WRITTEN STATEMENT SUBMITTED TO THE

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Hearing on Policies that Prevent Access to Asylum in the United States

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Submitted by:

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I. Introduction

The American Civil Liberties Union (ACLU) welcomes the Inter-American Commission on Human Rights' timely hearing, "Policies that Prevent Access to Asylum in the United States." Like previous hearings convened by this Commission on the human rights crisis at the southern U.S. border, this hearing is a critical opportunity to review the on-going and troubling deteriorating situation faced by asylum-seekers and other migrants when they seek humanitarian protection in the United States. Indeed, this hearing is all the more urgent given shifts in the recent political and legal landscape in the United States that have introduced new impediments for families and other migrants seeking protection.

Early this year, President Trump issued executive orders that have a significant impact on asylum seekers, refugees and other migrants seeking sanctuary in the United States. In addition to suspending the refugee resettlement program, these orders and the accompanying implementation memoranda expand immigration enforcement actions and immigration detention while simultaneously limiting the rights of migrants to assert their rights and defend against removal.

Recent proposals from the Secretary of the Department of Homeland Security, John Kelly, to separate mothers from children arriving at the U.S. border, recent changes to the credible fear and reasonable fear lesson plans, and the suggestion that unaccompanied children attempting to join family in the United States could be stripped of critical legal protections suggest that the human rights of asylum seekers arriving in the United States are under real threat. These concerns were echoed earlier this month by

the United Nations High Commissioner for Human Rights who expressed concerns regarding U.S. "policies which greatly expand the number of migrants at immediate risk of deportation – without regard for years spent in the US or family roots. These threaten to vastly increase use of detention, including of children. Expedited deportations could amount to collective expulsions and refoulement, in breach of international law, if undertaken without due process guarantees, including individual assessment. I am especially disturbed by the potential impact of these changes on children, who face being detained, or may see their families torn apart."[1]

Migrant families[2] seeking protection in the United States do have rights to humanitarian protection and fair treatment under domestic and international law. However, accessing these rights, which are increasingly under threat, is difficult for those seeking asylum given current U.S. government policies and practices. In order for children and their families to claim asylum in the United States, they must first be recognized as asylum seekers, given an adequate opportunity to present their claims, and defend against deportation. If, as happens all too often, their asylum claims are not recognized, these children and their families are deported back to the danger they fled, despite U.S. *non-refoulement* obligations. This submission focuses on access to justice and liberty for children and their families seeking protection and attempting to assert the right to enter and remain in the United States.

Both international human rights law and the domestic constitutional and statutory law of the United States guarantee certain basic legal protections to individuals attempting to claim asylum and to defend against removal. International human rights law includes particular protections for migrant children[3] but also specifically recognizes the right of all immigrants to defend against deportation, to be represented in deportation proceedings, and to have their expulsion reviewed by a competent authority.[4] In addition, human rights law guarantees that all persons appearing before a judicial proceeding receive "a fair and public hearing by a competent, independent, and impartial tribunal."[5] U.S. domestic law has historically recognized the importance of fair deportation hearings. The Supreme Court has long 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.[6] And 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."[7] And yet, because the overwhelming majority of migrants are removed from the United States without a meaningful hearing, pursuant to summary removal procedures, their ability to defend against deportation and to present evidence of harm if returned to the country they fled is severely limited.

International human rights law also strongly disfavors the use of immigration detention, and rejects it completely for children. Both human rights and domestic law specifically recognize that, for children and asylum seekers, detention is an "exceptional measure"[8] and, if necessary, should only be permitted "as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration with regard to the duration and conditions of detention."[9]

Nonetheless, the U.S. government seeks to detain and deport asylum seekers (adults and children) with procedures that are inadequate to identify and protect individuals with bona fide asylum claims. Most individuals, including many who are seeking asylum, are detained and turned away at the U.S. border with a deportation order but never receive a meaningful opportunity to present their claims to an immigration judge. Even those who do receive a hearing in immigration court typically have no attorney to represent them at that hearing. In addition, asylum seekers, including children, are still held in detention facilities, often for months on end. Lengthy detention compounds the trauma that many asylum seekers carry with them when they flee and makes it difficult for them to make out their asylum cases or obtain legal counsel. Over the past year, immigration detention has continued to grow to historically unprecedented levels, and new proposals from the Trump Administration are set to further expand the detention of asylum seekers.

Our written statement today centers on three on-going areas where basic human rights obligations have been ignored at tremendous cost to children and families seeking protection in the United States: (1) access to courts and a fair hearing; (2) right to liberty and freedom from detention; and (3) legal representation. All three of these issues, which the ACLU has previously briefed to the Commission, present live human rights violations that may only further deteriorate given the new proposed policies of the Trump Administration.

II. Access to Courts and a Fair Hearing

The overwhelming majority of people expelled from the United States each year will never see an immigration judge and never have a hearing where they can adequately present a defense or pursue claims to remain in the United States. According to the most recent statistics released by the U.S. government, over 83 percent of deportations in Fiscal Year 2014 were conducted by an immigration enforcement officer, *not* by an immigration judge.[10] Those so deported include families with young children and asylum seekers who were never afforded an opportunity to present their claims.

As a result of changes to U.S. immigration law over the past two decades, hundreds of thousands of people are now expelled from the United States after

proceedings in which officers of the Department of Homeland Security (DHS)—who are not necessarily even lawyers, let alone judges—conduct all of the functions normally associated with a judicial process. DHS officers, which include Immigration and Customs Enforcement (ICE) officers and Customs and Border Protection (CBP) officers, are the ones who arrest, detain, charge, prosecute, judge, and deport. The penalties associated with these removal orders include not only expulsion, but also bans on reentering the United States, which in some cases last for the entire lifetime of the individual in question. In addition, these orders of removal—even when unlawfully entered—can subject an individual to criminal prosecution and imprisonment should they subsequently attempt to reenter the United States after having been deported.[11] This regime plainly violates the requirement under international law of an impartial and independent hearing,[12] and presents significant dangers for asylum seekers who may, predictably but erroneously, be deported by a border official without the chance to present their claims.

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) has 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."[13] Moreover, it is a well-established international norm that only "competent authorities" should be empowered to issue removal orders "following consideration of individual circumstances with adequate justification in accordance with the law and international human rights standards, *inter alia* the prohibition of arbitrary or collective expulsions and the principle of non-refoulement."[14]

The United States has developed some procedures and policies to identify asylum seekers arriving at its borders so they can be referred to protection services. As described in more detail below (*see* I.A.2, *infra*), asylum seekers apprehended by DHS officers are supposed to be referred to an asylum officer with expertise in asylum law who will conduct an interview to determine if the applicant has a "credible fear of persecution"; that is, the officer determines whether the individual's claims are sufficiently meritorious to warrant a full asylum hearing before an immigration judge.[15] However, in practice, many *bona fide* asylum seekers are quickly deported at U.S. borders by immigration enforcement officers without being provided the opportunity to request asylum[16]; as a consequence, they are not referred to an asylum officer for a "credible fear" screening, and never get to seek asylum before an immigration judge. Instead they are quickly returned to the countries they fled, in violation of U.S. *non-refoulement* obligations.

President Trump has proposed to expand this regime of summary removals geographically into the interior of the United States and to apply summary removals to people who are not recent arrivals,[17] potentially sweeping in not only asylum seekers but

others with meritorious legal claims and families ties to the United States.[18] While some of these individuals may not have initially come to the United States for protection, without an individualized inquiry into their rights here and the situation they face upon deportation, there is a danger they will be returned to danger in violation of U.S. *non-refoulement* obligations.

