMES, May 3, 1996.
75. “Domestic Violence Cases in the Asylum Process,” Congressional Record Volume 146, Number 111 (Tuesday, September 19, 2000) available at <http://www.gpo.gov/fdsys/pkg/CREC-2000-09-19/html/CREC-2000-09-19-pt1-PgS8752.htm>.
76. *Id.*
77. 8 C.F.R. § 235.3(b)(4).
78. 8 C.F.R. § 235.3(b)(4)(i)(C). In February 2014, citing the significant increase in credible fear referrals, USCIS issued a memorandum to asylum officers regarding the credible fear standard. The memorandum states that a claim should be referred to an asylum officer only if the individual’s claim has a “significant possibility” of succeeding. John Lafferty, Chief, Asylum Division, USCIS, *Memorandum: Release of Updated Asylum Division Officer Training Course (ADOTC) Lesson Plan, Credible Fear of Persecution and Torture Determinations*, (Feb. 28, 2014), available at <http://www.aila.org/content/default.aspx?docid=48256>. Advocates have raised concern that this standard, which is higher than the standard an asylum seeker must meet in court, unjustly diverts asylum seekers into expedited removal without the chance to seek protection. Legal Scholar Bill Ong Hing writes, “[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.” Memorandum, 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, *available at* <http://static.squarespace.com/static/50b1609de4b054abacd5ab6c/t/53558353e4b02071f74ee3c4/1398113107754/Response%20to%20USCIS%20Credible%20Fear%20Memo,%20Bill%20Hing,%2004.21.2014.pdf>.

79. Refugee Protection Act of 2001, S. 1311, 107th Cong. (2001), *available at* <http://www.gpo.gov/fdsys/pkg/BILLS-107s1311is/pdf/BILLS-107s1311is.pdf>; *see generally*, Philip G. Schrag, *A Well-Founded Fear: The Congressional Battle to Save Political Asylum in America* (Routledge 2000).

80. UNITED STATES COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL, (Feb. 8, 2005) *available at* http://www.uscirf.gov/index.php?option=com_content&task=view&id=1892&Itemid=1.

81. Data obtained through a FOIA by The New York Times and analyzed by the ACLU shows that over 71 percent of people processed under ER have no criminal history, and less than 1 percent had been convicted of a violent crime. Over 60 percent of ERs with criminal history had illegal entry/reentry as their most serious offense.

82. As Gerald L. Neuman explained, the statute “does not authorize review of whether the officer’s factual conclusions have any evidentiary support, or whether the officer’s legal conclusions have any statutory basis. Bizarrely, the statute does not even permit the habeas court to consider whether the underlying legal regime is constitutional.” Gerald L. Neuman, *The Habeas Corpus Suspension Clause After Boumediene v. Bush*, 110 COLUM. L. REV. 531, 573-574 (2010).

83. *See Khan v. Holder*, 608 F.3d 325, 329 (7th Cir. 2010).

84. *Vasquez v. Holder*, 635 F.3d 563, 566 (1st Cir. 2011) (“The lack of procedural protections accompanying expedited removal stands in contrast to the significant process, specified in 8 U.S.C. § 1229a, that is required to effectuate a formal removal.”).

85. INA § 241(a)(5), 8 U.S.C. § 1231(a)(5); 8 C.F.R. § 241.8.

86. Department of Homeland Security, FY 2013 ICE Removal Statistics. This is also the fastest rising category of deportations. In 2005, 43,137 people were deported through reinstatement.

87. *See Villa-Anguiano v. Holder*, 727 F.3d 873, 878 (9th Cir. 2013) (“[] ICE agents, to whom § 1231(a)(5) delegates the decision to reinstate a prior removal order, may exercise their discretion not to pursue streamlined reinstatement procedures.”).

88. Some categories of individuals are statutorily exempt from reinstatement. These groups include Nicaraguans and Cuban applicants for adjustment under § 202 of the Nicaraguan Adjustment and Central American Relief Act of 1997, Legal Immigration Family Equity Act (LIFE Act), 1505(a)(1) Pub. L. No. 106-554, 114 Stat. 2763 (Dec. 21, 2000) amending NACARA § 202(a)(2); 8 C.F.R. § 241.8(d); Salvadoran, Guatemalan, and Eastern

European applicants under NACARA § 203, LIFE Act 1505(c); Haitian applicants for adjustment under the Haitian Refugee Immigration Fairness Act of 1998, LIFE Act § 1505(b)(1) amending HRIFA § 902(a)(2); 8 C.F.R. § 241.8(d); and some individuals applying for adjustment of status under INA § 245A (legalization) who are class members of certain lawsuits.

89. 8 C.F.R. § 241.8(a).

90. *See generally*, Trina Realmuto, National Immigration Project of the National Lawyers Guild and Legal Action Center of the American Immigration Center, *Practice Advisory: Reinstatement of Removal* (“Reinstatement Practice Advisory”) 9-10, (Aug. 2013), *available at* http://www.nationalimmigrationproject.org/legalresources/practice_advisories/2013-4-29%20Reinstatement%20of%20Removal.pdf.

91. 8 C.F.R. § 241.8(b).

92. INA § 242(b)(1). Filing a petition for review, however, does not automatically stay the removal.

93. INA § 242(b)(4)(A)&(B).

94. One study showed that ICE conducted more than 8,300 reinstatements in the Chicago area between FY 2007 and FY 2011. María Inés Zamudio, *Speedy Removal*, THE CHICAGO REPORTER, May 1, 2013, *available at* <http://www.chicagoreporter.com/speedy-removal#.VAi6VBat1z>.

95. INA § 212(a)(9)(A).

96. *See Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006).

97. 8 U.S.C. § 1326.

98. *Prosecutions for 2013*, SYRACUSE UNIVERSITY: TRANSACTIONAL RECORDS CLEARINGHOUSE (TRACfed), <http://tracfed.syr.edu/> (membership required); *At nearly 100,000, Immigration Prosecutions Reach All Time High*, SYRACUSE UNIVERSITY: TRANSACTIONAL RECORDS CLEARINGHOUSE (TRACfed), <http://tracfed.syr.edu/> (membership required).

99. INA § 241(a)(5).

100. INA § 241(b)(3)(A). *See generally* 64 Fed. Reg. 8478-01 (Feb. 19, 1999); Department of Homeland Security, U.S. Citizenship and Immigration Services, “Reinstatement of a Prior Order,” at 1 (p. 14 of FOIA response to the ACLU), March 24, 2014 (on file with the ACLU); Pennsylvania State University Dickinson School of Law’s Center for Immigrants’ Rights, “Withholding-Only Proceedings Toolkit,” August 2014, *available at* <https://law.psu.edu/sites/default/files/documents/pdfs/Immigrants/Withholding-Only-Toolkit.pdf>.

101. INA § 235(b)(1)(B)(v).

102. 8 C.F.R. § 208.30(e)(3).

103. 8 C.F.R. §§ 208.31(c); *see generally*, U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, “Questions & Answers: Reasonable Fear Screenings,” *available at* <http://www.uscis.gov/humanitarian/refugees-asylum/asylum/questions-answers-reasonable-fear-screenings>.

104. USCIS Asylum Division, *Lesson Plan Overview: Reasonable Fear of Persecution and Torture Determinations* at 8 (Aug. 6, 2008), available at <http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBT%20Lesson%20Plans/Reasonable-of-Persecution-Torture-Determinations-31aug10.pdf>.
105. *Id.* at 11.
106. *INS v. Cardozo-Fonseca*, 480 U.S. 421, 440 (1987).
107. See Center for Gender & Refugee Studies, University of California, Hastings College of the Law, PRO SE MANUAL: ASYLUM, WITHHOLDING OF REMOVAL, AND CONVENTION AGAINST TORTURE PROTECTION FOR SURVIVORS OF DOMESTIC VIOLENCE, at 12, available at http://cgrs.uchastings.edu/sites/default/files/CGRS%20DV%20Pro%20Se%20Manual_Final_2013.pdf.
108. In April 2014, several organizations, including the ACLU, filed a lawsuit challenging the significant delays for immigrants waiting in detention for a reasonable fear interview. *Alfaro Garcia v. Johnson*, No. 4:14-CV-01775-KAW (N.D. Cal. filed April 17, 2014).
109. *Arif v. Mukasey*, 509 F.3d 677 (5th Cir. 2007); *Delgado v. U.S. Att’y Gen.*, 487 F.3d 855, 862 (11th Cir. 2007); *Mohamed v. Ashcroft*, 396 F.3d 999, 1002 (8th Cir. 2005); *Ali v. Ashcroft*, 394 F.3d 780, 782 n.1 (9th Cir. 2005); *Castellano-Chacon v. I.N.S.*, 341 F.3d 533, 545 (6th Cir. 2003); *Huang v. I.N.S.*, 436 F.3d 89, 100–01 (2d Cir. 2006) (noting that denial of asylum in favor of withholding of removal would have the “practical effect” of separating the individual from his wife and children).
110. 8 C.F.R. §§ 208.31; 241.8(e).
111. 8 C.F.R. §§ 208.31(e) (requiring asylum officer to refer case to immigration judge); 1208.31(e) (same); 241.8(e) (same); 1241.8(e) (same); 8 C.F.R. §§ 208.2(c)(2) (immigration judge jurisdiction in referred cases); 1208.2(c)(2) (same). If the immigration judge decides the individual does not have a reasonable fear of persecution and/or is not eligible for relief under CAT, the non-citizen may appeal that determination to the Board of Immigration Appeals (BIA). 8 C.F.R. § 1208.31(e). If an asylum officer determines the individual does not have a reasonable fear of persecution, the non-citizen may appeal that negative finding to an immigration judge. 8 C.F.R. §§ 208.31(f), (g); 1208.31(f),(g). But should the immigration judge agree with the asylum officer’s negative finding, the non-citizen will *not* have the right to appeal to the BIA. 8 C.F.R. §§ 208.31(g)(1); 1208.31(g)(1).
112. *Garcia-Villeda v. Mukasey*, 531 F.3d 141, 150 (2d Cir. 2008).
113. Interview with Narcisco G., Reynosa, Mexico, April 17, 2014 (on file with the ACLU). Individuals who take administrative voluntary departure (“voluntary return”) but fail to depart the United States can be subject to civil penalties. 8 C.F.R. § 1240.26(j). Moreover, their voluntary return is converted into a formal removal order when the individual fails to depart the United States within the allotted time. 8 C.F.R. § 1240.26(a).
114. Individuals facing reinstatement of removal are also eligible to adjust status if they are beneficiaries of the Violence Against Women Act (VAWA), INA § 212(a)(9)(C)(iii), or through certain types of visas, such as a U visa (for victims of crime), INA § 101(a)(15)(U), INA § 212(d)(14) (waiver for crime victims), and T visas (for victims of trafficking), INA § 101(a)(15)(T), INA § 212(d)(13) (waiver for trafficking victims). For a more thorough list of ways a person might be eligible to adjust status, including through consular processing, see Reinstatement Practice Advisory, *supra* note 90.
115. Department of Homeland Security, FY 2013 ICE Removal Statistics, available at <http://www.ice.gov/removal-statistics/>.
116. 8 U.S.C. § 1229c(a)(1).
117. 8 C.F.R. § 240.25 (c).
118. See *Ibarra-Flores v. Gonzales*, 439 F.3d 614, 620 (9th Cir. 2006); *Orantes-Hernandez v. Smith*, 541 F.Supp. 351, 374 n.27 (C.D. Cal. 1982).
119. 8 U.S.C. § 1229c(a)(2)(A).
120. 8 C.F.R. § 240.25(a), (c).
121. *Lopez-Venegas v. Beers*, No. 2:13-CV-03972-JAK, ¶ 5(C.D. Cal. June 4, 2013).
122. 8 U.S.C. § 1182(a)(9)(B)(i)(II).
123. 8 U.S.C. § 1182(a)(9)(B)(i)(I).
124. 8 U.S.C. § 1182(a)(9)(B)(v).
125. *Id.*
126. 8 U.S.C. § 1182(a)(9)(C)(i).
127. 8 C.F.R. § 240.25(c).
128. *Lopez-Venegas v. Beers*, No. 2:13-CV-03972-JAK, ¶ 33-36 (C.D. Cal. June 4, 2013).
129. *Id.* ¶ 44.
130. *Id.*
131. Press Release, ACLU of San Diego & Imperial Counties, *ACLU Achieves Class Action Lawsuit Settlement That Ends Deceitful Immigration Practices*, (Aug. 27, 2014), available at <https://www.aclusandiego.org/aclu-achieves-class-action-lawsuit-settlement-ends-deceitful-immigration-practices/>; Gabriela Rivera and Mitra Ebadolahi, ACLU of San Diego & Imperial Counties, “Victory! Immigration Authorities Must Stop Coercing Immigrants Into Signing Away Their Rights,” Aug. 27, 2014, available at <https://www.aclu.org/blog/immigrants-rights/victory-immigration-authorities-must-stop-coercing-immigrants-signing-away>.
132. Interview with Veronica V., by telephone, April 23, 2014 (on file with the ACLU).

133. Press Release, ACLU of San Diego & Imperial Counties, *ACLU Achieves Class Action Lawsuit Settlement That Ends Deceitful Immigration Practices*, (Aug. 27, 2014), available at <https://www.aclusandiego.org/aclu-achieves-class-action-lawsuit-settlement-ends-deceitful-immigration-practices/>; Gabriela Rivera and Mitra Ebadolahi, ACLU of San Diego & Imperial Counties, “Victory! Immigration Authorities Must Stop Coercing Immigrants Into Signing Away Their Rights,” Aug. 27, 2014, available at <https://www.aclu.org/blog/immigrants-rights/victory-immigration-authorities-must-stop-coercing-immigrants-signing-away>.

134. Administrative removal applies to undocumented individuals but also to non-LPRs who are lawfully in the United State, such as individuals with permanent resident status on a *conditional* basis. 8 U.S.C. § 1228(b)(2)(B).

135. “Aggravated felonies” include crimes that, under state criminal laws, are not necessarily felonies and may not even include a term of imprisonment. The Immigration and Nationality Act (INA) identifies 21 types of crimes in the aggravated felony category ranging from tax evasion to rape, listed at 8 U.S.C. § 1101(a)(43), and what is considered an aggravated felony varies in accordance with state law. Moreover, federal courts can and do review the classification of a particular crime as an aggravated felony and determine that the crime is not an aggravated felony under immigration law. These can be complicated legal determinations for lawyers and judges.

136. A “crime involving moral turpitude” (CIMT) is a crime that, for immigration purposes, is considered to be a depraved or immoral act, or even a “reprehensible act” carried out with recklessness. While the INA does not list all the crimes that can be considered CIMTs, some crimes that may be CIMTs include crimes involving fraud or bodily harm to others. Persons with a conviction for a CIMT can be deportable (under 8 USC § 1227(a)(2)(A)(i), (ii)) or inadmissible (under 8 USC § 1182(a)(2)(A), with some exceptions for “youthful offenders” or “petty offenses”).

137. INA § 238(b), 8 U.S.C. § 1228(b).

138. 8 U.S.C. § 1228(b)(1).

139. 8 U.S.C. § 1228(b)(3). The actual period for appeal is governed by 8 U.S.C. § 1252(b)(1) and is 30 days, although under federal regulations the automatic stay on removal is only for 14 days. Based on the 238b form, this deadline may not be at all apparent to the individual facing removal and trying to collect supporting materials for appeal.

140. *Id.*

141. 8 U.S.C. § 1228(b)(4)(A)-(C). DHS is required to provide the individual with “a list of available free legal services programs” that can provide assistance. 8 C.F.R. § 238.1(b)(2)(iv).

142. 8 U.S.C. § 1228(b)(4)(E),(F).

143. 8 C.F.R. § 238.1(e).

144. Although the statute refers to the “Attorney General,” the Homeland Security Act of 2002, Pub. L. 107-296, Stat. 2135,

subsequently created the Department of Homeland Security and vested it with power to enforce immigration statutes.

145. INA § 238(b) (“The Attorney General *may* . . . determine the deportability of [a non-LPR convicted of an aggravated felony] and issue an order of removal pursuant to the procedures set forth in this subsection or section 240.”) (emphasis added). *See also* 8 C.F.R. § 238.1(d)(2)(ii)(A) (“If the deciding Service officer finds that the record of proceeding, including the alien’s timely rebuttal, raises a genuine issue of material fact regarding the preliminary findings, the deciding Service officer may . . . cause to be issued a notice to appear to initiate removal proceedings under section 240 of the Act.”) and 8 C.F.R. § 238.1(d)(2)(iii) (“If the deciding Service officer finds that the alien is not amenable to removal under section 238 of the Act, the deciding Service officer shall terminate the expedited proceedings under section 238 of the Act and shall, where appropriate, cause to be issued a notice to appear for the purpose of initiating removal proceedings before an immigration judge under section 240 of the Act.”).

146. Federal courts have previously rejected challenges to 238b brought under the Equal Protection Clause of the U.S. Constitution, asserting that the statute has no rational basis for allowing some individuals to be charged and processed through a summary removal procedure with limited safeguards while referring others to full immigration court hearings. *See Flores-Ledezma v. Gonzales*, 415 F.3d 375 (5th Cir. 2005) (holding that the Attorney General’s discretion over Expedited Removal survives rational basis); *see also Gonzalez v. Chertoff*, 454 F.3d 813, 818 (8th Cir. 2006) (same); *United States v. Calderon-Segura*, 512 F.3d 1104, 1107 (9th Cir. 2008) (same); *Graham v. Mukasey*, 519 F.3d 546, 552 (6th Cir. 2008) (same). However, advocates suggest that a challenge to the decision to place a person in the summary 238b proceedings instead of through immigration court raises fairness issues under *Judulang v. Holder* because a non-citizen’s eligibility for relief when convicted of an aggravated felony “hangs on the fortuity of an individual official’s decision.” *Judulang v. Holder*, 132 S. Ct. 476, 486 (2011). *See Practice Advisory, Implications of Judulang v. Holder for LPRs Seeking 212(c) Relief and For Other Individuals Challenging Arbitrary Agency Policies* (Dec. 2011) at 11 available at http://nationalimmigrationproject.org/legalresources/practice_advisories/pa_Implications_%20of_Judalang_v_Holder.pdf (“The agency’s practices on administrative removal are precisely such a chance system, in which one longtime immigrant may have an opportunity to seek adjustment while another will not, based solely on whether the deportation officer decided to issue an NTA or follow the procedures under INA § 238(b).”); Jeffrey D. Stein, *Delineating Discretion: How Judulang Limits Executive Immigration Policy-Making Authority and Opens Channels for Future Challenges* (forthcoming) (July 11, 2012) available at http://www.law.yale.edu/documents/pdf/News_&_Events/Stein_Delineating_Discretion.pdf.

147. 8 C.F.R. § 238.1(b)(2)(i). After the final order of removal has been issued, DHS must “immediately refer the alien’s case to an asylum officer to conduct a reasonable fear determination.” 8 C.F.R. §§ 238.1(f)(3); 208.31. The rules that apply to reasonable fear determinations for individuals with a 238b administrative removal order are the same that apply to individuals with reinstated orders of removal.

148. A U visa will cancel any prior order of removal. 8 C.F.R. § 214.14(c)(5)(i) (“For a petitioner who is subject to an order of exclusion, deportation, or removal issued by the Secretary, the order will be deemed canceled by operation of law as of the date of USCIS’ approval of Form I-918.”).
149. 8 C.F.R. §§ 238.1(b)(2)(i), 1238.1(b)(2)(i). 8 C.F.R. § 208.31.
150. See 8 C.F.R. §§ 238.1(c)(2)(i), 1238.1(c)(2)(i); see also INA § 101(a)(43); 8 U.S.C. § 1101(a)(43).
151. 8 U.S.C. § 1228(c)(3)(A)(i).
152. Compare 8 U.S.C. § 1229a(b)(4)(C) and 8 C.F.R. § 1240.9 with 8 C.F.R. § 1238.1(h).
153. *Padilla v. Kentucky*, 559 U.S. 356, 378 (2010) (J. Alito, concurring).
154. Interview with Ricardo S., by telephone, March 10, 2014 (interview and court files on file with the ACLU).
155. Miguel Perez, *Back in the U.S., ill woman tries to put INS error behind her*, THE RECORD, July 10, 2002, available at <http://lists.topica.com/lists/ImmigrantRightsAFSCNYMRO/read/message.html?sort=t&mid=803694050>; Daisy Cutter, *US citizens Detained And/Or Deported By Immigration Enforcement*, THE DAILY KOS, Aug. 16, 2008, available at <http://www.dailykos.com/story/2008/08/16/569034/-US-citizens-detained-and-or-deported-by-immigration-enforcement#>.
156. INA § 240(d); 8 U.S.C. § 1229a(d).
157. Inspection and Expedited Removal of Aliens, 62 Fed. Reg. 10312-01, 10322 (Mar. 6, 1997).
158. 8 C.F.R. § 1003.25(b).
159. 8 C.F.R. § 1003.25(b)(1)-(8).
160. A stipulated order cannot be appealed; however, a non-citizen may file a motion to reopen, but it is within the courts’ discretion to grant these petitions.
161. 8 C.F.R. § 1003.25(b).
162. U.S. Immigration and Customs Enforcement, *Protecting the Homeland: A Toolkit For Prosecutors* (April 2011), available at <http://www.ice.gov/doclib/about/offices/osltc/pdf/tool-kit-for-prosecutors.pdf>; see also, U.S. Department of Justice, Executive Office for Immigration Review, Memorandum, *Operating Policies and Procedures Memorandum: Procedures for Handling Requests for a Stipulated Removal Order*, (Sept. 15, 2010), available at <http://www.justice.gov/eoir/efoia/ocij/oppm10/10-01.pdf> (“These orders create operational efficiencies for both the immigration courts and the Department of Homeland Security (DHS).”).
163. Jennifer Lee Koh, Jayashri Srikantiah, and Karen C. Tumlin, DEPORTATION WITHOUT DUE PROCESS (September 2011) at 12, available at http://www.stanford.edu/group/irc/Deportation_Without_Due_Process_2011.pdf.
164. DEPORTATION WITHOUT DUE PROCESS, *supra* at 9.
165. According to Lisa Palumbo, supervisory attorney of the Immigrants and Workers’ Rights Practice Group at the Legal Assistance Foundation, “The majority of the people who signed [a stipulated order of removal] didn’t understand it amounted to a removal order.” María Inés Zamudio, *Speedy Removal*, THE CHICAGO REPORTER, May 1, 2013, available at http://www.chicagoreporter.com/speedy-removal#.U5noey_D8iA.
166. DEPORTATION WITHOUT DUE PROCESS, *supra* at 12-13.
167. *Id.* at 2. There are no regulations on what information an ICE officer must present to a person “solicited” to request and receive a stipulated order of removal, leading to further inconsistencies in practices across field offices. Jennifer Lee Koh, *Waiving Due Process (Goodbye): Stipulated Orders of Removal and The Crisis In Immigration Adjudication*, 91 N.C.L. Rev. 475, 543 (2013).
168. DEPORTATION WITHOUT DUE PROCESS, *supra* at 4.
169. *Id.* at 5-6.
170. *Id.* at 9; see also, Jennifer Lee Koh, *Waiving Due Process (Goodbye): Stipulated Orders of Removal and The Crisis In Immigration Adjudication*, 91 N.C.L. Rev. 475, 511 (2013).
171. DEPORTATION WITHOUT DUE PROCESS, *supra* at 12.
172. Koh, *supra* at 479; American Immigration Council, Immigration Policy Center, *Removal Without Recourse: The Growth of Summary Deportations From the United States*, May 2014.
173. MPI report at 26.
174. See also, Daniel Gonzales, *Immigration officials back away from deportation program*, THE ARIZONA REPUBLIC, Nov. 6, 2011, available at <http://www.azcentral.com/arizonarepublic/news/article/2011/11/06/20111106immigration-arizona-deportation-program.html>.
175. *U.S. v. Ramos*, 623 F.3d 672, 683 (9th Cir. 2010) (“Without any independent inquiry of the petitioner, and depending solely on information provided by DHS, the IJ concluded that Ramos had ‘voluntarily, knowingly, and intelligently’ waived his due process rights. As we have noted, shortcuts frequently turn out to be mistakes.”) (internal citations omitted).
176. María Inés Zamudio, *Speedy Removal*, The Chicago Reporter (May 1, 2013), available at http://www.chicagoreporter.com/speedy-removal#.U5noey_D8iA.
177. See, e.g., *U.S. v. Gomez*, 757 F.3d 885 (9th Cir. 2014) (finding a stipulated removal violated a non-citizen’s due process rights and the immigration judge violated the non-citizen’s rights by incorrectly finding the rights’ waiver to be “voluntary, knowing, and intelligent” despite insufficient record.); *Cordova-Soto v. Holder*, 732 F.3d 789 (7th Cir. 2013) (LPR with single drug possession offense was incorrectly told by immigration officer that her offense denied her any opportunity to stay in the United States and urged her to take a stipulated order; 7th Circuit held that although the IJ did not

confirm her waiver was knowing and voluntary, the removal order cannot be reopened).

178. U.S. Congress, Senate, Subcommittee on Immigration, Committee on the Judiciary, “The Detention and Treatment of Haitian Asylum seekers,” Statement of Senator Sam Brownback (Oct. 2, 2002), *available at* <http://www.gpo.gov/fdsys/pkg/CHRG-107shrg88613/html/CHRG-107shrg88613.htm>.

179. U.S. Congress, House Judiciary Committee, “Asylum Fraud: Abusing America’s Compassion,” Testimony of Chairman Goodlatte, “I am certainly not calling for reduced asylum protections. On the contrary, asylum should remain an important protection extended to aliens fleeing persecution,” February 11, 2014, *available at* http://judiciary.house.gov/_cache/files/959caa6a-3ea2-44a0-aa79-b9da1cb175e9/113-66-86648.pdf; *Id.*, Testimony of Representative Trey Gowdy, “We know that there are survivors of inconceivable and heinous atrocities. We are outraged. We are sympathetic. And more than just sympathy, we are willing to open our country to provide those in need with a refuge, with a sanctuary with safety and dignity.”

180. Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), art. 14.

181. Convention relating to the Status of Refugees, 189 U.N.T.S. 150, *entered into force* April 22, 1954 (“the Refugee Convention”) (implemented in U.S. law through INA Section 208); Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267; 19 U.S.T. 6223; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture), adopted December 10, 1984, G.A. res. 39/46 annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), *entered into force* June 26, 1987, ratified by the United States on October 21, 1994.

182. Article 31(1) of the 1951 Refugee Convention states, “The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.” The Refugee Convention, art. 31(1). These protections apply also to individuals *seeking* asylum whose refugee status has not yet been confirmed.

183. This figure includes only individuals with whom the ACLU spoke directly and who had a (prior or current) removal order when interviewed; it does not include cases reviewed on the files or based on interviews with relatives.

184. 8 U.S.C. § 1225(b)(1)(A)(ii).

185. 8 C.F.R. § 235.3(b)(2).

186. *See* appendices to this report, *available at* www.aclu.org; *see also* 8 C.F.R. § 235.3(b)(2)(i) (requiring that this script be read to the non-citizen).

187. In February 2014, USCIS quietly but deleteriously

issued new guidance for asylum officers on “credible fear” so that asylum applicants must now “demonstrate a substantial and realistic possibility of succeeding” in their cases to be permitted an opportunity to apply for asylum before an immigration judge. Memorandum from John Lafferty, Chief, Asylum Division, USCIS, Release of Updated Asylum Division Officer Training Course (ADOTC) Lesson Plan, Credible Fear of Persecution and Torture Determinations, February 28, 2014, *available at* <http://www.aila.org/content/default.aspx?docid=48256>. Advocates raised concern both that this standard is much higher than what an asylum seeker must actually show to qualify for asylum under the law, and also that the new instructions were issued in a surreptitious manner. *See, e.g.*, Bill Ong Hing, “Credible Fear Lesson Plan ‘Undermines the Asylum Process,’” May 5, 2014, *available at* <http://www.lexisnexis.com/legalnewsroom/immigration/b/insidenews/archive/2014/05/05/credible-fear-lesson-plan-39-undermines-the-asylum-process-39-bill-ong-hing.aspx>; Dree Collopy, AILA Refugee & Asylum Liaison Committee Chair, “The Revised Credible Fear Lesson Plan: Enough is Enough!” (April 25, 2014), *available at* <http://ailaleadershipblog.org/2014/04/25/the-revised-credible-fear-lesson-plan-enough-is-enough/>.

188. Interview with Kaveena Singh, Berkeley, California, February 2, 2014 (on file with the ACLU).

189. UNHCR, CONFIDENTIAL REPORT, FINDINGS AND RECOMMENDATIONS RELATING TO THE 2012-2013 MISSIONS TO MONITOR THE PROTECTION SCREENINGS OF MEXICAN UNACCOMPANIED CHILDREN ALONG THE U.S.-MEXICO BORDER (“UNHCR CONFIDENTIAL REPORT”), June 2014 (on file with the ACLU).

190. Interview with Manaf S., Oakland, California, March 3, 2014 (on file with the ACLU).

191. Interview with Hilda, Los Angeles, California, March 20, 2014 (on file with the ACLU).

192. *Id.*

193. Interview with Ana N. R., T. Don Hutto Residential Center, Taylor, Texas, April 22, 2014 (on file with the ACLU). Ana was in detention with an expedited removal order at the time of this interview and had been referred to an asylum officer, who found her credible.

194. Record of Sworn Statement (on file with the ACLU).

195. Declaration of Carlos C. Z. (on file with the ACLU).

196. Interview with Karen R. L., T. Don Hutto Residential Center, Taylor, Texas, April 22, 2014 (on file with the ACLU).

197. AMERICANS FOR IMMIGRANT JUSTICE, THE “HIELERAS”: A REPORT ON HUMAN & CIVIL RIGHTS ABUSES COMMITTED BY U.S. CUSTOMS AND BORDER PROTECTION AGENCY (2013), *available at* http://www.aijustice.org/the_hieleras_a_report_on_human_civil_rights_abuses_committed_by_u_s_customs_and_border_protection_agency; *see also* Center for Latin American Studies, University of Arizona, In the Shadow of the Wall: Family Separation, Immigration

Enforcement and Security Preliminary Data from the Migrant Border Crossing Study (2013), *available at*: http://las.arizona.edu/sites/las.arizona.edu/files/UA_Immigration_Report2013web.pdf; NO MORE DEATHS, A CULTURE OF CRUELTY: ABUSE AND IMPUNITY IN SHORT-TERM U.S. BORDER PATROL CUSTODY (2011), *available at* <http://www.nomoredeaths.org/Abuse-Report-Culture-of-Cruelty/View-category.html>; Rachel Bale, Center for Investigative Reporting, *Border crossers face 'freezer' detention*, UNION-TRIBUNE SAN DIEGO, Nov. 20, 2013, *available at* <http://www.utsandiego.com/news/2013/nov/20/cir-border-detainees-freezers/>.

198. *Id.*

199. Interview with Ponchita, Nogales, Sonora, Mexico, March 3, 2014 (on file with the ACLU). Similarly, an advocate who works with migrants in Mexico said, “When we have talked to migrants about their treatment, at first 80-90 percent say they were treated well but when I explain to them what the conditions should be like, about due process, the number goes down to 20-30 percent. ... So abuses are not seen [as abuses] all the time because they felt like this is how they are supposed to be treated.” Interview at Casa de Recursos des Migrantes, Agua Prieta, Mexico, February 28, 2014 (on file with the ACLU).

