



Recommendations for Reforming our Immigration Detention System and Promoting Access to Counsel in Immigration Proceedings

RECOMMENDATIONS FOR REFORMING OUR IMMIGRATION DETENTION SYSTEM AND PROMOTING ACCESS TO COUNSEL IN IMMIGRATION PROCEEDINGS

The Constitution Project

1200 18th Street, NW Suite 1000

Washington, DC 20036

(202) 580-6920 (tel)

(202) 580-6929 (fax)

info@constitutionproject.org

www.constitutionproject.org

Copyright © 2009 by the Constitution Project. All rights reserved. No part may be reproduced, stored in a retrieval system, or transmitted, in any form, or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior permission of the copyright holders.

For information about this report, or any other work of the Constitution Project, please visit our website at www.constitutionproject.org or e-mail us at info@constitutionproject.org.

Table of Contents

Preface	iv
Statement on Immigration Detention and Access to Counsel	1
I. Immigration Removal Proceedings and Detention	2
A. Detention for Non-Citizens Subject to Expedited Removal	3
B. Detention for Non-Citizens Subject to Standard Removal Proceedings	5
C. Detention for Non-Citizens Who Have Received a Final Removal Order	7
II. Access to Counsel	8
A. Aspirational Goal for Government-Funded Counsel	8
B. Short-Term Recommendations for Government-Funded Counsel	8
C. Recommendations for Facilitating <i>Pro Bono</i> Representation	10
D. Recommendations for Removing Barriers to the Attorney-Client Relationship	10
III. Members of the Liberty and Security Committee Endorsing the Constitution Project's Statement	11
Background Report	13
Introduction	13
I. Immigration Detention	13
A. Immigration Detention Facilities and Conditions of Detention	15
B. Removal Process	16
C. Detention of Non-Citizens Subject to Expedited Removal	17
D. Detention of Non-Citizens in Standard Removal Proceedings	21
E. Detention of Non-Citizens Who Have Received Final Removal Orders	26
II. Access to Counsel	28
A. Representation Rates	29
B. Opportunities for Appeal	30
C. Constitutional Principles Governing Access to Counsel	31
D. Recommendations for Reform with Respect to Access to Counsel	32
E. Recommendations for Facilitating <i>Pro Bono</i> Representation	34
F. Recommendations for Removing Barriers to the Attorney-Client Relationship	36
Conclusion	37
Endnotes	38

PREFACE

The Constitution Project is an independent think tank that promotes and defends constitutional safeguards. We create coalitions of respected leaders from across the political spectrum who issue consensus recommendations for policy reforms on a variety of legal and constitutional issues. The Project's Criminal Justice Program seeks to counter a broad-based effort to deny fundamental day-in-court rights and due process protections to those accused of crimes. The Project's Rule of Law Program addresses threats to our constitutional system and our civil liberties.

The Rule of Law Program's Liberty and Security Committee comprises an ideologically diverse group of prominent Americans who work with the Constitution Project to recommend ways to preserve individual rights while also ensuring public safety. The Committee addresses a wide range of issues, including the ones discussed in this report: immigration detention and access to counsel. The Constitution provides important guarantees to non-citizens, including due process, *habeas corpus* and equal protection of the law.

In recent years, the United States has witnessed a dramatic increase in the number of non-citizens held in immigration detention. This rapidly increasing population has drawn attention to the poor conditions of the nation's immigration detention facilities and the barriers immigrant detainees face in seeking representation of counsel in removal proceedings. These problems raise a variety of constitutional and policy concerns.

This report examines expedited removal, mandatory pre-removal detention, and post-removal detention and suggests much-needed agency-level and congressional reforms.

The report reflects the belief that an effective immigration enforcement strategy requires a commitment to the rule of law and respect for constitutional rights. Specifically, the report finds that legal representation is essential to ensuring that basic due process rights are upheld. The important and legitimate role of immigration enforcement is undermined when we fail to provide these fundamental protections. The Constitution Project's Liberty and Security Committee issues this report and accompanying recommendations in response to these concerns.

As this report goes to press, the Obama administration has just announced that it will reform detention standards. The promised reforms focus on improving the conditions of detention and call for the adoption of new guidelines on alternatives to detention. We hope that administration officials and members of Congress will follow the recommendations that follow in this report in developing those new guidelines.

This publication contains two parts. The first is a statement urging policy reforms, which has been endorsed by the members of the Constitution Project's Liberty and Security Committee listed at the end of the statement. The second part is a background report, which sets forth a more detailed legal and policy analysis supporting the Committee's recommendations for the use of immigration detention. A draft of this background report was made available to the Committee members as they developed their consensus statement. However, the Committee members have not been asked to endorse the specific language of the background report.

The Constitution Project sincerely thanks David Pinsky and Alissa Jijon, associates at Covington & Burling LLP, and Susannah Vance, formerly of Covington and now at Lutheran Immigration and Refugee Services, for sharing their expertise in immigration law and for their invaluable work in researching and drafting this report. We are also grateful to Becky Monroe, our former colleague, and John Terry Dundon, a Constitution Project Fellow, for their time and dedication to the development of this report.

The Constitution Project also thanks the Atlantic Philanthropies, CS Fund/Warsh-Mott Legacy, Educational Foundation of America, Lawrence and Lillian Solomon Fund, Open Society Institute, Overbrook Foundation, Rockefeller Brothers Fund, and Wallace Global Fund for their support of this report.

-Virginia E. Sloan, President, Sharon Bradford Franklin, Senior Counsel, Laura Olson, Senior Counsel, October 2009

STATEMENT ON IMMIGRATION DETENTION AND ACCESS TO COUNSEL

As the United States increases its immigration enforcement efforts, there is a concurrent growth in the use of immigration detention. Increasing numbers of non-citizens are subject to removal from the United States and to longer periods of confinement in detention facilities while their removal proceedings are pending. Indeed, the number of non-citizens held each day by federal immigration authorities has increased threefold since 1996 due to increasingly restrictive immigration laws and narrower interpretations of those laws by the Department of Homeland Security (“DHS”). Each year, more than 300,000 non-citizens are held in immigration detention in this country. Although DHS has pledged to ensure safe, secure, and humane conditions for the detained, significant reforms are needed to achieve this goal. Moreover, few of these immigration detainees have access to attorneys to help them navigate the U.S. immigration system and ensure that they secure the protections provided under our immigration laws. The important and legitimate role of immigration enforcement is undermined when we fail to provide these fundamental protections.

Despite the nominally “civil”—as opposed to “criminal”—nature of their alleged offenses, non-citizens are often held in state and local jails; others among them may be held in sub-standard, remote facilities. Additionally, recent media coverage has highlighted deficiencies in medical care in immigration facilities, citing 83 deaths in those facilities in the last five years alone. Last year, for example, the *New York Times* reported on the death of Boubacar Bah, a 52-year-old tailor from Guinea, who had overstayed a tourist visa and had been detained pending his removal. After ailing untreated for several days, Bah collapsed in his cell and hit his head on the floor. The fall fractured his skull and caused bleeding in his brain. Despite the severity of his condition, Bah was left shackled and pinned on the floor of the medical unit as he moaned and vomited, and then left in a disciplinary cell for more than 13 hours, unresponsive and foaming at the mouth, before he was taken to the hospital. Bah lingered in a coma for four months before he died. It took five days for detention officials to notify Bah’s family that he was in the hospital.

DHS has statutory authority to detain non-citizens alleged to have violated U.S. immigration laws, and whom it seeks to “remove” or return to their home countries. This includes people who are subject to pending removal proceedings, or, in some cases, those who are waiting for the United States to effect removal pursuant to an already issued order. The decision to detain is discretionary in most cases, albeit guided by statutory factors. In some instances, however, detention is required. For example, non-citizens who seek admission to the United States without proper documentation, as well as those inside the country who are not officially admitted or paroled, and who cannot demonstrate continued presence for a two-year period,

may be subject to “expedited removal,” which is a summary process for expelling some non-citizens before they officially enter the United States. As of 1996, all non-citizens subject to expedited removal must be detained. In addition, detention is mandated for some categories of non-citizens (such as those convicted of certain crimes) who are subject to standard removal proceedings.