A. Families Arriving in the United States Seeking Asylum

1. *Failure to Provide Access to the Asylum Process.*

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."[19] 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."[20] 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. 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."[21]

U.S. law also recognizes that asylum seekers arriving at a U.S. border should be provided with the chance to speak with an asylum officer and to make their claims[22], but in practice many asylum seekers are wrongly deprived of this right.[23]

Starting in May of 2016, the ACLU began receiving reports that asylum seekers attempting to present themselves at San Diego, California ports of entry as well as other ports along the southwestern U.S. border were being turned back to Mexico by U.S. Customs and Border Protection (CBP) officers, without being provided any access to the asylum process. ACLU has observed CBP's processing of migrants at the San Ysidro port of entry near San Diego, California, and has visited Tijuana on multiple occasions. ACLU has documented multiple examples of noncitizens who have sought to present their asylum claims to CBP officers, and yet who were turned back to Mexico without any opportunity to have their claims heard, including Mexican nationals seeking asylum from Mexico. The ACLU has also received reports from other partners of similar unlawful practices at ports of entry throughout the southwest border region, including in

Arizona and Texas. *See Exhibit A, Complaint to Department of Homeland Security, Office of Inspector General and Office of Civil Rights and Civil Liberties (January 2017).*

In addition to individuals who are turned back without a formal removal order, other asylum seekers are formally deported without being provided any means to assert their fears of persecution. Individuals who arrive in the United States without valid travel documents are subject to "expedited removal," which permits a border patrol officer to deport them without seeing a judge and with very little review.[24] This includes adults, as well as children arriving with their parents, who border officials fail to identify as asylum seekers and thus are never referred for a "credible fear" interview.

In order for individuals fleeing danger to claim protection in the United States, immigration enforcement officers must identify them as asylum seekers. However, in many instances, border officers do not ask the questions necessary (and required[25]) to identify an asylum seeker before ordering her deported. In December 2014, the ACLU published a report based on a year-long investigation and research into expulsions that take place without a hearing, for which we interviewed and documented the cases of over 135 individuals deported by immigration enforcement officers.[26] The ACLU found that DHS officials routinely fail to screen for asylum claims before issuing deportation orders; as a result, bona fide asylum seekers have been deported in violation of U.S. *non-refoulement* obligations under the Convention against Torture and the Refugee Convention, the 1967 Protocol to which the United States is a party.[27] For example, one mother interviewed by the ACLU was issued a deportation order, along with her two- and twelve-year old children, when they arrived in the United States seeking asylum; a border patrol officer, instead of referring them to an asylum officer, issued deportation orders to each of the three.[28]

In the course of its investigation, the ACLU interviewed 89 individuals (including 11 unaccompanied Mexican children) who were deported or returned (i.e., without a formal removal order) at the U.S. border without a hearing; 55 percent said they were not asked whether they had a fear of returning to their country of origin. Only 28 percent said they were asked about their fear of returning to their country of origin by a border officer or agent; and yet, 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 overwhelming majority of these individuals were repatriated to Mexico, Honduras, El Salvador, or Guatemala. Many were women fleeing gang and domestic violence who may have had strong asylum claims, as suggested by a recent Board of Immigration Appeals decision that recognized domestic violence as a basis for asylum.[29]

Several asylum seekers interviewed by the ACLU and deported without receiving an interview to determine if they faced a credible fear of persecution had in fact fled due to a real danger of future harm (which *non-refoulement* obligations are supposed to prevent). Some of these individuals were physically attacked, kidnapped, and sexually assaulted when they were returned, without a hearing, to the very dangers they had fled. Others faced extortion and threats to their own and their families' safety. One individual was murdered after he was deported. These individuals, however, had all been turned away by U.S. border officials without even the opportunity to explain their fears, sometimes with a deportation order they did not understand or had been coerced into signing. Since the ACLU's report was published, and as the U.S. government's expulsion of children and families along the southern U.S. border has increased, these incidents have continued to occur and been documented by advocates as well as by U.S. government agencies like the United States Commission on International Religious Freedom in 2016 and a DHS Office of Inspector General Report discussing the prosecution of asylum seekers.[30]

Unfortunately, the U.S. government has a history of depriving asylum seekers of their right to a fair hearing of their claims for relief from persecution. In 2005, the United States Commission on International Religious Freedom (USCIRF) published a study on asylum seekers and border removals for which researchers observed the interviews between border officials and arriving migrants.[31] The study found that in more than 50 percent of the interviews observed, border officials did not inform migrants of their right to seek protection if they feared being returned to their country. Two years later, USCIRF reported that its serious concerns about these practices had not been addressed and that these processes that bypass the courtroom were, instead, expanded.[32]

In months since this Commission last considered expulsions of asylum seekers, the situation at the southern U.S. border has only become more dire. For example, a large number of Haitian nationals have been either stranded in Mexico or detained within the United States while trying to enter the United States. After the United States cancelled the Temporary Protective Status (TPS) Haitians had received after the 2010 earthquake, began to use "metering" system at the ports of entry (mostly TJ and Nogales) or detaining them. Some asylum seeking Haitians and others were told by border officers that the "daily quota" for asylum cases has been reached and requiring them to wait in Mexico for a chance to present their cases.[33]

International law recognizes the importance of providing an effective remedy when individuals are unjustly given a removal order that, if effectuated, would return them to places where they face persecution or torture.[34] While some asylum seekers deported at the U.S. border without the chance to present their claims may return to try and claim protection, such individuals may once again be denied that opportunity and

instead prosecuted for the felony offense of illegal reentry.[35] One such individual, Soledad, was incarcerated for many months in a federal prison before she was able even to apply for protection in the United States.[36] Even children have been deported and subsequently prosecuted for returning without authorization, sometimes without ever having the chance to see an asylum officer or an immigration judge.[37]

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.[38] The United Nations High Commissioner for Refugees' (UNHCR) Detention Guidelines also require that detention not be "used as a punitive or disciplinary measure for illegal entry or presence in the country,"[39] 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. Moreover, given the continued failure of the U.S. government to ensure asylum seekers are not rapidly returned to danger without the opportunity to present their claims, the emphasis on penalizing asylum seekers, instead of recognizing their protection claims, is particularly unjust and abhorrent.

2. *Failure to Provide Adequate Procedures in Determining Protection Needs*

Although U.S. immigration laws allow many individuals to be summarily deported without ever seeing an immigration judge, they provide some minimal protection for asylum seekers. These statutory safeguards were enacted to ensure that asylum seekers—who frequently arrive without prior authorization or valid travel documents (particularly when fleeing persecution by the same governments that issue those documents)—have the opportunity to claim asylum in the United States rather than being immediately deported through the expedited removal system. The Immigration and Nationality Act requires that the Department of Homeland Security, refer individuals who claim a fear of return for a "credible fear interview" conducted by asylum officers who are part of the United States Citizenship and Immigration Services.[40] This interview is intended to be a non-adversarial opportunity for the asylum seeker to speak about her basis for claiming asylum, and the asylum officer is required to "to elicit all relevant and useful information bearing on whether the applicant has a credible fear of persecution or torture."[41] Individuals found to have a "credible fear" are then referred to an immigration judge for an asylum hearing during which they may present their claim for asylum, including by offering fact and expert witness testimony and documentary evidence.[42] If a person is found not to have a credible fear, he or she may contest that finding and request

a brief "review" of the credible fear determination by an immigration judge.[43] If the immigration judge concludes that the individual does not have a credible fear of persecution, the asylum seeker has no recognized right to a full asylum hearing to present his or her case and is usually deported expeditiously. The opportunities for judicial review of an immigration judge's decision are extremely limited[44] and, as a practical matter, most individuals with expedited removal orders are unable to challenge erroneous negative credible fear determinations. Legislation passed by Congress has been interpreted by the government as allowing only the most limited review of expedited removal orders,[45] a position that the ACLU has consistently challenged and is actively litigating.[46]

Thus, to be granted the right to an asylum hearing before an immigration judge, individuals must demonstrate a "credible fear" of persecution or torture, which is defined as "a significant possibility" that the individual is eligible for asylum under the Immigration and Nationality Act because of past persecution or has a well-founded fear of future persecution.[47] The reason for the low threshold at the credible fear stage is straightforward. An asylum claim is highly fact-specific and often will take a significant amount of time and resources to develop properly, and may require submitting expert testimony and extensive country conditions evidence. It is thus highly unrealistic for applicants in the expedited removal system, especially if unrepresented, to present an adequate asylum claim while in detention and under severe time constraints.