200. Interview with Nydia R., San Francisco, California, February 2, 2014 (on file with the ACLU).

201. Interview with Cesar by telephone, June 13, 2014 (on file with the ACLU).

202. Interview with Felipe R., Reynosa, Mexico, April 17, 2014 (on file with the ACLU).

203. UNHCR, CONFIDENTIAL REPORT, *supra* note 189, at 29.

204. Indeed, the United States recognizes that non-governmental actors or entities whom the government is unwilling or unable to control (including gangs or even families, in cases of domestic violence) can be persecutors for asylum purposes. *See* USCIS, “Asylum Eligibility Part I: Definition of Refugee; Definition of Persecution; Eligibility Based on Past Persecution,” (2009), *available at* <http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBT%20Lesson%20Plans/Definition-Refugee-Persecution-Eligibility-31aug10.pdf>, *citing the following cases*: *Matter of Villalta*, 20 I&N Dec. 142, 147 (BIA 1990) (recognizing persecution from paramilitary death squads); *Matter of H-*, 21 I&N Dec. 337 (BIA 1996) (recognizing persecution from members of opposition political party and clan); *Matter of Kasinga*, 21 I.&N. Dec. 357 (BIA 1996) (en banc) (recognizing persecution from family members); *Faruk v. Ashcroft*, 378 F.3d 940, 943 (9th Cir. 2004) (IJ erred in discounting persecution suffered by applicants at the hands of their family members when the applicants had established that the government was unable or unwilling to control their persecutors); *Nabulwala v. Gonzales*, 481 F.3d 1115, 1118 (8th Cir. 2007) (finding error where an IJ concluded that to qualify for asylum the applicant had to demonstrate government persecution); *Matter of S-A-*, 22 I&N Dec. 1328, 1335 (BIA 2000) (finding that testimony and country conditions indicated that it would be unproductive and possibly

dangerous for a young female applicant to report father’s abuse to government); *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052 (9th Cir. 2006) (holding that reporting not required if applicant can convincingly establish that doing so would have been futile or have subjected him or her to further abuse).

205. Interview with Nydia R., San Francisco, California, February 2014 (on file with the ACLU).

206. *U.S. v. Roberto Lopez-Gutierrez*, No. 3:13-CR-01573-LAB, Testimony of Agent Araceli Barba de la Cruz (July 24, 2013) at 18:17-18 (on file with the ACLU).

207. *Id.* at 21:9-15.

208. *Id.* at 26:15-25.

209. Interview with Telma M., Broward Transitional Center, Broward, Florida, April 8, 2014 (on file with the ACLU) (CBP interview reviewed by the ACLU).

210. *See, e.g., Matter of A-R-C-G-et al.*, 26 I&N Dec. 388 (BIA 2014) (recognizing that women who have experienced domestic violence may be considered a “member of a particular social group” for purposes of an asylum claim).

211. Interview with Juan Manuel C., Matamoros, Mexico, April 18, 2014 (on file with the ACLU).

212. Interview with Bessy M., T. Don Hutto Residential Center, Taylor, Texas, April 22, 2014 (on file with the ACLU).

213. *Id.*

214. Interview with Lucila O., Miami, Florida, April 9, 2014 (on file with the ACLU).

215. Interview with Ericka E. F., T. Don Hutto Residential Center, Taylor, Texas, April 22, 2014 (on file with the ACLU).

216. Interview with Braulia A., San Diego, California, March 25, 2014 (on file with the ACLU).

217. HUMAN RIGHTS FIRST, HOW TO PROTECT REFUGEES AND PREVENT ABUSE AT THE BORDER: BLUEPRINT FOR U.S. GOVERNMENT POLICY, at 12 (June 2014), *available at* <http://www.humanrightsfirst.org/sites/default/files/HRF-Asylum-on-the-Border-noApps.pdf>.

218. Interview with Wendy, Miami, Florida, April 11, 2014 (on file with the ACLU).

219. Interview with Rosa F. H., Hutto, Texas, April 22, 2014 (on file with the ACLU).

220. *Id.*

221. Interview with Maria, Marian, and Rosemarie, Miami, Florida, April 11, 2014 (on file with the ACLU).

222. *Id.*

223. *Id.*

224. *Id.*

225. Interview with Jacqueline Bradley Chacon, by telephone, February 23, 2014 (on file with the ACLU).
226. *Id.* (ICE files on file with the ACLU).
227. *Id.*
228. In fact, many individuals interviewed by the ACLU described being targeted *because* they were deportees from the United States, and it is not uncommon for deportees from the United States to be kidnapped or murdered after their deportation and repatriation. *See* Elizabeth Kennedy, AMERICAN IMMIGRATION COUNCIL, NO CHILDHOOD HERE: WHY CENTRAL AMERICAN CHILDREN ARE FLEEING THEIR HOMES, at 5 (July 2014) *available at* http://www.immigrationpolicy.org/sites/default/files/docs/no_childhood_here_why_central_american_children_are_fleeing_their_homes_final.pdf; CBS NEWS, “For child immigrants, dangers of staying are most grave,” July 17, 2014, *available at* <http://www.cbsnews.com/news/child-immigrants-face-grave-dangers-by-staying-in-central-america/>; *see, e.g.*, La Prensa Gráfica, “La tragedia de todo un país,” June 15, 2014, *available at* <http://www.laprensagrafica.com/2014/06/15/la-tragedia-de-todo-un-pais>; La Prensa Gráfica, “Asesinan a pandillero deportado de EUA en Tejutla,” May 24, 2014, *available at* <http://www.laprensagrafica.com/2014/05/21/asesinan-a-pandillero-deportado-de-eua-en-tejutla>; La Prensa Gráfica, “Asesinan en la capital a deportado de EUA,” December 14, 2013, *available at* <http://www.laprensagrafica.com/2013/10/14/asesinan-en-la-capital-a-deportado-de-eua>; La Prensa Gráfica, “Asesinan a expandillero que fue deportado de EUA,” March 19, 2013, *available at* <http://www.laprensagrafica.com/asesinan-a-expandillero-que-fue-deportado-de-eua>; La Prensa Gráfica, “Asesinan a un joven deportado en San Martín,” January 11, 2013, *available at* <http://www.laprensagrafica.com/asesinan-a-un-joven-deportado-en-san-martin>; La Prensa Gráfica, “Asesinan a dos hombres deportados de EUA,” May 9, 2012, *available at* <http://www.laprensagrafica.com/el-salvador/judicial/262121-asesinan-a-dos-hombres-deportados-de-eua.html>; El Salvador, “Matan a trabajador en mercado La Tiendona,” December 12, 2013, *available at* http://www.elsalvador.com/mwdh/nota/nota_completa.asp?idCat=47859&idArt=8399962.
229. Interview with immigration attorney, via email, June 22, 2014 (on file with the ACLU).
230. Interview with Ana D., Broward Transitional Center, Florida, April 8, 2014, (on file with the ACLU) (transcript reviewed in person by the ACLU).
231. USCIS Asylum Division, *Lesson Plan Overview: Reasonable Fear of Persecution and Torture Determinations* at 8 (Aug. 6, 2008), *available at* <http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Reasonable-of-Persecution-Torture-Determinations-31aug10.pdf>. Moreover, while the U.S. Supreme Court has held that a 10 percent risk of persecution is sufficient to support a grant of asylum, *NS v. Cardozo-Fonseca*, 480 U.S. 421, 430 (1987), courts have required immigrants seeking withholding to demonstrate at least a 51 percent likelihood of suffering future persecution. *See* Immigration Equality, *Immigration Equality Asylum Manual*, (2006), *available at* <https://immigrationequality.org/issues/law-library/lgbth-asylum-manual/withholding-of-removal/>
232. *Alfaro Garcia v. Johnson*, No. 4:14-CV-01775-KAW (N.D. Ca. filed April 17, 2014).
233. 8 C.F.R. § 208.31(b).
234. *Alfaro Garcia v. Johnson*, No. 4:14-CV-01775-KAW (N.D. Ca. filed April 17, 2014).
235. Interview with Alejandro, by telephone, May 28, 2014 (on file with the ACLU).
236. *Id.*
237. *Id.*
238. *Arif v. Mukasey*, 509 F.3d 677 (5th Cir. 2007); *Delgado v. U.S. Att’y Gen.*, 487 F.3d 855, 862 (11th Cir. 2007); *Mohamed v. Ashcroft*, 396 F.3d 999, 1002 (8th Cir. 2005); *Ali v. Ashcroft*, 394 F.3d 780, 782 n.1 (9th Cir. 2005); *Castellano-Chacon v. I.N.S.*, 341 F.3d 533, 545 (6th Cir. 2003); *Huang v. I.N.S.*, 436 F.3d 89, 100–01 (2d Cir. 2006) (noting that denial of asylum in favor of withholding of removal would have the “practical effect” of separating the individual from his wife and children); *see generally* U.S. DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE OF IMMIGRATION REVIEW, FACTSHEET: ASYLUM AND WITHHOLDING OF REMOVAL RELIEF CONVENTION AGAINST TORTURE PROTECTIONS, (2009), *available at* <http://www.justice.gov/eoir/press/09/AsylumWithholdingCATProtections.pdf>.
239. 8 C.F.R. § 208.16(f).
240. Advocates have challenged the limitation (in reinstatement proceedings) on who can receive asylum as inconsistent with the asylum statute, which provides that “any” immigrant, regardless of his or her immigration status, is eligible to apply for asylum. INA § 208(a), 8 U.S.C. § 1158(a). *See Maldonado-Lopez v. Holder*, No. 12-72800, (9th Cir. Feb. 4, 2014). The Supreme Court has also indicated that asylum remains available to individuals subject to reinstatement. *See Fernandez-Vargas v. Gonzalez*, 548 U.S. 30, 35 n.4 (2006); *see also Herrera-Molina v. Holder*, 597 F.3d 128, 139 n.8 (2d Cir. 2010) (noting Supreme Court’s acknowledgement of the availability of asylum *in dicta*).
241. Interview with Hermalinda L., Berkeley, California, March 18, 2014 (on file with the ACLU).
242. *Id.*
243. UNITED STATES COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM, EXPEDITED REMOVAL STUDY: TWO YEARS LATER (2007), *available at* http://www.uscirf.gov/images/stories/pdf/scorecard_final.pdf
244. *Id.*
245. *Id.*
246. UNITED STATES COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM, EXPEDITED REMOVAL STUDY: TWO YEARS LATER (2007), *available at* http://www.uscirf.gov/images/stories/pdf/scorecard_final.pdf.
247. *Id.* at 4.

248. *Id.* at 7-8.
249. HUMAN RIGHTS FIRST, HOW TO PROTECT REFUGEES AND PREVENT ABUSE AT THE BORDER: BLUEPRINT FOR U.S. GOVERNMENT POLICY, (June 2014), *available at* <http://www.humanrightsfirst.org/sites/default/files/HRF-Asylum-on-the-Border-noApps.pdf>; AMERICAN IMMIGRATION COUNCIL, MEXICAN AND CENTRAL AMERICAN ASYLUM AND CREDIBLE FEAR CLAIMS: BACKGROUND AND CONTEXT, (May 2014), *available at* http://www.immigrationpolicy.org/sites/default/files/docs/asylum_and_credible_fear_claims_final.pdf.
250. U.S. House of Representatives, *Asylum Fraud: Abusing America's Compassion? Before H. Comm. On the Judiciary*, 113th Cong. (2014) *available at* http://judiciary.house.gov/_cache/files/959caa6a-3ea2-44a0-aa79-b9da1cb175e9/113-66-86648.pdf; U.S. House of Representatives, *Asylum Abuse: Is It Overwhelming Our Borders? Before H. Comm. On the Judiciary*, 113th Cong. (2013) *available at* http://judiciary.house.gov/_cache/files/121ef25f-d824-448e-8259-cce4edc03856/113-56-85905.pdf.
251. U.S. House of Representatives, *Asylum Fraud: Abusing America's Compassion? Before H. Comm. On the Judiciary*, *supra*; HUMAN RIGHTS FIRST, HOW TO PROTECT REFUGEES AND PREVENT ABUSE AT THE BORDER, *supra*.
252. HUMAN RIGHTS FIRST, *supra* at Appendix B: Security Checks (detailing the numerous databases to which CBP and ICE have access when they initially run an immigrant's fingerprints at the border, and which become even more extensive should the individual be detained and/or referred into immigration court.).
253. *Id.* at 28. In its written testimony for the December 2013 House Judiciary Hearing, "Asylum Abuse: Is It Overwhelming Our Borders?", DHS submitted that the asylum offices conducting credible fear interviews "are extensively trained in national security issues, the security and law enforcement background check process, eligibility criteria, country conditions, interview techniques, making proper credibility determinations, and fraud detection." U.S. Congress, Written Testimony before the House Committee on the Judiciary, "Asylum Abuse: Is It Overwhelming Our Borders?" Combined DHS Written Testimony, Dec. 12, 2013, p. 7, *available at* http://judiciary.house.gov/_cache/files/e9043d83-e429-4d21-9621-c681c6499251/combined-dhs-testimony.pdf.
254. 8 U.S.C. § 1158(d)(6).
255. DHS officially estimates the number at 15 percent. *See* Written testimony of USCIS Deputy Director Lori Scialabba, ICE Deputy Director Daniel Ragsdale, and CBP Office of Border Patrol Chief Michael Fisher for a House Committee on the Judiciary hearing titled "Asylum Abuse: Is it Overwhelming our Borders?" (Dec. 12, 2013), *available at* <http://www.dhs.gov/news/2013/12/12/written-testimony-uscis-ice-and-cbp-house-committee-judiciary-hearing-titled-%E2%80%9CAsylum>. DHS data procured by The New York Times and analyzed by the ACLU suggests that a lower number—approximately 5 percent—of individuals who were issued expedited removal orders were referred for credible fear interviews. FY 2013 ICE data, procured by The New York Times and analyzed by the ACLU (on file with the ACLU). This data included any individuals who at some point passed through ICE and were considered removals. It is possible this data is an underestimate depending how the data provided was coded by DHS before it was provided to The New York Times.
256. *See, e.g.*, Jude Joffe-Block, *Facing Risk Of Rape, Migrant Women Prepare With Birth Control*, FRONTERAS (March 12, 2014) *available at* <http://www.fronterasdesk.org/content/9552/facing-risk-rape-migrant-women-prepare-birth-control>; Jenny Johnson, *Perilous Journey: Kidnapping and Violence against Migrants in Transit through Mexico*, LATIN AMERICA WORKING GROUP EDUCATION FUND, (October 2013), *available at* http://www.lawg.org/storage/LAWG2-13_Migrant_Report-v5.pdf; JESUIT REFUGEE SERVICE/USA, PERSISTENT INSECURITY: ABUSES AGAINST CENTRAL AMERICANS IN MEXICO (October 2013), *available at* https://www.jrsusa.org/assets/Publications/File/Persistent_Insecurity.pdf; Sarah Stillman, *What We Want Is the Head of the Friar*, THE NEW YORKER, April 5, 2013, *available at* <http://www.newyorker.com/online/blogs/comment/2013/04/migrants-and-zeta-violence-in-mexico.html>; Lorne Matalon, *Riding La Bestia, The Immigration Train*, FRONTERAS, Aug. 27, 2013, *available at* <http://www.fronterasdesk.org/content/8932/riding-la-bestia-immigration-train>; Karl Penhaul, CNN, "Scarred but alive after riding the train of death," July 30, 2010, *available at* <http://www.cnn.com/2010/WORLD/americas/07/30/wus.la.bestia.penhaul/index.html>.
257. U.S. Congress, Committee on the Judiciary, U.S. Senate, "The Southern Border in Crisis: Resources and Strategies to Improve National Security," S. Hrg. 109-2018 (June 7, 2005); Vice President Joseph Biden, Remarks to the Press and Question and Answer at the Residence of the U.S. Ambassador, Guatemala City, Guatemala (June 20, 2014) ("none of these children or women bringing children will be eligible under the existing law in the United States."), *available at* <http://www.whitehouse.gov/the-press-office/2014/06/20/remarks-press-qa-vice-president-joe-biden-guatemala>; Interview with Secretary of Homeland Security Jeh Johnson, NBC NEWS, MEET THE PRESS, July 6, 2014 (video) ("The goal of the Administration is to stem the tide and send the message unequivocally that if you come here you will be turned around."); Background Briefing from the Senior U.S. Department of State Official on Secretary Kerry's Trip to Panama (July 1, 2014) (stating incorrectly that people who are not fleeing war zones can be returned to dangerous locations), *available at* <http://m.state.gov.md228646.htm>.
258. Interview with Jaime Díez, Brownsville, Texas, April 18, 2014 (on file with the ACLU).
259. Jennifer Koh Lee, *Rethinking Removability*, 65 FLA. L. REV. 1803, 1821 (2013).
260. Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C.L. REV. 1965, 1967 (2013).
261. Koh Lee, *Rethinking Removability*, *supra* at 1822, citing *B05001: Citizenship Status in the United States: Universe: Total Population in the United States 2010 American Community Survey 1-Year Estimates*, U.S. CENSUS BUREAU, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_10_1YR_B05001&prodType=table.

262. See 8 U.S.C. § 1433(a).
263. Koh Lee, *Rethinking Removability*, *supra* at 1822.
264. Rosenbloom *The Citizenship Line*, *supra* at 1972.
265. Interview with Gabriela Rivera, by email, June 3, 2014 (on file with the ACLU).
266. *Olivas v. Whitford*, No. 3:14-CV-01434 (S.D. Cal. June 12, 2014).
267. Interview with Gabriela Rivera, by email, June 3, 2014 (on file with the ACLU).
268. Interview with Peter V., Tijuana, Mexico, March 26, 2014 (on file with the ACLU).
269. *Id.*
270. *United States v. Peter V.*, transcript on file with the ACLU.
271. Interview with Peter V., Tijuana, Mexico, March 26, 2014 (on file with the ACLU).
272. *Id.*
273. *Maria de la Paz v. Jeh Johnson*, No. 1:14-CV-016, First Amended Petition for Writ of Habeas Corpus (S.D. Texas February 21, 2014) (exhibits, including removal orders and birth certificates, on file with the ACLU).
274. *Id.* at 3.
275. *Id.* at 6.
276. Interview with Jaime Díez, by telephone, June 30, 2014 (on file with the ACLU); Joint Stipulation To Dismiss The Case (July 14, 2014) (on file with the ACLU).
277. *Castro v. Freeman*, No. 1:09-CV-00208 (S.D. Tex. 2009). See also, Jazmine Ulloa, *Born To Be Barred*, THE TEXAS OBSERVER (May 13, 2010), available at <http://www.texasobserver.org/born-to-be-barred/>.
278. The requirement to have a U.S. passport when crossing a land border is relatively recent (introduced in 2009) and has affected travel and life along the Mexico and Texas border in particular. The Western Hemisphere Travel Initiative (“WHTI”), which went into effect in June 2009, requires that U.S. citizens have a passport to enter the United States at a land border crossing. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 7209, 118 Stat. 3638, 3823-24, amended by Pub. L. No. 109-295, § 546, 120 Stat. 1355, 1386-87 (2006), and Pub. L. No. 110-53, § 723, 121 Stat. 266, 349-50 (2007) (codified as amended at 8 U.S.C. § 1185 (2012)); see 22 C.F.R. § 53.1 (2013). However, at the time, CBP had a policy of permitting applicants for admission to show a birth certificate and a receipt for the passport application instead of a passport.” *Castro* complaint at 13.
279. *Castro*, 1:09-CV-00208 (2009).
280. Jazmine Ulloa, *Born To Be Barred*, *supra*.
281. *Castro*, 1:09-CV-00208 (2009) at paras. 41-50, confirmed also with Lisa Brodyaga, attorney for the Castro family, by email, August 28, 2014 (on file with the ACLU).
282. *Castro*, 1:09-CV-00208 (2009) at paras. 14-15. Like Yuliana and Laura Castro, Ms. Garcia was able to get her passport and recognition of her citizenship from the Department of State only after litigation. Email from Lisa Brodyaga, attorney for Jessica Garcia, August 28, 2014 (on file with the ACLU).
283. HUMAN RIGHTS WATCH/AMERICAN CIVIL LIBERTIES UNION, DEPORTATION BY DEFAULT: MENTAL DISABILITY, UNFAIR HEARINGS, AND INDEFINITE DETENTION IN THE US IMMIGRATION SYSTEM (July 2010), available at <http://www.hrw.org/reports/2010/07/26/deportation-default-0>. The ACLU subsequently filed a class action lawsuit on behalf of immigrants with mental disabilities on the right to counsel, which resulted in a permanent injunction in California, Arizona, and Washington State in May 2013.
284. *Id.* at 31.
285. For example, 8 C.F.R. § 1240.10(c) discusses a non-citizen’s competence and how to proceed if it is in doubt, stating that immigration judges may not accept a non-citizen’s statement that he or she is deportable if there is no lawyer or other representative appearing with the individual. The IJ must “direct a hearing on the issues” when he or she decides not to accept a non-citizen’s admission that he or she is deportable, or that he or she is a non-citizen (an “alien” under U.S. immigration law). *Id.*
286. Helen Musalo, EXPEDITED REMOVAL, HUMAN RIGHTS, AMERICAN BAR ASSOCIATION, 2001, <http://www.abanet.org/irr/hr/winter01/musalo.html>.
287. Press Release, American Civil Liberties Union of Southern California, *Illegally Deported U.S. Citizen Pedro Guzman Found After Nearly Three Months in Mexico*, (Aug. 7, 2007) available at <http://www.aclu-sc.org/releases/view/102548> (accessed June 25, 2014); Sam Quinones, Los Angeles Times, “Disabled man found after 89-day ordeal,” August 8, 2007.
288. *Lyttle v. United States of America et al.*, No. 4:10-cv-142 (E.D.N.C. Oct. 13, 2010).
289. *Id.*
290. Michael C. Certification of Vital Records, City of Brownsville, Texas, Department of State Health Services, Vital Statistics Unit (on file with the ACLU).
291. Notice of Intent to Issue a Final Administrative Removal Order, June 27, 2003 (on file with the ACLU).
292. U.S. Department of Homeland Security, Immigration and Customs Enforcement, Letter to Michael C., Nov. 12, 2003 (on file with the ACLU).
293. Interview with Peter McGraw, Texas RioGrande Legal Aid, by telephone, May 28, 2014 (on file with the ACLU).
294. 8 C.F.R. § 235.3(b)(5).

295. Memorandum from John Morton, Assistant Sec’y, U.S. Immigration & Customs Enforcement, to Field Officer Directors, Special Agents in Charge, and Chief Counsels (Nov. 19, 2009), available at www.ice.gov/doclib/detention-reform/pdf/usc_guidance_nov_2009.pdf (providing the most recent guidance in a series of memoranda, and stating that “[a]s a matter of law, ICE cannot assert its civil immigration enforcement authority to arrest and/or detain a [U.S. citizen]”).
296. 8 C.F.R. § 1235.3(b)(5)(iv) (providing for a claimed status review hearing, at which an Immigration Judge reviews an expedited removal order issued by an immigration officer and determines the validity of a person’s claim to be a lawful permanent resident, refugee, asylee, or United States citizen).
297. *Id.*
298. Interview with Timothy D., by telephone, May 31, 2014 (on file with the ACLU). Timothy D. says his mother, who like him lives in Canada, is a U.S. citizen and that he has two approved I-130 applications.
299. Interview with Nydia R., San Francisco, California, February 3, 2014 (on file with the ACLU).
300. *Id.*
301. *Id.*
302. U.S. Department of Homeland Security, Record of Deportable/Inadmissible Alien, March 18, 2011 (on file with the ACLU).
303. Interview with Nydia R., San Francisco, California, February 3, 2014 (on file with the ACLU).
304. On file with the ACLU.
305. Interview with Nydia R., San Francisco, California, February 3, 2014 (on file with the ACLU).
306. Interview with Francisco by email, May 20 and 21, 2014 (on file with the ACLU).
307. *Id.*
308. *Id.*
309. *Id.*
310. Interview with Francisco’s attorney, Natalie Hansen, by telephone, June 2, 2014 (on file with the ACLU).
311. There is a statutory cap on the number of U visas that can be issued each year; thus, many people who are approved for a U visa cannot get the visa immediately and must wait until the following year’s visas are available. After being approved but prior to receiving a U visa, an individual receives deferred action and should not be removed.
312. Interview with Guadeloupe, by telephone, May 28, 2014 (on file with the ACLU).
313. *Id.*
314. *Id.*
315. Megan K. Stack, *Mother sues Border Patrol for son’s death*, ASSOCIATED PRESS, June 10, 2000, available at http://amarillo.com/stories/2000/06/10/usn_LD0749.shtml.
316. *Olivia Pelayo v. U.S. Border Patrol et al*, No. 03-40420 (5th Cir. 2003); Interview with Jennifer Harbury, Pelayo’s mother’s attorney, by telephone, February 25, 2014 (on file with the ACLU); Megan K. Stack, *Mother sues Border Patrol for son’s death*, *supra*.
317. 8 U.S.C. § 1101(a)(13)(C).
318. *Id.* §§(a)(13)(C)(i)-(ii). These are not the only ways a person can be seen as abandoning their status and is no longer entitled a hearing. The statute states: “(C) An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien--(i) has abandoned or relinquished that status, (ii) has been absent from the United States for a continuous period in excess of 180 days, (iii) has engaged in illegal activity after having departed the United States, (iv) has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this chapter and extradition proceedings, (v) has committed an offense identified in section 1182(a)(2) of this title, unless since such offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title, or (vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.”
319. Interview with Gabriela H., by phone, May 18, 2014 (on file with the ACLU).
320. *Id.*
321. *Khan v. Holder*, 608 F.3d 325, 329 (7th Cir. 2010).
322. *Smith v. U.S. Customs and Border Protection*, 741 F.3d 1016, 1021 n.4 (9th Cir. 2014) (“We do not evaluate the merits of the CBP’s decision to classify Smith as an intending immigrant, see 8 U.S.C. § 1252(e)(5) (barring judicial review of “whether the alien is actually inadmissible or entitled to any relief from removal”), nor do we inquire as to whether, had Smith made an honest request to enter for business purposes, as a temporary visitor or otherwise, he might have been granted a visa to do so.”).
323. *Id.* at 1022 n.6 (“we need not reach the question whether and under what circumstances a petitioner who establishes none of the permissible bases under § 1252(e)(2) might still have claims under the Suspension Clause.”).
324. Interview with Crystal Massey, Las Cruces, New Mexico, April 29, 2014 (on file with the ACLU).
325. Interview with Rosalba, by telephone, April 23, 2014 (on file with the ACLU).

326. Interview with Marisol Pérez, San Antonio, Texas, April 23, 2014 (on file with the ACLU).
327. Interview with Scott L., by telephone, May 21, 2014 (on file with the ACLU).
328. Interview with Lorenzo L., by telephone, May 21, 2014 (on file with the ACLU).
329. Interview with Antonio, by telephone, March 15, 2014 (on file with the ACLU).
330. The ACLU requested data on the number of such cases where a person was issued an expedited removal order, and the grounds upon which a person found to be misrepresenting themselves; this FOIA information was not provided and its provision is currently being litigated.
331. Interview with Roland J., by telephone, March 12, 2014 (on file with the ACLU).
332. *Id.*
333. *Id.*
334. *Id.*
335. A TN visa is available to professionals in certain fields from Canada and Mexico.
336. Interview with Timothy D., by telephone, May 13, 2014 (on file with the ACLU).
337. *Id.*
338. *Id.*
339. *See generally*, Congressional Research Service, Immigration Policy on Expedited Removal of Aliens, at 3 (September 30, 2005), *available at* <http://fpc.state.gov/documents/organization/54512.pdf>.
340. *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892).
341. *Compare, e.g., Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (non-citizens yet to be admitted are not entitled to the same panoply of rights as non-citizens who have entered the United States, even unlawfully) *with Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent”).
342. Mary Kenney, American Immigration Law Foundation, *Practice Advisory: DHS Announces Unprecedented Expansion of Expedited Removal To the Interior*, August 13, 2004 at 6 (noting that “It is possible that individuals who have resided in the United States for ten years or longer will be placed in interior expedited removal. Although short absences from the U.S. will not break the physical presence requirement for cancellation, immigration officials will treat any absence from the country as breaking the fourteen-day presence requirement for internal expedited removal. ... There is no guidance in the notice as to how an immigration officer is to determine whether an individual might be eligible for cancellation, or what factors the officer is to consider in exercising discretion not to place such a person in expedited removal.”), *available at* <https://shusterman.com/pdf/ailf81304.pdf>.
343. Interview with Wendy D.G., Miami, Florida, April 9, 2014 (on file with the ACLU).
344. *Id.*
345. *Id.*
346. *Id.*
347. Interview with Inocencia C., Orange, California, March 22, 2014 (on file with the ACLU).
348. Interview with Nora Phillips, by email, April 9, 2014 (on file with the ACLU).
349. Interview with Claudia D., by telephone, April 12, 2014 (on file with the ACLU).
350. Interview with Braulia A., San Diego, California, March 25, 2014 (on file with the ACLU).
351. U.S. Department of Homeland Security, Expedited Removal Sworn Statement (on file with the ACLU).
352. Interview with Braulia A., San Diego, California, March 25, 2014 (on file with the ACLU).
353. *Id.*
354. News articles and police reports confirmed the nephew’s involvement and were later deemed credible evidence by a U.S. immigration court (on file with the ACLU).
355. Interview with Braulia A., San Diego, California, March 25, 2014 (on file with the ACLU).
356. Interview with Cesar, by telephone, June 13, 2014 (on file with the ACLU).
357. ACLU OF NEW MEXICO, TORN APART: HOW U.S. IMMIGRATION POLICY FRAGMENTS NEW MEXICAN FAMILIES, (2014), *available at* http://www.aclu-nm.org/wp-content/uploads/2013/04/tornapart_030113_05_web05.pdf; *see also*, Chris Rickerd, ACLU, “Many deported ‘recent border crossers’ aren’t recent — or near the border,” MSNBC, July 22, 2014, *available at* <http://www.msnbc.com/msnbc/many-deported-recent-border-crossers-arent-recent-or-near-the-border>.
358. TORN APART, *supra* note 357, at 10-11.
359. As earlier explained, there are two forms of voluntary departure: (a) voluntary departure that is granted by an immigration judge at either the outset or conclusion of formal removal hearings; and (b) voluntary return that is administered and issued by an immigration officer. This chapter is concerned only with voluntary return.
360. “Voluntary departure may not be granted unless the alien

requests such voluntary departure *and agrees* to its terms and conditions.” (emphasis added). 8 C.F.R. § 240.25 (c).

361. See generally *Lopez Venegas v. Beers*, 13-cv-03972-JAK (C.D. Cal. 2013).

362. 8 U.S.C. § 1182(a)(9)(B)(i)(II).

363. 8 U.S.C. § 1182(a)(9)(B)(i)(I).

364. Interview with Veronica V., by telephone, April 23, 2014 (on file with the ACLU).

365. *Id.*

366. *Id.*

367. Interview with Emmanuel M., by telephone, June 13, 2014 (on file with the ACLU).

368. *Id.*

369. *Id.*

370. *Maria S. et al. v. Four Unknown Officers of CBP et al.*, No. B-13-108 (S.D. Tex. 2013).

371. Interview with Marisol Pérez, San Antonio, Texas, April 23, 2014 (on file with the ACLU).

372. *Lopez-Venegas v. Beers*, No. 13-cv-03972-JAK (PLA) (C.D. Cal. June 4, 2013).