As outlined below, we, the undersigned members of the Constitution Project’s Liberty and Security Committee (“the Committee”), are deeply concerned about the increasing reliance on and excessive length of immigration detention and about the limited attorney resources available for these cases. While we recognize that immigration detention under certain circumstances serves legitimate public purposes, the Committee believes that too many non-citizens are being held unnecessarily in immigration detention. A proper and effective enforcement strategy must demonstrate a true commitment to the rule of law and respect for fundamental constitutional rights. In light of these concerns, we recommend reforming detention policies in order to make sure that they are streamlined, focused, and consistent with constitutional principles and international instruments signed by the United States. Committee members agree that immigration detention can be made both more humane and more efficient without compromising national security and consistent with effective enforcement of our immigration laws.

In addition, we recommend improving access to counsel for immigration detainees and, more generally, for all non-citizens in removal proceedings, including individuals who are not detained. The laws governing removal are complex and may prove overwhelming for individuals with little or no knowledge of English, especially when held far from their families and other support networks. Unlike criminal defendants, non-citizens in removal proceedings have no general right to government-funded counsel, despite the magnitude of the deprivation at stake. Nearly two-thirds of non-citizens in removal proceedings are unrepresented. Appointed counsel for detainees would benefit both non-citizens and the government. By focusing on the crucial issues in each case, attorneys could make the removal process more efficient and, as a result, less costly. Most importantly, the process would be more just.

I. Immigration Removal Proceedings and Detention

Detention is a common and sometimes necessary feature of U.S. immigration policy, and it is governed by overlapping statutory and regulatory provisions. In this report, we address three principal situations in which non-citizens are subject to detention as part of immigration proceedings: (1) detention for non-citizens subject to expedited removal; (2) detention for non-citizens subject to standard removal proceedings; and (3) detention for non-citizens who have received a final removal order.

A. Detention for Non-Citizens Subject to Expedited Removal

Expedited removal is a summary process for expelling certain groups of non-citizens who have been apprehended before they officially enter the United States. The process takes place in three steps. First, non-citizens in expedited removal undergo an inspection to determine whether they intend to seek relief from removal, such as asylum. Second, assuming the non-citizen does intend to seek such relief, he or she is referred for a “credible fear” interview. Third, if the non-citizen is found to possess a credible fear, he or she is then placed in standard removal proceedings before an immigration judge.

Expedited removal is a process intended to speed up the expatriation of the non-citizen to his or her home country. Although it was designed to benefit non-citizens seeking protection from persecution and torture, it frequently works to their detriment by imposing mandatory detention without regard to legitimate public policy objectives, such as law enforcement and national security. Accordingly, we recommend that the expedited removal process be reformed in the following ways.

First, non-citizens who enter the United States holding valid nonimmigrant visas but who also express a fear of persecution or desire to seek asylum should not, solely on that basis, be subject to expedited removal. Presently, these non-citizens are placed into expedited removal proceedings because they are deemed to possess fraudulent immigrant intent. In the Committee’s view, this policy involves a strained reading of the governing law and confuses the meaning of fraudulent intent. A grant of asylum provides a temporary grant of refuge, and does not automatically provide the right to become a lawful permanent immigrant. Thus, the intent to seek asylum is not “immigrant intent” for purposes of the expedited removal analysis because the asylum application process does not provide an immigrant status. We note that this recommendation is not intended to interfere with the application of the Safe Third Country Doctrine. The principle underlying the Safe Third Country Doctrine is that where an asylum applicant could have previously sought protection in another safe country, it is reasonable and appropriate to require the applicant to return and make use of that opportunity. If the government demonstrates that a non-citizen applicant has failed to comply with this doctrine—and if the evidence demonstrates that an applicant has used a nonimmigrant visa in an attempt to circumvent the requirements of this doctrine, then the asylum officer should deny the application.

Second, although we agree with existing DHS practices that require a 48-hour “cooling off” period between a non-citizen’s arrival and his or her credible fear interview, we are concerned that too many applicants are subject to long periods of detention while they await their interviews. We therefore recommend that DHS should amend its credible fear regulation to require that interviews take place no later than two weeks after apprehension.

Third, we recommend the DHS fully utilize its discretionary authority under the expedited removal regulations to parole non-citizens who confront legitimate medical emergencies

while awaiting their credible fear interviews. DHS should implement screening procedures and controls in order to more effectively identify the warning signs of genuine medical emergencies, and these controls should direct screeners to pay particular attention to the elderly and to families with small children.

Fourth, Immigration and Customs Enforcement (“ICE”) should promulgate regulations governing the circumstances under which non-citizens who have received a positive credible fear determination may be paroled pending their hearings before an immigration judge. ICE should direct officers to presume that non-citizens are eligible for parole if they can establish their identities and present credible evidence that they do not pose a risk of flight or a danger to the community.

Fifth, all non-citizens with positive credible fear determinations who have been denied parole should have the right to a prompt appeal. Currently, this right of appeal is available only to some groups of non-citizens, such as those apprehended near a land border, and not to other groups, such as those arriving by air who have been apprehended at an airport. The Committee sees no rational reason to deny considerable numbers of non-citizens important procedural rights because of the mode of transportation they used to enter the United States. Additionally, during the appeal process, administrative decisionmakers should be encouraged to consider and implement alternatives to detention, such as home visits, self-reporting by telephone, or, where appropriate, electronic monitoring devices.

Sixth, DHS should amend its regulations to require that detained non-citizens with no criminal records not be housed with criminal inmates or with other non-citizens who do have criminal histories. If detention facilities are unable to maintain a separation between criminal and non-criminal detainees, those facilities should not be used for immigration detention purposes.

Seventh, DHS should undertake to clarify its expedited removal regulations to make sure that they are applied in an even-handed way. Currently, non-citizens intercepted within 100 air miles of the land borders of the United States may be subject to expedited removal if they are unable to prove that they have been in the United States for a fourteen-day period. Although there may be a rational basis for treating non-citizens intercepted near the border differently than others, DHS has not provided an explanation of the decision to use the 100 mile mark nor has it issued any guidance as to how non-citizens may prove this fourteen-day period of residence (i.e., whether by affidavit, testimony, or otherwise). In addition, DHS must improve oversight over the detention of non-citizens apprehended near land borders in order to ensure that this group is not treated differently than other classes of non-citizens subject to expedited removal.

B. Detention for Non-Citizens Subject to Standard Removal Proceedings

DHS has general discretionary authority to detain non-citizens in removal proceedings, and statutory law directs that certain categories of “criminal aliens” must be detained pending the resolution of their removal hearings. These “criminal aliens” are principally non-citizens who are removable because they have committed certain criminal offenses ranging from nonviolent crimes to the most serious violent offenses. This class of non-citizens, often referred to as “mandatory holds,” may be paroled only if necessary to further a government investigation. Additionally, the law governing mandatory holds makes no distinction between non-citizens who are lawful permanent residents (“LPRs”) and non-citizens who are not.

Many non-citizens subject to mandatory detention under these provisions have been in the U.S. for significant periods of time. Some have long-term employment and U.S. citizen families. Others lack family ties in their countries of birth, and still others may not even know the language. While the Committee agrees that non-citizens who qualify as “criminal aliens” are often appropriate candidates for incarceration or, in the alternative, some form of heightened government supervision during their removal proceedings, the Committee is also concerned that custodial detention is being used too frequently, generating great expense and imposing considerable personal suffering on the non-citizens subject to detention. Accordingly, we propose the following reforms.

First, we recommend that DHS consider rigorous in-home detention as an alternative to custodial detention in a facility for those mandatory detainees who do not present a danger to the community and who do not pose a flight risk. Such in-home detention would be particularly appropriate for mandatory detainees whose criminal records do not contain any indication of violent conduct. For this group, custodial detention in a facility should be applied only if the government is able to present credible evidence that the non-citizen poses a danger to the community or is a flight risk.

Second, Congress should amend the immigration laws to make them reflect the greater constitutional rights enjoyed by LPRs. This could be achieved by enacting a hardship waiver from mandatory detention for which only LPRs would be eligible. Several factors should be relevant to the question whether an LPR is entitled to a hardship waiver, including: (1) whether the LPR’s criminal record contains only minor offenses; (2) whether the LPR has lived in the United States for a significant period of time; (3) whether the LPR has extenuating health circumstances; and (4) whether the LPR has significant ties to the community, including family ties.

Third, DHS should release “mandatory hold” detainees where removal is impossible because the non-citizen’s country of origin does not have a valid repatriation agreement with the United States and there are no other legitimate grounds for detention unrelated to immigration status. It serves no legitimate policy objective to detain non-citizens during removal proceedings who will have to be released whether or not they are deemed removable.