Despite the low standard that should be required for asylum seekers to establish a credible fear, numerous procedural problems often make it difficult for bona fide asylum seekers, especially those who are unrepresented (which is the overwhelming majority), to pass a credible fear screening. For example, individuals who have gone through the credible fear process report problems such as inaccurate translation, adversarial and even hostile interviewers, and lack of explanation of the process—all of which can lead to erroneous findings that the individual does not have a credible fear of persecution. In some instances, asylum officers and immigration judges have also erred by demanding a higher showing than the low "significant possibility of persecution" threshold, which Congress intended and international law requires.

In February 2017, an updated lesson plan for asylum officers conducting credible and reasonable fear interviews, issued by the Department of Homeland Security, introduced problematic changes that may have serious consequences for asylum seekers in vindicating their rights.[48] For example, the lesson plan no longer encourages asylum officers to refer an individual to an immigration judge for a hearing where there is doubt as to the credible fear determination; it raises the standard for the finding by the asylum officer from a threshold determination to a final one without the benefit of a hearing and preparation; it raises the standard for information that must be provided at what used to

be a threshold determination; and it increases the weight placed upon border interviews despite the evidence from numerous reports that these interviews are unreliable and may have critical flaw.[49] These changes may fundamentally alter the nature of the asylum interview and result in fewer bona fide asylum claims being referred for a full hearing.

These new changes only add to the difficulties asylum seekers already face given the asylum process. The ACLU continues to litigate a group of consolidated habeas cases on behalf of detained Central American mothers and children who did not receive a substantively or procedurally fair opportunity to demonstrate that they are bona fide asylum seekers (the issue of whether these families can seek habeas review is pending before the U.S. Supreme Court).[50] Meanwhile, in reaction to fears about the United States' handling of asylum claims, many asylum seekers are walking to Canada to pursue protection there.[51]

B. Unaccompanied Children

Children arriving alone in the United States to seek protection remain at risk of being returned to danger without a hearing despite the "special care and protection" to which they are entitled under human rights law, and the years of advocacy and some legal reforms aimed at providing necessary safeguards.[52] Many of the relevant safeguards for immigrant children arose from two major cases, *Perez-Funez v. INS*[53], and *Flores v. Reno*[54]. Some of these safeguards were codified in statute in the Trafficking Victims Protection and Reauthorization Act of 2008 ("TVPRA"). This law prevents unaccompanied children from Central America (unlike those from Mexico) from being removed without a hearing, and requires the U.S. government to screen Mexican children for relief claims before repatriating them.[55] Some of these Central American children are denied this protection when they are misidentified as adults or as Mexican, resulting in some cases in their detention with adults and exclusion from critical hearings where they can present their cases. [56] In addition, Mexican unaccompanied children are repatriated to Mexico without being given a proper screening to determine whether they have legitimate claims for relief that would allow them to stay in the United States.

These protections are now in peril, in light of several executive orders signed by President Trump. For example, in 2014, the United States created an in-country refugee processing program to address the large number of unaccompanied minors seeking protection at the U.S. southern border. This program was suspended earlier this year by the executive order immediately suspending refugee admissions.[57] A draft memorandum on the implementation of a second executive order on immigration enforcement and border security indicates that children arriving alone to join family in the United States would no longer be able to avail themselves of the critical protections for unaccompanied

minors; moreover, their parents could be criminally prosecuted under anti-smuggling and anti-trafficking laws.[58]

1. Repatriation of Unaccompanied minors—Historical Background

In 1985, the district court in *Perez-Funez* entered an injunction establishing that unaccompanied children must be advised of their right to a hearing before an immigration judge before they are presented with the option of taking "voluntary departure" – in other words, acceding to return to their country of origin without a formal deportation order.[59] Under the injunction, children from noncontiguous countries – i.e., all countries other than Mexico and Canada – cannot agree to "voluntary departure" unless they have *actually* consulted with an adult friend or relative, or a legal services provider. Thus, such consultation is a mandatory prerequisite for these children before they can be repatriated.[60] In contrast, the *Perez-Funez* injunction does not require mandatory consultation for children from Mexico and Canada who are offered voluntary departure; these children must merely be given the *opportunity* to consult with an adult friend or relative or with a legal services provider – but no such consultation is actually required. Thus, the injunction allows unaccompanied children from Mexico and Canada – and particularly from Mexico – to be given "voluntary departure" without ever having seen an immigration judge or having consulted with an adult friend or relative or a legal services provider.

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.[61] The Flores settlement marked the beginning of the U.S. government's recognition (now unfortunately in decline) that immigrant children are entitled to due process rights, particularly with respect to the U.S. government's ability to hold them in detention. The government was originally supposed to issue regulations implementing the *Flores* settlement's requirements, but unfortunately it never promulgated a complete set of such regulations.[62]

In 2016, a federal court in California ordered the U.S. government to quickly release not only unaccompanied children but also those who are held with their parents. On appeal the Ninth Circuit Court of Appeals clarified that while accompanied children were covered by the *Flores* settlement, their parents were not entitled to release.[63] The Trump administration is reportedly considering a proposal to separate mothers and children arriving in the United States without prior authorization.[64] If implemented, this policy would separate families, violating the right to family unity under human rights law,[65] and would further signal to families that they will be effectively punished for seeking asylum, as is their right to do.

2. Mexican Unaccompanied Children Arriving in the United States

In the years following *Flores* and *Perez-Funez*, the Homeland Security Act of 2002, among other provisions, transferred responsibility for the care and custody of unaccompanied children from DHS to the Department of Health and Human Services, specifically, the Office of Refugee Resettlement ("ORR").[66] Congress undertook this measure in order to entrust immigrant children to an agency with greater expertise in working with young people.

Nonetheless, Mexican children continued to be routinely turned around at the border, just like most adults, without any evaluation of the risks they faced if repatriated.[67] Partly in response to this ongoing problem, Congress passed the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA"). The TVPRA sets forth certain critical procedural safeguards for unaccompanied children seeking refuge in the United States. One of the most important, for present purposes, is that for unaccompanied children from noncontiguous countries (i.e., from all countries other than Mexico and Canada), the TVPRA requires that once a federal department or agency determines that it has an unaccompanied child in its custody, the agency must transfer the child to ORR custody within 72 hours.[68] If the government wants to expel these children from the United States, the government must place them in regular removal proceedings before an immigration judge.[69] This protection prevents unaccompanied children from noncontiguous countries from being expelled via any sort of streamlined or truncated removal procedures, such as expedited removal or pre-hearing voluntary departure.

Unaccompanied children from contiguous countries (Canada and Mexico), however, can still be returned without a hearing before an immigration judge. While the TVPRA created certain screening requirements for Mexican children to ensure they were not returned to danger, in practice, the screening process has been ineffective at best, as further described below.

Specifically, the TVPRA requires that any border officer who apprehends an unaccompanied Mexican or Canadian 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) has the capacity to voluntarily agree to go back home.[70] Only if all three criteria are met can CBP repatriate the unaccompanied Mexican child without a hearing —and only if the child consents to repatriation.[71] If any of these criteria are *not* met—in other words, if the Mexican child has a potential claim for relief from persecution or trafficking, or the child lacks capacity to agree to her own return – the border officer must refer the child to regular removal proceedings before an immigration judge. Thus, the TVPRA presumes that an unaccompanied Mexican child needs special protection, and

requires CBP to ensure that the child does not need such protection before returning her to Mexico.

3. The TVPRA in Practice

In practice, however, law enforcement officers put the burden on the child to speak up and articulate their claims for relief. Several studies, including one completed by the UNHCR, have shown that these DHS officers are not asking the required questions, which may anyway be difficult for young children – who are alone, afraid, and languishing in detention – to immediately comprehend or answer.[72] As a result, for unaccompanied Mexican children, removal has become the default.