373. “Aggravated felonies” include crimes that, under state criminal laws, are not necessarily felonies and may not even include a term of imprisonment. The Immigration and Nationality Act (INA) identifies 21 types of crimes in the aggravated felony category ranging from tax evasion to rape, listed at 8 U.S.C. § 1101(a)(43), and what is considered an aggravated felony varies in accordance with state law. Some aggravated felonies do require that the individual was sentenced for a period of 365 days or more for the crime to constitute an aggravated felony—for example, burglary, a crime of theft, or a crime of violence. Even if the person never actually served any time in prison for the offense—for example, if the person receives a “suspended sentence” from a criminal court but is not required to serve all or any part of that sentence in prison—his or her crime can be considered an aggravated felony.

374. See *supra* note 136 (defining “crimes against moral turpitude.”).

375. Interview with Ricardo S., by telephone, March 10, 2014 (on file with the ACLU). The ACLU also spoke with Ricardo’s federal public defender in Arizona and the immigration attorney handling his appeal, and also reviewed all his pleadings in Ricardo’s prosecution for illegal reentry under 8 U.S.C. § 1326. All interviews and records are on file with the ACLU.

376. Interview with Ricardo S., by telephone, March 10, 2014 (on file with the ACLU).

377. A crime of theft or burglary is a crime that is considered to be an aggravated felony only when the individual is sentenced to 365

days or more in prison (which can include a suspended sentence). Thus, for Ricardo, whether or not “conspiracy to commit burglary” was a crime that fell within the aggravated felony category at that time, the reduction of his sentence to 364 days meant that his conviction could never be an aggravated felony.

378. In March 2010, in *Padilla v. Kennedy*, the U.S. Supreme Court held that failure to inform a criminal defendant of the immigration consequences of a criminal conviction before entering into a plea agreement constituted ineffective assistance of counsel and could be the basis of a claim under the Sixth Amendment to the U.S. Constitution. Such a claim allows an individual to vacate the criminal conviction that led, as a collateral consequence, to his or her deportation. However, in 2013, the Supreme Court held that this decision did not apply retroactively to criminal convictions entered before March 2010. *Chaidez v. U.S.*, 133 S.Ct. 1103 (2013).

379. For many years, the Department of Homeland Security argued that crimes involving drug possession were aggravated felonies, counting them as a drug trafficking crimes. However, in recent years, the U.S. Supreme Court has since determined that many low-level drug crimes that have been prosecuted as aggravated felonies are not appropriately considered drug trafficking crimes. For example, in *Lopez v. Gonzales*, 127 S.Ct. 625 (2006), the Supreme Court held that simple possession offenses (misdemeanors under federal law) are not aggravated felonies. And in *Moncrieffe v. Holder*, 133 S.Ct. 1678 (2013), the Supreme Court held that “social sharing of a small amount of marijuana” (sometimes prosecuted as “possession with intent to sell”) is not an aggravated felony. In its decision, the Court further observed, “This is the third time in seven years that we have considered whether the Government has properly characterized a low-level drug offense as ‘illicit trafficking in a controlled substance,’ and thus an ‘aggravated felony.’ Once again we hold that the Government’s approach defies ‘the “commonsense conception”’ of these terms.” *Id.* at 1693. See generally, IMMIGRANT DEFENSE PROJECT, “Drug Aggravated Felonies,” available at <http://immigrantdefenseproject.org/litigation/drug-aggravated-felonies>.

380. *U.S. v. Jose Luis Gonzalez-Segundo*, No.4:10-cr-0397, Memorandum and Order (S.D. Tex. Nov. 16, 2010).

381. Statement of Secretary Jeh C. Johnson, U.S. Department of Homeland Security Before House Committee on Homeland Security, June 24, 2014, available at <http://docs.house.gov/meetings/HM/HM00/20140624/102395/HHRG-113-HM00-Wstate-JohnsonJ-20140624.pdf>.

382. UNITED NATIONS HIGH COMMISSION FOR REFUGEES, CHILDREN ON THE RUN: UNACCOMPANIED CHILDREN LEAVING CENTRAL AMERICA AND MEXICO AND THE NEED FOR INTERNATIONAL PROTECTION (“UNHCR Report”) 39 (May 2014), available at http://www.unhcrwashington.org/sites/default/files/UAC_Children%20on%20the%20Run_Full%20Report_May2014.pdf. Similarly, the Women’s Refugee Commission’s report on unaccompanied minors found that even children who experienced dangerous and traumatic journeys to the United States through Mexico would repeat it to find sanctuary in the United States: “The conditions in Central America have deteriorated to such a point that, when the WRC asked the children if they would

risk the dangerous journey north through Mexico all over again now that they had direct knowledge of its risks, most replied that they would. They said that staying in their country would guarantee death, and that making the dangerous journey would at least give them a chance to survive. Many of them expressed a longing for their homelands, stating that they would not have left but for fear for their lives.” WOMEN’S REFUGEE COMMISSION, FORCED FROM HOME: THE LOST BOYS AND GIRLS OF CENTRAL AMERICA, 7 (Oct. 2012).

383. U.S. Department of Homeland Security, Statement by Secretary of Homeland Security Jeh Johnson Before the Senate Committee on Appropriations, July 10, 2014, *available at* <http://www.dhs.gov/news/2014/07/10/statement-secretary-homeland-security-jeh-johnson-senate-committee-appropriations>.

384. Memorandum for the Heads of Executive Departments and Agencies, *Response to the Influx of Unaccompanied Alien Children Across the Southwest Border* (June 2, 2014) (on file with the ACLU); *see also* Dianne Solís and Alfredo Corchado, *Immigrant Children Seeking Sanctuary Face Bleak Future*, DALLAS MORNING NEWS, June 7, 2014, <http://www.dallasnews.com/news/headlines/20140607-immigrant-children-seeking-sanctuary-face-bleak-future.ece>; *see generally*, CONGRESSIONAL RESEARCH SERVICE, UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW, June 23, 2014, *available at* <http://fas.org/sgp/crs/homesecc/R43599.pdf>.

385. 8 U.S.C. § 1232(a)(5)(D) (“Any unaccompanied alien child sought to be removed by the Department of Homeland Security, except for an unaccompanied alien child from a contiguous country . . . shall be placed in removal proceedings under section 240 of the Immigration and Nationality Act.”).

386. An unaccompanied alien child is defined as “a child who has no lawful immigration status in the United States; has not attained 18 years of age; and with respect to whom there is no parent or legal guardian in the United States; or no parent or legal guardian in the United States is available to provide care and physical custody.” 6 U.S.C. § 279(g).

387. The INS was later dissolved and replaced by the Department of Homeland Security and the U.S. Citizenship and Immigration Services.

388. *See, e.g.*, HUMAN RIGHTS WATCH, SLIPPING THROUGH THE CRACKS: UNACCOMPANIED CHILDREN DETAINED BY THE U.S. IMMIGRATION AND NATURALIZATION SERVICE (1992).

389. Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544-RJK (Px) (C.D. Cal. Jan. 17, 1997) (“the Flores Settlement”), *available at* http://www.aclu.org/files/pdfs/immigrants/flores_v_meese_agreement.pdf.

390. *Id.*; 8 U.S.C. § 1232(c)(2)(A).

391. 8 C.F.R. § 236.3.

392. *Perez-Funez v. INS*, 619 F. Supp. 656 (C.D. Cal. 1985). Although *Perez-Funez* was decided prior to 1996 and the introduction of most summary removal statutes at issue in this report, its protections for children survive. *See, e.g.*,

8 U.S.C. §§ 1232(a)(2)(B), (a)(5)(D). That said, children are not immune from these more formal removal orders. The ACLU met two children, ages two and 14, who traveled with their mother; all three were issued expedited removal orders in Texas. Recent data on ICE apprehensions, procured and calculated from The New York Times FOIA data on removals, shows that 83 children were issued expedited removal orders (and 74 received reinstated orders of removal). (Data on file with the ACLU).

393. *Id.*

394. Special Immigrant Juvenile Status is available to non-citizen children who have been abused, neglected, or abandoned or another similar basis under state law by one parent or both; these children, if approved, can later become lawful permanent residents and work lawfully in the United States. *See* INA § 101(a); 8 U.S.C. § 1101(a)(27)(J).

395. *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Pub. L. 110-457, 122 Stat. 5044 (2008), TVPRA § 1232(a)(5)(D)(i).

396. Within the ORR, the Division of Unaccompanied Children’s Services (DUCS) is responsible for placing unaccompanied children in appropriate housing throughout their immigration proceedings. Most children who are not released to family or sponsors are housed in shelters, although the full range of placements includes secure facilities and temporary foster care. *See generally*, Department of Health and Human Services, Factsheet: U.S. Department of Human Services, Administration for Children and Families, Office of Refugee Resettlement, Unaccompanied Alien Children Program, (May 2014), *available at* http://www.acf.hhs.gov/sites/default/files/orr/unaccompanied_childrens_services_fact_sheet.pdf.

397. NATIONAL IMMIGRANT JUSTICE CENTER, “U.S. Government Held Hundreds of Immigrant Children in Adult Detention Facilities, Sometimes for Weeks,” June 4, 2014, *available at* http://www.immigrantjustice.org/press_releases/us-government-held-hundreds-immigrant-children-adult-detention-facilities#.U5cklSi5K1h; DEPARTMENT OF HOMELAND SECURITY, OFFICE OF INSPECTOR GENERAL, CBP’S HANDLING OF UNACCOMPANIED ALIEN CHILDREN, Sept. 2010, *available at* <http://trac.syr.edu/immigration/library/P5017.pdf> (noting, in particular, that it was unclear whether CBP officers were adequately trained with respect to the *Flores* Agreement and that DHS had developed a one-hour training but only 35 percent of agents in FY 2008 and 40 percent of agents in FY 2009 had completed that training); *see generally* Rebecca M. López, *Codifying the Flores Settlement Agreement: Seeking to Protect Immigrant Children in U.S. Custody*, 95 MARQ. L. REV. 1635 (2012).

398. In the preamble to the Convention on the Rights of the Child, the United Nations recognized that the “child, by reason of his physical and mental maturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.” Convention on the Rights of the Child (“CRC”), adopted Nov. 20, 1989, GA Res. 44/25, Annex, UN GAOR 44th Session, Supp. No. 49 at 166, UN Doc. A/44/49 (1989).

399. Interview with Kevin G., Nogales, Mexico, March 3, 2014 (on file with the ACLU).
400. Interview with Kevin, Los Angeles, California, March 22, 2014 (on file with the ACLU).
401. As a report from the Congressional Research Service observed, “[I]n contrast to ORR’s refugee-based mission, the Immigration and Customs Enforcement (ICE) Office of Detention and Removal (DRO) of DHS has the mission of enforcing U.S. immigration laws to ensure the departure from the United States of all removable aliens” (internal citations omitted). CONGRESSIONAL RESEARCH SERVICE, UNACCOMPANIED ALIEN CHILDREN: POLICIES AND ISSUES, 14 (2007), available at <http://www.rcusa.org/uploads/pdfs/CRS%20UAC%20Report%202007.pdf>.
402. Complaint to Department of Homeland Security Office for Civil Rights and Civil Liberties and Office of Inspector General, Regarding Systemic Abuse of Unaccompanied Immigrant Children by U.S. Customs and Border Protection (“CRCL/OIG Complaint”) (June 11, 2014), available at <http://www.acluaz.org/sites/default/files/documents/DHS%20Complaint%20re%20CBP%20Abuse%20of%20UICs.pdf>.
403. This investigation is ongoing; to date, the Office of Inspector General of the Department of Homeland Security has reviewed 16 of the complaints and stated that it was unable to substantiate those complaints. See Memorandum to Secretary Jeh C. Johnson from John Roth, Inspector General, *Oversight of Unaccompanied Children*, (July 30, 2014), available at http://www.oig.dhs.gov/assets/Mgmt/2014/Over_Un_Ali_Chil.pdf; Memorandum to Secretary Jeh C. Johnson from John Roth, Inspector General, *Oversight of Unaccompanied Children*, (Aug. 28, 2014), available at http://www.oig.dhs.gov/assets/pr/2014/Sig_Mem_Over_Unac_Alien_Child090214.pdf. Advocates, however, claim that the OIG did not adequately or sensitively investigate the initial 16 of the 116 complaints and that they continue to receive similar complaints regarding inappropriate detention conditions and abuse from unaccompanied children. National Immigrant Justice Center, “DHS Inspector General Fails to Adequately Investigate Abuse of Detained Immigrant Children,” Sept. 3, 2014, available at http://www.immigrantjustice.org/press_releases/dhs-inspector-general-fails-adequately-investigate-abuse-detained-immigrant-children.
404. Interview with Maria, February 28, 2014, Agua Prieta, Sonora, Mexico (on file with the ACLU).
405. Interview with Mexican immigration staff, February 28, 2014, Agua Prieta, Sonora, Mexico (on file with the ACLU).
406. M. Aryah Somers, Draft, *Preliminary Program Highlights: Fulbright Scholar Research in Guatemala*, 7 (Aug. 2012) (on file with ACLU).
407. *Id.* at 8.
408. *Id.*
409. CRCL/OIG Complaint, *supra* n. 402.
410. *Id.* at 16.
411. Interview with Deyvin S., by survey, March 1, 2014 (on file with the ACLU).
412. *Id.*
413. While “contiguous” countries includes children from Canada and Mexico, in practice, the law distinguishing between children from contiguous and non-contiguous countries appears to be concerned with Mexican children, given both its legislative history and the number of children arriving from Mexico.
414. The 2014 UNHCR study based on interviews of unaccompanied children found that 64 percent of Mexican children had potential international protection needs; of those children, “[32 percent] spoke of violence in society, 17 percent spoke of violence in the home and 12 percent spoke of both” while “[a] striking 38 percent of the children from Mexico had been recruited into the human smuggling industry—precisely because of their age and vulnerability.” UNHCR Report, *supra* n. 19, at 11.
415. REFUGEES INTERNATIONAL, MEXICO’S UNSEEN VICTIMS, 3-4 (July 2, 2014), available at <http://refugeesinternational.org/sites/default/files/070214%20Mexico%20Unseen%20Victims%20English%20letterhead.pdf>. Some Mexican children, Refugees International concluded, who come to the United States fleeing forced recruitment should be able to apply for asylum based on their use, by non-state actors, as child combatants. *Id.* at 7.
416. 8 U.S.C. § 1232(a)(2). In addition to Form 93, which is the TVPRA screening form used to determine the existence of a trafficking or asylum claim, Mexican children are still supposed to be presented with the I-770 form, to establish their consent to voluntary departure. It is not clear what standard officers are using to determine whether a child has an asylum claim or is at risk of being trafficked.
417. 8 U.S.C. § 1232(a)(2), (a)(5)(D)(i).
418. 8 U.S.C. § 1232(e). Furthermore, if after determining that the child can be removed and does not meet the TVPRA protective criteria, triggering a hearing, the DHS officer nevertheless chooses to pursue a *formal* removal order (as opposed to voluntary departure), the child must be referred to regular immigration proceedings in front of a judge and also transferred to ORR custody. 8 U.S.C. § 1232(a)(5)(D)(i). Even without this screening checklist, the TVPRA always allows CBP officers to refer children to regular removal proceedings rather than require them to take voluntary departure; in practice, it is unlikely that many officers are making use of this option.
419. U.S. Customs and Border Protection, *Southwest Border Unaccompanied Alien Children*, available at <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children> (accessed July 1, 2014); see also Betsy Cavendish and Maru Cortazar, APPLESEED, CHILDREN AT THE BORDER: THE SCREENING, PROTECTION AND REPATRIATION OF UNACCOMPANIED MEXICAN MINORS (Appleseed Report), 49 (2011), available at <http://appleseednetwork.org/wp-content/uploads/2012/05/Children-At-The-Border1.pdf>.

420. APPLSEED, Letter to Congressional Research Service on Mexican Unaccompanied Minors at 7 (May 23, 2014) (on file with the ACLU) (citing annual figures 2010-2014 from the Centro de Estudios Migratorios de la Unidad de Política Migratoria de la SEGOB).
421. U.S. Department of Health and Human Services, About Unaccompanied Children's Services, *available at* https://www.acf.hhs.gov/sites/default/files/orr/uac_statistics.pdf (accessed July 1, 2014).
422. UNHCR, Confidential Report, *supra* n. 16, at 14.
423. Interview with Arturo, Nogales, Mexico, March 3, 2014 (on file with the ACLU).
424. A CBP official may nevertheless use his or her discretion to refer the child for a formal removal hearing, but as the TVPRA screening (when it occurs) does not include any questions about forms of relief except for trafficking and asylum, it is unlikely the officer will know that the child has another claim to be in the United States.
425. Interview with Hector, Nogales, Mexico, March 3, 2014 (on file with the ACLU).
426. Interview with Brian, Nogales, Mexico, March 3, 2014 (on file with the ACLU).
427. M. E. interview with legal services organization in California, shared with M. E.'s consent with the ACLU (and on file with the ACLU).
428. CRCL/OIG complaint, *supra* n. 402 at 17.
429. *Id.*
430. Interview with Hiram and Pepe, Nogales, Mexico, March 3, 2014 (on file with the ACLU).
431. *Id.*
432. 8 C.F.R. § 236.3(h).
433. CENTER FOR PUBLIC POLICY PRIORITIES, A CHILD ALONE AND WITHOUT PAPERS: A REPORT ON THE RETURN AND REPATRIATION OF UNACCOMPANIED UNDOCUMENTED CHILDREN BY THE UNITED STATES, at 40, (2008) ("CPPP Report"), *available at* http://forabettertexas.org/images/A_Child_Alone_and_Without_Papers.pdf.
434. Interview with Mexican immigration staff in Nogales, Mexico, March 3, 2014 (on file with the ACLU).
435. *Id.* at 48.
436. Lawrence Downes, *Beware John Cornyn's 'Humane' Immigration Act*, N.Y. TIMES, July 15, 2014, *available at* http://takingnote.blogs.nytimes.com/2014/07/15/beware-john-cornyns-humane-immigration-act/?_php=true&_type=blogs&_php=true&_type=blogs&_r=1&.
437. UNHCR, Confidential Report, *supra* n. 16 at 14.
438. *Id.* at 36.
439. *Id.* at 39.
440. *Id.* at 27, June 2014.
441. *Id.* at 29.
442. Appleseed Report, *supra* n. 419.
443. *Id.* at 49-50.
444. *Id.* at 40.
445. Interview on March 3, 2014, Nogales, Sonora, Mexico (on file with the ACLU).
446. Interview with Mexican immigration and repatriation official, Nogales, Mexico, March 3, 2014 (on file with the ACLU). *See also*, UNHCR Report, *supra* n. 19, finding that 64 percent of Mexican children interviewed raised international protection concerns.
447. Erin Siegal McIntyre, *Not All Kids Are Equal: Central American Kids Get Court Dates, Mexicans Get the Boot*, FUSION, July 11, 2014, *available at* <http://fusion.net/justice/story/kids-equal-central-american-kids-court-date-mexicans-845375>.
448. Appleseed Report, *supra* n. 419, at 36.
449. UNHCR summary findings on the TVPRA (on file with the ACLU); Appleseed Report.
450. Fawn Johnson, *There's No Explanation for the Central American Trafficking Law 'Loophole'*, NATIONAL JOURNAL, July 16, 2014, *available at* http://www.nationaljournal.com/congress/there-s-no-explanation-for-the-central-american-trafficking-law-loophole-20140716?ref=nj_daily.
451. *Id.*
452. *See* 8 C.F.R. § 236.3; *Perez-Funez v. INS*, 619 F. Supp. 656 (C.D. Cal. 1985).
453. 8 C.F.R. § 1236.3(g) ("Each juvenile, apprehended in the immediate vicinity of the border, who resides permanently in Mexico or Canada, shall be informed, prior to presentation of the voluntary departure form or being allowed to withdraw his or her application for admission, that he or she may make a telephone call to a parent, close relative, a friend, or to an organization found on the free legal services list. A juvenile who does not reside in Mexico or Canada who is apprehended shall be provided access to a telephone and must in fact communicate either with a parent, adult relative, friend, or with an organization found on the free legal services list prior to presentation of the voluntary departure form. If such juvenile, of his or her own volition, asks to contact a consular officer, and does in fact make such contact, the requirements of this section are satisfied.").
454. Appleseed Report, *supra* n. 419, at 39.

455. *Id.* The Form 93 is not publicly available on the CBP website and was not provided to the ACLU in the course of its FOIAs. Applesseed noted that it was able to procure a heavily redacted copy of the form only in response to their 2010 FOIA.
456. *Id.* at 36.
457. *Id.*
458. *Id.*
459. Interview on file with the ACLU, February 28, 2014, Agua Prieta, Sonora, Mexico.
460. Applesseed Report, *supra* n. 419, at 34.
461. Interview with Len Saunders, by telephone, January 21, 2014 (on file with the ACLU).
462. Interview with Greg Boos, by telephone, January 17, 2014 (on file with the ACLU). Moreover, Boos notes that in some cases where a supervisor will vacate the order, there may still be retaliatory consequences for the individual returning to the United States. In one case, Boos says, a client had been accused of overstaying her visa but a FOIA proved that to be untrue; although the deportation order was rescinded, according to Boos, the supervisor said his client was “really going to have to prove her non-immigrant intent” in the future. In such cases, reflects Boos, “Even when you win, they can retaliate.”
463. Interview with Greg Boos, by telephone, January 17, 2014 (on file with the ACLU); *see also*, Michael Platt, *Canadian Actor Chad Rook Barred From Entering U.S. For Five Years By Border Guards*, CALGARY SUN, Feb. 11, 2013, *available at* <http://www.calgarysun.com/2013/02/11/canadian-actor-chad-rook-barred-from-entering-us-for-five-years-by-border-guards/>; Kashmir Hill, *The Privacy Price To Cross The Border*, FORBES, Feb. 21, 2013, *available at* <http://www.forbes.com/sites/kashmirhill/2013/02/21/the-privacy-price-to-cross-the-border/>; CTV BRITISH COLUMBIA, *B.C. Actor Credits Media Attention For Overturning Border Ban*, Jan. 9, 2014, *available at* <http://bc.ctvnews.ca/b-c-actor-credits-media-attention-for-overturning-border-ban-1.1632570#ixzz36okzWcFC>.
464. Letter to Greg Boos from Michele James, Director, Field Operations, U.S. Customs and Border Protection, Dec. 30, 2013 (on file with the ACLU).
465. Interview with Len Saunders, by telephone, January 21, 2014 (on file with the ACLU).
466. In his declaration, Officer Helle stated, “I used my fingers to apply pressure to the ‘brachial plexus origin’ which is a pressure point along the side of the neck. . . . I told the driver, ‘You can drive any way you want to in Canada. But if you drive that way down here somebody might put a bullet up your ass.’ I then got in my car and left.” Declaration of Joel J. Helle in Support of Notice of Removal, *State of Washington v. Joel Jeffrey Helle*, NO. CV11-971, June 6, 2010 (on file with the ACLU). *See also* Jeremy Schwartz, *CBP Agent Pleads Guilty To Harassment*, NORTHERN LIGHT, Aug. 17, 2011, *available at* http://www.thenorthernlight.com/news/article.exm/2011-08-17_cbp_agent_pleads_guilty_to_harassment; Interview with Greg Boos, by telephone, January 17, 2014 (on file with the ACLU); Interview with Len Saunders, by telephone, January 21, 2014 (on file with the ACLU). According to one news source that reviewed CBP data, between 2007 and 2010, 422 individuals were issued expedited removal orders in the area where Helle worked (Blaine, Washington); 55 of those orders came from Helle alone. Kathy Tomlinson, *Ex-U.S. Officer’s Border Bans To Be Reviewed*, CANADIAN BROADCASTING CORPORATION, Sept. 27, 2011, *available at* <http://www.cbc.ca/news/canada/british-columbia/ex-u-s-officer-s-border-bans-to-be-reviewed-1.997985>.
467. Kathy Tomlinson, *supra* n. 466; *see also* Letter to Michele James, Director, Seattle Field Office, U.S. Customs and Border Protection, re Customs and Border Protection Officer Joel Helle and Expedited Removal, Sept. 20, 2011 (requesting that CBP review the expedited removal orders issued by Officer Helle, signed by 26 attorneys practicing in the region) (on file with the ACLU).
468. Interview with Cathy Potter, by telephone, July 3, 2014 (on file with the ACLU).
469. *See* Section I. A.-E., on the temporal, procedural, and substantive limits of judicial review available for expedited removal, reinstatement, administrative removal, and stipulated orders of removal.
470. The Board of Immigration Appeals, as well as some courts, has determined that a person seeking review of a prior removal order must demonstrate a “grievous miscarriage of justice” for a court to undo the order. *Matter of La Grotta*, 14 I&N Dec. 110, 111-12 (BIA 1972); *William v. Holder*, 359 F. Appx 370, 372 (4th Cir. 2009) (per curiam); *Ramirez-Molina v. Ziglar*, 436 F.3d 508 (5th Cir. 2006); *Isturbe-Covarrubias v. Gonzales*, 183 Fed.Appx. 425 (5th Cir. 2006). In the Ninth Circuit, individuals seeking to collaterally attack a deportation order must show that the order was fundamentally unfair because the orders violated due process and the individuals were prejudiced by that violation. *U.S. v. Ubaldo-Figueroa*, 364 F.3d 1042, 1048 (9th Cir. 2004) (internal quotation marks and citation omitted).
471. Rachel Rosenbloom, *Remedies for the Wrongly Deported: Territoriality, Finality, and the Significance of Departure*, 33 U.HAWAII L. REV. 139, 183 (2011).
472. Although rejected by 10 federal circuit courts of appeal, the Board of Immigration Appeals, which reviews appeals of immigration judge decisions, maintains that there is a post-departure bar on filing for review after deportation because physical removal, even if involuntary, is “a transformative event that fundamentally alters the alien’s posture under the law” such that he or she is “in no better position after departure than *any other alien* who is outside the territory of the United States.” *In re Armendarez-Mendez*, 24 I&N Dec. 646, 656 (B.I.A. 2008) (emphasis in the original). *See generally*, Richard Frankel, ILLEGAL EMIGRATION: THE CONTINUING LIFE OF INVALID DEPORTATION ORDERS, 65 SMU L. REV. 503 (2012). Legal scholar Rachel Rosenbloom observes that despite all the impediments built against individuals seeking review of their case post-deportation, “the entire discussion

of finality in the removal context was shaped not by departure but by the specter of its opposite: failure to depart. As the Supreme Court repeatedly noted in the days before IIRIRA, the reason that motions to reopen were particularly disfavored in the deportation or removal context was that ‘every delay works to the advantage of the deportable alien who wishes merely to remain in the United States.’ For the person who is already outside the United States, there is nothing to be gained by a motion to reopen or reconsider unless it is meritorious.” Rosenbloom, *supra* at 181.

473. Interview with Carlos S., Tijuana, Mexico, March 24, 2014 (on file with the ACLU).

474. Interview with Juan C., Tijuana, Mexico, March 24, 2014 (on file with the ACLU).

475. Interview with Guillermo L., Reynosa, Mexico, April 17, 2014 (on file with the ACLU).

476. According to FOIA data obtained by The New York Times and analyzed by the ACLU, in FY 2013, 20 percent of those who received reinstatement orders from ICE were apprehended through the “criminal alien program” (CAP) and were not necessarily living in the border region (on file with the ACLU).

477. INA §§ 212(a)(9)(C)(i)(II), (C)(ii).

478. Interview with Lance Curtright, San Antonio, Texas, April 23, 2014 (on file with the ACLU).

479. Interview with Nancy Falgout, by telephone, January 14, 2014 (on file with the ACLU).

480. Interview with Ken McGuire, by telephone, February 11, 2014 (on file with the ACLU).

481. Interview with Enrique, Tijuana, Mexico, March 25, 2014 (on file with the ACLU).

482. An *in absentia* order of removal can be entered against a person who does not show up at their immigration hearing if the government can demonstrate, by clear, convincing, and unequivocal evidence, that the proper written notice was provided and that the individual was removable. 8 C.F.R. § 1003.26. This report does not focus on individuals in this category, who could have seen a judge but for whatever reason, missed their hearings and were subsequently ordered removed by an immigration judge. However, in the course of this investigation, the ACLU interviewed several people who were deported with *in absentia* orders who said they had never received notice of their hearing, some of whom appeared to have very strong immigration cases and every incentive to appear in court and make their claims. For example, Serafin G., a single parent raising four U.S. citizen children and who had been in the United States for approximately 26 years, paid a lawyer who never informed him of the court date. Since his deportation, he says, his three younger children have been staying with friends.

483. Interview with Marcos V., Tijuana, Mexico, March 25, 2014 (on file with the ACLU).

484. Interview with Ken McGuire, by telephone, February 11, 2014 (on file with the ACLU).

485. Interview with Ken McGuire, by telephone, February 11, 2014 (on file with the ACLU).

486. ICE has explicit civil immigration enforcement priorities (for apprehension, prosecution, and removal), which include non-citizens who pose a national security risk, fugitives, and recent unlawful entrants. See U.S. Customs and Immigration Enforcement, John Morton, Director, Memorandum, Civil Immigration Enforcement Action: Priorities for the Apprehension, Detention, and Removal of Aliens, March 2, 2011, available at <https://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf>; U.S. Customs and Immigration Enforcement, John Morton, Director, Memorandum, “Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens,” June 17, 2011, available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

487. Interview with Pancho, Nogales, Mexico, March 3, 2014 (on file with the ACLU).

488. *Id.*

489. *Id.*

490. Interview with Alex B., by telephone, January 17, 2014 (on file with the ACLU).

491. Shoba S. Wadhia, *The Rise of Speed Deportation and the Role of Discretion* 6 COLUM. J. RACE & L. 1, 21 (2014). Similarly, a large number of appeals in circuit court come from asylum or withholding-based claims. Stacy Caplow, *After the Flood: The Legacy of the ‘Surge’ of Federal Immigration Appeals*, 7 NW. J.L. & SOC. POL’Y 1 (2012).

492. Shoba S. Wadhia, *supra* n. 491, at 21. Similarly, a large number of appeals in circuit court come from asylum or withholding-based claims. Stacy Caplow, *After the Flood: The Legacy of the ‘Surge’ of Federal Immigration Appeals*, 7 NW. J.L. & SOC. POL’Y 1 (2012).

493. C.F.R. § 214.14(c)(5)(i) (“For a petitioner who is subject to an order of exclusion, deportation, or removal issued by the Secretary, the order will be deemed canceled by operation of law as of the date of USCIS’s approval of Form I-918.”).

494. U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, “USCIS Victims of Trafficking Form I-914 (T) and Victims of Crime Form I-918 (U) Visa Statistics (FY2002-FY2012),” (2012) available at <http://www.uscis.gov/tools/reports-studies/immigration-forms-data/data-set-form-i-914-application-t-nonimmigrant-status> (accessed on June 17, 2014). Even those who are “approved” for U visas, however, do not immediately get them, as there is a statutory cap of 10,000 U visas per year. Individuals who are approved for a U visa but cannot get one due to the cap are given a Notice of Conditional Approval given deferred action and placed on a waiting list until the next year. See U.S. Citizenship and Immigration Services, “USCIS Approves 10,000 U Visas for 5th Straight Fiscal Year,” (Dec. 11, 2013); see generally, ASISTA

Cited in USA v. Peralta-Sanchez
No. 14-50393 archived on February 2, 2017

HELP, U Cap Update from USCIS & Additional Updates from VSC Stakeholder Teleconference (Dec. 11, 2013).