Fourth, DHS should reform its legal standard for determining whether or not a non-citizen qualifies as a “criminal alien” subject to mandatory detention. Currently, in order to avoid mandatory detention, non-citizens must show that the government is “substantially unlikely” to prove that an underlying conviction makes the non-citizen subject to mandatory detention. In our view, this standard imposes too heavy a burden on non-citizens. Instead of the current standard, we recommend that non-citizens be able to obtain relief from mandatory detention if they can “raise a substantial question of law or fact” regarding the basis of mandatory detention.

Fifth, DOJ and DHS should implement regulations to establish a maximum time limit between the initiation of removal proceedings and the date of a merits hearing before an immigration judge. Currently, there is no such maximum time limit, and many non-citizens are subject to detention for lengthy periods of time before they receive hearings on the merits of their cases. We propose that authorities establish a reasonable limit of 90 days from the initiation of a removal proceeding to the merits hearing. This regulation should provide for tolling of the 90-day deadline when the non-citizen seeks a continuance or is otherwise responsible for delay in the proceedings.

Sixth, DHS should evaluate the Institutional Removal program to make sure that it complies with basic due process requirements and consider its expansion upon completion of this review. This program allows DHS to identify removable prisoners serving criminal sentences and to initiate removal proceedings against those prisoners while they are serving out their criminal sentences. We believe that with the proper protections in place, the Institutional Removal program is a valuable tool that works to the advantage of both the government and non-citizens who would otherwise be subject to mandatory immigration detention upon release from prison. At the same time, however, we are concerned about reports of insufficient notice to detainees about upcoming hearings, denial of access to legal materials or assistance, as well as the atmospheric and logistical implications of these proceedings taking place in prisons. Therefore, we recommend that DHS establish safeguards to ensure that the program is conducted in a fair manner with full regard to the procedural rights afforded non-citizens during removal proceedings.

Seventh, we recommend that DHS reform its policies regarding detainees by expanding the use of alternatives to detention. These alternatives should be tailored to the individual non-citizen. For those non-citizens posing only a small flight risk, relatively non-intrusive means should be used, such as periodic home visits or self-reporting by telephone. For non-citizens posing a greater flight risk, more intrusive means may be appropriate, such as home visits or, in proper cases, electronic monitoring.

C. Detention for Non-Citizens Who Have Received a Final Removal Order

The third principal category of non-citizens subject to immigration detention is those who have received a final order of removal and who are awaiting implementation of that order. As a general rule, the law requires DHS to remove non-citizens from the United States within 90 days of a final order of removal. However, many non-citizens who have received a final order of removal are detained for periods considerably longer than 90 days. The main reason is that it is often administratively difficult to remove non-citizens to their country of origin if that country does not have a valid repatriation agreement with the United States.

Under current regulations, non-citizens who are detained following a final order of removal receive hearings ninety days and six months after the date of the final order of removal. At these reviews, DHS is supposed to evaluate whether further detention is warranted in light of multiple factors, including whether the non-citizen presents a flight risk, how likely it is that travel documents will be forthcoming, and whether the non-citizen has cooperated in the acquisition of travel documents.

While we appreciate the considerable difficulties that are often involved in the implementation of removal orders, we also believe that non-citizens should not be detained for lengthy periods of time when removal is not a foreseeable possibility. Accordingly, we propose the following recommendations.

First, we suggest that DHS implement its own Inspector General's recommendations regarding the tracking of non-citizens subject to final orders of removal. Improved tracking is necessary to ensure that non-citizens will receive their ninety-day and six-month hearings in a timely fashion. Additionally, DHS should ensure that detainees have ready access to information about the status of their ninety-day and six-month hearings. Finally, DHS should make it a high priority to secure travel documents for non-citizens who would present a danger to the public or a national security threat.

Second, ICE should modify its standards used to determine whether further detention is warranted because of the possibility that travel documents will be forthcoming. In conducting this analysis, ICE should pay attention to individualized factors. In many cases, repatriation of a specific individual to his or her country of origin may be impossible even though it is possible to repatriate others to that country. Additionally, ICE should issue guidance on what non-citizens need to do in order to demonstrate "cooperation" for purposes of their ninety-day and six-month reviews.

Third, DHS should implement an administrative complaint process for untimely six-month reviews. Detainees should be able to avail themselves of this complaint process in order to ensure that the agency conducts review hearings in a timely manner. We believe an administrative review process will be more efficient than litigating the detention in federal court. At the same time however, we do not intend this administrative process to prejudice the ability

of non-citizens to vindicate their rights in federal courts should the agency (and the administrative review process) not live up to constitutional standards.

II. Access to Counsel

Under federal law, non-citizens in removal proceedings are provided with “the privilege of being represented” by counsel but “at no expense to the Government.” As a result, most non-citizens in removal proceedings do not have the assistance of counsel. This regime exists in a context in which legal representation during removal proceedings is more important than ever. Indeed, in recent years, avenues for appeal, both before administrative and federal circuit courts, have narrowed. And since September 11, 2001, the nominally civil nature of removal proceedings has been obscured, as federal authorities have used the removal process as a criminal enforcement mechanism.

The Committee proposes four categories of recommendations to facilitate non-citizens’ access to counsel in removal proceedings: (1) an aspirational goal for government funded and appointed counsel for all indigent non-citizens in removal proceedings where voluntary *pro bono* services are not otherwise available; (2) short-term recommendations for government-funded counsel; (3) recommendations for facilitating *pro bono* representation; and (4) recommendations for removing barriers to the attorney-client relationship.

A. Aspirational Goal for Government-Funded Counsel

The Committee recommends that all indigent non-citizens in standard immigration removal proceedings, as distinguished from “expedited removal proceedings,” should have access to government appointed and funded legal representation where *pro bono* services are not available. The same standard for establishing indigence should apply as in the criminal context. Providing all indigent non-citizens with access to counsel serves both non-citizens’ and the federal government’s interests. For non-citizens, legal representation is essential to ensuring that basic due process rights are upheld, particularly in light of the potential consequences of an order of removal. Meanwhile, the assistance of counsel is likely to facilitate a more efficient process, as attorneys prepare well-organized cases for presentation before immigration judges. Increased efficiency may in turn decrease detention times, lowering the costs of an expensive system.

B. Short-Term Recommendations for Government-Funded Counsel

Recognizing that the above aspirational goal is likely not feasible at the present time, the Committee recommends passage of legislation in the short term providing for more immediate relief. Specifically, Congress should pass legislation to allow immigration judges the

discretion to appoint counsel for indigent non-citizens in all standard immigration removal proceedings. This legislation should be modeled upon the habeas corpus statute's provision authorizing the appointment of counsel. The funding for such counsel should come from a system independent of the office of the federal public defender.

Immigration judges should be required to appoint counsel for indigent non-citizens in standard immigration removal proceedings where at least one of the following factors is present:

(i) *Where the legal and/or factual issues involved are particularly complex.* The Committee believes that providing legal assistance to indigent non-citizens in such situations is necessary to ensure the fundamental fairness of removal proceedings.

(ii) *Where non-citizen children are unaccompanied by an adult.* In 2006, more than half of the 7,800 children who appeared unaccompanied by an adult in removal proceedings are believed to have appeared without legal representation. Many if not most unaccompanied children are unlikely to understand the issues presented in removal proceedings without the assistance of counsel.

(iii) *Where non-citizens are unable to represent themselves due to mental illness, extreme emotional distress, or other disability.* Non-citizens suffering from mental illness, extreme emotional distress, or other disability are unlikely to understand the issues (and perhaps the consequences) of a removal proceeding should they appear without counsel.

(iv) *Where non-citizens seek relief under the Convention against Torture.* The consequences of an order of removal are severe for all non-citizens. But they are particularly severe for non-citizens who fear torture should they be returned to their countries of origin. The Committee believes that the government should ensure that individuals with credible claims under the Convention Against Torture are provided with legal representation in removal proceedings. Immigration judges should be granted the authority to determine whether the non-citizen has made a credible claim.

(v) *Where removal would impose a greater than usual hardship due to the extent of the non-citizen's ties to the United States and/or the lack of ties to the person's country of origin.* The Committee believes the nature of the deprivation at stake for such individuals -- whose entire families may be legal residents of the United States and who may have no memory of their countries of origin -- weighs in favor of ensuring counsel is appointed.