According to U.S. government statistics from Fiscal Year 2013, 17,240 Mexican unaccompanied children were apprehended at the border.[73] And yet, during the same time period, ORR, which is responsible for the care and custody of unaccompanied minors during their immigration proceedings, reported only 740 Mexican unaccompanied kids in its custody. [74] These figures suggest that the overwhelming majority of Mexican children arriving alone and apprehended by DHS—around 96 percent—are turned away at the border, rather than given a hearing. UNHCR has similarly estimated that 95.5 percent of Mexican children are returned without seeing a judge.[75]

Mexican unaccompanied minors are returned at high rates despite the merits of their claims. As the ACLU and others have found, U.S. immigration officers are not adequately conducting the required TVPRA screening to identify unaccompanied Mexican children with asylum or trafficking claims or who cannot independently consent to being returned. Of the 11 Mexican unaccompanied children interviewed by the ACLU in Sonora, Mexico, ranging in age from 11 to 17, only one, Hector, said that he had been asked about his fear of returning to Mexico; the others said they were not asked anything but their age and a name. Hector recalls: "I asked if there was any benefit [to seeing a judge] and the *migra* said, 'No, there is probably no benefit. You just crossed through the desert so you're going to be deported.'" 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.

Even where officers are attempting to conduct the screening, many do not speak Spanish despite working with a largely Spanish-speaking population. Most unaccompanied 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 in 2014 spoke any English at the time of their apprehension (and two of them spoke an indigenous language and knew very little Spanish).[76]

Two thorough investigations, one conducted by Appleseed between 2009 and 2011 and the other by the U.N. High Commission for Refugees (UNHCR), found that the majority of Mexican children arriving alone are quickly returned due to significant failures in the TVPRA screening.[77] The 2014 UNHCR investigation concluded that the "virtual automatic voluntary return" of Mexican children is due to systemic problems, including DHS officers' failure to understand and implement the TVPRA screening.[78] According to the study, which was based on in-person observation of TVPRA interviews, "[t]he 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."[79] The report concluded that 95.5 percent of unaccompanied Mexican children apprehended by Customs and Border Protection ("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]."[80] 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. The failures in screening inevitably lead to violations of U.S. *non-refoulement* obligations by denying unaccompanied Mexican children a meaningful way to seek protection and articulate their fears of persecution or torture if repatriated.

Furthermore, the Department of Homeland Security's leaked proposal to deny TVPRA protections to children arriving alone in the United States to rejoin family increases the vulnerability of these children. If treated as accompanied children, these individuals can be provided with formal removal orders through expedited removal, without a requirement that they be provided a hearing or counsel, and can be subject to all the consequences of a formal removal order (ban on reentry, criminal prosecution if they do reenter, etc.).

The U.N. Secretary-General recently called upon States to ensure that unaccompanied migrant children are provided with "an individualized, case-by-case, comprehensive assessment of their status and protection needs" conducted "in a child-rights-friendly manner by qualified professionals."[81] The current system in place in the United States—rather than providing the careful, rights-protective and individualized assessment called for by the Secretary-General—leads to the rapid return of unaccompanied Mexican children who may have claims to remain in the United States and may face danger upon their repatriation. The U.N. High Commissioner on Human Rights' report on migrants in transit recently reaffirmed the importance of protecting the principle of *non-refoulement* by ensuring that removal orders are "only [] issued

following consideration of individual circumstances with adequate justification in accordance with the law and international human rights standards."[82]

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All asylum seekers, regardless of where they are from or whether they are children arriving alone or with their families, should be afforded their human right to seek asylum. To ensure that the United States provides asylum seekers with this essential opportunity and does not violate its *non-refoulement* obligations, the U.S. government must correct its screening processes at the border, which in practice lead to the rapid removal of parents and children with *bona fide* asylum claims. Border officials must be trained to honor and implement U.S. obligations under domestic and international law so that asylum seekers are not deported to danger without even the opportunity to present asylum claims to an independent authority.

III. Detention of Families and Children

Every year, the U.S. Department of Homeland Security imprisons hundreds of thousands of non-citizens in administrative immigration detention. In the summer of 2014, however, in response to the increased number of Central Americans arriving at the U.S.-Mexico border, the U.S. government dramatically expanded its detention of immigrant families, including those with young children. Prior to the summer of 2014, the United States had largely abandoned the practice of detaining immigrant families, maintaining only one residential shelter for immigrant families in Pennsylvania with capacity for 96 people. But in June 2014, the government abruptly reversed course, announcing plans to expand family detention. Currently, the government is operating family detention facilities in Karnes County, Texas, with almost 600 beds, run by the GEO private prison company, and in Dilley, Texas, with 2,400 beds, which is operated by the largest private prison company in the United States—Corrections Corporation of America, now known as CoreCivic. The majority of the families detained in these facilities are Central American women and children who have fled extreme violence in their countries and are seeking political asylum.

In 2016, the U.S. government expanded its use of detention for asylum seekers, with approximately 3,600 mothers and children detained each day, the majority of whom fled violence in Central America. The Trump administration has signaled that it will continue and expand the use of detention for families seeking protection in the United States. The January 25, 2017 executive order on border security calls for the termination of what President Trump refers to as "catch and release," requiring the continued detention of apprehended asylum seekers. According to news reports, President Trump plans to expand the detention of immigrant families, and the Department of Homeland

Security has allegedly already identified an additional 20,000 detention beds for asylum seekers[83].

International human rights law strongly disfavors the use of immigration detention, particularly for asylum seekers and children. Detention may exacerbate psychological problems for individuals who have fled trauma and deny them the opportunity to recover. In addition, detention harms children's health, including by negatively impacting their physical and psychological development, which may create long-lasting effects that plague once-detained children for their entire lives. Being held in a prison-like setting, even for a short period of time, can cause psychological trauma for children and asylum seekers and increase their risk factor for future mental disorders. Indeed, this Commission has previously recognized the "terrible psychological impact that detention can have" for children. Indeed, the U.N. Special Rapporteur on torture, Juan E. Méndez, said in 2015, "The detention of children is inextricably linked – in fact if not in law – with the ill-treatment of children, owing to the particularly vulnerable situation in which they have been placed that exposes them to numerous types of risk." In addition to the devastating impact of detention upon children and asylum seekers generally, reports of conditions in family detention centers raise alarming concerns: there have been allegations of abusive conditions at the different family detention facilities, including sexual abuse, threats by guards to separate mothers from their children, retaliation against mothers for engaging in actions to protest their detention, and inadequate mental health and medical care. After a lawsuit by advocacy groups including the ACLU, in August 2016, a federal judge ordered the release of video stills and expert testimony related to detention conditions at the short-term facilities, operated by Customs and Border Protection, at which asylum-seeking families are held when apprehended.[84] The conditions at these facilities, long a subject of complaint and concern for migrants and advocates, were condemned by experts for the plaintiffs. One expert wrote that, in his 35 years of experience working in correctional facilities, he had "never been in one that treats those confined in a manner that the CBP treats detainees."[85]

When the U.S. government began detaining families en masse in mid-2014, it did so pursuant to a blanket "no-release" policy, the express purpose of which was to send a deterrent message to other Central Americans who might be considering migrating to the United States. As a result, many women and children remained in detention even though they were eligible for release on bond or recognizance and most had family members or friends residing in the United States who have offered them a place to live and support while their asylum cases are pending. In December 2014, the ACLU challenged this policy in federal court, seeking a preliminary injunction to stop the government from detaining these families for deterrence purposes. The district court concluded that the ACLU likely to succeed on this claim and blocked the government from locking up families for deterrence purposes, requiring instead that their detention be based on a

finding of danger or flight risk. Ultimately, the government announced that it would cease using deterrence as a basis for detention, but it continues to detain families, including those who are unable to pay high bonds, and it often requires families who are released to agree to wear painful and humiliating ankle monitors. Although some families were able to secure release in 2015 and 2016, after the *Flores* litigation reinforced that accompanied children should be released from detention as soon as possible, advocates are concerned that this practice may be short-lived given the renewed focus on detention, previewed by the Trump Administration.