495. U.S. Citizenship and Immigration Services, “Removal Proceedings,” (Sept. 2013) (on file with the ACLU) (see FOIA request and responses, *available at* www.aclu.org.)]

496. Interview with Demetrio, Adelanto, California, March 28, 2014 (on file with the ACLU).

497. *Id.*

498. Interview with Emmanuel M., by telephone, June 13, 2014 (interview and individual’s immigration file on file with the ACLU).

499. Interview with Elizabeth Badger, by telephone, January 13, 2014 (interview and case file on file with the ACLU).

500. *Id.*

501. Operation Streamline proceedings for illegal entry, in particular, have been criticized for their lack of due process. *See* ACLU, *Reform U.S. Approach to Border Prosecutions*, July 2014, *available at* https://www.aclu.org/sites/default/files/assets/14_7_3_aclu_streamline_recommendations_final.pdf; ACLU, Immigration Reform should Eliminate Operation Streamline, *available at* https://www.aclu.org/files/assets/operation_streamline_issue_brief.pdf; *see generally*, HUMAN RIGHTS WATCH, TURNING MIGRANTS INTO CRIMINALS (2013), *available at* <http://www.hrw.org/reports/2013/05/22/turning-migrants-criminals-0>. Judges combine the initial appearance, arraignment, plea, and sentencing into a single hearing, sometimes taking as few as 25 seconds per defendant. Fernanda Santos, “Detainees Sentenced in Seconds in ‘Streamline’ Justice on Border,” *The New York Times*, Feb. 11, 2014, <http://www.nytimes.com/2014/02/12/us/split-second-justice-as-us-cracks-down-on-border-crossers.html>.

502. 8 U.S.C. §§ 1325-1326 (2011); 18 U.S.C. § 3559 (2011).

503. U.S. DEP’T OF JUSTICE, SMART ON CRIME, REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY, at 2 (Aug. 2013), *available at* <http://www.justice.gov/ag/smart-on-crime.pdf>.

504. As Judge Sam Sparks, U.S. District Court for the Western District of Texas, said, “The expenses of prosecuting illegal entry and reentry cases (rather than deportation) on aliens without any significant criminal record is simply mind boggling. The U.S. Attorney’s policy of prosecuting all aliens presents a cost to the American taxpayer that is neither meritorious nor reasonable.” MY FOX HOUSTON, *Federal Judge Questions Immigration Prosecutions*, Feb. 7, 2010, <http://www.myfoxboston.com/story/18229445/federal-judge-questions-immigration-prosecutions>. Judge Ruben Castillo of the U.S. District Court for the Northern District of Illinois and former Commissioner, U.S. Sentencing Commission, agreed, “There is a use of criminal justice resources that doesn’t make sense.” Forrest Wilder, *The Lawsuit West of the Pecos*, TEXAS OBSERVER Dec. 8, 2010, *available at* <http://www.texasobserver.org/forrestforthetrees/the-lawsuit-west-of-the-pecos>. Judge Robert C. Brack, on the U.S. District Court for the District of New Mexico, observed, “Every day I see people who would never have been

considered as criminal defendants two years ago.” Joe Palazzollo and Miriam Jordan, *Border Laws Put Judge on Map*, WALL ST. JOURNAL, May 31, 2013, *available at* <http://online.wsj.com/article/SB10001424127887323336104578499480108652610.html>.

505. *See* ACLU of Texas & American Civil Liberties Union, WAREHOUSED AND FORGOTTEN: IMMIGRANTS TRAPPED IN OUR SHADOW PRIVATE PRISON SYSTEM, June 2014, *available at* <https://www.aclu.org/sites/default/files/assets/060614-aclu-car-reportonline.pdf>.

506. GRASSROOTS LEADERSHIP, OPERATION STREAMLINE: COSTS AND CONSEQUENCES (Sept. 2012), *available at* http://grassrootsleadership.org/sites/default/files/uploads/GRL_Sept2012_Report-final.pdf. While these figures examine costs and prosecutions in 2011, prosecutions for illegal entry and reentry continue to rise, and their corresponding costs should be expected to rise as well.

507. *Prosecutions for 2013, Syracuse University: Transactional Records Clearinghouse* *supra* n. 98, *At nearly 100,000 Immigration Prosecutions Reach All Time High*, Syracuse University: Transactional Records Clearinghouse (TRACfed), *supra* n. 98.

508. FY 2013 DHS data provided to The New York Times through a FOIA request, analyzed by the ACLU (on file with the ACLU).

509. Interview with Victoria Trull, by telephone, March 2, 2014 (on file with the ACLU); *see also*, HUMAN RIGHTS WATCH, TURNING MIGRANTS INTO CRIMINALS, *supra* n. 502 at 46 (quoting one federal defender as saying three-quarters of her clients charged with illegal reentry never saw an immigration judge).

510. Interview with Veronica Trull, by telephone, March 2, 2014 (on file with the ACLU).

511. *Id.*

512. NATIONAL PUBLIC RADIO, *Claims of Border Program Success are Unproved*, Sept. 13, 2010.

513. NPR, “Is Operation Streamline Worth Its Budget Being Tripled?” September 5, 2013, *available at*: <http://www.npr.org/2013/09/05/219177459/is-operation-streamline-worth-its-budget-being-tripled>.

514. Government Accountability Office, “Key Elements of New Strategic Plan Not Yet in Place to Inform Border Security Status and Resource Needs,” December 2012, <https://media.azpm.org/master/document/2013/1/9/pdf/gaoborderreport.pdf>.

515. Interview with Felipe R., Reynosa, Mexico, April 17, 2014 (on file with the ACLU).

516. *Id.*

517. Interview with Francisco, Tijuana, Mexico, March 24, 2014 (on file with the ACLU).

518. 8 U.S.C. § 1326(a).

519. *See U.S. v. Mendoza-Lopez*, 481 U.S. 828, 838 (1987).

520. The exhaustion requirement “cannot bar collateral review of a deportation proceeding when the waiver of right to an administrative appeal did not comport with due process.” *U.S. v. Ubaldo-Figueroa*, 364 F.3d 1042, 1048 (9th Cir. 2004) (citing *United States v. Muro-Inclan*, 249 F.3d 1180, 1183-84 (9th Cir. 2001)). The Due Process Clause requires that an alien’s waiver of his right to appeal a deportation order be “considered and intelligent.” *See id.* at 1049; *see also Mendoza-Lopez*, 481 U.S. at 839. An alien who is not advised of his rights cannot make a “considered and intelligent” waiver, and is thus not subject to the exhaustion of administrative remedies requirement of 8 U.S.C. § 1326(d). *See Ubaldo-Figueroa* at 1049-1050.
521. *U.S. v. Garcia-Martinez*, 228 F.3d 956, 960 (9th Cir. 2000).
522. For a non-citizen who is not a permanent resident of the United States and who wants to immigrate to the United States to join family, an approved I-130 is the first step to permanent residence. The approved I-130 makes the individual eligible for an immigrant visa if and when that becomes available. Immediate relatives, such as parents, spouses, or children of U.S. citizens, do not have to wait for a visa number whereas other relatives in “preference” categories are subject to the immigrant visa limit and must wait for a visa to become available. *See generally*, U.S. Department of Homeland Security, USCIS, “Instructions for Form I-130 Petition for Alien Relative,” available at <http://www.uscis.gov/sites/default/files/files/form/i-130instr.pdf>.
523. *U.S. v. Jose Arteaga Gonzales*, No. 12-cr-4704-L, Order (S.D. Cal. Sept. 30, 2013).
524. *U.S. v. Jose Luis Gonzalez-Segundo*, No. 4:10-cr-0397, Memorandum and Order (S.D. Tex. Nov. 16, 2010).
525. *U.S. v. Mizael Padilla Hernandez*, No. 4:13-cr-00611, (S.D. Tex. Jan. 30, 2014).
526. HUMAN RIGHTS WATCH, TURNING MIGRANTS INTO CRIMINALS, *supra* n. 502 at 63-64.
527. The Refugee Convention, *supra* n. 181, art. 31(1).
528. Interview with Soledad, San Francisco, California, February 3, 2014 (on file with the ACLU).
529. *Id.*
530. Soledad, psychological evaluation, p. 4 (on file with the ACLU).
531. Under *Rodriguez v. Robbins*, a class-action lawsuit brought by the ACLU, people who are detained six months or longer while they fight their deportation cases must be provided with a bond hearing. This case was brought in the Central District of California and affirmed by the Court of Appeals for the Ninth Circuit. *Rodriguez v. Robbins*, No. 2:07-cv-03239-TJH-RNB (C.D. Cal. 2010).
532. Interview with Inocencia C., Orange, California, March 22, 2014 (on file with the ACLU). The ACLU also interviewed Inocencia’s federal public defender and immigration attorney and reviewed her case files for this report.
533. Interview with Inocencia C., Orange, California, March 22, 2014 (on file with the ACLU).
534. *Id.*
535. *Id.*
536. Interview with Ericka E.F., T. Don Hutto Residential Center, Taylor, Texas, April 22, 2014 (on file with the ACLU).
537. Department of Homeland Security, U.S. Citizenship and Immigration Services, “Reinstatement of a Prior Order,” at 1 (p. 14 of the FOIA response), March 20, 2014 (on file with the ACLU); U.S. Citizenship and Immigration Services, “Affirmative Asylum Procedures Manual,” Nov. 2007 (revised July 2010), at 136 (p. 49 of the FOIA Response) (on file with the ACLU).
538. *Id.*
539. *Id.*
540. Interview with Jacqueline Bradley Chacon, by telephone, February 13, 2014 (on file with the ACLU).
541. U.S. Department of Homeland Security, Immigration and Customs Enforcement, *Deportation of Aliens Claiming U.S.-Born Children: First Semi-Annual, Calendar Year 2013*, 7 (April 28, 2014) (and noting that “ICE also removed 14,892 aliens claiming a U.S.-born child who were apprehended along the borders while attempting to unlawfully enter the United States”), available at <http://big.assets.huffingtonpost.com/2013report1.pdf>; U.S. Department of Homeland Security, Immigration and Customs Enforcement, *Deportation of Aliens Claiming U.S.-Born Children: Second Half, Calendar Year 2013*, (April 28, 2014) available at <http://big.assets.huffingtonpost.com/2013report2.pdf>.
542. HUMAN IMPACT PARTNERS, HOW FAMILY-FOCUSED IMMIGRATION REFORM WILL MEAN BETTER HEALTH FOR CHILDREN AND FAMILIES, 8 (June 2013), available at <http://www.familyunityfamilyhealth.org/uploads/images/FamilyUnityFamilyHealth.pdf>; *see generally*, Seth Freed Wessler, APPLIED RESEARCH CENTER (now “Race Forward”), SHATTERED FAMILIES: THE PERILOUS INTERSECTION OF IMMIGRATION ENFORCEMENT AND THE CHILD WELFARE SYSTEM (November 2011), available at <https://www.raceforward.org/research/reports/shattered-families?arc=1>.
543. Interview with Jaime Díez, April 18, 2014 (on file with ACLU).
544. Interview with Marisol Pérez, by telephone, February 26, 2014 (on file with the ACLU).
545. *See generally*, Laura L. Lichter and Mark R. Barr, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, *Practice Advisory: Unlawful Presence and INA §§ 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I): A summary of the May 6, 2009 Interoffice Memorandum from Donald Neufeld, Lori Scialabba, and Pearl Chang revising the Adjudicator’s Field Manual*, (2009) available at <http://www.aila.org/content/default.aspx?bc=1016|6715|6721|8815|31024|30095>. For example, an immigrant who was unlawfully present in the U.S. prior to deportation who has a United States citizen or LPR spouse, parent,

or fiancé (but not child), may, in certain circumstances, apply for a waiver under INA § 212(a)(9)(B)(v). An asylee or refugee subject to the three- or ten-year bar can seek a waiver under INA § 209(c). If an individual is subject to a permanent ban under 212(a)(9)(C)(i) (I), the options for a waiver are more limited. Certain individuals may still apply for waivers, such as Temporary Protected Status (TPS) applicants or asylees and refugees applying to adjust status. An undocumented victim of violence under the Violence Against Women Act (VAWA) can apply for a discretionary waiver of the fraud or misrepresentation bar if they meet certain criteria. *See, e.g., AMERICAN IMMIGRATION LAW FOUNDATION LEGAL ACTION CENTER, The § 237(a)(1)(H) Fraud Waiver: Practice Advisory* (2009) available at http://www.aiif.org/lac/pa/lac_pa_fraudwaiver.pdf.

546. Interview with Lesley Hoare, by telephone, July 6, 2014 (on file with the ACLU).

547. Interview with Katie and Jorge R., by telephone, January 28, 2014 (on file with the ACLU).

548. *Id.*

549. Interview with Consuelo, by telephone, May 9, 2014 (on file with the ACLU).

550. *Id.*

551. *Id.*

552. *Id.*

553. *Id.*

554. *Vélez Loor v. Panama*, Inter-Am. Ct. H.R. (ser. C) No. 218-07, ¶ 97 (Nov. 23, 2010).

555. International Covenant on Civil and Political Rights (“ICCPR”), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, ratified by the United States on June 8, 1992, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>, art. 13; *see also* Body of Principles for the Protection of Persons Under Any Form of Detention and Imprisonment, Principle 17(2), G.A. Res. 43/173, Annex, U.N. Doc. A/Res/43/173 (Dec. 9, 1988) (right of all detainees to receive legal assistance if he or she is unable to afford a lawyer), available at <http://www.un.org/documents/ga/res/43/a43r173.htm>.

556. U.N. Human Rights Committee, “The Position of Aliens Under the Covenant,” General Comment No. 15, U.N. Doc. A/41/40 (1986), ¶¶ 9, 10.

557. United Nations, *Report of the Secretary-General, Promotion and protection of human rights, including ways and means to promote the human rights of migrants*, para. 67 (August 7, 2014).

558. ICCPR, art 13, *supra* n. 555.

559. International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (“CRPD”), adopted December 13, 2006, G.A. Res. 61/106, U.N. Doc. A/61/49

(2006), entered into force May 3, 2008, arts. 12-13 (requiring that governments “ensure effective access to justice for persons with disabilities ... including through the provision of procedural and age-appropriate accommodations” and further “take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.”).

560. U.N. Committee on the Rights of the Child, “Treatment of Unaccompanied and Separated Children Outside their Country of Origin,” General Comment No. 6, UN Doc. CRC/GC/2005/6 (2005), available at <http://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf>, paras. 36 & 69 (“the unaccompanied or separated child should also, in all cases, be given access, free of charge, to a qualified legal representative”).

561. Body of Principles for the Protection of Persons Under Any Form of Detention and Imprisonment, Principle 17(2), G.A. Res. 43/173, Annex, U.N. Doc. A/Res/43/173 (Dec. 9, 1988).

562. ICCPR, *supra* n. 555, art. 14. According to the Human Rights Committee, the requirement of a competent, independent, and impartial tribunal “is an absolute right that is not subject to any exception.” Human Rights Committee, “Right to equality before courts and tribunals and to a fair trial,” General Comment No. 32, U.N. Doc. CCPR/C/GC/32 (2007), ¶ 19.

563. American Convention on Human Rights (“Pact of San José, Costa Rica”), adopted November 22, 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Relating to Human Rights in the Inter-American System, O.E.S. Ser. L.V/II.82 doc.6 rev.1 at 25 (1992), http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm.

564. Inter-American Commission on Human Rights, Report No. 49/99 Case 11.610, Loren Laroye Riebe Star, Jorge Alberto Barón Guttlein and Rodolfo Izal Elorz v. Mexico, April 13, 1999, Section 70-1.

565. ICCPR, *supra* n. 555, art 2.

566. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/810 at 71 (1948), art. 8 (“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”).

567. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture), adopted December 10, 1984, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987, ratified by the United States on October 21, 1994, art. 14, sec. 1 (requiring countries to “ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation.”).

568. International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”), adopted December 21, 1965, G.A. Res. 2106 (XX), annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force January

- 4, 1969, ratified by the United States on October 21, 1994, art. 6 (granting victims of racial discrimination “the right to seek ... just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.”).
569. American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992), art. 25 (“Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.”).
570. European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, opened for signature Nov. 4, 1950, entered into force Sept. 3, 1953, as amended by Protocols Nos. 3, 5, 8, and 11, entered into force 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively, art. 13 (“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”).
571. Universal Declaration of Human Rights, *supra* n.564, art. 14.
572. American Convention on Human Rights, art. 22(8). The Inter-American Court for Human Rights, interpreting the American Convention, recently reiterated this “individual human right to seek and receive international protection on foreign territory.” Inter-American Court of Human Rights, Advisory Opinion OC-21/14, *Rights and Guarantees of Children in the Context of Migration And/Or In Need of International Protection*, Official Summary, Aug. 19, 2014.
573. U.N. Office of the High Commissioner for Human Rights (OHCHR), *Recommended Principles and Guidelines on Human Rights at International Borders*, Guideline 7, para. 5, A/69/CRP.1, 23 July 2014.
574. OHCHR, *supra* note 8, Guideline 7.
575. The Refugee Convention, *supra* n. 189, art. 33. *See also* Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267, entered into force October 4, 1967. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture), adopted December 10, 1984, G.A. res.39/46, annex, 39 U.N. GAOR Supp. (no. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987, art. 3.; ICCPR, *supra* n. 555, art. 7.; U.N. Human Rights Committee (UN HRC), General Comment 20, Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Forty-Fourth Session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 151 (2003).
576. *Sale v. Haitian Ctr. Council, Inc.*, 509 U.S. 155 (1993).
577. IACHR, Report No. 51/96, Case 10.675, Haitian Centre for Human Rights (United States), March 13, 1997.
578. UNHCR CONFIDENTIAL REPORT, *supra* n. 16 at 25 (discussing CBP officers’ misconceptions about violence by non-state actors as a ground for not providing protection in the United States).
579. Refugee Convention, *supra* n. 189, art. 31.
580. UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum seekers and Alternatives to Detention, Guideline 1, (2012), *available at* <http://www.unhcr.org/505b10ee9.html>.
581. CRC, *supra* n. 398, arts. 3, 22; *see also* I/A Court H.R., Juridical Condition and Human Rights of the Child,” Advisory Opinion OC17/02, paragraphs 58-59 (August 28, 2002), *available at* http://www.corteidh.or.cr/docs/opiniones/seriea_17_ing.pdf.
582. U.N. Committee on the Rights of the Child, General Comment No. 6, at para. 84.
583. *Id.* ¶ 79.
584. UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, (2012) *available at* <http://www.unhcr.org/505b10ee9.html>, para. 54.
585. CRC, art. 37(b), *supra* n. 398; U.N. Convention on the Rights of the Child, *Concluding Observations on the Combined Third and Fourth Periodic Reports of Germany*, U.N. Doc. CRC/C/DEU/CO/3-4 (Feb. 25, 2014); United Nations, Report of the United Nations Special Rapporteur on the Human Rights of Migrant Workers, Gabriela Rodríguez Pizarro, E/CN.4/2003/85, para. 75(a) (December 30, 2002) (“detention of children is permitted only as a measure of last resort and only when it is in the best interest of the child, for the shortest appropriate period of time and in conditions that ensure the realization of the rights enshrined in the Convention on the Rights of the Child”), *available at* [http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/3ff50c339f54a354c1256cde004bfbdb8/\\$FILE/G0216255.pdf](http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/3ff50c339f54a354c1256cde004bfbdb8/$FILE/G0216255.pdf); *see also* François Crépeau, U.N. Special Rapporteur on the human rights of migrants, “Migrant Children should not be Detained,” High-level Dialogue on international migration and development (October 2, 2013).
586. U.N. Convention on the Rights of the Child, *Concluding Observations on the Combined Third and Fourth Periodic Reports of Portugal*, U.N. Doc. CRC/C/PRT/CO/3-4 (Feb. 25, 2014).
587. U.N. Convention on the Rights of the Child, *Concluding Observations on the Combined Third and Fourth Periodic Reports of China (Including Hong Kong and Macau Special Administrative Regions)*, Adopted by the Committee at its Sixty-Fourth Session (16 September – 4 October 2013), U.N. Doc. CRC/C/CHN/CO/3-4 (Oct. 4, 2013).
588. IACHR, Report No. 51/96, Case 10.675, Haitian Centre for Human Rights (United States), March 13, 1997 *available at* <http://www.cidh.oas.org/annualrep/96eng/USA10675.htm>.

589. *In re Gault*, 387 U.S. 1, 37 (1967) (quoting *Powell v. State of Alabama*, 287 U.S. 45, 69 (1932)).
590. U.N. Committee on the Rights of the Child, General Comment No. 6, para. 69.
591. ICCPR, *supra* n. 555, art. 9(4).
592. U.N. Human Rights Committee, Communication No. 560/1993.
593. Human Rights Committee, General Comment No. 8, in Report of the Human Rights Committee, Human Rights Committee, U.N. GAOR, 37th sess., Supp. No. 40, Annex V at 95 (1982).
594. UNHCR DETENTION GUIDELINES: GUIDELINES ON THE APPLICABLE CRITERIA AND STANDARDS RELATING TO THE DETENTION OF ASYLUM-SEEKERS AND ALTERNATIVES TO DETENTION (2012), paras. 18–19 (providing that decisions to detain must be based on a “detailed and individualized assessment”) and para. 20 (establishing that mandatory or automatic detention is prohibited as arbitrary), available at <http://www.unhcr.org/505b10ee9.html>; *Vélez Lóor*, Inter-Am. Ct. H.R. (ser. C) No. 218, para. 118 (finding a violation of the right to liberty where detention of irregular migrants was automatic without consideration of individualized circumstances); U.N. Human Rights Committee, *A v. Australia Communication*, No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993, April 30, 1997 paras. 9.2, 9.4 (holding that detention must be necessary “in all the circumstances of the case” and the grounds for detention must be “particular to . . . individuals”); Inter-American Commission for Human Rights (“IACHR”), REPORT ON IMMIGRATION IN THE UNITED STATES: DETENTION AND DUE PROCESS (Dec. 2010) ¶ 428 (disapproving “mandatory detention for broad classes of immigrants”) and paras. 35, 37, available at <http://cidh.org/pdf%20files/ReportOnImmigrationInTheUnited%20States-DetentionAndDueProcess.pdf>.
595. IACHR REPORT ON DETENTION, *supra* n. 591, paras. 39, 134 (“The burden of proof must be on the authority ordering detention or denying parole, not on the immigrant”); UNHCR Detention Guidelines, *supra* n. 591, para. 47(v) (“[The] burden of proof to establish the lawfulness of the detention rests on the authorities in question”); see Human Rights Comm., *Shams et al v. Australia*, Communication Nos. 1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004, U.N. Doc CCPR/C/90/D/1255, 1256, 1259, 1260, 1266, 1268, 1270, and 1288/2004 (2007), para. 72 (holding that a government must advance grounds “particular to [individual] cases which would justify their continued detention”); Human Rights Comm., *A v. Australia*, *supra* note 79, ¶ 9.4 (holding that a government must provide appropriate justification for detention not to be designated as arbitrary).
596. U.N. COMMISSION ON HUMAN RIGHTS, REPORT OF THE WORKING GROUP ON ARBITRARY DETENTION, A/HRC/13/30, January 18, 2010, para. 59.
597. See *Shams et al v. Australia*, *supra* n. 592; UNHCR, DETENTION GUIDELINES, *supra* n. 591, Guideline 4 (prohibiting arbitrary detention and requiring individualized assessment of the need for detaining an asylum seeker) available at <http://www.unhcr.org/505b10ee9.html>; see also UNHCR, DETENTION OF REFUGEES AND ASYLUM SEEKERS (1986), available at <http://www.unhcr.org/refworld/docid/3ae68c43c0.html> (giving the initial statement regarding the protections due to detainees).
598. See generally, HUMAN RIGHTS WATCH, FORCED APART: FAMILIES SEPARATED AND IMMIGRANTS HARMED BY UNITED STATES DEPORTATION POLICY (2007), available at <http://www.hrw.org/reports/2007/07/16/forced-apart-0>.
599. Universal Declaration of Human Rights (UDHR), adopted December 10, 1948, G.A. Res. 217A(III), U.N. Doc. A/810 at 78 (1948), art. 16(3). The Declaration also states, “Motherhood and childhood are entitled to special care and assistance.” UDHR, art. 25(2).
600. CRC, *supra* n. 398, art. 9(1).
601. U.N. HUMAN RIGHTS COMMITTEE, *General Comment 19: Protection of the Family, the right to marriage and equality of the spouses*, art. 23, July 27, 1990.
602. U.N. HUMAN RIGHTS COMMITTEE, *General Comment 15: The Position of aliens under the Covenant*, Nov. 4, 1986.
603. *Winata v. Australia*, Communication No. 930/2000, U.N. Doc. CCPR/C/72/D/930/2000 (2001).

Cited in: USA v. Peralta-Sanchez
No. 14-50393 archived on February 2, 2017

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Every year, hundreds of thousands of people (83 percent) are deported from the United States without a hearing. These individuals never see a judge; instead, their rights and fates are determined by a single immigration enforcement officer in a summary removal procedure that can take mere minutes. The officer issuing a deportation order is the same officer who arrests, detains, prosecutes, and departs the individual; there is no independence, no opportunity for the individual to speak to a lawyer, and no meaningful opportunity for the individual to defend his or her rights to be in the United States. Those deported in these near-instantaneous removal procedures—which are used in over 83 percent of all deportations—include U.S. citizens, longtime residents with U.S. citizen children, asylum seekers, and individuals with valid work and tourist visas. While a person can be ordered removed and deported in a matter of hours, the consequences and ramifications of these removal orders can last a lifetime; individuals are banished for years, sometimes for life, and with almost no opportunity to fix an unfair or even illegal removal order. This report documents 136 cases of individuals who faced deportation from the United States without the basic opportunity to be heard in court—in some cases, with shattering consequences for them and their U.S. citizen family.

Immigration Enforcement Actions: 2013

JOHN F. SIMANSKI

Each year, the Department of Homeland Security (DHS) undertakes immigration enforcement actions involving hundreds of thousands of aliens who may be or are in violation of U.S. immigration laws. These actions include the apprehension or arrest, detention, return, and removal from the United States of aliens (see Box 1). Aliens may be removable from the United States for violations including illegally entering the United States, failing to abide by the terms and conditions of admission, or committing crimes. Primary responsibility for the enforcement of immigration law within DHS rests with U.S. Customs and Border Protection (CBP), U.S. Immigration and Customs Enforcement (ICE) and U.S. Citizenship and Immigration Services (USCIS). CBP is generally responsible for immigration enforcement at and between the ports of entry, and ICE is generally responsible for interior enforcement, and detention and removal operations. USCIS is generally responsible for the administration of immigration and naturalization functions (see **APPENDIX**).

This Office of Immigration Statistics (OIS) Annual Report presents information on aliens determined inadmissible, apprehended, arrested, detained, returned, or removed, during 2013.¹ Key findings in this report include:

- CBP determined approximately 204,000 aliens were inadmissible.
- DHS apprehended approximately 62,000 aliens; 64 percent were citizens of Mexico.
- ICE detained nearly 441,000 aliens.
- Approximately 178,000 aliens were returned to their home countries through processes that did not require a removal order.
- DHS removed approximately 438,000 aliens from the United States.² The leading countries of origin for those removed were Mexico (72 percent), Guatemala (11 percent), Honduras (8.3 percent), and El Salvador (4.8 percent).
- Expedited removal orders accounted for 44 percent, of all removals.
- Reinstatements of final orders accounted for 39 percent, of all removals.
- ICE removed approximately 198,000 known criminal aliens from the United States.³

¹ In this report, years refer to fiscal years (October 1 to September 30).

² Includes removals, counted in the year the events occurred, by both ICE and CBP. Removals and returns are reported separately.

³ Refers to persons removed who have a prior criminal conviction.

ENFORCEMENT ACTIONS PROCESS

Inspection Process

All aliens who are applicants for admission or otherwise seeking admission or readmission to or transit through the United States are inspected. CBP officers within the Office of Field Operations (OFO) determine the admissibility of aliens who are applying for admission to the United States at designated ports of entry. Applicants for admission determined to be inadmissible may be, as appropriate, permitted to voluntarily withdraw their application for admission and return to their home country, processed for expedited removal or referred to an immigration judge for removal proceedings. CBP officers may transfer aliens issued a charging document (e.g., Notice to Appear (NTA), Notice of Referral to an Immigration Judge) to ICE for detention and custody determinations. Aliens who apply under the Visa Waiver Program (VWP) who are found to be inadmissible are refused admission without referral to an immigration judge, per Section 217 of the Immigration and Nationality Act (INA), unless the alien requests asylum.

Apprehension Process

Aliens who enter without inspection between ports of entry and are apprehended by U.S. Border Patrol (USBP) of CBP may be, as appropriate, removed, permitted to return to their country, or issued a NTA to commence proceedings before the immigration court. Aliens issued a charging document are either transferred to ICE for detention and custody determinations pending a hearing or



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released on their own recognizance. Beginning in FY12, USBP implemented the Consequence Delivery System (CDS) across all sectors. CDS guides USBP agents through a process designed to uniquely evaluate each subject and identify the ideal consequences to deliver to impede and deter further illegal activity. CDS consequences can include administrative, criminal, or programmatic actions.

Aliens unlawfully present in the United States and those lawfully present who are subject to removal may be identified and apprehended by ICE within the interior of the United States. The agency's two primary operating components are Homeland Security Investigations (HSI) and Enforcement and Removal Operations (ERO). ICE may identify aliens in violation of their status for removal while they are incarcerated, during worksite enforcement operations, or through other means. Aliens apprehended by ICE are generally subject to the same consequences as aliens who are apprehended by USBP.

Benefit Denial

USCIS has authority to issue an NTA or otherwise refer an alien for removal proceedings upon determining that an alien is inadmissible or has violated immigration law pursuant to INA Sections 212 and 237. USCIS will also issue an NTA when required by statute or regulation,⁴ e.g., termination of conditional permanent resident status, denial of asylum application, termination of refugee status, or positive credible fear determination.

Detention Process

Following arrest or transfer of custody from CBP, ICE ERO makes custody redeterminations, which may result in detention or release on bond, orders of supervision, or orders of recognizance. An alien may be detained during the pendency of removal proceedings, and, if an alien is ordered removed, the alien may be detained for a certain period of time pending repatriation.

Removal Process

Removal proceedings include the administrative process that leads to the removal of an alien pursuant to Sections 237 or 212 of the INA.

Unless eligible for relief, the most common dispositions for aliens found within the United States, are returns, expedited removals, reinstatements of final orders and removal obtained through removal proceedings.

Return. Certain apprehended aliens who appear to be inadmissible or deportable may be offered the opportunity to voluntarily return to their home country in lieu of formal removal proceedings before an immigration judge.⁵ Generally, aliens waive their right to a hearing, remain in custody, and, if applicable, agree to depart the United States under supervision. Some aliens apprehended within the United States may agree to voluntarily depart and pay the expense of departing. Voluntary departure may be granted by an immigration

⁴ As authorized by Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens, PM 602-0050, November 7, 2011. http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/NTA%20PM%20%28Approved%20as%20final%2011-7-11%29.pdf

⁵ Examples include voluntary departure under INA § 240B, VWP returns under INA § 217(b), crewmembers under INA § 252(b) and stowaways under INA § 217(b).

BOX 1.

Definitions of Immigration Enforcement Terms

Administrative Removal: The removal of an alien not admitted for permanent residence, or of an alien admitted for permanent residence on a conditional basis pursuant to section 216 of the INA, under a DHS order based on the determination that the individual has been convicted of an aggravated felony (INA § 238(b)(1)). The alien may be removed without a hearing before an immigration judge.