In exercising their discretion as to whether to appoint counsel in a removal proceeding not involving one of the mandatory factors listed above, the factors to be considered by the immigration judge should include whether the charged violation of immigration law leading to the removal proceedings is a relatively minor or technical violation. In such proceedings, immigration judges should consider the availability of *pro bono* representation before determining whether to appoint government funded counsel.

C. Recommendations for Facilitating *Pro Bono* Representation

The Committee's recommendations for facilitating *pro bono* representation for non-citizens in removal proceedings include four individual reforms.

First, the Board of Immigration Appeals' Pro Bono Project, designed to help unrepresented litigants obtain *pro bono* counsel, should be expanded to accommodate a larger percentage of the Board's caseload. Established in 2001, this effort helped match nearly 300 non-citizens with *pro bono* counsel by 2004. An independent review of the Pro Bono Project found that its results (*e.g.*, better drafted briefs that helped appellate judges understand the issues on appeal) were widely praised within the immigration system.

Second, the Federal Legal Orientation Program, which educates detainees on immigration law and the removal process, should be expanded to all respondents in removal proceedings. This orientation program, supported by federal grants to non-profit agencies, involves an attorney or paralegal from the funding agencies meeting with and educating detainees on immigration law and the removal process. The Department of Justice has concluded that the program increases the likelihood of a just result and saves federal dollars by expediting processing times and decreasing detention terms.

Third, a federally-funded system should be established to refer indigent non-citizens in removal proceedings to *pro bono* attorneys. Such a system could be developed with a focus on securing referrals for non-citizens with possible claims of relief. Non-profit agencies may be recruited to direct a screening process and refer cases to *pro bono* attorneys.

Fourth, DOJ should provide guidance to immigration judges on how to encourage *pro bono* representation for non-citizens in removal proceedings. For example, where appropriate, immigration judges should grant adjournments that allow indigent non-citizens sufficient time to secure representation by law school clinics or other *pro bono* providers.

D. Recommendations for Removing Barriers to the Attorney-Client Relationship

The Committee's recommendations for removing barriers to the attorney-client relationship also include four individual reforms. First, DHS and DOJ should adopt regulations requiring that in determining whether to transfer a detainee, the agencies should consider whether such a transfer would adversely affect an existing attorney-client relationship, and if so, weigh this as an important factor against any such transfer. Second, DHS and DOJ should adopt regulations requiring that in deciding the locations for construction and use of detention facilities, an important factor in choosing such locations should be whether the geographic areas provide sufficient access to interpreters and attorneys. Third, the 30-day time limit to file a Notice to Appeal with the Board of Immigration Appeals following receipt of the Immigration Court's decision should be extended to 60 days to allow sufficient time for a non-citizen to locate and retain counsel. Fourth, information on petitioning for review

in federal courts should be provided to non-citizens whose initial appeals to the Board of Immigration Appeals are rejected.

III. Members of the Liberty and Security Committee Endorsing the Constitution Project's Statement on Immigration Detention and Access to Counsel*

A. Co-Chairs

David Cole, Professor, Georgetown University Law Center

David Keene, Chairman, American Conservative Union

B. Members

Stephen Abraham, Partner, Fink & Abraham LLP; Lieutenant Colonel, Military Intelligence, United States Army Reserve (Ret)

Azizah al-Hibri, Professor, The T.C. Williams School of Law, University of Richmond; President, Karamah: Muslim Women Lawyers for Human Rights

Christopher Bryant, Professor of Law, University of Cincinnati; Assistant to the Senate Legal Counsel, 1997–99

Thomas B. Evans, Jr., Former Member of Congress (R-DE) and Co-Chairman, Republican National Committee; Founder, Florida Coalition for Preservation

Louis Fisher, Specialist in Constitutional Law, Law Library, Library of Congress

Dr. Morton H. Halperin, Senior Advisor, Open Society Policy Center; Senior Fellow, Center for American Progress; Director of Policy Planning Staff, Department of State, Clinton administration

Asa Hutchinson, Senior Partner, Asa Hutchinson Law Group; Undersecretary, Department of Homeland Security, 2003–2005; Administrator, Drug Enforcement Administration, 2001–2003; Member of Congress (R-AR), 1997–2001; United States Attorney, Western District of Arkansas, 1982–1985

* Affiliations listed for identification purposes only.

David Kay, Senior Fellow, Potomac Institute for Policy Studies; former Head, Iraq Survey Group; former Special Advisor on the Search for Iraqi Weapons of Mass Destruction to the Director of Central Intelligence Agency

Thomas R. Pickering, Undersecretary of State for Political Affairs, 1997–2000; United States Ambassador and Representative to the United Nations, 1989–1992

Neal Sonnett, Chair, American Bar Association Task Force on Treatment of Enemy Combatants and Task Force on Domestic Surveillance in the Fight Against Terrorism; former United States Attorney and Chief of Criminal Division for the Southern District of Florida; former President, National Association of Criminal Defense Lawyers

William H. Taft, IV, Of Counsel, Fried, Frank, Harris, Shriver & Jacobson; former Legal Advisor, Department of State, George W. Bush administration; Deputy Secretary of Defense, Reagan administration

John F. Terzano, Vice President, Veterans for America

Patricia McGowan Wald, Former Judge, International Criminal Tribunal for the former Yugoslavia; former Chief Judge, United States Court of Appeals for the D.C. Circuit

John W. Whitehead, President, The Rutherford Institute

Lawrence B. Wilkerson, Col, USA (Ret), Visiting Pamela C. Harriman Professor of Government at the College of William and Mary; Professorial Lecturer in the University Honors Program at the George Washington University; former Chief of Staff to Secretary of State Colin Powell; Colonel, United States Army (Ret.)

Roger Wilkins, Clarence J. Robinson Professor of History and American Culture, George Mason University; Director of United States Community Relations Service, Johnson administration

BACKGROUND REPORT*

Introduction

In fiscal year 2008, immigration courts in the United States completed more than 274,000 removal proceedings.¹ For many of the individuals involved in these proceedings, the experience was marked by confusion and fear. Some of the non-citizens involved in removal proceedings are detained in government facilities for periods that may last for months or even years. A number of these individuals are seeking asylum and may be coping with the aftermath of recent experiences of persecution or torture. Some of these individuals have lived in the United States for years and face the prospect of removal to countries with which they no longer identify and where the language is now unfamiliar. Many others have little or no knowledge of English and are forced to navigate a complex body of law and procedure without the assistance of an attorney or a translator.

This two-part report provides background for the Statement and Recommendations of the Constitution Project's Liberty and Security Committee ("the Committee"). Part I provides an overview of current immigration detention policies and practices, and discusses the Committee's related recommendations for reform. Part II examines issues related to non-citizens' limited access to legal counsel in removal proceedings and explains the grounds for the Committee's conclusion that the federal government should facilitate the appointment of competent legal counsel for indigent non-citizens in standard removal proceedings.²

I. Immigration Detention

There has been a dramatic increase in the number of non-citizens detained by U.S. immigration authorities in recent years. The number of non-citizens held in detention on a given day increased by approximately forty percent between 2003 and 2007, and that number continues to grow.³ In fiscal year 2007, more than 311,000 individuals were detained⁴ and the average detention duration was 37 days.⁵ Immigration authorities currently detain more than 33,000 people in over 500 facilities on any given night.⁶ This expanded use of immigration

* The Constitution Project sincerely thanks David Pinsky and Alissa Jijon, associates at Covington & Burling LLP, and Susannah Vance, formerly of Covington and now at Lutheran Immigration and Refugee Services, for their extensive work in researching and drafting this background report. A draft of this background report was made available to members of the Constitution Project's Liberty and Security Committee as they developed their consensus statement. However, committee members have not been asked to endorse the specific language of this background report.

detention is partly attributable to the strict mandatory detention rules established by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRAIRA”) and partly to the increased enforcement of immigration laws following the terrorist attacks of September 11, 2001.