Despite widespread advocacy about the harmful effects of detention on asylum seekers and children, the U.S. government has maintained family detention and continues to defend these practices in litigation. As noted above, the *Flores* settlement agreement created nationwide standards requiring that immigrant children be held in the least restrictive setting appropriate to their age and be released from custody without unnecessary delay to, inter alia, a parent, legal guardian, adult relative, individual specifically designated by the parent. The government has recently taken the position that it does not apply to children who are accompanied by their parents and therefore does not limit or otherwise restrict the detention of accompanied children. In February 2015, *Flores* class counsel filed a motion to enforce the *Flores* agreement on the ground that the extant family detention practices violated the children's rights to be placed in a non-secure, licensed facility while in custody and the government's refusal to release children with their parents violated the children's right to family unification. In July 2015, the district court issued an injunction finding that the *Flores* agreement applies to all children, including those who are accompanied by their parents, sets clear limits on the detention of children in U.S. immigration custody, and clearly articulates a preference for release to a parent over another relative or community sponsor; thus children should not be detained in unlicensed family detention centers like those in Karnes and Dilley, Texas, beyond a brief period of time and parents should be released together with their children whenever possible. In response, the government sought an expedited appeal, arguing that the injunction should be reversed because, inter alia, it needs to be able to use expedited removal against families and, in its view, the expedited removal statute requires that individuals be detained pending a positive credible fear determination. In fact, however, the government is neither compelled to place families—or any asylum seeker—in expedited removal proceedings, nor must it detain them throughout the expedited process should it choose to use that process. Thus, the government's arguments against placing limits on the detention of children are wholly unfounded. The Ninth Circuit agreed with the district court that accompanied children were covered by the Flores settlement; however, it found that their parents were not entitled to release.

In the past, the United States has supported the Universal Periodic Review (UPR) recommendations that it "reconsider alternatives to detention" (rec. 212), "investigate

carefully each case of immigrants' incarceration" (rec. 183), and "adapt the detention conditions of immigrants in line with international human rights law" (rec. 184). In its response to the 2015 UPR recommendations, the United States claims that we "actively utilize alternatives to detention where appropriate, and are working to shorten detention families may face while their immigration proceedings are resolved. Conditions at Family Residential Centers are continually being evaluated and improved." However, despite recognizing the importance of those fundamental principles, the U.S. government's expansion and continued use of family detention directly contravenes the UPR recommendations and its obligations under international human rights law. The new suggestion that families be separated—perhaps for the same deterrence rationale the Obama administration used to justify no-bond detention—is deeply disturbing from a moral, humanitarian, and human rights law perspective.

IV. Legal Representation

Even individuals who receive an immigration hearing, however, continue to be denied critical human rights protections—notably, legal representation. International law recognizes the importance of legal representation and assistance, including in deportation proceedings and for migrant unaccompanied children in particular.[86] Although the U.S. Supreme Court has recognized the "drastic deprivation"[87] that deportation may entail for individuals who face persecution or torture in their home countries, current U.S. law fails to provide a right to legal representation to all persons facing deportation regardless of their wealth. Instead, only those who can afford counsel can typically access it.

The Supreme Court interpreted the Sixth Amendment to the U.S. Constitution to establish a right to appointed counsel in most criminal cases over fifty years ago in *Gideon v. Wainwright*.[88] Further strengthening this right, the Supreme Court held over forty years ago in *Argersinger v. Hamlin* that the Constitution prohibits a criminal prosecution resulting in *any* jail sentence, even for one day, without appointed counsel.[89] Although government-funded defense services remain deeply flawed in their delivery of adequate representation, fifty years of U.S. case law have made clear that the right to appointed counsel plays a critical role as we strive to ensure that indigence is not an impediment to justice in our criminal system.

The operation of the federal government's deportation system stands in stark contrast to the Supreme Court's pronouncements in cases such as *Gideon*. Every day, immigration courts permanently separate people from their families, deport refugees who fled persecution or torture, and impose other consequences far more dire than a few days in prison. Yet they do so without affording immigrants the basic safeguard of appointed counsel.

There should be no dispute that immigrants often suffer significant harm because of this critical gap in available legal representation. A recent study of New York immigration courts showed that immigrants who are compelled to proceed without representation are six times more likely to lose their cases than those who have counsel.[90] While DHS always pays for an attorney to represent itself in removal proceedings, hundreds of thousands of immigrants, including children and detained asylum seekers, must defend against deportation without legal representation. A legal system that asks immigrants with no legal training to defend themselves in such a complex proceeding will fail to protect the human right to a fair hearing and also lead to violations of *non-refoulement* obligations where unrepresented asylum seekers cannot adequately present and support their claims.

While legislators have advanced proposals for the appointment of counsel for children, persons with serious mental disabilities, and other vulnerable groups, and a federal judge in California ordered the government to provide appointed counsel to individuals with mental disabilities who are detained in three states, the U.S. government continues to deport noncitizens who lacked representation in their deportation proceedings. [91]At the same time, the U.S. government continues to deport Mexican and Central American families with children without necessary safeguards.[92]

In July 2014, the ACLU and other advocacy organizations filed a lawsuit challenging the U.S. government's failure to provide counsel for children facing removal.[93] Children as young as five or six years old have been forced to represent themselves in notoriously complex legal proceedings without assistance, a human rights violation this lawsuit sought to remedy.[94] However, the Ninth Circuit issued a decision ruling against the child plaintiffs on jurisdictional grounds.[95] While the Obama administration has announced limited programs to provide legal assistance to some youth facing deportation hearings,[96] these programs do not come close to meeting the urgent need for legal representation for all children whom the government wants to deport.[97] In the meantime, children continue to appear alone in court every day.

The gap in legal representation is particularly stark for asylum seekers and other immigrants whom DHS chooses to detain, an issue of concern recently highlighted by the Inter-American Commission on Human Rights, including after its fact-finding visit to the United States.[98] Approximately 84% of immigration detainees are unrepresented in immigration court,[99] a crisis that the federal government has previously acknowledged.[100] In the absence of government-funded legal services it is inevitable that large numbers of people will go through immigration proceedings without legal assistance given the high cost of legal representation and the extremely limited availability of assistance in the remote areas where many detention centers are located.[101] Immigration detainees are often incarcerated far from their families and from legal service providers who could

provide representation at an affordable rate. Because phone services in detention facilities are limited, expensive, and often non-operational, many attorneys decline to represent immigration detainees because they cannot afford the time and expense needed to communicate with their clients.[102]

The impediments to representation, stemming from the expansive U.S. immigration detention system, have deprived families and children of a fair hearing in immigration court. In August 2014, the ACLU and other advocacy groups filed a lawsuit to challenge the truncated and accelerated asylum proceedings at a new makeshift detention facility that existed in Artesia, New Mexico.[103] The policies in place at Artesia effectively precluded women and children from contacting and receiving assistance from attorneys while detained in this remote facility. As documented in the complaint, immigration officers at Artesia actively obstructed access to counsel by severely limiting phone access; denying attorneys a confidential meeting space with their clients; refusing to allow attorneys and potential clients to meet; and by misinforming detainees about the role of an attorney. For example, an immigration officer told a mother seeking asylum that an attorney would facilitate her deportation rather than help her defend against it.[104] While the U.S. government has since closed the Artesia facility, individuals held in facilities throughout the country continue to experience similar barriers to accessing counsel.[105]

Absent a fair hearing where asylum seekers (adults and children) are provided with counsel and a meaningful opportunity to present arguments and evidence, these individuals may be erroneously deported with devastating consequences. In order to respect the human rights of migrants, the United States government should ensure that all persons facing removal are provided with an attorney, at government expense, and the chance to be heard so that asylum seekers are not unjustly deported back to the danger they fled.