Alien: A person who is not a citizen or national of the United States.

Deportable Alien: An alien inspected and admitted into the United States but who is subject to removal under INA § 237(a).

Detention: The physical custody of an alien in order to hold him/her, pending a determination on whether the alien is to be removed from the United States or awaiting return transportation to his/her country of citizenship after a final order of removal has been entered.

Expedited Removal: The removal without a hearing before an immigration judge of an alien arriving in the United States who is inadmissible because the individual does not possess valid entry documents or is inadmissible for fraud or misrepresentation of material fact; or the removal of an alien who has not been admitted or paroled in the United States and who has not affirmatively shown to the satisfaction of an immigration officer, that the alien had been physically present in the United States for the immediately preceding 2-year period (INA § 235(b)(1)(A)).

Inadmissible Alien: An alien who is ineligible to receive a visa and ineligible to be admitted to the United States, according to the provisions of INA § 212(a).

Reinstatement or Final Removal Orders: The removal of an alien on the reinstatement of a prior removal order, where the alien departed the United States under an order of removal and illegally re-entered the United States (INA § 241(a)(5)). The alien may be removed without a hearing before an immigration judge.

Removable Alien: An alien who is inadmissible or deportable (INA § 240(e)(2)).

Removal: The compulsory and confirmed movement of an inadmissible or deportable alien out of the United States based on an order of removal. An alien who is removed has administrative or criminal consequences placed on subsequent reentry.

Return: The confirmed movement of an inadmissible or deportable alien out of the United States not based on an order of removal.

judge, during an immigration hearing or prior to an immigration hearing by certain DHS officials.

Expedited Removal. DHS officers and agents may order the expedited removal of certain aliens who are inadmissible because they do not possess valid entry documents or are inadmissible for fraud or misrepresentation of material fact; or because the alien, who has not been admitted or paroled in the United State, has not affirmatively shown to the satisfaction of an immigration officer, that the alien had been physically present in the United States for the immediately preceding 2-year period. Aliens placed in expedited removal proceedings are generally not entitled to immigration proceedings before an immigration judge unless the alien is

seeking asylum or makes a claim to legal status in the United States. An expedited removal order issued by a DHS officer is equivalent to a removal order issued by an immigration judge.

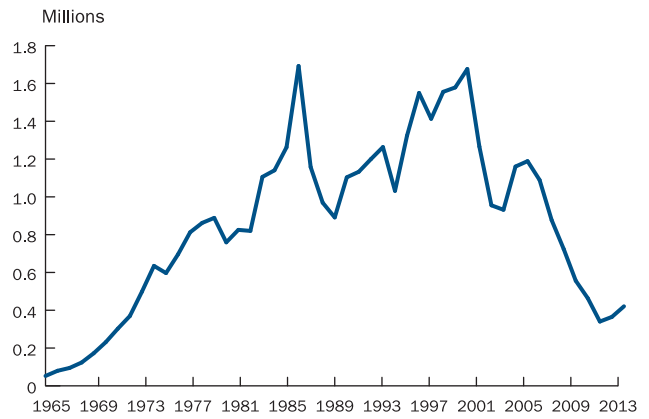
Reinstatement of Final Removal Orders. Section 241(a)(5) of the INA permits DHS to reinstate final removal orders, without further hearing or review, for aliens who were removed or departed voluntarily under an order of removal and who illegally re-entered the United States.

Removal Proceedings. Aliens not immediately returned or processed for removal by a DHS officer, e.g. due to a fear of return or because the alien has applied for certain forms of adjustment of status, may be issued an NTA for an immigration hearing and may be transferred to ICE for a custody determination, which may result in detention or release on bond, orders of supervision, or orders of recognizance. Removal hearings before an immigration court may result in a variety of outcomes including an order of removal; a grant of voluntary departure at the alien’s expense (considered a “return”); a grant of certain forms of relief or protection from removal, which could include adjustment to lawful permanent resident status; or termination of proceedings. Decisions of immigration judges can be appealed to the Board of Immigration Appeals.

The penalties associated with removal include not only the removal itself but also possible fines, imprisonment for up to ten years for those who fail to appear at hearings or who fail to depart, and a bar to future legal entry.⁶ The imposition and extent of these penalties depend upon the individual circumstances of the case.

⁶The bar is permanent for aggravated felons and up to 20 years for certain other aliens.

Figure 1.
Apprehensions by the U.S. Border Patrol: Fiscal Years 1965 to 2013



Source: U.S. Department of Homeland Security.

DATA⁷

Apprehension and inadmissibility data are collected in the Enforcement Integrated Database (EID) using Form I-213, Seized Asset and Case Tracking System (SEACATS), and EID Arrest Graphical User Interface for Law Enforcement (EAGLE). Data on individuals detained are collected through the ICE ENFORCE Alien Detention Module (EADM) and the ENFORCE Alien Removal

⁷ICE data (apprehensions, inadmissible aliens, removals, and returns) are current as of November 2013. ICE EPO apprehension data are current as of October 2013. ICE HSI data are current as of October 2013. ICE removal and return data are current as of January 2014. USCIS NTA data are current as of May 2014.

Table 1.

Apprehensions by Program and Country of Nationality: Fiscal Years 2011 to 2013

(Countries ranked by 2013 apprehensions)

Program and country of nationality	2013		2012		2011	
	Number	Percent	Number	Percent	Number	Percent
PROGRAM						
Total	662,483	100.0	671,327	100.0	678,606	100.0
CBP U.S. Border Patrol	420,789	63.5	364,768	54.3	340,252	50.1
Southwest sectors (sub-total)	414,397	62.6	356,873	53.2	327,577	48.3
ICE Enforcement and Removal Operations	229,698	34.7	290,622	43.3	322,093	47.5
ICE Homeland Security Investigations	11,996	1.8	15,937	2.4	16,261	2.4
COUNTRY OF NATIONALITY						
Total	662,483	100.0	671,327	100.0	678,606	100.0
Mexico	424,978	64.1	468,766	69.8	517,472	76.3
Guatemala	73,208	11.1	57,486	8.6	41,708	6.1
Honduras	64,157	9.7	50,771	7.6	31,189	4.6
El Salvador	51,226	7.7	38,976	5.8	27,652	4.1
Ecuador	5,680	0.9	4,374	0.7	3,298	0.5
Dominican Republic	3,893	0.6	4,506	0.7	4,433	0.7
Cuba	2,809	0.4	4,121	0.6	4,801	0.7
Nicaragua	2,712	0.4	2,532	0.4	2,278	0.3
Jamaica	2,147	0.3	2,655	0.4	2,862	0.4
Haiti	1,992	0.3	1,492	0.2	1,351	0.2
All other countries, including unknown	29,681	4.5	35,648	5.3	41,562	6.1

Source: U.S. Department of Homeland Security, Enforcement Integrated Database (EID); Seized Asset and Case Tracking System (SEACATS); EID Arrest Graphical User Interface for Law Enforcement (EAGLE); CBP U.S. Border Patrol data for 2013 are current as of November 2013, 2012 are current as of November 2012, 2011 are current as of December 2011; ICE Enforcement and Removal Operations data for 2013 are current as of October 2013, 2012 are current as of October 2012, 2011 are current as of January 2012; Homeland Security Investigations data for 2013 are current as of October 2013, 2012 are current as of October 2012, 2011 are current as of June 2012.

Module (EARM). Data on USCIS NTAs are collected using the USCIS NTA Database. Data on individuals removed or returned are collected through both EARM and EID.

The data on enforcement actions (e.g., inadmissible aliens, apprehensions, NTAs, and removals) relate to events. For example, an alien may be apprehended more than once, and each apprehension would count as a separate record. Removals and returns are reported separately and counted in the years the events occurred. Data appearing for a given year may change in subsequent years due to updating of the data series.⁸

TRENDS AND CHARACTERISTICS OF ENFORCEMENT ACTIONS

Apprehensions

DHS made 662,483 apprehensions in 2013 (see Table 1). The U.S. Border Patrol was responsible for 420,789 or 64 percent (see Figure 1) of all apprehensions. Ninety-eight percent of USBP apprehensions occurred along the Southwest border. ICE ERO made 229,698 administrative arrests and ICE HSI made 11,996 administrative arrests.⁹

Nationality of All Apprehended Aliens. In 2013, Mexican nationals accounted for 64 percent of all aliens apprehended by Immigration and Customs Enforcement or the U.S. Border Patrol, down from 70 percent in 2012. The next leading countries were Guatemala (11 percent), Honduras (9.7 percent), and El Salvador (7.7 percent). These four countries accounted for 93 percent of all apprehensions.

Nationality of Aliens Apprehended by Border Patrol. Non-Mexican aliens accounted for 36 percent of all USBP apprehensions in 2013, up from 27 percent in 2012. USBP apprehensions of non-Mexican aliens increased 182 percent from 2011 to 2013.

⁸Arrests under INA § 287(g) are included in ICE ERO apprehension data for 2011 to 2013.

⁹An administrative arrest refers to the arrest of an alien who is charged with an immigration violation. Administrative arrests are included in the DHS apprehension totals.

Table 2.

Apprehensions by U.S. Border Patrol Sector: Fiscal Years 2011 to 2013

(Sectors ranked by 2013 apprehensions)

U.S. Border Patrol Sector	2013		2012		2011	
	Number	Percent	Number	Percent	Number	Percent
Total	420,789	100.0	364,768	100.0	340,252	100.0
Rio Grande Valley, TX	154,453	36.7	97,762	26.8	59,243	17.4
Tucson, AZ	120,939	28.7	120,000	32.9	123,285	36.2
Laredo, TX	50,749	12.1	44,872	12.3	36,053	10.6
San Diego, CA	27,496	6.5	28,461	7.8	42,447	12.5
Del Rio, TX	23,510	5.6	21,720	6.0	16,144	4.7
EL Centro, CA	16,306	3.9	23,916	6.6	30,191	8.9
EL Paso, TX	11,154	2.7	9,678	2.7	10,345	3.0
Yuma, AZ	6,106	1.5	6,500	1.8	5,833	1.7
Big Bend, TX*	3,684	0.9	3,964	1.1	4,036	1.2
Miami, FL	1,738	0.4	2,509	0.7	4,401	1.3
All other sectors	4,654	1.1	5,386	1.5	8,274	2.4

* Formerly known as Marfa, TX.

Source: U.S. Department of Homeland Security, Customs and Border Protection (CBP) U.S Border Patrol (USBP), Enforcement Integrated Database (EID), November 2013.

Table 3.

Aliens Determined Inadmissible by Mode of Travel, Country of Citizenship, and Field Office: Fiscal Years 2011 to 2013

(Ranked by 2013 inadmissible aliens)

Characteristic	2013		2012		2011	
	Number	Percent	Number	Percent	Number	Percent
MODE OF TRAVEL						
Total	204,108	100.0	193,606	100.0	212,234	100.0
Land	103,480	50.7	100,344	51.8	107,205	50.5
Sea	51,566	25.3	52,609	27.1	66,227	31.2
Air	49,060	24.0	40,756	21.1	38,802	18.3
COUNTRY						
Total	204,108	100.0	193,606	100.0	212,234	100.0
Mexico	56,267	27.6	58,658	30.3	67,410	31.8
Canada	29,387	14.4	30,731	15.9	32,141	15.1
Philippines	23,389	11.5	22,486	11.6	25,197	11.9
Cuba	17,679	8.7	12,253	6.3	7,759	3.7
China, People's Republic	13,552	6.6	12,888	6.7	16,931	8.0
India	11,815	5.8	6,907	3.6	5,983	2.8
Ukraine	2,882	1.4	2,928	1.5	4,359	2.1
Russia	2,618	1.3	2,946	1.5	3,905	1.8
Spain	2,423	1.2	1,717	0.9	988	0.5
El Salvador	2,194	1.1	1,028	0.5	853	0.4
All other countries, including unknown	41,902	20.5	41,064	21.2	46,708	22.0
FIELD OFFICE						
Total	204,108	100.0	193,606	100.0	212,234	100.0
Laredo, TX	31,781	15.6	28,005	14.5	25,790	12.2
San Diego, CA	25,632	12.6	26,889	13.9	33,719	15.9
New Orleans, LA	21,011	10.3	20,204	10.4	20,855	9.8
San Francisco, CA	14,939	7.3	9,832	5.1	6,954	3.3
Buffalo, NY	13,425	6.6	14,050	7.3	15,712	7.4
Houston, TX	10,909	5.3	12,706	6.6	19,528	9.2
Tucson, AZ	9,991	4.9	7,612	3.9	7,951	3.7
Pre-Clearance*	9,695	4.7	8,559	4.4	8,586	4.0
Seattle, WA	9,343	4.6	10,529	5.4	10,650	5.0
Miami, FL	8,684	4.3	7,593	3.9	6,896	3.2
All other field offices, including unknown	48,698	23.9	47,627	24.6	55,593	26.2

*Refers to field offices abroad.

Source: U.S. Department of Homeland Security, Customs and Border Protection, Office of Field Operations. Enforcement Integrated Database (EID), October 2013.

Table 4.**Notices to Appear Issued by Homeland Security Office: Fiscal Years 2011 to 2013**

(Ranked by 2013 notices to appear)

Homeland Security office	2013		2012		2011	
	Number	Percent	Number	Percent	Number	Percent
Total	224,185	100.0	235,687	100.0	250,127	100.0
ICE Enforcement and Removal Operations	101,571	45.3	140,707	59.7	156,208	62.5
United States Citizenship and Immigration Services	56,896	25.4	41,778	17.7	44,638	17.8
CBP U.S. Border Patrol	42,078	18.8	31,506	13.4	31,739	12.7
CBP Office of Field Operations	23,640	10.5	21,696	9.2	17,542	7.0

Source: U.S. Department of Homeland Security, Customs and Border Protection, U.S. Border Patrol, November 2013; ICE Enforcement and Removal Operations, October 2013; CBP Office of Field Operations, October 2013, United States Citizenship and Immigration Services, NTA Database, May 2014.

Southwest Border Apprehensions. Apprehensions by the USBP along the Southwest border increased 16 percent from 356,873 in 2012 to 414,397 in 2013. Rio Grande Valley was the leading sector for apprehensions (154,453) and displayed the highest increase from 2012 to 2013 (56,691 or 58 percent) (see Table 2). The next leading sectors in 2013 were Tucson (120,939) Laredo (50,749), San Diego (27,496), and Del Rio (23,510).

Inadmissible Aliens

CBP Office of Field Operations (OFO) determined 204,108 aliens arriving at a port of entry were inadmissible in 2013, up 5.4 percent from 193,606 in 2012 (See Table 3). Fifty-one percent of all inadmissible aliens in 2013 were processed at land ports, followed by 25 percent at sea ports, and 24 percent at airports.

Nationality of Inadmissible Aliens. Mexican nationals accounted for 28 percent of inadmissible aliens in 2013, followed by Canada (14 percent) and the Philippines (12 percent). Other leading countries included Cuba, China, India, Ukraine, Russia, Spain and El Salvador. The greatest increases from 2012 to 2013 were for nationals of El Salvador (113 percent) and India (71 percent) (see Table 3).

Notices to Appear

DHS issued 224,185 NTAs in 2013, down from 235,687 in 2012 (see Table 4). ICE ERO issued 101,571 or 45 percent of all NTAs in 2013, down from 140,707 or 60 percent in 2012. NTAs issued by USCIS accounted for 25 percent of all NTAs in 2013, up from 18 percent in 2012, partly due to an increase in the number of

Table 5.**Initial Admissions to ICE Detention Facilities by Country of Nationality: Fiscal Years 2011 to 2013**

(Ranked by 2013 detention admissions)

Country of nationality	2013		2012		2011	
	Number	Percent	Number	Percent	Number	Percent
Total	440,557	100.0	477,523	100.0	429,247	100.0
Mexico	244,585	55.5	307,523	64.4	288,581	67.2
Guatemala	59,189	13.4	50,723	10.6	38,450	9.0
Honduras	50,609	11.5	40,469	8.5	26,416	6.2
El Salvador	40,261	9.1	31,286	6.6	23,792	5.5
Ecuador	4,716	1.1	3,856	0.8	2,957	0.7
India	4,057	0.9	1,522	0.3	3,438	0.8
Dominican Republic	3,537	0.8	4,265	0.9	4,201	1.0
Haiti	2,382	0.5	1,609	0.3	1,775	0.4
Nicaragua	2,323	0.5	2,131	0.4	2,015	0.5
Jamaica	1,943	0.4	2,365	0.5	2,597	0.6
All other countries, including unknown	26,965	6.1	31,774	6.7	35,025	8.2

Note: Excludes Office of Refugee Resettlement and Mexican Interior Repatriation Program facilities.

Source: U.S. Department of Homeland Security, ENFORCE Alien Detention Module (EADM), October 2013.

Table 6.**Aliens Removed by Component: Fiscal Years 2011 to 2013**

Component	2013		2012		2011	
	Number	Percent	Number	Percent	Number	Percent
Total	438,421	100.0	418,397	100.0	387,134	100.0
ICE	330,651	75.4	345,628	82.6	314,453	81.2
CBP U.S. Border Patrol	86,253	19.7	51,012	12.2	42,952	11.1
CBP Office of Field Operations	21,517	4.9	21,757	5.2	29,729	7.7

Note: OIS and ICE totals may differ. See footnote 2 on page 1.

Source: U.S. Department of Homeland Security, ENFORCE Alien Removal Module (EARM), January 2014, Enforcement Integrated Database (EID), November 2013.

Table 7.**Trends in Total Removals, Expedited Removals, and Reinstatements of Final Removal Orders: Fiscal Years 2011 to 2013**

Removals	2013		2012		2011	
	Number	Percent	Number	Percent	Number	Percent
Total	438,421	100.0	418,397	100.0	387,134	100.0
Expedited Removals	193,032	44.0	163,308	39.0	122,236	31.6
Reinstatements	170,247	38.8	146,044	34.9	124,784	32.2
All other removals	75,142	17.1	109,045	26.1	140,114	36.2

Source: U.S. Department of Homeland Security, ENFORCE Alien Removal Module (EARM), January 2014, Enforcement Integrated Database (EID), November 2013.

“Credible Fear” issued NTAs. USBP issued NTAs accounted for 19 percent of all NTAs in 2013, up from 14 percent in 2012. OFO issued 11 percent of NTAs in 2013 and 9 percent in 2012.

Detentions

ICE detained 440,557 aliens during 2013, a decrease of 8 percent from 2012 (See Table 5). Mexican nationals accounted for 56 percent of total detainees in 2013, down from 64 percent in 2012. The next leading countries in 2013 were Guatemala (13 percent), Honduras (12 percent) and El Salvador (9 percent). These four countries accounted for 90 percent of all detainees in 2013.

Removals and Returns

Total Removals. The number of removals increased from 418,397 in 2012 to an all-time high of 438,421 in 2013 (see Tables 6, 7 and Figure 2). ICE accounted for 75 percent of all removals in 2013,

down from 83 percent in 2012. USBP accounted for 20 percent of all removals in 2013, up from 12 percent in 2012. OFO performed 4.9 percent of removals in 2013 and 5.2 percent in 2012 (see table 6). Mexican nationals accounted for 72 percent of all aliens removed in 2013. The next leading countries were Guatemala (11 percent), Honduras (8.3 percent) and El Salvador (4.7 percent). These four countries accounted for 96 percent of all removals in 2012 (see Table 8).

Expedited Removals. Expedited removals represented 44 percent of all removals in 2013, up from 39 percent in 2012 but down from an all-time high of 49 percent in 1999. Aliens from Mexico accounted for 75 percent of expedited removals in 2013. The next leading countries were Guatemala, Honduras, and El Salvador. Nationals from these four countries accounted for 98 percent of all expedited removals in 2013.

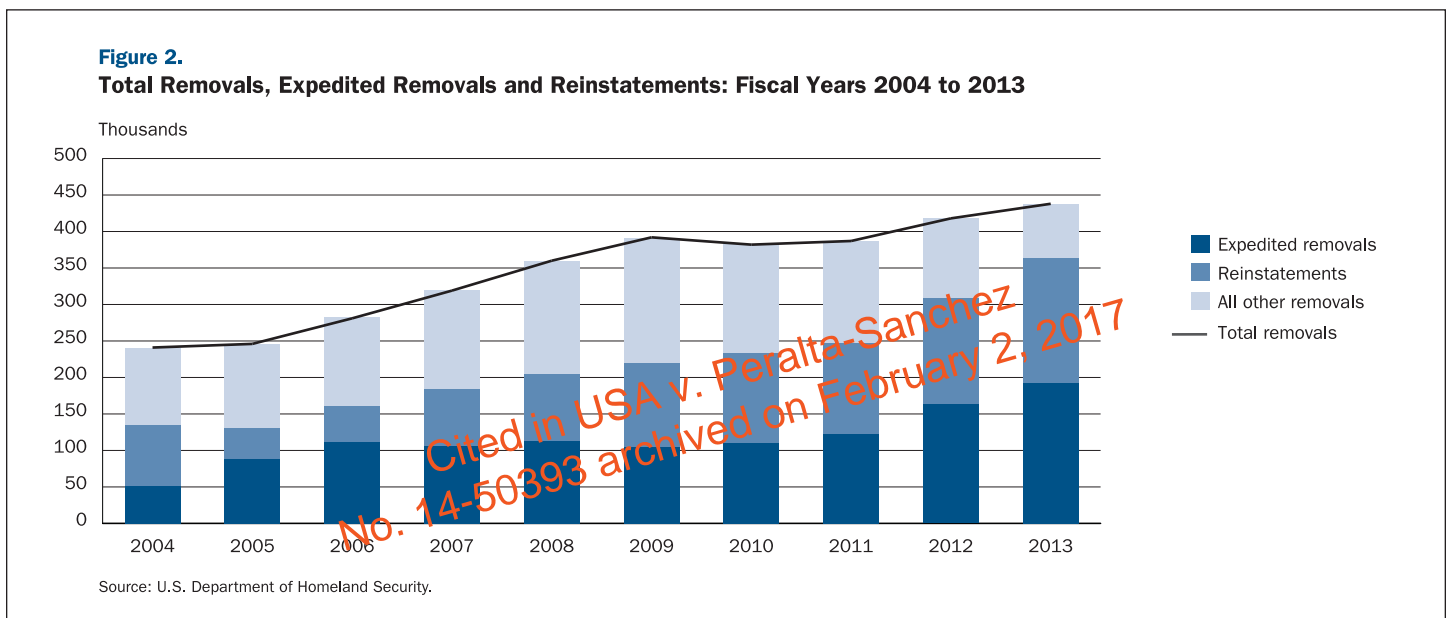


Table 8.

Aliens Removed by Criminal Status and Country of Nationality: Fiscal Years 2011 to 2013

(Ranked by 2013 aliens removed)

Country of nationality	2013			2012			2011		
	Total	Criminal*	Non-Criminal	Total	Criminal*	Non-Criminal	Total	Criminal*	Non-Criminal
Total	438,421	198,394	240,027	418,397	200,143	218,254	387,134	188,964	198,170
Mexico	314,904	146,298	168,606	303,745	151,444	152,301	288,078	145,133	142,945
Guatemala	46,866	15,365	31,501	38,900	13,494	25,406	30,343	11,718	18,625
Honduras	36,526	16,609	19,917	31,740	13,815	17,925	22,027	10,825	11,202
El Salvador	20,862	9,440	11,422	18,993	8,674	10,319	17,381	8,507	8,874
Dominican Republic	2,278	1,805	473	2,868	2,182	686	2,893	2,142	751
Ecuador	1,491	580	911	1,763	706	1,057	1,716	704	1,012
Colombia	1,421	956	465	1,591	1,055	536	1,899	1,048	851
Brazil	1,411	366	1,045	2,397	424	1,973	3,350	550	2,800
Nicaragua	1,337	691	646	1,400	731	669	1,502	696	806
Jamaica	1,101	993	108	1,319	1,150	169	1,474	1,225	249
All other countries, including unknown . .	10,224	5,291	4,933	13,681	6,468	7,213	16,471	6,416	10,055

* Refers to persons removed who have a prior criminal conviction.

Note: Excludes criminals removed by Customs and Border Protection (CBP). CBP EID does not identify if aliens removed were criminals.

Source: U.S. Department of Homeland Security, ENFORCE Alien Removal Module (EARM), January 2014, Enforcement Integrated Database (EID), November 2013.

Reinstatements. Reinstatements of previous removal orders accounted for 39 percent of all removals in 2013. The number of removals based on a reinstatement of final orders increased every year between 2005 and 2013. In 2013, aliens from Mexico accounted for 75 percent of all reinstatements. Other leading countries included Guatemala, Honduras, and El Salvador. These four countries accounted for 99 percent of all reinstatements in 2013.

Criminal Activity. Approximately 198,000 aliens removed in 2013 had a prior criminal conviction.¹⁰ The most common categories of crime were immigration-related offenses, dangerous drugs, criminal traffic offenses, and assault. Immigration-related offenses increased 31 percent from 2012 to 2013 and 65 percent between 2011 and 2013. Dangerous drugs and criminal traffic offenses decreased 28 and 35 percent respectively from 2012 to 2013. These four leading categories accounted for 72 percent of all criminal alien removals in 2013 (see Table 9).

¹⁰ Excludes criminals removed by CBP; CBP EID data do not identify if aliens removed were criminals.

Table 9.

Criminal Aliens Removed by Crime Category: Fiscal Years 2011 to 2013

(Ranked by 2013 criminal aliens removed)

Crime Category	2013		2012		2011	
	Number	Percent	Number	Percent	Number	Percent
Total	198,394	100.0	200,143	100.0	188,964	100.0
Immigration*	62,194	31.3	47,616	23.8	37,606	19.9
Dangerous Drugs**	30,603	15.4	42,679	21.3	43,378	23.0
Criminal Traffic Offenses†	29,844	15.0	46,182	23.1	43,154	22.8
Assault	20,181	10.2	13,045	6.5	12,783	6.8
Burglary	5,505	2.8	4,569	1.8	3,808	2.0
Weapon Offenses	5,296	2.7	2,513	1.3	2,730	1.4
Larceny	5,290	2.7	5,428	2.7	5,728	3.0
Fraudulent Activities	5,219	2.6	3,879	1.9	4,232	2.2
Sexual Assault	3,166	1.6	3,353	1.7	3,576	1.9
Forgery	3,032	1.5	2,430	1.2	2,858	1.5
All other categories, including unknown	28,104	14.2	29,469	14.7	29,111	15.4

* Including entry and reentry, false claims to citizenship, and alien smuggling.

** Including the manufacturing, distribution, sale, and possession of illegal drugs.

† Including hit and run and driving under the influence.

Notes: Data refers to persons removed who have a prior criminal conviction. Excludes criminals removed by Customs and Border Protection (CBP). CBP EID does not identify if aliens removed were criminals.

Source: U.S. Department of Homeland Security, ENFORCE Alien Removal Module (EARM), January 2014.

Table 10.

Aliens Returned by Component: Fiscal Years 2011 to 2013

Component	2013		2012		2011	
	Number	Percent	Number	Percent	Number	Percent
Total	178,371	100.0	230,386	100.0	322,124	100.0
CBP Office of Field Operations	104,300	58.5	109,468	47.5	130,996	40.7
CBP U.S. Border Patrol	38,779	21.7	58,197	25.3	113,886	35.4
ICE	35,292	19.8	62,721	27.2	77,242	24.0

Note: OIS and ICE totals may differ. See footnote 2 on page 1.

Source: U.S. Department of Homeland Security, ENFORCE Alien Removal Module (EARM), January 2014, Enforcement Integrated Database (EID), November 2013.

Returns. In 2013, 178,371 aliens were returned to their home countries without an order of removal, a decline of 23 percent from 2012 and the lowest number since 1967 (see Table 10). 2013 was the ninth consecutive year in which returns declined. Fifty-nine percent of returns were performed by OFO in 2013, up from 48 percent in 2012. USBP accounted for 22 percent of all returns in 2013, down from 25 percent in 2012. From 2011 to 2013, returns by USBP decreased 66 percent. ICE accounted for the remaining 20 percent of returns in 2013, down from 27 percent in 2012. Mexican nationals accounted for 49 percent of all returns in 2013, down from 57 percent in 2012. The next leading countries of nationality for returns in 2013 were Canada (13 percent), the Philippines (12 percent) and China (6.6 percent) (see Table 11).

FOR MORE INFORMATION

For more information about immigration and immigration statistics, visit the Office of Immigration Statistics Website at www.dhs.gov/immigration-statistics.

Table 11.**Aliens Returned by Country of Nationality: Fiscal Years 2011 to 2013**

(Ranked by 2013 aliens returned)

Country of nationality	2013		2012		2011	
	Number	Percent	Number	Percent	Number	Percent
Total	178,371	100.0	230,386	100.0	322,124	100.0
Mexico	88,042	49.4	131,983	57.3	205,158	63.7
Canada	23,963	13.4	27,039	11.7	28,274	8.8
Philippines	21,523	12.1	20,903	9.1	23,150	7.2
China, People's Republic	11,684	6.6	11,780	5.1	16,234	5.0
Ukraine	2,604	1.5	2,589	1.1	4,111	1.3
India	2,462	1.4	3,273	1.4	4,136	1.3
Russia	1,991	1.1	2,464	1.1	3,512	1.1
Burma	1,920	1.1	2,337	1.0	2,582	0.8
Guatemala	1,347	0.8	2,332	1.0	3,026	0.9
Korea, South	1,259	0.7	1,191	0.5	1,619	0.5
All other countries, including unknown	21,576	12.1	24,495	10.6	30,322	9.4

Note: Returns are the confirmed movement of an inadmissible or deportable alien out of the United States not based on an order of removal.

Source: U.S. Department of Homeland Security, ENFORCE Alien Removal Module (EARM), January 2014, Enforcement Integrated Database (EID), November 2013.

APPENDIX**ENFORCEMENT PROGRAM OFFICES****U.S. Customs and Border Protection (CBP)****Office of Field Operations**

CBP's Office of Field Operations (OFO) is responsible for securing the U.S. border at ports of entry while facilitating lawful trade and travel. CBP officers determine the admissibility of aliens who are applying for admission to the United States at designated ports of entry.

U.S. Border Patrol

The primary mission of the U.S. Border Patrol (USBP) is to secure approximately 7,000 miles of international land border with Canada and Mexico and 2,600 miles of coastal border of the United States. Its major objectives are to deter, detect, and interdict the illegal entry of aliens, terrorists, terrorist weapons, and other contraband into the United States. USBP operations are divided into geographic regions referred to as sectors.

U.S. Immigration and Customs Enforcement (ICE)**Homeland Security Investigations**

The U.S. Immigration and Customs Enforcement (ICE) Homeland Security Investigations (HSI) Directorate is a critical asset in the ICE mission, responsible for disrupting and dismantling transnational criminal threats facing the United States. HSI uses its legal

authorities to investigate immigration and customs violations such as: human rights violations; narcotics; weapons smuggling and the smuggling of other types of contraband; financial crimes; cyber crimes; human trafficking; child pornography; intellectual property violations; commercial fraud; export violations; and identity and benefit fraud. HSI special agents also conduct national security investigations aimed at protecting critical infrastructure vulnerable to sabotage, attack, or exploitation. In addition to domestic HSI criminal investigations, HSI oversees ICE's international affairs operations and intelligence functions.