The increasing use of detention places a significant strain on government resources. Since 2003, the custody operations budget of U.S. Immigration and Customs Enforcement (“ICE”)—an agency within the U.S. Department of Homeland Security (“DHS”)—has doubled as the government’s immigration detention program expands.⁷ These costs continue to grow: in its fiscal year 2009 report to Congress, ICE requested an additional \$72 million to support a planned increase in staffing and bed space,⁸ and by 2010 immigration detention is expected to cost taxpayers over \$1.7 billion.⁹

The human cost of detention, measured by the hardships endured by detained non-citizens and their families, is more difficult to estimate. Detainees may be separated from their families and friends for long periods of time with little to no idea of the date or conditions of their eventual release. During their detentions, many are subject to frequent physical restraint and may have limited privacy and restricted access to necessities such as communication with the outside world, exercise, or leisure activities.¹⁰ Many face daily barriers to resources that could help them understand their cases, such as access to counsel, translators, and legal materials.¹¹ Such barriers can take many forms: absence of information about *pro bono* legal services (notices which may need to be provided in translation), heavily restricted visitation rights, absence of a confidential venue for meeting with counsel, restricted access to a telephone or other form of communication, absence of a system for receiving messages, limited access to legal materials, or incomplete legal materials (materials which may need to be provided in translation), among others.¹² Regrettably, recent reports by ICE, the American Bar Association, and the United Nations High Commissioner for Refugees found the presence of these barriers at U.S. detention facilities to be widespread.¹³

Detention also puts an economic strain on non-citizens and their families. Some detainees are their families’ primary wage-earners, and while they are detained their spouses and children may struggle to provide for themselves.¹⁴ Some detainees miss major events in the lives of their families while in prison—events such as births and deaths—which are irreparable losses.¹⁵ In the most extreme of cases, detention may even cost a detainee his or her life. Reports of potentially avoidable deaths occurring in custody bring to light the shortcomings and dangers of an overwhelmed detention system.¹⁶

This part of the report provides information about immigration detention facilities and the policies that have dramatically increased the use of detention. A discussion of the Committee’s recommendations for reform follows and will be organized around three categories of detention: (1) detention of non-citizens subject to “expedited” removal; (2) detention

of non-citizens subject to standard removal proceedings; and (3) detention of non-citizens who have received a final removal order.

A. Immigration Detention Facilities and Conditions of Detention

Since 2003, ICE has been responsible for the oversight of detention facilities. ICE directly operates eight detention facilities, known as Service Processing Centers, and has agreements with contractors to house immigration detainees in seven privately-run facilities.¹⁷ ICE also has intergovernmental service agreements (“IGSAs”) that allow the government to hold immigration detainees in more than 350 state and local prisons and jails.¹⁸ Additionally, the ICE detention system includes five Bureau of Prisons (“BOP”) facilities, which are funded directly through congressional appropriations to BOP or through ICE reimbursement.¹⁹ More than half of all detainees are held in IGSA facilities.²⁰ In many cases, non-criminal immigration detainees are held in prison-like conditions. They are frequently required to wear prison uniforms, denied contact and visits with family or friends, and lack privacy and recreational opportunities.²¹ Even more troubling, some non-criminal immigration detainees are housed together with individuals accused or convicted of committing violent crimes in some IGSA facilities.²²

In recent years, there have been numerous complaints about ICE’s oversight of detention facilities, including its failure to ensure adequate medical care, provide safe living conditions, address overcrowding, and provide education and recreation to detained children.²³ U.S. government and media reports confirm that serious deficiencies exist in the healthcare system for non-citizens in immigration detention. The system is plagued by severe staffing shortages, long delays for detainees waiting to receive medically necessary procedures, and general unresponsiveness to detainee requests for care.²⁴ Documented accounts of avoidable deaths and suicides serve as startling reminders of the serious shortcomings of the current medical care services provided to immigration detainees.²⁵ Immediate medical examination is sometimes also critical for the separate purpose of establishing medical evidence supporting a non-citizen’s potential claim of asylum or past persecution or torture.²⁶

Inadequate personal safety is another significant problem that immigration detainees may face while in custody. Despite the fact that ICE detention standards mandate that all facilities physically separate immigration detainees from detainees in other categories (namely, those in criminal custody), various facilities report that it is commonplace to commingle different types of detainee populations. This practice puts immigration detainees at risk of physical harm, and many report the occurrence of threats, confrontations, and physical violence between them and their criminal counterparts.²⁷ Some detainees also report being subjected to physical and verbal abuse while in detention, sometimes even at the hands of facility guards.²⁸

Overcrowding is a related problem with which many immigration detainees must cope. In some facilities, two or three detainees must sleep in cells intended to hold one person. In

others, detainees sleep in crowded makeshift dormitories or on plastic cots on the floor.²⁹ This crowding affects the entire facility, straining all shared resources such as cafeterias, bathrooms, recreation spaces, and most significantly, the medical care system.³⁰

Children are perhaps the most vulnerable individuals in the immigration detention system. Even though children being held in immigration detention facilities have special protections under law, many of these safeguards are not applied in practice. Unaccompanied minors who find themselves in detention facilities frequently face serious problems, such as: being housed with juvenile offenders or adults; physical restraints; excessive discipline; physical and verbal abuse; lack of access to open air, exercise, and recreation; and the lack of educational services.³¹ The detention experience may have a long-lasting social, emotional, and psychological impact on children, and in the current immigration detention system, these young detainees often suffer the most.³²

In 2000, the former Immigration and Naturalization Service (“INS”)³³ adopted a set of immigration facility detention standards in an attempt to establish minimum benchmarks for conditions of confinement—ICE updated these standards with a new set of “performance based” standards in 2008.³⁴ These standards address a variety of subjects including medical care, food service, access to legal materials, and environmental conditions. Unfortunately, many provisions of these standards apply only to facilities directly operated by ICE (*i.e.*, not in the IGSA facilities where the majority of immigration detainees are held) and, in any event, the standards are only advisory in nature.³⁵ Unsurprisingly, a variety of monitors have confirmed that a number of the facilities housing immigration detainees do not adhere to these standards.³⁶

B. Removal Process

A non-citizen enters the removal process when DHS issues him or her a “Notice to Appear,” which initiates removal proceedings.³⁷ Such a notice may be issued to a non-citizen living inside the United States or to one who is denied entry at the U.S. border. After receiving the notice, a non-citizen’s case is transferred from the jurisdiction of DHS to the Executive Office for Immigration Review (“EOIR”), the division of the U.S. Department of Justice (“DOJ”) responsible for immigration proceedings.³⁸ Despite the EOIR’s adjudicative role, ultimate responsibility for removal remains with DHS.³⁹

A non-citizen in removal proceedings may consent to removal or voluntarily depart from the country.⁴⁰ Alternatively, the non-citizen may seek to remain in the United States by challenging the grounds for removal, claiming asylum, pleading for relief under the Convention Against Torture (“CAT”), requesting a “cancellation of removal,” or requesting an adjustment to lawful permanent resident status, among other options.⁴¹ Should the individual seek to remain, a formal proceeding before an immigration judge will be held to adjudicate the

merits of his or her case. ICE represents the government in the court room—the majority of non-citizens are unrepresented.⁴²

C. Detention of Non-Citizens Subject to Expedited Removal

1. Overview

The passage of IIRAIRA created a new, “expedited” removal process separate from standard removal proceedings. Expedited removal is a summary process that DHS uses to expel without further hearing or review certain non-citizens who attempt to enter the United States with fraudulent or improper documents.⁴³ The Customs and Border Patrol (“CBP”) officer inspecting the non-citizen’s paperwork has the authority to issue an expedited removal order, which ordinarily results in the individual being quickly removed from the United States. One key exemption from this perfunctory process applies to non-citizens seeking asylum. If a non-citizen expresses the intent to apply for asylum, states a fear of persecution or torture upon return to his or her home country, or states a fear of return to his or her home country, then the CBP officer must refer that individual to an asylum officer with the U.S. Citizenship and Immigration Services (“USCIS”).⁴⁴ The asylum officer will interview⁴⁵ the non-citizen and determine whether the non-citizen’s fear of persecution or torture is “credible.”⁴⁶ Immigration regulations require that ICE detain the individual until this “credible fear interview” takes place.⁴⁷ Although ICE claims that credible fear interviews occur within two weeks on average, evidence suggests that some individuals wait several weeks, or even months, for their interviews, all while in detention.⁴⁸ If the interviewing asylum officer concludes that the non-citizen’s fear of persecution is credible, DHS is required to transfer the individual from the expedited removal process into standard removal proceedings.⁴⁹ If the asylum officer concludes that the non-citizen’s fear is not credible, the non-citizen is ordered removed⁵⁰ and DHS must detain the individual until he or she is removed from the United States.⁵¹ A non-citizen may appeal an asylum officer’s negative finding on the credible fear issue to an immigration judge, who is required to review the officer’s finding within one week.⁵²