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We thank the Commission for its attention to the plight of migrants arriving at the southern U.S. border and endorse the recommendations to the Commission, collectively submitted by the requesters. We further request that the United States publish its written responses to questions presented in today's hearing and participate in the proposed joint working group and meeting of experts so that today's conversations and suggested reforms can continue and materialize. Moreover, given that many of the U.S. government policies and practices to impede asylum seekers from accessing protection have been implemented in partnership with other States, including Mexico, Honduras, Guatemala and El Salvador, we join our colleagues in urging the Commission to convene a

conversation between representatives of these governments and to provide information on the agreements in place that restrict asylum seekers from seeking protection. Should you have further questions regarding the information in this submission, please contact Sarah Mehta (smehta@aclu.org).

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[1] U.N. Office of the High Commissioner for Human Rights (OHCHR), *Item 2: Annual Report and Oral Update to the 34th session of the Human Rights Council*, 8 Mar. 2017, *available at* http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21316&LangID=E

[2] In this submission, we use the terms "migrant" and immigrant interchangeably to reflect a broader category of persons, including but not limited to refugees and asylum seekers.

[3] For example, 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. 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), 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. 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. U.N. Committee on the Rights of the Child, General Comment No. 6, at para. 84. 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. *Id*. ¶79.

[4] The International Covenant on Civil and Political Rights (ICCPR) guarantees that "[a]n alien lawful in the territory of a State party" cannot be deported except "in pursuance of a decision reached in accordance with the law and shall, except where compelling reasons of national security require otherwise, 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." 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. According to the UN 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, General Comment 32, Right to equality before courts and tribunals and to a fair trial, U.N.Doc CCPR/C/GC/32 (2007), http://www1.umn.edu/humanrts/gencomm/hrcom32.html, para. 19. 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. 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 Pertaining to Human Rights in the Inter-American System, OEA/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. 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 includes the right to a meaningful defense and to be represented by an attorney. 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.

[5] ICCPR, art. 14.

[6] *See, e.g.*, *Yamataya v. Fisher*, 189 U.S. 86, 100-01 (1903).

[7] *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").

[8] United Nations High Commissioner for Refugees ("UNHCR"), Detention Guidelines, 4.1.1 (2012).

[9] Human Rights Commission, General Comment No. 35 on ICCPR Article 9: Liberty and Security of person. *See also* UN Committee on the Rights of the Child (CRC), Committee on the Rights of the Child, The Rights of All Children in the Context of International Migration ¶ 78 (2012), available at http://www.refworld.org/docid/51efb6fa4.html ("States should . . . completely cease the detention of children on the basis of their immigration status."); The United States has signed but not ratified the Convention on the Rights of the Child. Although not directly bound by the terms of the treaty absent ratification, as a signatory the United States may not engage in action that defeats the objectives of the CRC. *See* Vienna Convention on the Law of Treaties, art. 18, May 23, 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679 ("A State is obligated to refrain from acts that would defeat the object or purpose of the treaty when . . . it has signed the treaty"); s*ee also* 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.

[10] Department of Homeland Security, Office of Immigration Statistics, Annual Report, *Immigration Enforcement Actions: 2014*, January 2016, *available at* https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2014.pdf.

[11] 8 U.S.C. § 1326.

[12] ICCPR, art. 13, 14.

[13] 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.

[14] *Id*. Guideline 9 ¶¶ 4 & 6.

[15] 8 U.S.C. § 1225(b)(1)(A)(ii).

[16] Sarah Mehta, Human Rights Program, American Civil Liberties Union, *American Exile, Rapid Deportations That Bypass the Courtroom* (2014), *available at* https://www.aclu.org/files/assets/120214-expeditedremoval_0.pdf.

[17] John Kelly, Secretary, Department of Homeland Security, Memorandum, "Implementing the President's Border Security and Immigration Enforcement Improvements Policies," Feb. 17, 2017, *available at* http://www.mcclatchydc.com/news/politics-government/white-house/article133607789.ece/BINARY/DHS%20implementation%20border%20security%20policies.

[18] *See generally*, Sarah Mehta, Human Rights Program, American Civil Liberties Union, *American Exile, Rapid Deportations That Bypass the Courtroom* (2014), *available at* https://www.aclu.org/files/assets/120214-expeditedremoval_0.pdf.

[19] Universal Declaration of Human Rights (UDHR), *supra* n.564, art. 14.

[20] American Convention on Human Rights, art. 22(8); *see also* 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.

[21] OHCHR, *supra* note 8, Guideline 7.

[22] *See* American Exile, *supra* note 14.

[23] 8 C.F.R. § 235.3(b)(4).

[24] *See* 8 U.S.C. § 1225(b)(1)(A)(i), 1252(e)(2)(B); 8 C.F.R. § 235.3 (b)(2)(ii).

[25] The regulations governing expedited removal require that DHS officers use a form that includes a paragraph explaining asylum to individual processed for expedited removal. 8 C.F.R. 235.3(b)(2)(i).

[26] *See* American Exile, *supra* note 14.

[27] Convention relating to the Status of Refugees, 189 U.N.T.S. 150, entered into force April 22, 1954 (implemented in US 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.

[28] Interview with Hilda, Los Angeles, CA, March 20, 2014 (on file with the ACLU).

[29] *See Matter of A-R-C-G*, 26 I&N Dec. 388 (BIA 2014).

[30] *See* UNHCR, "Deported children face deadly new dangers on return to Honduras" Jan. 29, 2015, *available at* http://www.unhcr.org/54ca32d89.html; Sibylla Brodzinsky & Ed Pilkington, *The Guardian*, "US government deporting Central American migrants to their deaths," October 12, 2015, *available at* http://www.theguardian.com/us-news/2015/oct/12/obama-immigration-deportations-central-america; Roberto Lovato, *Al Jazeera America* "Deported to death: The tragic journey of a Salvadoran immigrant," July 11, 2015, *available at* http://america.aljazeera.com/articles/2015/7/11/deported-to-death-the-tragic-journey-of-an-el-salvadoran-immigrant.html; Esther Yu-Hsi Lee, *thinkprogress.org*, "Constantino Morales Warned He Could Be Killed If He Was Deported. Then He Was," Apr. 9, 2015, *available at* http://thinkprogress.org/immigration/2015/04/09/3644411/constantino-morales-death-after-deportation/; UNITED STATES COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM (USCIRF), BARRIERS TO PROTECTION: THE TREATMENT OF ASYLUM SEEKERS IN EXPEDITED REMOVAL (2016), *available at https://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf*; *see also* Department of Homeland Security, Office of Inspector General, *Streamline: Measuring Its Effect on Illegal Border Crossing* (May 2015) ("Border Patrol does not have guidance on using Streamline for aliens who express fear of persecution or return to their home countries, and its use of Streamline with such aliens is inconsistent and may violate U.S. treaty obligations."); Borderland Immigration Council, *Discretion to Deny: Family Separation, Prolonged Detention, and Deterrence of Asylum Seekers* (2016).

[31] UNITED STATES COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM (USCIRF), REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL (2005), *available at* http://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/Volume_I.pdf

[32] USCIRF, EXPEDITED REMOVAL STUDY REPORT CARD: 2 YEARS LATER (2007), *available at* http://www.uscirf.gov/sites/default/files/resources/stories/pdf/scorecard_final.pdf

[33] Joshua Partlow, *The Washington Post*, "U.S. border officials are illegally turning away asylum seekers, critics say," (Jan. 16, 2017), *available at* https://www.washingtonpost.com/world/the_americas/us-border-officials-are-illegally-turning-away-asylum-seekers-critics-say/2017/01/16/f7f5c54a-c6d0-11e6-acda-59924caa2450_story.html?postshare=9711484609307204&tid=ss_tw&utm_term=.d6b23ea676cc.

[34] OHCHR, *supra* note 8, Guideline 9, ¶ 6.