Enforcement and Removal Operations

Officers and agents of ICE Enforcement and Removal Operations (ERO) serve as the primary enforcement arm within ICE for the identification, apprehension, and removal of certain aliens from the United States. ERO transports removable aliens, manages aliens in custody or subject in conditions of release, and removes individuals ordered to be removed from the United States.

U.S. Citizenship and Immigration Services (USCIS)

U.S. Citizenship and Immigration Services (USCIS) oversees lawful immigration to the United States and processes applications for immigration benefits within the United States. USCIS provides accurate and useful information to its customers, granting immigration and citizenship benefits, promoting an awareness and understanding of citizenship, and ensuring the integrity of the immigration system.

STUDY ON ASYLUM SEEKERS IN EXPEDITED REMOVAL
As Authorized by Section 605 of the International Religious Freedom Act of 1998

**EVALUATION OF CREDIBLE FEAR REFERRAL IN EXPEDITED
REMOVAL AT PORTS OF ENTRY IN THE UNITED STATES**

FEBRUARY 2005
Cited in *USA v. Peralta-Sanchez*
No. 14-50393 archived on February 2, 2017

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*Cited in USA v. Peralta-Sanchez
No. 14-50393 archived on February 2, 2017*

OVERVIEW

Between May and July of 2004, the Bellevue/NYU School of Medicine Program for Survivors of Torture conducted a study of Credible Fear referral in the Expedited Removal process. Section 605 of the International Religious Freedom Act of 1998 authorized the United States Commission on International Religious Freedom (USCIRF) to appoint experts to study the treatment of asylum seekers subject to Expedited Removal. Pursuant to this authority, the Commission appointed Dr. Allen Keller as the “lead” expert with regard to monitoring ports of entry. Under Dr. Keller’s supervision, and employing a methodology developed by the authors of this report in consultation with the other experts appointed by the Commission, two dozen trained research assistants observed more than 400 cases over several months in seven ports of entry (airports and border crossings) in the continental United States. The study integrated data from observations of Secondary Inspection interviews, independent interviews with aliens conducted by our research staff, and a review of official records from these interviews (A-files). A draft of this report was reviewed by Customs and Border Protection (CBP) administrators and port directors, and their comments were used in making revisions.

Our findings suggest that when procedures are followed, appropriate referrals are more likely to be made. However, there was frequent failure on the part of CBP officers to provide required information to aliens during the Secondary Inspection interview and occasional failures to refer eligible aliens for Credible Fear interviews when they expressed a fear of returning to their home countries. In addition, researchers noted a number of inconsistencies between their observations and the official records prepared by the investigating officers (A-files). Finally, on a handful of occasions, researchers observed overt attempts by CBP officers to coerce aliens to retract their fear claim and withdraw their applications for admission.

The results of this study shed light on the first three of the four questions posed to the Experts by the Congress in Section 605 of IRFA. Those questions are, whether immigration officers exercising authority pursuant to the Expedited Removal provisions (Section 235(b)) of the Immigration and Nationality Act are, with respect to aliens who may be eligible for asylum, (1) improperly encouraging such aliens to withdraw their applications for admission; (2) incorrectly failing to refer such aliens for an interview by an asylum officer for a determination of whether they have a credible fear of persecution; (3) incorrectly removing such aliens to a country where they may be persecuted; or (4) are detaining such aliens improperly or under inappropriate conditions.

BACKGROUND

In 1996, the United States Congress passed the Illegal Immigration Reform and Immigration Responsibility Act. One of the results of this law was the creation of the Expedited Removal process for aliens entering the country by fraudulent means, misrepresentation, or without proper travel documents. The Expedited Removal process, which was implemented in April of 1997, was intended to expeditiously identify and remove improperly documented aliens at ports of entry but, at the same time, ensure that bona fide asylum seekers would have access to an asylum hearing (GAO, 2000). All aliens entering the U.S. without proper travel documents or under fraud or misrepresentation are subject to immediate return (Expedited Removal) and are subsequently barred from entering the U.S. for a minimum of five years. However, if at the port of entry (i.e., during the Secondary Inspection interview) the alien states that he/she wishes to seek asylum or expresses fear of returning to the country he or she left, then the person is entitled to further consideration to determine the validity of his or her claim. This process begins with a referral for a Credible Fear interview with an asylum officer, who is charged with assessing the legitimacy of the alien's claimed fear. This initial screening process at ports of entry has been the subject of debate among legal scholars and human rights activists.

One of the primary concerns raised by critics of the Expedited Removal process is the possibility that individuals with a genuine asylum claim may not be identified by the screening procedures and will be erroneously returned to their native country, possibly facing further danger or even death (U.N. High Commissioner for Refugees, 2003). Human rights organizations have provided anecdotal reports of individuals fearing persecution who were removed at the time of entry into the U.S. (ABA, 2004; Lawyers Committee for Human Rights, 2000), and several lawsuits have been brought alleging mistreatment at ports of entry (Wang, personal communication, July 2004). The General Accounting Office (GAO) reviewed 365 case files randomly selected from 47,791 fiscal year 1999 case files of aliens who attempted entry at Los Angeles, John F. Kennedy, and Miami airports, and San Ysidro border station and were charged under the Expedited Removal provisions (GAO, 2000). Although this study showed that inspectors at these ports generally complied with established procedures, the reliance on archival data (i.e., official records or A-files) presupposes that official records provide a reliable account of the actual procedures, behaviors and interactions that occurred.

The present study was designed to overcome some of the limitations of GAO's methodology by integrating observational data and independent interviews in order to analyze the practices of Department of Homeland Security (DHS), Customs and Border Protection (CBP) officers at airport and land port border crossings across the U.S. This represents the first systematic study of the Expedited Removal process using direct observations of CBP officers and aliens during Secondary Inspection interviews and comparing these data with the official records generated from these interviews. The goals of this study were to assess the extent to which existing procedures enabled the identification of aliens with a credible fear of returning to their home country, to assess potential obstacles to accurate identification, and to assess the accuracy of data contained in the official records of these interviews. CBP administrators and port directors were consulted in the implementation of the study (e.g., optimal hours for collecting data) and, after reviewing a draft of the report, provided feedback.

I. STUDY METHODOLOGY

Data were collected from seven sites across the country: Atlanta Hartsfield International Airport, Houston International Airport, John F. Kennedy International Airport (JFK), Los Angeles International Airport, Miami International Airport, Newark Liberty International Airport, and the San Ysidro Border Station. These sites were selected because of both the high volume of Secondary Inspections conducted and to obtain a representative cross-section of aliens entering the U.S. Across these sites, four sources of data were collected, some of which were integrated for subsequent analysis and others that were analyzed separately. Data collection involved a) observation of Secondary Inspection interviews conducted by CBP officers at several ports across the U.S. (JFK, Los Angeles, Miami, Newark, and San Ysidro), b) observation of videotaped Secondary Inspection interviews (Atlanta and Houston), c) interviews with aliens following a completed Secondary Inspection interview but prior to ultimate disposition (at JFK, Los Angeles, Miami, Newark, and San Ysidro), and d) review of official documents generated by CBP officials for all aliens who were interviewed or observed at the above-named locations (all sites). The decision to use live observation versus videotape was based on the availability of videotaped interviews at the sites as well as the amount and type of access provided to research staff.¹ When videotaped observations were reviewed, we provided extra videotapes to the ports of entry in order to permit retention of those videotapes that had been coded in case further review was necessary.² Prior to initiating data collection, the observational rating scale developed for this study was pilot-tested using videotaped Secondary Inspection interviews conducted at Houston International Airport. Because study investigators were prohibited from interfering with the tasks of CBP officers, no data were collected directly from the CBP officers (i.e., we did not interview officers about their opinion or decision-making).

In order to complete this large, multi-site research project, 26 research assistants were recruited and trained by the Principal Investigators (Drs. Keller and Rosenfeld), Project Coordinator (Dr. Rasmussen), and Site Supervisor (Ms. Reeves). Research assistants were recruited from local universities and graduate schools, and participated in an initial two-day orientation and training regarding immigration policies, study goals, past research findings, and the instruments and design involved in the current investigation. In addition, on-site supervision was provided on a regular basis by supervisory staff (Dr. Rasmussen and Ms. Reeves) in order to supplement this initial training and address general and site-specific research issues that arose during the course of the study. Efforts were made to recruit researchers that had experience with social and policy research, and were fluent in languages relevant to the particular ports of entry. In addition to English, the languages spoken by research staff included Spanish, French, Mandarin, Haitian Creole, Farsi, Serbo-Croatian, and German. When research interviews required fluency in a language that was not spoken by the available study personnel, telephonic interpreters were used. Study design logistics are presented in Table 1.1.³

¹ We requested permission to videotape all interviews at each site. Unfortunately, approval was given by DHS after data collection had already been completed at most sites.

² Standard procedure at both Atlanta and Houston was to retain videotapes for 90 days in case a need for review arose (although review reported to be extremely rare). All tapes were re-used after this 90 day period.

³ Because this study presents data that concern individuals who may be in danger if they are identified or have been returned to their country of origin, data are presented with as little identifying information as possible.

Table 1.1: Study Design

Study Site	Data	Study Period (# Weeks)	Number of Cases
Atlanta Int'l Airport	Video Obs.	All videotaped interviews conducted from May 30 to June 7, 2004 were reviewed	43
Houston Int'l Airport	Video Obs. Interview	A random subset of all videotaped interviews conducted from May 4, 2004 to June 20, 2004 were reviewed	27
JFK Int'l Airport (JFK)	Direct Obs. Interview	June 16 to July 7, 2004 (3 wks) Weds-Mon, 2pm-10pm	13
Los Angeles Int'l Airport	Direct Obs. Interview	July 7 to 25, 2004 (3 wks) Weds-Mon, 2pm-10pm	27
Miami Int'l Airport	Direct Obs. Interview	May 19 to June 27, 2004 (6 wks) Thurs-Mon, 6am-10pm	110
Newark Int'l Airport	Direct Obs. Interview	May 5 to June 13, 2004 (6 wks) Weds-Sun, 2pm-10pm	32
San Ysidro Border Station	Direct Obs. Interview	May 26 to July 5, 2004 (6 wks) Weds-Sun 9am-10pm	191

Research assistants monitored the study sites for over 1500 hours, generating data on several hundred cases (described in detail below). The amount of time spent collecting data and the number of staff available varied across sites, ranging from a minimum of two researchers at Atlanta for a two-week period to a maximum of six researchers at Newark, Miami, and San Ysidro for six-week periods at each site. In all ports where live observation and interviews were conducted, staff were present during the hours and days in which the maximum volume of Secondary Inspections were conducted. As a result of space constraints and concerns about interference with port operations, USCIRF agreed to CBP requests to limit both the number of research assistants who could be present in a given site at any time, as well as the number of weeks that research staff could collect data.

National estimates of the number of aliens sent to Secondary Inspection per year approximate 10 million, and 90 percent of these individuals are ultimately allowed to enter the U.S. after being processed through an initial triage, usually at a counter in a large waiting room (Congressional Research Service Analysis of INS Workload Data, 2004). Our focus was confined to the 10 percent not allowed past this triage stage—i.e., those sent to Secondary Inspection interviews. Research assistants observed as many Secondary Inspection interviews that time and personnel restrictions allowed (provided they were informed that these interviews were occurring), and conducted independent interviews with aliens after the Secondary Inspection interviews were complete whenever possible. The length of observations ranged from 3 to 386 minutes, with an overall average of 54 minutes, although there was considerable variation across ports of entry. Interviews averaged 18 minutes at San Ysidro (range: 3 to 150) compared to 2 hours and 53 minutes at Houston (range: 79 to 380). Post-inspection interviews lasted, on average, one hour each. Roughly 10 percent of all observations were observed simultaneously by two researchers in order to assess the reliability of the ratings generated. Variables that could not be reliably rated were not used in subsequent data analysis (described below).

In sites where live observation was used to collect data (JFK, Los Angeles, Miami, Newark, and San Ysidro), aliens were asked to consent to allow research assistants to observe the Secondary Inspection interview. Of the aliens who were asked to consent to live

observations, only two (0.4 percent) refused to allow an observer to be present. A substantially larger proportion of aliens refused to consent to an individual interview after completion of the Secondary Inspection interview, as 64 of the 266 aliens (24 percent) approached refused. The most common reason cited for refusing to participate in an individual interview was feeling tired (n=8), although 21 people did not offer an explanation for refusing to participate in the research interview. Because researchers at Atlanta and Houston reviewed videotaped Secondary Inspection interviews that had already been completed, no individual interviews were conducted at Atlanta and only four were conducted at Houston. Once interviews or observations were complete, researchers requested official immigration files (A-Files) prepared on the basis of these same secondary interviews in order to compare the A-Files of the Secondary Inspection interview and the direct observations of our research team. Thus, a maximum of three data sources were available for analysis: observation (direct or videotaped) of the Secondary Inspection interview, independent interview with the alien and official records produced on the basis of the Secondary Inspection interviews (A-files).

Although the study methodology centered around obtaining a consecutive sample of Secondary Inspection interviews conducted at the research sites, we deliberately under-sampled Mexican cases processed at San Ysidro. Because of the high volume of Mexicans involved in Expedited Removal at San Ysidro, and the potential for these data to dwarf data collected at the other sites, we included data from only a subset of all Mexican cases and prioritized observations and interviews of non-Mexican aliens. This under-sampling was handled in several ways. First, after collecting observational data on 200 Mexican cases (far exceeding the volume of cases from other sites), we stopped conducting individual interviews with individuals from Mexico in order to focus our resources on interviews with non-Mexican aliens (although direct observation of Secondary Inspection interviews continued). Second, in order to reduce the disparity between Mexican aliens and those from other countries, we included only a random subset of these cases in the dataset analyzed (roughly one fourth of all Mexican cases observed; n=150). Finally, a number of analyses were conducted twice, once using the total sample and once after eliminating the San Ysidro sample. The analyses excluding San Ysidro are noted throughout the report and can be found in Appendix C. Thus, although the sample described below still contains a large number of Mexican aliens interviewed or observed at San Ysidro, it contains only a fraction of all Mexican cases for which data were collected.

Logistical difficulties also hindered data collection at some sites. For example, JFK has five terminals that process international flights and most regularly conduct Secondary Inspection interviews at counters rather than in individual rooms. Because these factors presented methodological challenges not present at other sites, we were unable to collect a sufficient amount of data to estimate an accurate picture of the frequency of behaviors and processes at this site. We observed cases at one terminal only (Terminal Four), and scheduled our research assistants to be present during the late afternoon and evening (high traffic periods). Because of the limited number of cases, JFK data are excluded from port-by-port statistical analyses, although they are included in analyses using the total sample.

In several data collection sites (Atlanta, Houston, and San Ysidro), Secondary Inspection interviews (live or videotaped) were observed by two researchers in order to establish inter-rater reliability. At San Ysidro and Houston, two researchers observed every 10th secondary

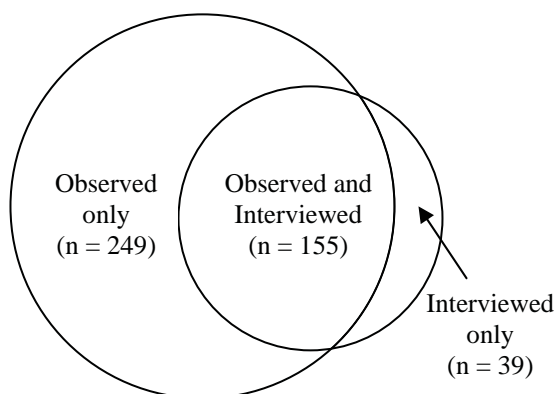
investigation interview while at Atlanta every interview was observed by two raters. In total, 93 paired ratings were available for analysis. Inter-rater reliability varied across the data collected with many variables being reliably assessed and others that were more difficult to establish reliable coding. When reliability was unacceptable (Kappa coefficient below .4 or intraclass correlation coefficient below .6), variables were excluded from subsequent data analysis.⁴ Of the data reported here, the average inter-rater reliability coefficient for dichotomous variables (Kappa) was .63 (range .42-1.00) and for variables with more than two categories (intra-class correlation coefficients) was .90 (range .65-1.00).

All data were initially entered into an Excel spreadsheet. Supervisory staff (Dr. Rasmussen and Ms. Reeves) monitored data entry, reviewing all data for incorrect entries and comparing 10 percent of all records against original sources to insure data accuracy. Excel spreadsheets were then converted to SPSS for subsequent data analyses.

Participants

In total, data were analyzed for 443 different cases across the seven data collection sites. These cases included 404 direct observations of Secondary Inspection interviews (341 live observations and 63 observations of videotaped interviews; because the same data was available from these two sources, these were collapsed into a single “observation” dataset for most analyses) and 194 individual interviews with aliens. Both interview and observation data were available for 155 cases; 39 cases had only an interview with our staff without direct observation of the CBP secondary investigation interview. A-files were available for 435 of these 443 cases (A-files were not provided for 8 cases). Figure 1 presents a schematic representation of the overlap between the three data sources.

Figure 1.1: Participant cases observed and interviewed



⁴ This process resulted in the exclusion of relatively few variables with the exception of observational ratings of several officer behaviors (described in Section IV), where a moderate number of potential variables were excluded because of inadequate reliability. Much of the difficulty in establishing reliability for these variables was attributable to the low frequency of the behaviors although some were also subjective in nature, increasing the potential variability in rater coding. Variables that were analyzed are found in Section IV of this report.

Because some important differences emerged across sites while other issues were consistent across all or most sites, data are described in some places for the entire sample and in other instances are reported for specific sites.

Demographics for the three samples are presented in Appendix A. Males comprised 58 percent of the sample. Participants came from 56 countries, although the vast majority originated from Central and South America and the Caribbean (roughly 80 percent). Over half the cases from each sample resulted in an Expedited Removal while another 24 percent were labeled Withdrawals (i.e., the alien voluntarily returned to his or her country of origin without requesting asylum or being banned from re-entry); roughly one sixth of all cases resulted in a referral for a Credible Fear interview. The initial intent of this study was to focus on both Expedited Removal proceedings as well as the processing of aliens bearing documentation from a Visa Waiver Program (VWP) country who were suspected of actually being from a non-VWP country.⁵ However, because only a small number of VWP refusal cases (i.e., where an individual bearing documentation from a VWP country was refused entry because of suspected fraud or misrepresentation) were found (n=19), these data were excluded from analyses.⁶

Basis for Secondary Inspection and Case Outcome

Because many aliens were unaware of the basis for their Secondary Inspection interview, data on the reasons for Secondary Inspection across the different ports of entry were taken only from cases in which direct observation of Secondary Inspection interviews occurred. Of note, these data were missing in five percent of cases (n=20). The most common reasons for a Secondary Inspection interview included clearly false or missing documents, cases in which the travel visa appeared suspicious or may have misrepresented the alien's intent, or when the alien had overstayed his or her visa during a previous visit to the U.S. Cases in which the CBP officer characterized the alien's documents (passport and/or visa) as false (i.e., were clearly

Table 1.2: Basis for the Secondary Inspection Interviews by Port of Entry

Port of Entry	Objective	Discretionary	Prior Overstay	Other ^a	Total
Atlanta	3 (7.1%)	17 (40.4%)	8 (19.0%)	14 (33.0%)	42
Houston	6 (23.0%)	16(61.6%)	2 (7.7%)	2 (7.7%)	26
Los Angeles	10 (50.0%)	4 (20.0%)	2 (10.0%)	4 (20.0%)	20
Miami	34 (36.2%)	15 (16.0%)	36 (38.3%)	9 (9.6%)	94
Newark	16 (53.4%)	4 (13.3%)	7 (23.3%)	3 (10.0%)	30
San Ysidro	107 (62.2%)	52 (30.3%)	1 (.6%)	12 (7.0%)	172
Total	176	108	56	44	384

^a Other reasons included attempting to evade inspection, being arrested during prior visa extensions, and failing to register with immigration authorities on a prior visit.

⁵ Under the standing interpretation of DHS regulations, aliens who use false passports from visa waiver countries will be returned unless they step forward and identify themselves as asylum-seekers. In contrast, aliens who use other false documents are subject to expedited removal, and must be asked if they have any fear of return before they can be expeditiously removed. (See 8 CFR 217.4; DHS Inspector Field Manual Section 15.7 (2003), In re Kanagasundram, BIA Interim Decision 3407 (1999)).

⁶ Of the 19 VWP cases observed in the course of this study, three were referred for an "asylum only" interview (i.e., three requested asylum upon interview). Although this sample is small, the findings highlight the possibility that some individuals seeking asylum enter the U.S. bearing documentation from a VWP country.

fraudulent) or were absent (i.e., no passport) were subsequently classified as “objective” reasons for Secondary Inspection whereas cases in which a legal passport was presented but the CBP officer suspected that the visa did not accurately reflect the alien’s intent (e.g., an adult traveling on a student visa who is suspected of intending to remain indefinitely) or that the alien committed a material misrepresentation as “discretionary” reasons for a Secondary Inspection interview. In addition, we categorized Prior Overstay as a separate category since these decisions are often at the discretion of the CBP officer, although the bases for such decisions are typically more objective than cases of misrepresentation. Ports of entry differed in reasons offered for a Secondary Inspection interview, with Houston and Atlanta being more likely to refer aliens based on discretionary reasons than other ports of entry (see Table 1.2).

Case outcome also varied by port of entry. In most ports, Expedited Removal comprised the vast majority of case outcomes although both Atlanta and Houston had much higher rates of withdrawals. The proportion of Credible Fear referrals was also much higher in Miami than in the other ports of entry studied (see Table 1.3).

Table 1.3: Case Outcome by Port of Entry

Port of Entry	Expedited Removal	Withdrawal	Credible Fear Referral	Total
Atlanta	13 (30.2%)	30 (69.8%)	0	43
Houston	11 (40.7%)	14 (51.9%)	2 (7.4%)	27
Los Angeles	11 (40.7%)	7 (25.9%)	9 (33.3%)	27
Miami	38 (34.5%)	34 (30.9%)	38 (34.5%)	110
Newark	12 (37.5%)	12 (37.5%)	8 (25.0%)	32
San Ysidro	168 (88.0%)	10 (5.2%)	13 (6.8%)	191
Total	253	107	70	430

Use of Interpreters and Bilingual Officers

Less than one fifth of all cases (16.7 percent) were processed solely in English (i.e., when the alien spoke English). Cases were processed in 27 other languages, with the most common languages being Spanish (61.6 percent of all cases analyzed), followed by Portuguese (5.7 percent), Mandarin (4.1 percent), Haitian Creole (4.5 percent), and Arabic (1.1 percent). Information regarding the use of interpreters and bilingual officers are presented in Table 1.4 and 1.5. There was only one case processed during the study period in which a non-English speaking alien reported (during the interview with research staff) that no interpreter had been provided despite the inability of the interviewing officer to speak his language, however direct observation of this case did not occur⁷.

Table 1.4: Interpreters, Bilingual officers, and interviews in English

	Frequency	Percent
Interpreter used	131	30.6
Interview done in English	79	18.5
Interview done by bilingual officer only	218	50.9
Total	428	100.0

⁷ There were two cases where aliens were provided interpreters but only after repeated requests by the alien. In a third case, it is unclear whether an interpreter was provided after repeated requests by the alien.

Table 1.5: Number of cases and languages in which officers were bilingual

	Frequency	Percent
Spanish	199	91.3
Haitian Creole	13	6.0
Mandarin	4	1.9
Russian	1	0.5
French	1	0.5

Types of interpreters used for those cases conducted in a language not shared between officer and alien by ports of entry are presented in Table 1.6. Clearly there were differences across sites, with Miami relying on telephonic interpretation, Atlanta on in-person staff, and Los Angeles, using all methods available.

Table 1.6: Type of Interpreters by Ports of Entry

	Atlanta	Houston	Los Angeles	Miami	Newark	San Ysidro	Total
Interviewing officer ^a	2 (6.7%)	1 (33.3%)	4 (19.0%)	2 (4.1%)	2 (22.2%)	1 (7.7%)	12 (9.6%)
Another CBP officer	0	1 (33.3%)	3 (14.3%)	1 (2.0%)	1 (11.1%)	1 (7.7%)	7 (5.6%)
Telephonic interpreter	0	0	5 (23.8%)	46 (93.9%)	5 (55.6%)	11 (84.6%)	67 (53.6%)
Airline employee	3 (10.0%)	0	5 (23.8%)	0	1 (11.1%)	0	9 (7.2%)
In-person interpreter	24 (80.0%)	0	3 (14.3%)	0	0	0	27 (21.6%)
Unknown	1 (3.3%)	1 (33.3%)	1 (4.8%)	0	0	0	3 (2.4%)
Total cases	30	3	21	49	9	13	125

^aInterviewing officers both interviewed aliens themselves and interpreted for the primary officer

Representativeness of study samples

Most ports of entry provided basic demographic and case outcome information for cases that were processed during the study period but were not included in our study. Reasons for the failure to observe a Secondary Inspection interview or conduct a separate interview with the alien included the lack of research investigators on site at the time a case was processed, a volume of cases processed that exceeded the number of study investigators available, or a refusal on the part of the alien to participate in the study. Because the data provided varied somewhat across the study sites, comparisons were made on a port-by-port basis rather than using the aggregated dataset. Moreover, comparison data were not provided prior by Newark, and at Atlanta there was no comparison data because observations included all of the cases that were processed during the study period. Detailed data comparing cases observed during the course of the study versus those cases processed but not observed or interviewed are presented in Appendix B.

Across the sites that provided basic demographic data on Secondary Inspection interviews (Houston, JFK, Miami, San Ysidro), there were no significant differences in the gender or age of aliens who were observed or interviewed by our research staff compared to those processed but not included in our study. Case outcome differed between cases processed and those not observed at some ports of entry but not others. The proportion of Credible Fear referrals in our sample was greater at Miami and San Ysidro compared to cases not studied (i.e., we observed a disproportionately greater number of cases that resulted in a referral for Credible Fear interview) but there were no differences at the other sites. The proportion of Expedited Removals was greater among cases observed compared to those not observed at Houston but did

not appear to differ at other sites. There were no differences with regard to case outcome between cases included in this study and cases processed but not included at JFK and Los Angeles. Region of origin for aliens included in our study differed from those processed but not included at San Ysidro but not at the other study sites. At San Ysidro, the proportion of aliens from Latin America was lower in our sample than in the group not observed or interviewed, although this discrepancy was deliberate, due to our intentional under-sampling of Mexicans described above. Country of origin data were not available for JFK or Los Angeles. Given the modest, and non-systematic differences (with the exception of region of origin at San Ysidro), the data collected in the present study appears to provide a representative sample of the population of cases processed at these ports during the study period.

Relative to national statistics for 2000-2003 (summarized in Fleming and Scheuren, Statistical Report on Expedited Removal, Credible Fear, and Withdrawal, FY 2000-2003), our sample includes a higher proportion of women, of Expedited Removal cases at airports, and includes four of the top ten countries of origin for Credible Fear cases for 2000-2003. In addition, the patterns of case outcomes at particular ports of entry were similar.

*Cited in USA v. Peralta-Sanchez
No. 14-50393 archived on February 2, 2017*

II. USE AND ADHERENCE TO THE I-867 FORMAT

The I-867A form provides information to arriving aliens concerning the Expedited Removal process, the consequences of providing false information, and the protections given by the U.S. for those individuals fleeing persecution. The I-867B form consists of questions designed to assess whether or not the alien has any fear of returning to his or her country—the “fear questions.” CBP Expedited Removal Training Materials (September, 2003) state that “Form I-867A&B must be used in every case in which an alien is determined to be subject to Expedited Removal. It is not an optional form” (p. 15; emphasis in original). Box 2.1 reproduces the text provided in the I-867A and B forms.

Box 2.1: Information that officers are obliged to read to aliens

I-867A	2 nd paragraph	You do not appear to be admissible or to have the required legal papers authorizing your admission to the United States. This may result in your being denied admission and immediately returned to your home country without a hearing. If a decision is made to refuse your admission into the United States, you may be immediately removed from this country, and if so, barred from reentry for a period of 5 years or longer.
	3 rd paragraph	This may be your only opportunity to present information to me and the Immigration and Naturalization Service [sic.] to make a decision. It is very important that you tell me the truth. If you lie or give misinformation, you may be subject to criminal or civil penalties, or barred from receiving immigration benefits or relief now or in the future.
	4 th paragraph	U.S. law provides protection to certain persons who face persecution, harm or torture upon return to their home country. If you fear or have a concern about being removed from the United States or about being sent home, you should tell me so during this interview because you may not have another chance. You will have the opportunity to speak privately and confidentially to another officer about your fear or concern. That officer will determine if you should remain in the United States and not be removed because of that fear.
I-867B Fear Questions	Question 1	Why did you leave your home country or country of last residence?
	Question 2	Do you have any fear or concern about being returned to your home country or being removed from the United States?
	Question 3	Would you be harmed if you are returned to your home country or country of last residence?

Although reading the I-867A form is a required element of every Secondary Inspection interview in which Expedited Removal will be applied, we observed many cases in which the requisite information was not provided to the alien. In many other cases the alien was simply handed a photocopy containing the necessary information but was not read the information or offered any further explanation (see Table 2.1). The column labeled “Not read but presented in text” refers to cases in which the I-867A form was given to the alien without instructions or explanation of its content (i.e., placed in front of them). This was a common practice at Houston, which accounted for virtually all of the cases in which this material was presented in written form (see Table 2.1).

Table 2.1: Information conveyed and questions asked from the I-867A and B forms

Obligatory Statements	Read or Paraphrased	Observation		A-File	
		Not read	Not read but presented in text	Question/response in record	Question/response not in record
I867A 2 nd paragraph	278 (75.3%)	72 (19.5%)	19 (5.1%)	--	--
I867A 3 rd paragraph	206 (56.0%)	142 (38.6%)	20 (5.4%)	--	--
I867A 4 th paragraph	164 (44.1%)	188 (50.5%)	20 (4.5%)	--	--
I867B: Why did you leave...?	325 (89.8%)	37 (10.2%)	--	376 (95.2%)	22 (5.5%)
I867B: Do you have any fear...?	336 (94.1%)	21 (5.9%)	--	379 (95.2%)	19 (4.8%)
I867B: Would you be harmed..?	311 (87.1%)	46 (12.9%)	--	379 (95.2%)	19 (4.8%)
I867B: At least one fear question asked	362 (95.0%)	19 (5.0%)	--	379 (94.8%)	21 (5.3%)

To examine the use and adherence to the I-867 format at each port of entry, these figures were obtained for each port of entry. Table 2.2 presents the same information as Table 2.1 port-by-port.⁸

Table 2.2: Information presented from the I-867A and B forms by Port of Entry

Item Read or Paraphrased	Atlanta	Houston	Los Angeles	Miami ⁹	Newark	San Ysidro
I867A 2 nd paragraph	37 (94.9%)	22 (91.7%)	12 (75.0%)	86 (97.7%)	19 (67.9%)	120 (69.4%)
I867A 3 rd paragraph	35 (89.7%)	23 (95.8%)	12 (75.0%)	87 (97.8%)	14 (50.0%)	55 (32.2%)
I867A 4 th paragraph	35 (89.5%)	23 (95.8%)	11 (68.8%)	86 (96.6%)	13 (46.4%)	17 (9.7%)
Why did you leave..?	34 (91.4%)	20 (87.0%)	17 (85.0%)	71 (98.6%)	25 (83.3%)	157 (88.2%)
Do you have any fear..?	34 (89.5%)	22 (91.7%)	18 (90.0%)	69 (97.2%)	29 (96.7%)	163 (94.2%)
Would you be harmed..?	33 (89.2%)	20 (83.3%)	17 (85.0%)	70 (98.6%)	26 (86.7%)	144 (82.8%)
At least one fear question asked	34 (91.4%)	22 (91.6%)	18 (90%)	95 (96.9%)	29 (96.7%)	169 (94.4%)

Rates of reading information in the three paragraphs of the I-867A form varied across ports of entry,¹⁰ as did the rate associated with asking the third fear question (“Would you be harmed...?”).¹¹ While rates for conveying this information were lower in Newark and Los Angeles than Miami, Houston and Atlanta, the lowest rates of compliance with I-867 requirements were observed at San Ysidro. At this site, aliens were read the 2nd paragraph from

⁸ The number and corresponding percentages vary somewhat because of missing data.