Immigration authorities have gradually expanded the categories of non-citizens who are subject to expedited removal. Initially, expedited removal applied only to non-citizens who attempted to enter the United States without the required documentation (*e.g.*, a valid visa) and to non-citizens apprehended in international or U.S. waters and brought into the United States.⁵³ In November 2002, DHS expanded expedited removal to include non-citizens (other than Cuban nationals) who arrive by sea but do not enter lawfully and have not been physically present in the United States for at least two years.⁵⁴ Expedited removal now also applies to non-citizens without proper entrance documents who are apprehended inside the United States or within 100 miles of any U.S. land border if they cannot demonstrate that they have been present in the country for at least 14 days before being apprehended.⁵⁵ DHS also extends this policy to apprehended non-citizens’ undocumented family members,

regardless of whether the family members are present with the apprehended individual.⁵⁶ Under current law, all non-citizens involved in expedited removal proceedings must be detained.⁵⁷

Immigration officials have limited authority to release individuals who are determined to have a credible fear of persecution prior to consideration of their applications for asylum (at what is often referred to as a “merits hearing”). In November 2007, ICE announced a new policy for determining whether a non-citizen with a credible fear of persecution should be temporarily released (“paroled,” in the immigration context) until his or her final merits hearing. Under this policy, ICE will release a non-citizen if: (1) the non-citizen establishes his or her identity; (2) the non-citizen does not pose a flight risk or danger to the community; and (3) ICE determines that “urgent humanitarian reasons” or a “significant public benefit” counsel in favor of parole.⁵⁸ Only five categories of non-citizens may satisfy the third part of the test: (1) individuals with serious medical conditions; (2) pregnant women; (3) certain juveniles; (4) individuals who will serve as witnesses in judicial or administrative proceedings; and (5) individuals whose parole is in the “public interest.”⁵⁹ It is unclear what circumstances would qualify as being in the “public interest,” but current policies state that, contrary to past practice, parole should be granted only in “limited circumstances.”⁶⁰

2. Recommendations for Reform

In a 2005 study, the United States Commission on International Religious Freedom, a U.S. government agency, concluded that the expedited removal process lacks adequate safeguards to prevent improper removal and extended detention of *bona fide* refugees in the United States.⁶¹ The recommendations for reform that follow attempt to address these concerns and reflect the Committee’s belief that the federal government should detain non-citizens who have credible fears of persecution in their home countries only when absolutely necessary. In making these recommendations, the Committee is mindful of the fact that it is important and necessary to detain non-citizens who present threats to public safety, and that the automatic parole of all non-citizens in expedited removal would undermine the government’s efforts to ensure that non-citizens attend their removal hearings.

a. Do Not Apply Expedited Removal to Holders of Valid Nonimmigrant Visas.

DHS presently applies expedited removal and mandatory detention to all non-citizens with valid nonimmigrant visas who declare an intent to seek asylum when attempting to enter the United States.⁶² DHS considers such individuals to have had fraudulent immigrant intent, which in effect invalidates their U.S. entrance documents and thereby automatically subjects them to expedited removal.⁶³ DHS imputes fraud because the fact of an application for asylum indicates an intention to reside in the U.S. permanently, which contradicts the original application for the *nonimmigrant* visa with which they travelled to the United States. Immigration enforcement policy should recognize that non-citizens cannot apply for asylum

in the United States until they are physically present in the country. As a result, travel on a nonimmigrant visa may be the only means available for a persecuted individual to escape his or her home country. DHS should amend its regulations to ensure that such individuals are not placed in expedited removal and detained simply because they seek asylum in the United States.⁶⁴

b. Require Asylum Officers to Administer Credible Fear Interviews within Two Weeks of Non-Citizens' Apprehension.

DHS presently requires that asylum officers wait 48 hours—a “cooling off” period—after the government apprehends non-citizens who are subject to the expedited removal process before administering credible fear interviews.⁶⁵ However, too many applicants wait far longer in detention until their interviews because DHS regulations do not establish a time period within which credible fear interviews must take place.⁶⁶ DHS should amend its regulations to require that asylum officers administer credible fear interviews within two weeks of the apprehension of non-citizens who are subject to expedited removal. This reform, together with the recommendations that follow it, is intended to reduce the amount of time asylum-seekers must spend in detention.

c. In the Case of a Medical Emergency, Grant Parole to Non-Citizens Who Are in Expedited Removal and Are Awaiting Credible Fear Interviews.

ICE detention standards require detained non-citizens to undergo an initial medical screening within 12 hours of detention and a full medical examination within 14 days.⁶⁷ In addition, DHS regulations that govern mandatory detention during the expedited removal process allow the government to parole non-citizens when “required to meet a medical emergency.”⁶⁸ Nonetheless, non-profit observers report that medically infirm persons have suffered avoidable deaths shortly after being placed in expedited removal.⁶⁹ One tragic example is that of 81-year-old Baptist minister Joseph Dantica, who fled Haiti to seek asylum in the United States. Although he had a valid U.S. visa, Mr. Dantica was detained at the Miami airport after requesting asylum. He was in poor health and complained to his immigration lawyer that his medication had been taken away. He also stated that a medical officer had accused him of faking illness. At an asylum hearing four days later, he began vomiting and collapsed. He died of pancreatitis in a hospital the following day. Although DHS insisted that there was no connection between Mr. Dantica’s pre-existing illness and the expedited removal process, one must question whether inaction on the part of the detaining officials hastened this man’s death.⁷⁰ To protect against such situations, DHS should ensure the prompt screening of non-citizens subject to expedited removal proceedings for medical emergencies, with particular attention to the elderly and families with small children, when non-citizens are taken into government custody.

d. Adopt Rules that Encourage DHS to Grant Parole to Non-Citizens with Credible Fears of Persecution.

Under both a 1997 policy directive of the former INS and current ICE regulations, “arriving aliens”⁷¹ who are found to have a credible fear of persecution or torture may be paroled in limited circumstances.⁷² As discussed earlier, such individuals may be paroled if they do not pose a flight or security risk and if the reviewing officer determines that “urgent humanitarian reasons” or a “significant public benefit” exist.⁷³ Five categories of individuals have been identified as potentially satisfying this parole standard: (1) aliens who have serious medical conditions, where continued detention would not be appropriate; (2) pregnant women; (3) certain juveniles; (4) aliens who will be witnesses in judicial or other governmental proceedings; and (5) aliens whose continued detention is not in the public interest.⁷⁴ Non-profit groups have raised serious concerns about ICE’s failure to explain what circumstances would qualify as in the “public interest” and have concluded that the vagueness of the provision discourages officials from granting parole on this basis to non-citizens with credible fears of persecution.⁷⁵

As the non-profit international human rights organization Human Rights First has suggested,⁷⁶ ICE should re-adopt a prior policy that allowed immigration authorities considerable discretion to parole non-citizens with credible fears of persecution, as long as they established their identity and community ties, and did not pose a flight risk or have previous criminal convictions that disqualified them from receiving asylum.⁷⁷ To apply this policy uniformly,⁷⁸ ICE should establish regulations that specify: (1) how asylum-seekers without government-issued identity documents may prove their identities (*e.g.*, by submitting affidavits or other declarations); and (2) the facts non-citizens may show to demonstrate that they are not flight risks. The regulations should include a presumption that non-citizens are eligible for parole if they prove their identities and show that they are not flight risks. The regulations should *require* DHS to grant parole to non-citizens who meet the two preceding criteria and demonstrate that they are survivors of torture. Finally, ICE should consider paroling every non-citizen with a credible fear of persecution, whether or not the non-citizen specifically requests such relief.

e. Allow All Non-Citizens with a Credible Fear of Persecution the Right to Appeal if DHS Denies Parole.

Under current DHS regulations, an arriving alien with a credible fear of persecution cannot appeal DHS’s decision to deny him or her parole.⁷⁹ However, other non-citizens subject to expedited removal, such as individuals who arrive by sea and are present in the United States or individuals apprehended near land borders, can appeal such decisions.⁸⁰ This inconsistency must be corrected, absent a compelling, articulated reason to maintain it. DHS should amend its regulations to allow *all* non-citizens with credible fears of persecution to appeal denials of parole to immigration judges. During the appeal process, DHS should consider alternatives to detention when appropriate.

f. Ensure that Non-Citizens without Criminal Records are Not Held with Criminal Inmates in Detention Facilities.