[35] The federal government chooses to prosecute that crime in thousands of cases each year. Illegal entry and reentry are the most prosecuted federal crimes within the federal criminal justice system. See Transitional Records Access Clearinghouse (TRAC) "At Nearly 100,000, Immigration Prosecutions Reach All-time High in FY 2013" Nov. 25, 2013, *available at* http://trac.syr.edu/immigration/reports/336/.

[36] Interview with Soledad, San Francisco, CA (on file with the ACLU).

[37] Data received by *The New York Times* from Immigration and Customs Enforcement suggests that 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. FY 2013 DHS data provided to The New York Times through a FOIA request, analyzed by the ACLU (on file with the ACLU).

[38] Refugee Convention, art. 31.

[39] 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.

[40] 8 U.S.C. § 1225(b)(1)(B). Individuals with certain criminal convictions or with prior removal orders are not eligible for asylum and are therefore put into a process called "reinstatement of removal." The process for identifying asylum claims in that population is similar to the credible fear interview process, but must meet a higher standard of proof by showing a "reasonable fear" of future persecution or torture. 8 C.F.R. §§ 208.31; 241.8(e); *See also* American Exile, *supra* note 14 at 19–20.

[41] 8 C.F.R. § 208.30(d).

[42] 8 U.S.C. § 1225(b)(1)(B); 8 C.F.R. § 208.30.

[43] 8 U.S.C. § 1225(b)(1)(B);(iii)(III); 8 C.F.R. § 208.30(g)(2); 8 C.F.R. § 1208.30(g)(2).

[44] 8 U.S.C. § 1225(e).

[45] *Id.*

[46] *Castro v. Department of Homeland Security, et al*., 16-1339 (3d Cir. 2016).

[47] 8 U.S.C. § 1225(b)(1)(B)(v).

[48] Department of Homeland Security, Memorandum to All Asylum Office Personnel Re: Release of Updated Asylum Division Officer Training Course Lesson Plans, Credible Fear of Persecution and Torture Determinations, and Reasonable Fear of Persecution and Torture Determinations, Feb. 13, 2017.

[49] *See generally* Tahirih Justice Center, Summary of February 13, 2017 Asylum Division Lesson Plan Implementing Executive Orders: Possible Impacts on Survivors of Domestic and Sexual Violence (March 6, 2017).

[50] *See supra* note 45. Before these individuals can get judicial review the merits of their claims, they must counter the government's argument that the court lacks jurisdiction even to consider these claims.

[51] National Public Radio, "Migrants Choose Arrest in Canada Over Staying In The U.S." Feb. 17, 2017, *available at* http://www.npr.org/2017/02/17/515662976/migrants-choose-arrest-in-canada-over-staying-in-the-u-s.

[52] "[C]hildren seeking asylum, particularly if they are unaccompanied, are entitled to special care and protection." Office of the UN High Commissioner for Refugees, Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum (Feb. 1997); *see also* American Convention, art. 19 (entitling children to special protection); UN Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2 1990, Preamble.

[53] *Perez-Funez v. INS,* 619 F. Supp. 656 (C.D. Cal. 1985)

[54] *Flores v. Reno*, No. CV 85-4544-RJK (Px) (C.D. Cal. Jan. 17, 1997)

[55] 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.").

[56] In 2012, for example, 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. M. Aryah Somers, Draft, *Preliminary Program Highlights: Fulbright Scholar Research in Guatemala*, at 7, August 2012 (on file with ACLU). 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.

[57] Executive Order, "Protecting the Nation from Foreign Terrorist Entry Into the United States," (Jan. 27, 2017), *available at* https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states.

[58] John Kelly, Secretary, Department of Homeland Security, Memorandum, "Implementing the President's Border Security and Immigration Enforcement Improvements Policies," Feb. 17, 2017, *available at* http://www.mcclatchydc.com/news/politics-government/white-house/article133607789.ece/BINARY/DHS%20implementation%20border%20security%20policies.

[59] *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 unaccompanied children survive. *See, e.g.,* 8 U.S.C. §§ 1232(a)(2)(B), (a)(5)(D).

[60] *Id*.

[61] 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.

[62] A limited number of the protections set forth in *Perez-Funez* injunction and the *Flores* settlement are currently enshrined in 8 C.F.R. § 236.3, however. In particular, this regulation requires that 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 a hearing before an Immigration Judge. 8 C.F.R. § 236.3.

[63] *Flores v. Lynch*, D.C. No. 2:85-cv-04544- DMG-AGR (9th Cir. July 6, 2016), *available at* https://cdn.ca9.uscourts.gov/datastore/opinions/2016/07/06/15-56434.pdf.

[64] Reuters, "Trump administration considering separating women, children at Mexico border ,"(March 4, 2017) *available at* http://www.reuters.com/article/us-usa-immigration-children-idUSKBN16A2ES

[65] *See* 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; 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, art 9(1), (1989).

[66] Homeland Security Act of 2002, Pub. L. 107-296, Stat. 2135.

[67] *See generally*, Betsy Cavendish and Maru Cortazar, APPLESEED, CHILDREN AT THE BORDER: THE SCREENING, PROTECTION AND REPATRIATION OF UNACCOMPANIED MEXICAN MINORS (Appleseed Report) (2011), *available at* http://appleseednetwork.org/wp-content/uploads/2012/05/Children-At-The-Border1.pdf.

[68] *See* 8 U.S.C. §§ 1232(a)(3), 1232(b).

[69] *See* 8 U.S.C. § 1232(a)(5)(D)(i); *see also* 8 U.S.C. § 1229a.

[70] 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.

[71] 8 U.S.C. § 1232(a)(2), (a)(5)(D)(i).

[72] *See* UNHCR, "Findings and Recommendations Relating to the 2012-2013 Missions to Monitor the Protection Screening of Mexican Unaccompanied Children Along the U.S. Mexico Border," (June 2014); *see also* Betsy Cavendish and Maru Cortazar, "Children at the Border: The Screening, Processing and Repatriation of Mexican Minors," (2011), available at: http://appleseednetwork.org/wp-content/uploads/2012/05/Children-At-The-Border1.pdf. The ACLU's own investigation on summary removals and returns at the U.S. border includes interviews with unaccompanied Mexican children and will be released this winter.

[73] U.S. Customs and Border Protection, *Southwest Border Unaccompanied Alien Children*, *available at* http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children (accessed October 14, 2014); *see also* Betsy Cavendish and Maru Cortazar, APPLESEED, CHILDREN AT THE BORDER: THE SCREENING, PROTECTION AND REPATRIATION OF UNACCOMPANIED MEXICAN MINORS at 49 (Appleseed Report) (2011), *available at* http://appleseednetwork.org/wp-content/uploads/2012/05/Children-At-The-Border1.pdf. Relatedly, figures from official Mexican immigration sources estimate that in 2013, 14,078 Mexican unaccompanied children were repatriated from the United States. Appleseed, *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).

[74] 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 October 14, 2014).

[75] 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"), at 14, June 2014 (on file with the ACLU). 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

[76] Interview on file with the ACLU, February 28, 2014, Agua Prieta, Sonora, Mexico.

[77] Betsy Cavendish and Maru Cortazar, APPLESEED, CHILDREN AT THE BORDER: THE SCREENING, PROTECTION AND REPATRIATION OF UNACCOMPANIED MEXICAN MINORS (Appleseed Report) (2011), *available at* http://appleseednetwork.org/wp-content/uploads/2012/05/Children-At-The-Border1.pdf; 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).

[78] UNHCR Confidential Report.

[79] *Id*. at 36.

[80] *Id*. at 14.

[81] 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. 79 (d)(August 7, 2014).

[82] United Nations Human Rights Council, SITUATION OF MIGRANTS IN TRANSIT, REPORT OF THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, Jan. 27, 2016, at 8, *available at* https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/012/91/PDF/G1601291.pdf?OpenElement

[83] Chris Hayes and Brian Montopoli, *MSNBC*, "Exclusive: Trump admin. plans expanded immigrant detention" (Mar. 3, 2017), *available at* http://www.msnbc.com/all-in/exclusive-trump-admin-plans-expanded-immigrant-detention

[84] *Doe v. Johnson*, No. 4:15-cv-00250-TUC-DCB (D. Az. 2016).