⁹ Language limitations of research assistants resulted in a number of missing cases for this variable at Miami.

¹⁰ Categorical association was measured using chi-square analysis; $\chi^2=36.12$, $p<.001$; $\chi^2=121.70$, $p<.001$; and $\chi^2=213.09$, $p<.001$; for the 2nd, 3rd, and 4th paragraphs, respectively.

¹¹ Categorical association was measured using chi-square analysis; $\chi^2=12.75$, $p<.05$

the I-867A form in roughly two thirds of all cases but only one in ten aliens were read the 4th paragraph pertaining to U.S. providing protection to those fleeing persecution.¹² San Ysidro personnel reported (after data collection had been completed) that staff periodically show an informational video that contains I-867A content (in both Spanish and English) to aliens awaiting Secondary Inspection in lieu of reading the information. San Ysidro personnel reported that officers are expected to read the I-867A to the alien when this video is not shown. Because this video was not observed by our research staff, we could not determine whether aliens watched this video when officers did not read the I-867A, and there is no information in A-files to indicate whether or not the video was shown. Moreover, it is not clear if officers conducting Secondary Inspection interviews are aware of whether or not this video has been shown to an alien when they begin their Secondary Inspection interviews. For subsequent analyses, we compared those cases in which the officer was observed to read the I-867A information versus those that were either not read or presented only with a written copy of the information (consistent with CBP policy and DHS regulations that require officers to read this information to the aliens out loud, IFM 17.15(b)(2003) and 8 CFR 235.3(b)(2)(2004)).

In order to judge whether officers' adherence to the I-867A and B differed when a live observer was present versus when observations were videotaped, we compared data from videotaped observation sites (Atlanta and Houston) to those where live observation was used. Contrary to our expectation that the presence of study interviewers would result in greater compliance with established policies, two of the three I-867A paragraphs (the 2nd and 4th) were actually read more often in videotaped observations compared to direct observation.¹³ There was no significant difference in the rates of asking the I-867B fear questions. These findings were largely unchanged when data from San Ysidro were excluded (see Appendix C).

Officer utilization of the I-867B questions was substantially greater than provision of the I-867A information, as these questions were only omitted in between six and 13 percent of all cases (see Table 2.1). However, despite the observation of a number of cases in which the I-867B Fear questions were not asked, official documents prepared during these interviews (A-files) indicated that questions were asked and answered in most of the cases in which our research team did not observe any such questioning (see Tables 2.3-2.5). Notably, in some cases where the file did *not* indicate that the question had been asked or answered, our observers documented that the question had actually been asked. In 37 of 356 cases observed, the first question regarding why the individual left his or her home country or country of last residence was not read to the individual being interviewed (data were missing in 48 cases). Yet in 32 of those 37 cases (86.5 percent), the A-file incorrectly indicated that the question had been asked and answered. Of note, there was no indication in any of these files that this question was deliberately omitted because the information had been offered spontaneously during an earlier portion of the interview. Moreover, for the subset of these 37 cases in which a second researcher observed the same interview, both observers agreed that the question had not been asked.

¹² All but 10 cases in the study sample at San Ysidro were subject to Expedited Removal proceedings. While there are ports of entry that regularly provide I-867 material to Withdrawal cases, there is some disagreement whether or not this practice is required. In any case, the 10 cases at San Ysidro (which were not provided I-867 information) are too few to substantially influence study results.

¹³ The association between observation type and proportion of cases in which I-867A information was read to the alien was analyzed using the chi-square test of association; $\chi^2=5.38$, $p < .05$; $\chi^2=0.37$, $p = .54$; and $\chi^2=6.61$, $p < .01$ for the 2nd, 3rd, and 4th paragraphs, respectively.

Table 2.3: "Why did you leave..."

		Question in file		Total
		Yes	No	
Question observed	Yes	304 (95.3%)	15 (4.7%)	319
	No	32 (86.5%)	5 (13.5%)	37
Total		336	20	356

Table 2.4: "Do you have any fear..."

		Question in file		Total
		Yes	No	
Question observed	Yes	324 (98.2%)	6 (1.8%)	330
	No	10 (47.6%)	11 (52.4%)	21
Total		334	17	351

Table 2.5: "Would you be harmed..."

		Question in file		Total
		Yes	No	
Question observed	Yes	300 (98.0%)	6 (2.0%)	306
	No	34 (75.6%)	11 (24.4%)	45
Total		334	17	351

Because records of Secondary Inspection are relied upon in Credible Fear determinations and subsequent asylum hearings, we looked closely at any information concerning the consistency of A-files and observations of these cases. Although not asked to specifically note inconsistency in case notes, research assistants noted seven cases (out of 69 referred for a Credible Fear interview) in which upon review of A-files, there were marked differences between what was observed and the information contained in the official records. In five cases considerable detail about the aliens' fears was not present in the A-file despite having been offered by the alien (and in one of these cases the officer specifically instructed the alien not to give details and to simply respond "yes" or "no" to questions). In three cases, the information recorded in A-files was qualitatively different from the responses observed in Secondary Inspection (e.g., one person responded to a fear question that "Falun Gong teaches me to help people" and the file states that this person simply answered "yes"). It should be emphasized that research assistants' notes were not structured to investigate inconsistency between A-file and observations, and therefore these discrepancies are likely to represent a conservative estimate of the actual magnitude of this phenomena.

Relationship between I-867 and Credible Fear Referrals

In order to investigate the impact of reading I-867 materials, we explored the relationship between providing this information and Credible Fear referrals. There was no association between whether the interviewing officer read the 2nd paragraph (pertaining to the potential for removal and a 5-year bar on re-entry) and Credible Fear referral. However, Credible Fear referrals were significantly associated with reading the 3rd and 4th paragraphs of the I-867 ("This may be your only opportunity to present information ..." and "U.S. law provides protection to certain persons who face persecution, harm or torture ..." respectively). These data are detailed in Tables 2.6 and 2.7. For the 3rd paragraph, the likelihood of being referred for a Credible Fear interview was four times greater when the information was read to aliens compared to cases in

which this information was not provided.¹⁴ The odds of being referred for a Credible Fear interview increased seven times when the 4th paragraph was read to aliens relative to when it was not.¹⁵

Table 2.6: Association between 3rd paragraph (“This may be your only opportunity to present information...”) and referral for Credible Fear

	Referred	Not referred
Read 3 rd paragraph	51 (24.8%)	155 (75.2%)
Not read 3 rd paragraph	13 (8.0%)	149 (92.0%)

Table 2.7: Association between reading the 4th paragraph (“US law provides protection...”) and referral for Credible Fear

	Referred	Not referred
Read 4 th paragraph	51 (31.1%)	113 (68.9%)
Not read 4 th paragraph	13 (6.3%)	195 (93.8%)

With cases from San Ysidro excluded, associations between reading these paragraphs and referral showed a similar pattern of results, although the associations were no longer statistically significant because of the reduced sample size (see Appendix C).

In order to investigate whether the failure to ask the I-867 questions pertaining to fear had an impact on case outcome, we analyzed rates of referral for a Credible Fear interview among three sub-groups of individuals: those who were asked *both* fear-related questions (“Do you have any fear of returning ...” and “Would you be harmed if you returned ...”; n=327), those who were asked *neither* of these questions (n=20), and a third group who were asked only one of the two questions (n=35). As evident from Table 2.8, the likelihood of a Credible Fear referral increased with each additional fear question asked.¹⁶

Table 2.8: Fear inquired about directly by officer

	Referred	Not Referred
Both "Fear" and "Harm" asked	59 (18.0%)	268 (82.0%)
Either "Fear" or "Harm" asked	3 (8.6%)	32 (91.4%)
Neither Fear Question asked	1 (5.3%)	18 (94.7%)

Of the 54 cases in which one or both of the fear questions were not asked, only four were referred for a Credible Fear interview. Eighteen of the 19 cases in which neither fear question was read either withdrew their application for admission to the U.S. or were ordered removed; only one was referred for a Credible Fear interview. Of the 35 cases in which one of the two questions were asked, 32 were ordered removed or withdrew their application for admission, and three were referred for a Credible Fear interview. With San Ysidro cases removed from the sample, these effects were roughly comparable (although again, the association was no longer statistically significant). In both the analyses with and without San Ysidro data, the likelihood of referral for a Credible Fear interview was roughly doubled for each fear question asked (i.e., the

¹⁴ This association was measured using the chi-square test of association; effect size was estimated with an odds ratio (OR); $\chi^2=17.67$, $p<.01$, OR=3.77.

¹⁵ This association was measured using the chi-square test of association; effect size was estimated with an odds ratio (OR); $\chi^2=34.83$, $p < .001$, OR=7.09

¹⁶ Spearman’s Rho (ρ)=.10, $t=1.97$, $p < .05$, OR=2.14

likelihood was 4 times greater for individuals who were asked both fear questions compared to those who were asked neither question).¹⁷

Confirming statements made in Secondary Inspection interviews

The statements taken during Secondary Inspection interviews and recorded in the I-867 form comprise an official record of the content of interviews between officers and aliens. Following the conclusion of the Secondary Inspection interview, aliens are asked to sign a statement attesting that the transcript of the statements made is correct. Confirming the accuracy of the statements is thus a required step for those referred for a Credible Fear interview, since these statements may be introduced as evidence during subsequent proceedings. According to the regulations:

Following questioning and recording of the alien's statement regarding identity, alienage, and inadmissibility, the examining immigration officer shall record the alien's response to the questions contained on the Form I-867B, and have the alien read (or have read to him or her) the statement, and the alien shall sign and initial each page of the statement and each correction. 8CFR 235.3(b)(2)(i)

Table 2.9: Observed being asked to confirm statements

	Frequency	Valid Percent
Yes	319	84.4
No	59	15.6
Total	378	100.0

Table 2.10: Confirming statements and Referral for Credible Fear

	Referred	Not referred
Asked to confirm	44 (13.8%)	275 (86.2%)
Not asked to confirm	15 (25.4%)	44 (74.6%)

Overall, 84.4 percent of aliens observed were asked to confirm the truth of statements recorded by officers during Secondary Inspection. However, *every* statement was signed by aliens being interviewed – 15.6 percent were simply not informed of the reason for their signature. Being asked to confirm the truth of their statements was significantly *less* common for individuals who were referred for a Credible Fear interview hearing compared to cases in which the alien was being removed.¹⁸ More than a quarter of all aliens referred for a Credible Fear interview were not asked to confirm their statements, despite the potential use of these statements in subsequent asylum proceedings. With cases from San Ysidro removed, the rate of being asked to confirm statements was lower still (73.3 percent; the association between being asked to confirm statements and Credible Fear referral was not statistically significant when these data were excluded from the analysis; see Appendix C).

We also analyzed whether aliens actually read or had their statements read to them during the process of confirming the statement. In only 28.2 percent of cases, aliens were observed to

¹⁷ Ordinal association was measured by Spearman's Rho; $\rho=.10$, $p=.16$; OR=1.91.

¹⁸ $\chi^2=5.11$, $p < .05$, OR=.47. This finding is particularly worrisome given that Credible Fear referrals are precisely those instances in which the sworn statement may become relevant.

read their statements or had their statements read to them before signing the confirmation.¹⁹ When analyzing only those cases in which aliens were actually asked to confirm their statements (319 cases, or 84.4 percent of all observations), the rate of reading statements is only slightly higher (29.8 percent). Reading statements to aliens was a problem identified at all ports of entry studied. There was no association between being informed of the content of statements and referral for a Credible Fear interview. Of note, when asked during our interviews whether the content of statements was accurate, several of the aliens who reported having read the statements indicated that they had identified errors in their accuracy. Unfortunately, because videotaped interviews were not possible in most ports of entry, and A-file records were not available during the time when research staff reviewed videotaped interviews, it was not possible to compare written statements against the actual interview transcript.

Table 2.11: Were the statements read and by whom

	Frequency	Valid Percent
Alien read statements	34	9.1
Interpreter read statements	36	9.7
Officer read statements	30	8.0
Statements not read	268	71.8
Total	373	100.0

*Cited in USA v. Peralta-Sanchez
No. 14-50393 archived on February 2, 2017*

¹⁹ Despite short Secondary Inspection interviews at San Ysidro, the rate of confirming statements was higher. However, when cases from San Ysidro were excluded the rate of reading statements was also higher, (46.2%; see Appendix C).

III. EXPRESSING FEAR AND REFERRAL

Referral for a Credible Fear interview is triggered when an alien expresses a fear of returning to his or her country of origin. In the process of this study we became aware of a significant discrepancy between DHS Regulations (8 CFR 235.3, 2004) and the CBP Inspectors' Field Manual (CBP, 2003) as to whether or not there are types of fear that need not result in a Credible Fear referral (versus a presumption that *any* expression of fear must result in a Credible Fear referral). Specifically, Federal Regulations require that a Credible Fear referral occur regardless of the nature of the fear expressed. The CBP Field Manual, however, indicates that instances where the fear would clearly not qualify an individual for asylum need not necessarily be referred. Because this study could not resolve these complex policy issues, we sought to analyze the relationship between Credible Fear referrals and the nature of fears expressed by the aliens.

Among all cases for which data were available, we identified 69 cases where a referral for a Credible Fear interview occurred.²⁰ Interestingly, in two of these cases no fear was expressed during the interview but the individual was referred for a Credible Fear interview nonetheless. Not surprisingly, the likelihood of a Credible Fear referral was significantly higher when an alien expressed some type of fear compared to cases in which he or she did not.²¹ However, in roughly one sixth of cases in which an alien expressed a fear of returning to his or her native country, no referral for a Credible Fear interview was made and the alien was either ordered removed or allowed to withdraw his or her application for entry. Of note, these data reflect the combined sample of interview and/or observational data (i.e., including the 39 individuals for whom a research interview was available but were not observed in the secondary investigation interview conducted by CBP). Table 3.1 presents the relationship between expressed fear and Credible Fear referrals. This association was essentially unchanged when San Ysidro cases were excluded (see Appendix C).

Table 3.1: Expressing fear to officer and Referral for Credible Fear Interview

	Referred	Not referred
Fear expressed to officer	67 (84.8%)	12 (15.2%)
No fear expressed to officer	2 (0.6%)	309 (99.4%)

Twelve individuals who expressed a fear of returning to their native country to officers were nonetheless returned without a referral for a Credible Fear interview (i.e., to determine if the fear expressed was sufficiently severe and valid as to warrant an asylum hearing in front of an immigration judge). These cases represented roughly three percent of all cases observed by our research staff but nearly one sixth of all cases in which a fear was expressed to officers. In seven of these 12 cases, the A-file did not indicate that any fear had been expressed. These 12 cases were no more or less likely to have been read I-867A information, or to be directly asked about their fear. In addition, there were 10 cases in which aliens expressed fear during our research interview when they had not mentioned any fear to the interviewing officer when asked.

²⁰ This total did not include the 3 "Asylum Only" referrals of individuals arriving from Visa Waiver Program countries.

²¹ Categorical association was measured using chi-square analysis and effect size estimated with an odds ratio (OR); $\chi^2=306.47$, $p < .0001$, $OR=862.63$

All of these individuals, when asked if they wanted to alert the CBP officer of their fear, declined (these cases are thus not included in among “Fear expressed to officer” in Table 3.1).²²

In response to CBP concerns that aliens may be “prompted” to express fears to officers by the I-867B fear questions, we further examined A-files of the 79 cases in which aliens were observed to express fear directly to officers. For six cases, either A-files were missing Q & A records (n=4) or the entire A-files were missing at the time of review (n=2). For 73 cases we were able to determine whether or not fear was expressed before the I-867B questions had been asked, or was only stated in response to the fear questions. According to A-files, 50 of these individuals (63.3 percent) spontaneously expressed a fear of returning to their home country during the question and answer session or in response to the question “Why did you leave your home country or country of last residence.” Three quarters of these (n=38), however, had been told that US provides protection to persecuted individuals (i.e., they were read the 4th paragraph of the I-867A). In another 17 cases (21.5 percent) aliens’ fear claims appear in records only in response to asking directly about fear, and for six cases, no fear was recorded in the A-files (these individuals were all returned to their countries of origin). It should be noted that interpreting these findings as evidence that most aliens (at least two-thirds) who claim fear are not prompted by the fear questions must be done in light of our previous findings of considerable discrepancies between direct observation and the A-files (see Section II). Nevertheless, there was little evidence that aliens are prompted to claim fear by the I-867 information and questions.

Types of fear expressed by those individuals who expressed a fear to officers are presented in the Table 3.2, and abbreviated descriptions of the 12 individuals who expressed fear yet were not referred for a Credible Fear interview, as well as the ten individuals who expressed fear to our research assistants only, are provided in Appendix D. It should be noted that among the countries to which the 12 aliens who expressed fear were returned, five of them (of nine) are noted to have extrajudicial killings and human rights abuses in recent reports from the US Department of State and Amnesty International, and two of the countries have significant limitations on religious expression as cited in reports by the US Commission on International Religious Freedom.²³

²² Seven of the ten individuals who expressed fear in the research interview but did not express their fear to interviewing CBP officer were asked to explain why they withheld this information. Two with a fear of economic hardship reported that their understanding of the officers’ questions were that they pertained only to “physical damage” and “life being in danger.” A third with an economic fear stated that he thought the officers would not care and were going to deport him anyways. A woman who was afraid for her sick child reported that she thought “there was nothing [the officer] could do about” her situation. Another reported that he thought he actually had informed the officer of his fear but then declined the opportunity to relate his fear to the officers when given the opportunity. Two did not provide an explanation as to why they did not inform the officer of their fear, although both expressed considerable distrust of the interviewing officers. One indicated a belief that the officers were lying to him and the second reported that officers “screamed” at her while she was waiting for her interview and that they were “very inconsiderate” during the interview (the research assistant observing the interview corroborated this report, noting that an officer in the secondary waiting area was “sarcastic, demeaning” and “repeatedly shouted at her”). Three cases were missing information as to why they did not express their fear.

²³ Because of concerns about the confidentiality of the participants, the countries are not identified—regions of origin for these participants are presented in Appendix D.

Table 3.2: Expressed Fear for those referred to a Credible Fear Interview

	Referred	Not referred
Political Persecution	29 (43.3%)	1 (8.3%)
Coercive Family Planning	5 (7.5%)	0
Religious Persecution	9 (13.4%)	0
Membership in a Particular Social Group ^a	9 (13.4%)	1 (8.3%)
Nationality	2 (3.0%)	0
Race	2 (3.0%)	0
Not Specified	4 (6.0%)	3 (25.0%)
Economic Hardship	2 (3.0%)	3 (25.0%)
Other	5 (7.5%)	4 (33.3%)
Total	67	12

^a This includes domestic violence and female genital mutilation.

In many of the cases in which fear was expressed during the Secondary Inspection interview but no referral was made, the nature of the fear expressed may not have been sufficient justification for an asylum hearing.²⁴ For example, three of the 12 cases in which aliens expressed fear directly to officers involved fears that were best characterized as economic hardship and one individual expressed a “fear” that concerned the health of a family member living in the U.S. However, two individuals articulated fears that may have formed the basis for a legitimate asylum claim, such as a fear of the government or concern about persecution by religious fundamentalists (one of these two individuals eventually declined referral for a Credible Fear interview after a lengthy discussion with interviewing officers).²⁵ Other cases involved individuals whose fears were more ambiguous, such as cases where the nature of the fear was not described or where the individual expressed fear of harm because of debts owed or using a false passport to leave the country.

In order to gauge the prevalence of referring cases which may have formed the basis of an asylum claim, we identified instances involving a clearly articulated fear of political persecution, coercive family planning, religious persecution, persecution based on nationality or racial discrimination, membership in a particular social group (including violence against women). Of the 58 cases that fell into these six categories, two aliens (3.4 percent) were not referred for a Credible Fear interview. In addition, there were seven cases in which the nature of the fear was not specified, and three of these individuals were also returned. When these two groups were combined (i.e., possibly “legitimate” fears based on asylum law and those cases in which the

²⁴ Although our research methodology was not intended to ascertain the “validity” of fears expressed, we attempted to differentiate cases on the basis of the apparent legitimacy of the fears expressed in order to assess whether Credible Fear referral decisions were influenced by similar judgments made by CBP officers.

²⁵ One man from South Asia characterized himself as a political activist and expressed fear of Islamic fundamentalists who had threatened him in the past. He acknowledged having applied for asylum during a previous visit but had been denied and subsequently removed. The research team observer noted that this individual clearly articulated a fear of returning to his country because of political persecution but also stated that he did not want to be detained. He indicated that he would prefer to return to his country rather than face detention in the U.S. The investigating officer informed the man that he could not be returned if he claimed fear, and was asked a second time whether he indeed feared returning. Upon this second inquiry the man denied having a fear of harm and was subsequently returned. Another individual, a male from Central America, expressed a fear of the government. When the CBP officer asked for more information this man was unable to give further explanation and subsequently retracted his claim. Of note, the A-file from this case indicated that the man’s concern pertained to his sons who were U.S. citizens and his wife who was ill. The file noted that his reply to the question about fear of harm was “it could be possible.”

legitimacy of the fear could not be determined due to a lack of information) the rate of return was 7.7 percent (five of 65).²⁶ A more general reading of U.S. Expedited Removal policies, in which anyone answering affirmatively to one of the “fear questions” should be referred for a Credible Fear interview, would result in a substantially higher rate of erroneous removals (roughly 15 percent, 12 of 79).

Officers encouraging aliens to retract their fear claims

While most individuals who expressed fear during Secondary Inspection were referred for a Credible Fear interview, there were four cases (all at Houston) in which CBP officers appeared to encourage aliens to withdraw their applications for admission after they had expressed a fear of returning to their home country and one case (at San Ysidro) in which officers encouraged an alien to retract his fear claim and removed him. In two of these cases aliens withdrew their application for entry into the US. One case in which an alien withdrew involved a woman from Central America who spontaneously expressed a fear of her ex-husband, crying and asking the officer to help her. The interviewing officer repeatedly told her that if she did not cooperate she would be “in trouble” and refused to answer her questions. Before asking the I-867B fear questions, the officer warned her that she would not see her family for a long time if she made a fear claim. The A-file indicated that the alien’s response to being asked about fear was, “Not a real fear. My ex-husband does not like me.” Another woman from Central America claimed a fear but did not specify the basis of that fear. The CBP officer handling the case informed her that she needed to state a reason for her fear and added “we can’t let everybody in.” The alien asked how long she would be in custody and what would happen to her son. The officer reportedly responded, “If you say you’re afraid you will go into detention for an unknown number of days until you have a hearing” and that she would not be able to have contact with her son (who lived in her home country).

Two other aliens were encouraged to retract their fear claims but did not and were ultimately referred for a credible fear interview. In one case a CBP officer told an African man that because he had tried to obtain an R-1 (Religious Worker) Visa, he *must not* have a fear of returning to his native country. This man had already expressed a fear of government officials because of his prior associations with Americans working in his country of origin. In addition, officers described in detail negative aspects of detention and repeatedly asked whether he had a fear of returning (despite his having already expressed such a fear), seemingly attempting to elicit a different (negative) response. The man maintained his request for admission and was eventually referred for a Credible Fear interview. Another potential withdrawal case involved a Central American man who feared being harmed by his in-laws, who had threatened him repeatedly. The officer told him, “What you are experiencing is a personal problem, not one the US offers people asylum for” and that “I know for sure you will be deported.” The officer then told the alien that if he claimed fear he would be in detention for three months. The alien maintained his claim and was referred.

²⁶ Extrapolating from our sample, the “error rate” among expedited removal cases at these ports of entry (which are the busiest in the U.S.) , using this more conservative estimate and excluding cases that appear unlikely to justify a legitimate asylum claim, would likely fall between 1 and 13 percent (95% confidence interval: .01, .13).

There was one case in which officers encouraged an alien to retract his fear and then removed him via Expedited Removal (i.e., without the option of withdrawing). This South Asian man (who is referenced above in footnote 25) was a political activist and feared of Islamic fundamentalists who had threatened him in the past. He had reportedly applied for asylum during a previous visit but his application had been denied and he was subsequently removed. He clearly articulated a fear that “enemy parties would kill” him, stated that he also feared being detained in the US, and asked the officer for advice. The officer said she could not help him make a decision and that he had already taken up too much of her time. The supervisor told the officer to ask the “fear” question again and the alien then said no. The officer told him that he would be processed for removal, not for political asylum because he already asked for political asylum and had been denied.

In addition to the cases described above, there were cases in which CBP officers told aliens about other negative consequences of pursuing asylum claims that could have been prohibitive. Two were told that because they entered illegally they might not have a chance to present their cases. Five were told they would be held in detention for three weeks or more and three of these were told that detention would last at least one month. Because it was sometimes difficult to differentiate between appropriate factual responses to alien questions and deliberate attempts to discourage fear claims, we did not consider these disclosures to reflect deliberate coercion.

In addition to the above incidents, our researchers were informed of two incidents at San Ysidro in which asylum seekers were reportedly turned away at Primary Inspection. Five aliens we interviewed reported having been turned away at the border the previous day. These cases involved two African men and one African woman who claimed to be fleeing political persecution and two Middle Eastern men expressing fears of religious persecution by “people in power.” These aliens reported having approached the CBP officer at Primary Inspection and requesting asylum but being told to “go away.” One of the Africans stated that the CBP officer “told us to go back from where we came from,” forcing them to return to Mexico. The next day, Primary Inspection officers stopped and handcuffed them briefly until the aliens refused to leave. One African reported that he cried and begged the officer to allow him to enter and all three were subsequently brought to the Secondary Inspection area. A Middle Eastern man described a similar incident, stating that a CBP officer at Primary Inspection refused him entry, telling him that he and his companion would need a Visa in order to proceed. The next day they returned and were brought to the Secondary Inspection area. In all of these cases, a referral for Credible Fear interview was subsequently made, albeit on the second attempt to enter the U.S.

IV. UNDERSTANDING THE RESULT OF SECONDARY INSPECTION INTERVIEWS

In our interviews with aliens, research assistants also asked about the individual's understanding of what would happen to them after completion of the Secondary Inspection interview. This question is particularly important because section 17.15(a) of the Inspector Field Manual requires that the inspector "must be absolutely certain...that the alien has understood the proceedings against him or her." Nonetheless, nearly one third of the aliens we interviewed (n=56) reported having no knowledge of what was going to happen to them after the Secondary Inspection interview, despite having signed the statement (see Table 4.1). Understanding of the outcome of their interview did not vary by port of entry.

Table 4.1: Aliens' reports of what will happen to them next

	Frequency	Valid Percent
Expected to be returned to country of origin	88	48.4
Expected to be detained	12	6.6
Expected another interview	8	4.4
Did not know	56	30.8
Other	12	6.6
Expected nothing	6	3.3
Total	182	100.0

Aliens' expectations regarding the outcome of their case was not associated with their case outcomes (see Table 4.2). Indeed, many aliens expected to be removed despite the fact that a large proportion of these individuals were actually going to be referred for a Credible Fear interview. More than half of the aliens referred for a Credible Fear interview expected to be returned to their country of origin while only one individual actually expected to have another interview. Conversely, less than half of the individuals being removed were aware that this would be the outcome of their interview (despite having signed a statement indicating that they had been informed). Even among the subset of individuals who withdrew their application for admission to the U.S., roughly a third did not realize that they were going to be returned to their country of origin. In short, our interviews with aliens revealed considerable confusion about what was going to happen to them and this confusion was present regardless of the actual outcome of the case.

Table 4.2: Aliens' reports of what will happen to them next by case outcome

	Credible Fear referral	Expedited Removal	Withdrawal
Expected to be returned to country of origin	23 (53.5%)	41 (39.8%)	24 (66.7%)
Expected to be detained	2 (4.7%)	8 (7.8%)	2 (5.6%)
Expected another interview	1 (2.3%)	6 (5.8%)	1 (2.8%)
Did not know	11 (25.6%)	38 (36.9%)	7 (19.4%)
Other	5 (11.6%)	6 (5.8%)	1 (2.8%)
Expected nothing	1 (2.3%)	4 (3.9%)	1 (2.8%)
Total	43	103	36

V. OFFICERS' BEHAVIOR DURING SECONDARY INSPECTION INTERVIEWS

Research assistants were also instructed to note a number of behaviors that might arise during Secondary Inspection interviews. These behaviors included several behaviors thought to be consistent with aggressive or intimidating interrogation procedures, as well as behaviors that reflected positive or helpful behaviors on the part of the officer.²⁷ The frequency of these behaviors is presented in Tables 4.3 and 4.4.

Table 5.1: Aggressive or Intimidating Behaviors Observed during Secondary Inspection

Behavior	All cases	Cases referred for Credible Fear
Raising voice	41 (10.4%)	13 (19.7%)
Interrupting	40 (10.1%)	10 (15.2%)
Grabbing/threatening touches	1 (0.3%)	0
Accusations	28 (7.1%)	4 (6.1%)
Verbal threats	20 (5.1%)	2 (3.0%)
Sarcasm/Ridicule	37 (9.4%)	7 (10.6%)
Being demanding	36 (9.1%)	5 (7.6%)
Standing over alien	9 (2.3%)	1 (1.5%)
Leaving room without explanation	63 (15.9%)	9 (13.6%)

Table 5.2: Helpful Behaviors Observed during Secondary Inspection Interviews

Behavior	All cases	Cases referred for Credible Fear
Offering comforting words	41 (10.4%)	8 (12.1%)
Friendly joking	41 (10.4%)	14 (21.2%)
Small talk	44 (11.2%)	3 (4.6%)
Explaining actions	26 (6.6%)	16 (24.2%)

Most of the behaviors characterized as aggressive or intimidating behaviors were observed relatively infrequently, rarely exceeding ten percent of all cases. Helpful behaviors, on the other hand, were more frequent. In addition, our observers noted a number of occasions where interviewing officers engaged in helpful or comforting behaviors that were not systematically coded in the study. For example, research assistants were particularly impressed with a number of the CBP officers in Miami, who appeared to go to great lengths to make the aliens being interviewed more comfortable. On one occasion, an officer interviewing a pregnant Caribbean woman, appeared particularly sensitive to her physical condition and was both reassuring and helpful. At Newark, officers took special care to explain the Credible Fear process to two African men fleeing ethnic violence, and offered refreshments at several points during the interview. At Houston, an officer took time to discuss personal concerns about removal with a woman from South America. At San Ysidro, the Middle Eastern men (discussed above in Section III) were offered refreshments almost immediately after their arrival in the Secondary Inspection area.