As explained above, DHS holds many immigration detainees in federal, state, and local jails and prisons. Such facilities often hold non-citizens charged with immigration violations—which are civil rather than criminal violations—with individuals accused or convicted of criminal offenses. DHS should amend its existing regulations⁸¹ to prohibit the detention of non-citizens who have not been accused or convicted of criminal offenses with other incarcerated individuals who have. Detention facilities that cannot segregate detainees in this manner should not be used to hold immigration detainees.

g. Ensure that Detention Policies Are Applied Equitably to Non-Citizens Apprehended Near U.S. Land Borders.

Although there may be a rational basis for doing so, DHS has not yet explained the reasoning behind its decision to expand expedited removal to include non-citizens, other than Mexican and Canadian nationals, apprehended within 100 miles of all U.S. land borders. To ensure that such individuals are treated equitably, DHS should explain the basis for its decision to impose the 100-mile rule. If the reasoning behind the rule is that non-citizens found within 100 miles of a U.S. land border are more likely to have entered the country illegally, DHS should introduce more thorough safeguards to ensure that this policy does not ensnare non-citizens who have been legitimately living in or near this extremely large geographic area. DHS has not yet provided guidance as to how a non-citizen, if taken into custody within 100 miles of the border, may successfully establish that he or she has been present in the United States for 14 days before his or her apprehension.⁸² DHS should issue guidance that sets forth the types of evidence (*e.g.*, affidavits or other declarations) that non-citizens may submit to establish that they have been in the United States for 14 days.

Non-citizens who are apprehended within the 100-mile limit and found to have credible fears of persecution face unique challenges not faced by other non-citizens subject to expedited removal. Notably, many of the detention facilities that hold such individuals are located in remote settings, making it difficult for detainees to secure counsel and maintain contact with family members.⁸³ DHS should clarify its expedited removal regulations and the reasoning behind the 100-mile rule to ensure that the expedited removal process is applied equitably to non-citizens detained near U.S. land borders.

D. Detention of Non-Citizens in Standard Removal Proceedings

1. Overview

Before IIRAIRA took effect, U.S. immigration authorities detained non-citizens whom they sought to remove from the United States only when the government established that the individual was a flight risk or a threat to public safety.⁸⁴ The law now requires that DHS detain non-citizens who are in standard removal proceedings if they previously have been

convicted of certain criminal offenses, even though they have completed the terms of their criminal sentences.⁸⁵ The requirement of mandatory detention is triggered by a variety of offenses ranging from non-violent crimes, including drug and prostitution offenses and crimes involving moral turpitude, to firearm offenses and violent crimes.⁸⁶ Under the Patriot Act of 2001, DHS also must detain non-citizens certified by the Attorney General as suspected terrorists.⁸⁷ DHS may release individuals subject to mandatory detention only if their release is necessary to further a government investigation.⁸⁸ None of these mandatory detention rules make any distinction based on whether a non-citizen is a lawful permanent resident of the United States.

Non-citizens who are subject to mandatory detention may request a hearing before an immigration judge to contest their detentions.⁸⁹ If an immigration judge determines that a non-citizen is actually a U.S. citizen or that the government is “substantially unlikely” to establish the validity of the conviction or other grounds for the non-citizen’s mandatory detention, DHS must release the individual.⁹⁰ A non-citizen in standard removal proceedings to whom mandatory detention does *not* apply may request that an immigration judge review the basis for the detention,⁹¹ and an immigration judge may release such a non-citizen on his or her own personal recognizance, on bond, or on conditional parole.⁹²

2. Recommendations for Reform

Unlike non-citizens who are subject to expedited removal, the individuals involved in standard removal proceedings are sometimes lawful permanent residents of the United States.⁹³ These individuals may have held long-term jobs in this country and may have family members in the United States relying on them for support. Moreover, some of these individuals no longer have family ties or knowledge of the language spoken in their countries of origin.⁹⁴ The recommendations that follow reflect the belief that U.S. immigration detention policy must account for these circumstances, while acknowledging that detention is a necessary and lawful tool for enforcing immigration laws in some cases. The suggested reforms would increase the use of alternative methods of supervision that are effective, but less costly and restrictive than detention.

a. Establish an In-Home Detention Program for Non-Violent Mandatory Detainees Who Do Not Pose a Flight Risk.

Because IIRAIRA does not define “detention,” the law arguably does not require DHS to confine non-citizens subject to mandatory detention in detention facilities.⁹⁵ Policymakers should explore expanding the use of alternative options such as in-home detention or electronic monitoring systems. These alternatives should be used specifically for non-citizens who are in standard removal proceedings, have not been convicted of violent crimes, and do not pose a flight risk. Similar programs have been widely adopted for purposes of pre-trial release in criminal courts⁹⁶ and have effectively ensured that defendants appear for trial.⁹⁷

b. Enact a Hardship Waiver for Lawful Permanent Residents of the United States.

The Supreme Court has stated that “once an alien gains admission to [the United States] and begins to develop the ties that go with permanent residence his constitutional status changes accordingly.”⁹⁸ Congress should therefore provide lawful permanent residents in standard removal proceedings greater protection under the law than other non-citizens. At a minimum, Congress should amend IIRAIRA to create a hardship waiver that exempts certain lawful permanent residents previously convicted of criminal offenses from mandatory detention.⁹⁹ Factors to be used in determining whether a lawful permanent resident qualifies for such a waiver should include: (1) the nature of the individual’s ties to the United States, including the length of time spent in this country and the presence of family members in this country; (2) whether family members in the United States depend on the individual for financial support; (3) whether the individual has extenuating health circumstances; and (4) the nature and date of the individual’s conviction and term of imprisonment.

c. Release Mandatory Detainees Where Removal to a Detainee’s Country of Origin Is Impossible.

Both Congress and DHS have recognized that there is no reason to detain non-citizens if it is impossible for the government to effect removal. For example, the rules which previously applied to the detention of non-citizens who were in removal proceedings and released from criminal custody before October 8, 1998, allowed the former INS to release such individuals if the government could not remove them from the United States.¹⁰⁰ The current DHS regulations governing the detention of non-citizens who have been ordered removed from the United States allow for release under such circumstances, as required by the Supreme Court,¹⁰¹ but only so long as mandatory detention rules do not apply. The rules should be amended to allow for release from detention in a broader range of circumstances—namely, whenever a detainee is in standard removal proceedings, removal to the detainee’s country of origin is not possible, and the detainee does not pose a threat to public safety.¹⁰² A non-citizen should not be held in detention during the removal process when it is known in advance that the government’s removal attempt will be futile.

d. Amend the Standard of Proof Required of Non-Citizens Who Seek to Challenge Mandatory Detention Determinations.

Non-citizens who are in standard removal proceedings and to whom mandatory detention applies may challenge the basis of their detentions by petitioning an immigration judge.¹⁰³ Given the magnitude of the deprivation at stake, however, the showing that non-citizens must make to secure relief is unjustifiably stringent—an individual must establish that the government is “substantially unlikely” to establish the fact of the non-citizen’s conviction or other grounds for mandatory detention.¹⁰⁴ Supreme Court Justice Stephen Breyer has criticized this standard, recommending instead that non-citizens be released from mandatory detention if, in addition to other showings, they are able to “raise[] a substantial question

of law or fact” as to the basis for their detentions.¹⁰⁵ Judge A. Wallace Tashima of the Ninth Circuit Court of Appeals, noting that “individual liberty is one of the most fundamental rights protected by the Constitution,”¹⁰⁶ has agreed, stating that the current standard “is not just unconstitutional, it is egregiously so.”¹⁰⁷ Judge Tashima pointed to a string of Supreme Court decisions which place the burden *on the government* to show that an individual’s detention is warranted.¹⁰⁸ The “substantially unlikely” standard “not only places the burden on the defendant to prove that he should not be physically detained, it makes that burden all but insurmountable.”¹⁰⁹ The fact that, in these cases, the individuals being detained are non-citizens is irrelevant—the Supreme Court has held that the Due Process Clause applies to citizens and non-citizens alike.¹¹⁰ The “substantially unlikely” burden of proof that currently applies to non-citizens was articulated prior to the Supreme Court’s decision in *Zadvydas* (discussed below in Section I.E.) and may now be unconstitutional in light of it.¹¹¹ At the very least, the standard should be carefully reexamined.

e. Institute a “Speedy Trial Act” for Removal Proceedings.