[85] Declaration of Eldon Vail in Support of Plaintiffs' Motion for Preliminary Injunction, *Doe v. Johnson*, No. 4:15-cv-00250-TUC-DCB (D. Az. Aug. 17, 2016).

[86] *See supra* note 2; *see also*, OHCHR, *supra* note 8 at para. 14 (on "providing migrants in detention with unconditional access to competent, free and independent legal aid as well as any necessary interpretation services"); 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), art. 37(d) ("Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action."); Committee on the Rights of the Child, General Comment No. 6, Treatment of Unaccompanied and Separated Children Outside of Their Country, CRC/GC/2005/6 at para. 21 (Sept. 1, 2005) ("unaccompanied children are referred to asylum procedures or other administrative or judicial proceedings, they should also be provided with a legal representative") and paras. 33, 36, 69, *available at* http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fGC%2f2005%2f6&Lang=en.

[87] *Woodby v. INS*, 385 U.S. 276, 285 (1966).

[88] *Gideon v. Wainwright*, 372 U.S. 335 (1963).

[89] *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) ("We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial").

[90] STUDY GROUP ON IMMIGRATION REPRESENTATION, NEW YORK IMMIGRANT REPRESENTATION STUDY REPORT: PART II, ACCESSING JUSTICE II: A MODEL FOR PROVIDING COUNSEL TO NEW YORK IMMIGRANTS IN REMOVAL PROCEEDINGS, 2012, p. 1., *available at* http://www.cardozolawreview.com/content/denovo/NYIRS_ReportII.pdf; *see also* Ramji-Nogales et al., "Refugee Roulette: Disparities in Asylum Adjudication," 60 Stanford Law Review 295, 340 (2007) (showing represented asylum-seekers are three to six times more likely to win asylum).

[91] *Franco-Gonzalez v. Holder*, No. CV 10–02211 DMG (DTBx), 2013 WL 8115423 (C.D. Cal. Apr. 23, 2013).

[92] This summer alone, the U.S. government deported almost 300 women and children from two facilities (in Texas and New Mexico, respectively). Cindy Carcamo, "Nearly 300 women, children deported from immigration detention centers," THE LOS ANGELES TIMES (Aug. 21, 2014), *available at* http://www.latimes.com/nation/nationnow/la-na-nn-ff-new-mexico-immigration-deportation-20140821-story.html.

[93] *J.E.F.M. v. Holder*, Case 2:14-cv-01026-TSZ (W.D. Wa. July 9, 2014), *available at* https://www.aclu.org/immigrants-rights/jefm-v-holder-complaint.

[94] 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-facedeportation.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. 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.")

[95] *See J.E.F.M. v. Lynch*, D.C. No. 2:14-cv-01026-TSZ (9th Cir. Sept. 10, 2016).

[96] For example, the U.S. government recently announced plans to provide $9 million to fund attorneys for child refugees, with the intention of providing initial representation for approximately 2,600 children arriving at the southern U.S. border. Miriam Jordan, *U.S. Government to Provide $9 Million for Legal Aid to Child Migrants*, The Wall Street Journal (Sept. 30, 2014), *available at* http://online.wsj.com/articles/u-s-government-to-provide-9-million-for-legal-aid-to-child-migrants-1412106221.

[97] In June 2015, the Government issued a Request for Proposals as part of an additional program that would fund direct representation of certain children who were previously in ORR custody and are in immigration proceedings in one of nine cities. Department of Health and Human Services, Legal Service Providers Solicitation Notice, RFP15-233-SOL-00264 (Jun. 15, 2015), available at https://www.fbo.gov/index?s=opportunity&mode=form&id=a0ad02223e2e3aa94eda83de4b4891f8&tab=core&_cview=1. Yet, this and other government-funded counsel programs have simply not met the need for legal representation. As of September 2015 (the most recent publicly-available data), children in more than 32,700 pending immigration cases remained unrepresented. Transactional Records Access Clearinghouse, Juveniles — Immigration Court Deportation Proceedings, http://trac.syr.edu/phptools/immigration/juvenile/ (last visited Oct. 16, 2015).

[98] Inter-American Commission on Human Rights, Human Rights Situation of Refugee and Migrant Families and Unaccompanied Children in the United States of America, OAS/Ser.L/V/II. 155, Doc. 16, July 24, 2015, *available at* https://www.oas.org/en/iachr/reports/pdfs/Refugees-Migrants-US.pdf ; Inter-American Commission on Human Rights, Press Release, "IACHR Wraps Up Visit to the United States of America," (Oct. 2, 2014) ("The Commission notes that there is a shortage of lawyers who are willing and able to provide legal representation at low or no cost to the families detained, and likewise notes the difficulties expressed by organizations and individual attorneys who represent detained families in entering the center and being able to bring in with them tools such as phones and computers in order to work more efficiently on cases."), *available at* http://www.oas.org/en/iachr/media_center/PReleases/2014/110.asp.

[99] VERA INSTITUTE FOR JUSTICE, IMPROVING EFFICIENCY AND PROMOTING JUSTICE IN THE IMMIGRATION SYSTEM: LESSONS FROM THE LEGAL ORIENTATION PROGRAM, May 2008, at 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.

[100] Executive Office of Immigration Review Statistical Year Book FY2010 at G1 (calling the large number of individuals representing themselves as "of great concern..."), *available at* http://www.justice.gov/eoir/statspub/fy10syb.pdf; DOJ's Executive Office for Immigration Review has noted the challenges created by non-represented cases for court efficiency, and the National Association of Immigration Judges wrote to members of Congress that "when noncitizens are represented by attorneys, Immigration Judges are able to conduct proceedings more expeditiously and resolves cases more quickly." Charles H. Kuck, Legal Assistance for Asylum Seekers in Expedited Removal: A Survey of Alternative Practices, p. 8, in U.S. COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM, ASYLUM SEEKERS IN EXPEDITED REMOVAL (2005), *available at* http://www.uscirf.gov/images/stories/pdf/asylum_seekers/legalAssist.pdf;

Letter from Dana Marks, National Association of Immigration Judges, to Members of Congress, March 22, 2013 (on file with the ACLU); *see also* Jennifer Ludden, "Immigration Crackdown Overwhelms Judges," National Public Radio, February 9, 2009, transcript, *available at* http://www.npr.org/templates/transcript/transcript.php?storyId=100420476.

[101] HUMAN RIGHTS FIRST, JAILS AND JUMPSUITS, October 2011, p. 31, *available at* http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Jails-and-Jumpsuits-report.pdf (finding that 40 percent of all detention facilities are located more than 60 miles from an urban center).

[102] NATIONAL INSTITUTE FOR IMMIGRANT JUSTICE, ISOLATED IN DETENTION: LIMITED ACCESS TO LEGAL COUNSEL IN IMMIGRATION DETENTION FACILITIES JEOPARDIZES A FAIR DAY IN COURT, September 2010, *available at* *https://www.immigrantjustice.org/isolatedindetention*. The ACLU is currently litigating the issue of access to phone services for detained immigrants. *See* ACLU of Northern California, "ACLU Sues ICE Over Unfair Telephone Policy," Dec. 19, 2013, https://www.aclunc.org/news/aclu-sues-ice-over-unfair-telephone-policy.

[103] *M.S.P.C. et al. v. Johnson et. al*., Case 1:14-cv-01437 (D.D.C. Aug. 22, 2014), *available at* https://www.aclu.org/sites/default/files/assets/filed_complaint_1.pdf.

[104] *Id.* at para. 117.

[105] *See, e.g*., *Lyon v. ICE*, 13-cv-5878 (N.D. Cal. filed Dec. 19, 2013).