However, a number of other aggressive or intimidating behaviors that were not systematically assessed were also noteworthy. For example, while not necessarily inappropriate

²⁷ Some of these behaviors were not reliably coded, either because of ambiguous descriptions or because of exceptionally low frequency, and were excluded from subsequent analyses.

for criminal aliens, multiple occasions of shackling aliens being processed for Expedited Removal was observed at JFK. This practice was not observed at any other port of entry during the study period. It should be noted that during the preparation of this report, the CBP New York Field Office informed our staff that CBP has since issued clear guidelines as to the use of physical restraint and that shackling is now extremely rare at JFK. In Houston, there were a number of incidents observed (on videotape) that appeared to reflect frankly inappropriate behaviors. One Central American man was told that he was a “woman,” and a “sissy,” and that he sat “like a girl.” In another incident, also at Houston, an officer referred to an alien who was not in the room as a “motherfucker” to a second officer, but in the presence of another alien who was involved in his own Secondary Inspection interview (which was occurring in English).

Of course, it is often difficult to accurately assess the appropriateness of officer behaviors outside of the context in which it occurs. Although not the focus of this study, we also coded aggressive or seemingly inappropriate behaviors on the part of the aliens being interviewed. Although inappropriate behavior on the part of aliens was occasionally noted, these behaviors typically comprised interruptions of the interviewing officers, raised voices, and a demanding tone. We did not observe any aggressive physical behaviors, disruptive behaviors, or threatening behaviors by aliens during the Secondary Inspection interview.²⁸

*Cited in USA v. Peralta-Sanchez
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²⁸ It is possible that problematic alien behaviors occurred outside of the Secondary Inspection interview itself. However, our observers, who were present for extended periods of time, did not record any such behaviors.

VI. DISCUSSION OF FINDINGS

Inspectors who work for the Bureau of Customs and Border Protection are the United States' first line of defense at the border, charged with the challenge of ensuring that inadmissible aliens are not permitted to enter. At the same time, inspectors are required to ensure that individuals fleeing persecution, including torture, are offered the opportunity to seek protection, in accordance with U.S. laws and treaty obligations toward refugees and asylum seekers. In guidance in implementing Expedited Removal, the Department of Homeland Security (and its predecessor, the Immigration and Naturalization Service) emphasizes to its inspectors the importance of both of these missions:

"Because of the sensitivity of the program and the potential consequences of a summary (expedited) removal, you must take special care to ensure that the basic rights of all aliens are preserved, and that aliens who fear removal from the United States are given every opportunity to express any concerns at any point during the process. Since a removal order under this process is subject to very limited review, you must be absolutely certain that all required procedures have been adhered to and that the alien has understood the proceedings against him or her." (Inspector's Field Manual 17.15(a) (2003)."

Many inspectors who were observed during this study appeared to take this responsibility very seriously. In one particularly busy port of entry, Miami, in all but a very small number of cases observed, officers consistently demonstrated that most required procedures directly relating to the Credible Fear referral process were adhered to (one exception concerned reading sworn statements back to aliens, a problem area for all ports of entry). In other ports, however, inspectors' adherence to these procedures was more variable, with some requirements being fulfilled the majority of the time and others frequently being neglected.

This study is the first systematic evaluation of the Expedited Removal process utilizing direct observation of Secondary Inspection interviews with arriving aliens. This study attempted to address a number of important issues in the Expedited Removal process, including the extent to which required information is being presented to aliens, whether official documents (e.g., A-files) accurately recount the Secondary Inspection interview, and whether a significant risk of erroneous removals of aliens who might otherwise qualify for an asylum hearing exist. Shortcomings observed in this study include the frequent failure on the part of CBP officers to provide required information to aliens during the Secondary Inspection interview, occasional failures to refer eligible aliens for Credible Fear interviews when they expressed a fear of returning to their home countries, inconsistencies between the official records prepared by the investigating officers and the observations made by our research team, and on a handful of occasions, overt attempts to coerce aliens to retract their fear claim and withdraw their applications for admission.

In a large proportion of cases observed, CBP officers did not provide information contained in the I-867A form to aliens who were being processed. For example, in roughly half of all cases observed, officers did not read the obligatory paragraph informing aliens that U.S. law provides protection to certain persons who face persecution, harm or torture upon return to their home country. These statements are particularly important given that many aliens may not

understand the purpose of the Secondary Inspection interview and may not realize that this interview is their primary, if not sole opportunity to express concerns or seek asylum. The importance of these paragraphs is evident in the association between providing the I-867A information and referral for a Credible Fear interview, as individuals who did not receive this information were significantly less likely to be referred for a Credible Fear interview.

Although far less common, the finding that CBP officers did not specifically inquire about fear of returning to their country in approximately five percent of the cases observed may be of even greater concern. Given the potential importance of these questions in eliciting aliens' fears, it is unclear why some officers would fail to ask these questions. Particularly given the length of time typically used in Secondary Inspection interviews at the airports, the failure to ask these important and mandatory questions is simply inexplicable. Not surprisingly, the likelihood of a Credible Fear referral increased with each of the fear questions asked. If officers fail to provide an explanation and opportunity for aliens to express their concerns, this crucial step in the asylum process may not occur.

Even when the alien expressed a fear of return, referral for a Credible Fear interview was not guaranteed. One in six aliens who expressed a fear of return during the Secondary Inspection interview were placed in Expedited Removal or allowed to withdraw their application for admission. However, understanding the failure to refer aliens who expressed fear is complicated by the apparently conflicting positions expressed in different CBP guidelines. While some DHS regulations (8 CFR 235.3(b)(4)) indicate that any alien who expresses a fear must be referred for a credible fear interview, the Inspectors' Field Manual instructs that the case should not be referred if "the alien asserts a fear or concern which is clearly unrelated to an intention to seek asylum or a fear of persecution." Indeed, many of the cases that we observed in which an alien expressed fear but was not referred appeared to be "unrelated to an intention to seek asylum" (e.g., cases in which the alien expressed primarily economic concerns²⁹). On the other hand, we observed some cases that appeared to be unequivocal cases of CBP error, returning precisely the sort of individuals that U.S. policy is designed to protect (e.g., a South Asian man who expressed fear of retaliation from religious fundamentalists because of his political affiliation). Although we would not deign to assess the credibility of the claims made by these individuals, it is clear that clarity is needed within CBP as to precisely when referral for a Credible Fear interview is warranted. When only the cases of fears voiced in Secondary Inspections that clearly fell into categories set out by asylum law were analyzed, we found an error rate of 3.4 percent, suggesting that a substantial number of individuals seeking asylum risk being returned, despite expressing a fear of return precisely as they are required (this rate increased to 7.2 percent when cases in which the nature of fear was not articulated were included). In essence, these findings suggest that some CBP officers make *de facto* assessments of the legitimacy of expressed fears, returning aliens that they perceive to be inappropriate and referring those that they perceive as warranting asylum (including two individuals who did not express any fear, but were from countries where legitimate fears are common). These practices suggest an important gap in the Expedited Removal process that should be addressed. However, even with absolute clarity regarding the procedures and policies (as apparently exists for the reading of the I-867 paragraphs and

²⁹ However, we should note that economic hardship may occur within a broader context of persecution, as acknowledged by the USCIS Credible Fear Manual: "The statement by an applicant that 'I left my country because I can't work' is insufficient to judge the merits of a case and should lead to further inquiry." (Eligibility, Part I, p. 24)

questions), our data suggest that errors will likely remain, albeit perhaps less frequently.

The lack of congruence between the observations of our research assistants and the official records prepared by the investigating officers (A-files) suggests that the asylum process itself may be compromised by the use of these documents as official transcripts. We found that when CBP officials failed to ask the relevant fear questions, the official record frequently indicated that these questions had been asked and answered, typically containing just the word “no” in response to fear questions that had not been asked. Likewise, on some occasions the A-files did not indicate that the relevant questions had been asked (i.e., were left blank) when our observers noted that they had been, or contained only a portion of the information that had been disclosed in response to a given question. These discrepancies, however, only reflect the most simplistic level of analysis, since the A-files might have provided incorrect information in many more cases but could not be detected because of our inability to simultaneously observe Secondary Inspection interviews and compare them with A-files. Nevertheless, these data demonstrate that A-files do not necessarily present an accurate record of Secondary Inspection interviews, despite the temptation to assume their accuracy. This issue is particularly important given the evidence observed in other studies in this report that the content of A-files is relied upon during the Credible Fear interview and subsequent Asylum hearings. Officials may present statements from the Secondary Inspection interview as evidence to impeach an aliens’ testimony, citing contradictions between their statements and the official records as evidence of a changing story (see Jastram and Hartsough, A-file and Record of Proceeding Analysis of Expedited Removal, this report), when the “evidence” is an erroneous official record.

The safeguard against inaccurate A-file records, asking aliens to attest to the accuracy of their statements, also appears inadequate as currently implemented. Roughly one in six cases in which statements were taken by CBP officers and recorded in A-files were not confirmed by aliens, despite the presence of signatures in the required place. When they were asked to confirm their statements, most aliens were neither asked to read the statements, nor had their statements read to them, but were simply told to sign forms. Aliens were often told to sign documents with little or no explanation of what they were signing or what the implications might be, and in most cases these documents were written in a language they were not able to read (English). Failure to confirm statements was more common in cases where the individual was referred for Credible Fear interviews, despite the fact that these statements have the potential to be used in subsequent Asylum Interviews and Hearings.

It is impossible to know how the presence of our observers influenced the behavior of CBP officers. It certainly seems likely that compliance with required policies could be greater and inappropriate behaviors would be fewer when observers were monitoring their interviews. Thus, the rates of problems observed in this study likely underestimate the actual rate of problem behaviors and failures to adhere to established policies. We attempted to investigate the effect of our presence by comparing cases in which live observation was used to those in which videotaped interviews were reviewed. In this analysis, when the data from San Ysidro were excluded (since the border crossing is quite different in many respects from the airports), although different rates of reading required material remained, we found no significant differences in the rates of failure to ask required questions, or the frequency of referrals for a Credible Fear interview. This may reflect the fact that 24-hour video surveillance of the

interview rooms is not markedly different than live observation, indicating that both are vulnerable to the Hawthorne effect (where observers, by their mere presence, influence the behavior under investigation). Alternatively, officers may simply have behaved as they normally do, despite the presence of our research team. If so, the port-by-port variation observed in some variables may reflect differences in the training and supervision practices across ports. Ultimately, of course, we cannot know what the behavior of officers would be like without any form of observation. Nevertheless, given that it is virtually unimaginable that officers would have deliberately violated policies or required procedures *more often* while being monitored, it is likely that our observations represent some degree of underestimation of the problems observed in this study.

Perhaps most surprising is that, despite the presence of researchers observing Secondary Inspection interviews, our observers witnessed a number of incidents of seemingly serious problem behaviors. For example, our observers noted that on more than one occasion aliens were refused interpreters at Houston, even when they requested them. The report that aliens who claimed to have expressed a fear of persecution were initially turned away at the San Ysidro border crossing is an additional concern. In addition, aggressive or hostile interview techniques, sarcasm and ridicule of aliens, and verbal threats or accusations, while not common, were not infrequent in our sample. The fact that these behaviors occurred *while observers were present* suggests that such behavior may not even be perceived as problematic by some CBP officers.

Study Limitations

In addition to the possibility that officer behavior and adherence to policies improved simply because our research team was present, a number of methodological issues limit the conclusiveness of this study. Perhaps the most significant issue pertains to sample size. Although our initial intent was to have researchers present in each site for three to four months, USCIRF and CBP agreed to limitations in terms of both the volume of research staff that could be present as well as the length of time that study investigators could remain in each site. Thus, many of the study sites yielded an inadequate sample to permit reliable comparisons across sites or to allow for an accurate estimate of the prevalence of problems observed. Estimates of the frequency with which aliens are removed despite having expressed a seemingly legitimate fear are thus limited (particularly when only the airport study sites are considered). Nonetheless, this study represents the largest systematic analysis of the Expedited Removal process and the only study to apply a multi-method approach to these important issues.

A second limitation to our study concerns the small number of Visa Waiver Program (VWP) refusal cases that were observed by our researchers. Our initial intent was to systematically analyze this subset of VWP cases along with ER cases, particularly because of our expectation that individuals with a legitimate asylum claim may enter the U.S. with documentation from a VWP country. That we observed three (of 19) VWP cases in which aliens were referred for an “asylum only” hearing to determine the legitimacy of their claim offers some support for this belief. However, the small number of VWP cases observed was inadequate to reliably assess the frequency with which this occurs or whether different problems exist in the processing of ER and VWP cases. Further research focusing specifically in VWP cases is necessary to clarify differences and similarities between these types of cases.

Another limitation in the present study was our reliance on live observations or one-time viewings of videotaped observations for most aspects of data collection. Our original intent was to videotape all Secondary Inspection interviews at all ports of entry during the study periods (i.e., to install cameras in those ports that did not already videotape and to archive videotapes in ports that already routinely videotape).³⁰ We also hoped to retain these videotapes after completion of the study, in order to permit re-analysis of the data whenever questions or important findings occurred. Such a method would have allowed, among other things, for a more detailed analysis of the accuracy of A-files, as well as help resolve observations that our researchers were unsure how to code. Although our inter-rater reliability data indicated that our researchers were quite consistent in their application of our coding system, reliability would have been further improved by the availability of videotapes (i.e., to review interactions that occurred too rapidly for the observer to perceive or when translation issues made comprehension difficult). Unfortunately, DHS administrators did not approve our request to videotape in advance of our required study timeline.³¹

At some sites, CBP officers themselves imposed additional study limitations. The most notable example was in Houston, where CBP officials were initially quite receptive.³² Once data collection began, however, Houston CBP officers were less cooperative. Early in the data collection process it became clear that many aliens had been interviewed in the Secondary Inspection area but that CBP staff had not notified our research assistants. This omission was brought to the attention of the Chief, and we were permitted to remain in Houston for an additional week of data collection. However, our research assistants were still not informed when aliens were present to be interviewed, resulting in only four post-inspection interviews during the 4-week study period in which dozens of aliens were processed. Moreover, our researchers described a number of overtly hostile behaviors, including one incident where a CBP supervisor attempted to physically remove a research assistant, grabbing her arm and escorting her from an area that had been previously designated as open to our personnel. Although it is not clear how or if this tension impacted our study findings, it is possible that this small sample of interviews with aliens arriving at Houston was not representative of all arrivals to this port.

Data collection at JFK was also limited, largely by the structure of the Secondary Inspection facilities. Because JFK utilizes a counter with several interview stations, and processes a large volume of cases of which Expedited Removal cases comprise only a small subset, we were unable to determine which among the many cases in Secondary Inspection were Expedited Removal interviews. These logistical difficulties preclude us from drawing any conclusions about the frequency of behaviors or problems at JFK.

³⁰ Although Houston and Atlanta routinely videotape each Secondary Inspection interview, these videotapes are only archived for 2-3 months and then taped over. We requested these ports maintain copies of the videotapes our researchers reviewed, in case further review was desired, but we were not permitted to retain copies ourselves.

³¹ CBP officials eventually approved videotaping but not until two months after data collection had begun and our time constraints did not permit the application of this technology (i.e., we were unable to install and test equipment in the limited time left for data collection).

³² During the study design phase, Houston CBP staff allowed us to pilot our measurement instruments on videotaped Secondary Inspections and provided our research team with suggestions on how to best coordinate file review and live observations.

A final limitation concerns the prohibition to measure the opinions of the CBP officers themselves. As those charged with carrying out the credible fear referral provisions of Expedited Removal policy, it may be that there are some officers who rely on their opinions of asylum and asylum seekers rather than the provisions as set forth in regulations. While our researchers reported that most of the officers they encountered were professional and did not seem to let preconceptions about the legitimacy of the asylum process or asylum seekers affect their work, further research addressing officer knowledge, attitudes and behaviors and the relationship between Expedited Removal practices would be helpful.

Conclusions

Our findings suggest that when procedures are followed, appropriate referrals are more likely to be made. These findings present a picture of a system that, with several notable exceptions, generally seems to function by the rules set out for it. This conclusion is applicable to each port of entry in our study to varying degrees. Research assistants often expressed admiration for officers who were able to balance the twin duties of interrogating aliens without proper documents and then providing protection to them when necessary. This conflicting dual nature of CBP officers' role in the Expedited Removal process cannot be stressed enough, and it is with appreciation for the difficulty of this job, particularly in an era of heightened awareness and need for vigilance against international terrorism, that these findings are presented. While we cite shortcomings in the implementation of Expedited Removal, it is our hope that these observations will be perceived not as a criticism of CBP Inspectors, but as encouragement to better enforce those rules which are clear, and to more clearly articulate those which are not. This is particularly important with the creation of the Department of Homeland Security, in which INS inspection duties are being absorbed by many individuals who formerly worked as Customs or Agricultural inspectors.

This study identified a number of strengths and several disconcerting weaknesses in the Expedited Removal process concerning Credible Fear referral. Many ports employed practices which, if adopted by other ports, may result in much better compliance with CBP rules and reduce the chances that asylum seekers are returned to places where they may face persecution. For example, in Houston and Atlanta, the practice of videotaping all secondary inspections was associated with a higher tendency to comply with the requirement of explaining the Expedited Removal process to the alien, as articulated on the Form I-867A. In Atlanta and Los Angeles, the use of professional on-site interpreters was noteworthy, and may reduce the likelihood of communication problems during the interviews. Given that some asylum seekers come to the U.S. bearing documentation from Visa Waiver Program countries, the practices described by Newark and JFK personnel, in which all Visa Waiver Program cases are asked fear questions, appear appropriate and useful in identifying possible asylum seekers. Despite the high volume and short amount of time allotted for Secondary Inspection interviews, many San Ysidro officers were more diligent than some of those at airports. Finally, Miami International Airport deserves further study as a model. Without employing any of the above tools, Miami was much more compliant than any other port of entry in following the rules to ensure that asylum seekers are identified, and that aliens subject to Expedited Removal understand the nature of the proceedings.

As is clear in this report, DHS procedures designed to identify and refer asylum seekers subject to Expedited Removal are not always followed by immigration inspectors. Since these procedures are not always followed, it is impossible not to conclude that some proportion of individuals with a genuine asylum claim are turned away. Given the vulnerable nature of many aliens who seek asylum in the U.S., adherence to established protocol should be a minimum requirement.

*Cited in USA v. Peralta-Sanchez
No. 14-50393 archived on February 2, 2017*

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APPENDICES

Appendix A: Demographic characteristics of samples

	Observed		Interviewed		File	
	#	Valid %	#	Valid %	#	Valid %
Gender						
Male	237	58.7	110	56.7	253	58.2
Female	167	41.3	84	43.3	182	41.8
Region of Origin						
Africa	13	3.2	9	4.6	15	3.4
Americas	332	82.2	160	82.5	358	82.3
Asia	49	12.1	20	10.3	52	12.0
Europe	9	2.2	5	2.6	9	2.1
Pacific Islands	1	.2			1	.2
Race:						
Black	49	12.4				
White	256	64.6				
Asian	38	9.6				
Native Am.	9	2.3				
Mestizo	44	11.1				
Latino ethnicity						
Not Latino	117	29.0				
Latino	286	71.0				
Marital status						
Single	93	48.2	120	61.9		
Married	100	17.8	74	38.1		
Religion						
Buddhist			6	3.1		
Christian			162	83.9		
Hindu			4	2.1		
Jewish			7	3.6		
Muslim			10	5.2		
None			4	2.1		
Other			6	3.1		
Education						
No High School			81	42.0		
High School			50	25.9		
Some College			29	15.0		
College Degree			23	11.9		
Graduate/Professional Degree			7	3.6		
No Education			3	1.6		
Case outcome						
Credible Fear referral	67	16.6	50	25.8	69	15.9
Expedited Removal	241	59.7	102	52.6	261	60.0
Withdrawal	96	23.8	42	21.6	105	24.1
Mean age (SD)	33.3 (10.7)		34.0 (11.1)			

Cited in USA v. Peralta-Sanchez
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Appendix B: Participant cases versus non-participant cases

Houston

Case outcome	Not observed/interviewed		Observed/Interviewed	
	Frequency	Valid Percent	Frequency	Valid Percent
Credible Fear referral	0	0.0	2	7.4
Expedited Removal	3	10.3	11	40.7
Withdrawal	26	89.7	14	51.9
Total	29	100.0	27	100.0

The case outcomes between the two samples were significantly different³³. Specifically, in our sample there were more Expedited Removal cases and fewer Withdrawals. In addition, there were two Credible Fear referral cases in our sample.

Gender	Not observed/interviewed		Observed/Interviewed	
	Frequency	Valid Percent	Frequency	Valid Percent
Male	19	65.5	19	70.4
Female	10	34.5	8	29.6
Total	29	100.0	27	100.0

Gender between the two samples did not differ.

Age	Mean	Std. Deviation	Mean	Std. Deviation
		32.86	11.04	32.70

These samples did not differ by age.

Global Region	Not observed/interviewed		Observed/Interviewed	
	Frequency	Valid Percent	Frequency	Valid Percent
Africa	1	3.4	1	3.7
Americas	22	75.9	22	81.5
Asia	6	20.7	4	14.8
Total	29	100.0	27	100.0

Global region of origin did not differ between the two samples.

John F. Kennedy

Case outcome	Not observed/interviewed		Observed/Interviewed	
	Frequency	Valid Percent	Frequency	Valid Percent
Credible Fear referral	18	11.4	1	7.7
Expedited Removal	94	59.5	11	84.6
Withdrawal	46	29.1	1	7.7
Total	158	100.0	13	100.0

The case outcomes between the two samples were not significantly different.

³³ $\chi^2=10.14$, $p < .01$

Gender	Not observed/interviewed		Observed/Interviewed	
	Frequency	Valid Percent	Frequency	Valid Percent
Male	100	63.3	9	69.2
Female	58	36.7	4	30.8
Total	160	100.0	14	100.0

Gender between the two samples did not differ.

Age and global region information was not available from JFK records.

Los Angeles

Case outcome	Not observed/interviewed		Observed/Interviewed	
	Frequency	Valid Percent	Frequency	Valid Percent
Credible Fear referral	21	29.6	9	33.3
Expedited Removal	22	31.0	11	40.7
Withdrawal	28	39.4	7	25.9
Total	71	100.0	27	100.0

Case outcome between the two samples did not differ. Gender, age, and global region information was not available from Los Angeles records.

Miami

Case outcome	Not observed/interviewed		Observed/Interviewed	
	Frequency	Valid Percent	Frequency	Valid Percent
Credible Fear referral	96	22.0	38	34.5
Expedited Removal	176	40.3	38	34.5
Withdrawal	165	37.8	34	30.9
Total	437	100.0	110	100.0

The proportion of Credible Fear cases among those we interviewed was higher than among those we did not interview³⁴.

Gender	Not observed/interviewed		Observed/Interviewed	
	Frequency	Valid Percent	Frequency	Valid Percent
Male	262	60.0	55	50.0
Female	175	40.0	55	50.0
Total	437	100.0	110	100.0

Gender between the two samples did not differ.

	Mean	Std. Deviation	Mean	Std. Deviation
Age	36.10	12.54	35.72	11.77

These samples did not differ by age.

³⁴ $\chi^2=7.55$, $p < .05$

Global Region	Not observed/interviewed		Observed/Interviewed	
	Frequency	Valid Percent	Frequency	Valid Percent
Africa	4	0.9	0	0
Americas	386	88.3	96	87.3
Asia	36	8.2	11	10.0
Europe	11	2.5	3	2.7
Total	437	100.0	110	100.0

The two samples did not differ with regards to global region of origin.

San Ysidro

Case outcome	Not observed/interviewed		Observed/Interviewed	
	Frequency	Valid Percent	Frequency	Valid Percent
Credible Fear referral	9	1.7	13	6.8
Expedited Removal	531	98.2	168	88.0
Withdrawal	1	0.2	10	5.2
Total	541	100.0	191	100.0

The two samples differed by case outcome³⁵, with higher proportions of Credible Fear referrals and Withdrawals among the group we observed or interviewed.

Gender	Not observed/interviewed		Observed/Interviewed	
	Frequency	Valid Percent	Frequency	Valid Percent
Male	295	62.5	117	61.3
Female	177	37.5	74	38.7
Missing	69	0.0	0	0.0
Total	541	100.0	197	100.0

The two samples did not differ on gender, although missing data on the group that was not observed or interviewed may have biased this finding.

	Mean	Std. Deviation	Mean	Std. Deviation
Age	29.82	9.13	30.78	9.61

These samples did not differ by age.

Global Region	Not observed/interviewed		Observed/Interviewed	
	Frequency	Valid Percent	Frequency	Valid Percent
Africa	1	0.2	4	2.0
Americas	530	98.0	179	93.4
Asia	7	1.3	8	4.1
Europe	2	0.4	0	0.5
Pacific Islands	1	0.2	0	0.0
Total	541	100.0	191	100.0

The two samples differed by global region of origin³⁶, with a higher proportion of cases from Latin America among those we did not observe or interview.

³⁵ $\chi^2= 37.95, p < .001$

³⁶ $\chi^2= 14.68, p < .01$

Appendix C: Data analyses excluding San Ysidro (Tables correspond to tables in the report)

Table 2.1a: Information conveyed and questions asked from the I-867A and B forms

Obligatory Statements	Observation	
	Read or Paraphrased	Not Read
I867A 2 nd paragraph	158 (80.6%)	38 (19.4%)
I867A 3 rd paragraph	151 (76.6%)	46 (23.4%)
I867A 4 th paragraph	147 (74.6%)	50 (25.4%)
Why did you leave...?	168 (91.3%)	16 (8.7%)
Do you have any fear...?	173 (94.0%)	11 (6.0%)
Would you be harmed..?	167 (91.3%)	16 (8.7%)
At least one fear question asked	196 (95.1%)	10 (4.9%)

Table 2.2a “Why did you leave...”

Question	Question in file		Total
	yes	no	
observed	yes 158 (97.5%)	4 (2.5%)	162
	no 13 (81.3%)	3 (18.8%)	16
Total	171	7	178

Table 2.3a “Do you have any fear...”

Question	Question in file		Total
	yes	no	
observed	yes 165 (98.8%)	2 (1.2%)	167
	no 8 (72.7%)	3 (27.3%)	11
Total	173	5	178

Table 2.4a “Would you be harmed..?”

Question	Question in file		Total
	yes	no	
observed	yes 160 (98.8%)	2 (1.2%)	162
	no 11 (73.3%)	4 (26.7%)	15
Total	171	6	177

Table 2.6a: Association between 3rd paragraph (“This may be your only opportunity to present information...”) and referral for Credible Fear³⁷

	Referred	Not referred
Read 3 rd paragraph	44 (29.1%)	107 (70.9%)
Not read 3 rd paragraph	8 (17.4%)	38 (82.6%)

Table 2.7a: Association between reading the 4th paragraph (“US law provides protection...”) and referral for Credible Fear³⁸

	Referred	Not referred
Read 4 th paragraph	43 (29.3%)	104 (70.7%)
Not read 4 th paragraph	9 (18.0%)	41 (82.0%)

³⁷ $\chi^2= 2.51, p = .11, OR = 1.95$ ³⁸ $\chi^2= 2.43, p = .12, OR = 1.88$

Table 2.8a: Fear inquired about directly by officer³⁹

	Referred	Not Referred
"Fear" and "Harm" asked	49 (26.2%)	138 (73.8%)
"Fear" or "Harm" asked	1 (12.5%)	7 (87.5%)
Fear not asked	1 (10.0%)	9 (90.0%)

Table 2.9a: Observed being asked to confirm statements

	Frequency	Valid Percent
No	52	26.7
Yes	143	73.3
Total	195	100.0

Table 2.10a: Confirming statements and Referral for Credible Fear

	Referred	Not referred
Asked to confirm	34 (72.3%)	109 (73.6%)
Not asked to confirm	13 (27.7%)	39 (26.4%)

Table 2.11a: Were the statements read and by whom: Observational sample.

	Frequency	Valid Percent
Alien read statements	32	16.4
Interpreter read statements	36	18.5
Officer read statements	22	11.3
Statements not read	105	54.1
Total	195	100.0

Table 3.1a: Expressing fear and referral for Credible Fear Interview⁴⁰

	Referred	Not referred
Fear expressed	54 (93.1%)	4 (6.9%)
No fear expressed	2 (1.3%)	153 (98.7%)

Table 4.1a: Aliens' reports of what will happen to them next

	Frequency	Valid Percent
Will be removed	63	56.8
Will be detained	4	3.6
Will have another interview	4	3.6
Nothing will happen	3	2.7
Do not know	29	26.1
Other	8	7.2
Total	111	100.0

³⁹ $r_s = .10, p = .16$ ⁴⁰ $\chi^2 = 183.60, p < .0001, OR = 1032.75$

Table 5.1a: Aggressive or Intimidating Behaviors Observed during Secondary Inspection Interviews

Behavior	All cases	Cases referred for Credible Fear
Raising voice	35 (16.4%)	13 (24.1%)
Interrupting	35 (16.4%)	10 (18.5%)
Grabbing/threatening touches	1 (0.5%)	0
Accusations	25 (11.7%)	3 (5.6%)
Verbal threats	18 (8.5%)	1 (1.9%)
Sarcasm/Ridicule	30 (14.1%)	7 (13.0%)
Being demanding	33 (15.4%)	5 (9.3%)
Standing over alien	9 (4.2%)	1 (1.9%)
Leaving room without explanation	58 (27.1%)	9 (16.7%)

Table 5.2a: Helpful Behaviors Observed during Secondary Inspection Interviews

Behavior	All cases	Cases referred for Credible Fear
Offering comforting words	33 (15.4%)	7 (13.0%)
Friendly joking	48 (22.4%)	11 (20.4%)
Small talk	33 (15.5%)	2 (3.8%)
Explaining actions	75 (35.0%)	16 (29.6%)

Cited in USA v. Peralta-Sanchez
No. 14-50393 archived on February 2, 2017

Appendix D: Aliens who expressed a fear and were not referred

Port of Entry	Gender	Region of origin	Fear expressed to officer	Fear recorded in file	Case Outcome
Newark	female	South America	Economic Hardship	no	Expedited Removal
Miami	male	South America	Economic Hardship	no	Expedited Removal
Houston	female	Central America	Not specific	no	Withdrawal
Houston	female	Central America	Fears ex-husband (Social Group)	Fears ex-husband	Withdrawal
San Ysidro	male	Central America	Not Specific	no	Expedited Removal
San Ysidro	male	Central America	Police will harass him at border (Other)	“Yes, on the border because of police”	Expedited Removal
San Ysidro	male	East Asia	Economic Hardship	no	Expedited Removal
San Ysidro	male	Central America	Scared of government (Not Specific)	“It could be possible”	Expedited Removal
San Ysidro	male	Central America	Economic Hardship	“Yes, there’s no jobs back home”	Expedited Removal
San Ysidro	female	Central America	Ill child in US (Other)	“My daughter is sick”	Expedited Removal
San Ysidro	male	South Asia	Threats by fundamentalist political party (Political Persecution)	no	Expedited Removal
San Ysidro	male	Central America	Does not know Mexico (Other)	no	Expedited Removal
Port of Entry	Gender	Region of origin	Fear expressed to researcher only	Fear recorded in file	Case Outcome
Newark	female	West Africa	Passport problems (Other)	no	Withdrawal
Miami	male	South America	Economic Hardship	no	Expedited Removal
Miami	female	South America	Not specific	no	Expedited Removal
Miami	male	South America	Economic Hardship	no	Expedited Removal
Miami	female	South America	Ill child in US (Other)	no	Expedited Removal
JFK	male	South America	Police would learn about US immigration case (Other)	no	Expedited Removal
JFK	male	Caribbean	Economic Hardship	no	Expedited Removal
San Ysidro	female	Central America	Economic Hardship	no	Withdrawal
San Ysidro	female	South America	Economic Hardship	no	Expedited Removal
San Ysidro	male	Central America	Economic Hardship	no	Expedited Removal