Although the Supreme Court has concluded that mandatory detention does not violate due process, that conclusion is based in part on the assumption that non-citizens in removal proceedings will be detained only for a “limited period.”¹¹² In reality, however, non-citizens are often detained for weeks or months, and some are even in detention for years.¹¹³ Among the primary reasons for such long periods of detention is the law’s failure to set a time period within which removal proceedings must be completed.¹¹⁴ DHS should follow the model provided by the Speedy Trial Act and institute a reasonable time limit within which the final removal hearing must take place.¹¹⁵ This deadline could apply to all hearings or only to hearings for individuals who are detained. To ensure that individuals in removal proceedings do not pursue dilatory tactics designed to secure release on the grounds that the time limit has expired, the new regulations should temporarily stop the clock when a non-citizen requests a continuance.¹¹⁶

f. Improve the Institutional Removal Program.

U.S. immigration authorities have not yet developed an effective method of identifying non-citizens subject to removal from the United States who are serving criminal sentences.¹¹⁷ The U.S. Government Accountability Office has estimated that only 40 percent of such individuals report for their removal hearings after their release from criminal custody.¹¹⁸ The Institutional Removal Program was instituted by the EOIR and the former INS in 1988 as an effort to remedy this problem. The program allows DHS to initiate and complete removal proceedings while non-citizens serve criminal sentences, reducing detention times and conserving government resources.¹¹⁹

Critics of the Institutional Removal Program, however, have argued that non-citizens whose removal proceedings take place in prisons are unfairly disadvantaged. For example,

immigration judges typically conduct such individuals' removal hearings by videoconference rather than in person—this has the potential to “dehumanize” the proceedings. Due to the practical constraints imposed by their incarceration in criminal holding facilities, inmates may have more difficulties than ordinary, non-criminal immigration detainees in securing interpreter services and counsel with expertise in immigration law. DHS should re-evaluate the Institutional Removal Program in light of these concerns. DHS should also take steps to ensure that non-citizen inmates in immigration proceedings receive the procedural protections, such as notice, to which they are legally entitled.

g. Expand the Use of Alternatives to Detention for Non-Mandatory Detainees.

Policymakers should expand the use of, and budget for, alternative options such as in-home detention or electronic monitoring systems. The institutional detention of non-citizens imposes significant costs on the government. For example, ICE spends more than \$800 million annually just to secure bedspace for detainees.¹²⁰ Non-citizens who are not subject to mandatory detention and who do not pose a threat to public safety are ideal candidates for effective monitoring programs. The expansion of such programs could lead to significant cost savings for the government since the estimated cost of monitoring programs is between \$10 and \$14 a day, compared to an average of \$95 a day for detention.¹²¹

In recent years, ICE has experimented with alternative detention programs.¹²² The first program, known as the *Intensive Supervision Appearance Program* (“ISAP”), relies on a variety of techniques including electronic monitoring, home visits, telephonic reporting, local office visits, employment verification, curfews, and collection of travel documents.¹²³ According to ICE, ISAP is available in 12 cities and has a maximum participant limit of 6,000.¹²⁴ More than 5,700 non-citizens were actively participating in the program in March 2009 and a total of approximately 12,300 individuals have participated since the initiation of the program.¹²⁵ ISAP has been extremely successful in ensuring that non-citizens appear for hearings. ICE reports a 99 percent total appearance rate at immigration hearings, a 95 percent appearance rate at final removal hearings, and a 91 percent compliance rate with removal orders.¹²⁶ ISAP requires \$22 per night, per detainee, to administer, as opposed to \$95 or more for detention.¹²⁷

The second program, known as the *Enhanced Supervision/Reporting Program* (“ESR”), is similar to ISAP in that participants are closely supervised using electronic monitoring, residence verification, home visits, in-person reporting, and collection of travel documents.¹²⁸ However, ESR requires fewer home visits and in-person reporting visits.¹²⁹ ESR is available in all 24 of ICE's Office of Detention and Removal Operations field offices and three sub-offices.¹³⁰ As of March 2009, the maximum participant limit for ESR was 7,000 and there were more than 6,600 active participants.¹³¹ ESR has also been quite effective and reports a 98 percent total appearance rate at immigration hearings, a 93 percent appearance rate at final removal hearings, and a 63 percent compliance rate with removal orders.¹³²

ICE additionally uses an electronic monitoring program which apparently has no participant limit and is available nationwide.¹³³ According to ICE, in March 2009 there were more than 5,100 active participants in the electronic monitoring program.¹³⁴ ICE has stated that the majority of the participants in the electronic monitoring program are non-citizens who cannot be removed in the foreseeable future and who are being monitored after having completed immigration proceedings.¹³⁵

E. Detention of Non-Citizens Who Have Received Final Removal Orders

1. Overview

Once an immigration judge has issued a final order of removal, IIRAIRA requires that U.S. immigration authorities detain certain categories of non-citizens until their departures from the United States.¹³⁶ While the law requires (with some exceptions) that DHS remove non-citizens within 90 days of the final removal order,¹³⁷ it is sometimes impossible for immigration authorities to actually remove certain individuals. This commonly occurs when the United States does not have a repatriation agreement with a non-citizen's home country, or when immigration authorities cannot obtain travel documents for an individual.¹³⁸ For example, while Mexico and Central American countries typically cooperate with U.S. authorities and their nationals are rarely held in post-removal detention longer than 90 days, nationals of countries such as India, Pakistan, China, and Haiti are routinely held in post-removal detention for more than a year.¹³⁹

In the case of *Zadvydas v. Davis*, the Supreme Court held that this system of extended and sometimes indefinite detention had the potential to violate detainees' due process rights and could not continue.¹⁴⁰ The Court announced that immigration authorities could detain non-citizens who had received final orders of removal for a presumptively reasonable period of six months.¹⁴¹ After six months, however, if the detained non-citizen is able to demonstrate that it is not reasonably foreseeable that the government can remove him or her from the United States, the government must provide "evidence sufficient to rebut that showing" or else release the detainee.¹⁴² If the government does provide evidence to rebut such showing, the detainee may continue to be held "until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future."¹⁴³ At the time of this printing, no consensus exists as to precisely how much longer these individuals may be detained, though the Supreme Court made clear that "as the period of postremoval confinement grows, what counts as the 'reasonably foreseeable future' conversely would have to shrink."¹⁴⁴

In the wake of the *Zadvydas* decision, DHS updated its regulations. Under the current regulations, if 90 days have passed since a non-citizen has received a final order of removal and he or she remains in detention, DHS must assess: (1) whether the non-citizen poses a flight risk or threat to public safety; and (2) whether removal is imminent because travel documents

have been or will soon be obtained.¹⁴⁵ If travel documents are not likely to be forthcoming and if the non-citizen is determined not to pose a flight risk or threat to public safety, DHS officials may release the detainee. If the non-citizen is not released or removed after DHS's 90-day assessment, DHS must conduct a second assessment six months after the non-citizen received the removal order.¹⁴⁶ In the six-month review process, DHS must inquire whether removal of the non-citizen in the near future appears reasonably likely.¹⁴⁷ This inquiry examines "all facts of the case," including whether the non-citizen has cooperated in DHS's effort to obtain travel documents and the historic success rate of U.S. government efforts in repatriating individuals to the detainee's home country or some particular third country.¹⁴⁸ In addition to this inquiry, DHS must also consider whether there are any special circumstances that weigh in favor of continued detention even if removal is unlikely. Such circumstances include whether: (1) the non-citizen has a highly contagious disease; (2) there are any serious adverse foreign policy consequences to the non-citizen's release; (3) the non-citizen has been detained due to security or terrorism concerns; or (4) the non-citizen has been determined to be "specially dangerous."¹⁴⁹

2. Recommendations for Reform

The Committee's recommendations reflect the concerns raised in the preceding analysis and, where noted, have been proposed by other organizations.

a. DHS Should Implement the Inspector General's Recommendations.

The DHS Inspector General has found that ICE sometimes fails to monitor the status of detainees who have been held longer than 90 days, and that the six-month review is frequently untimely.¹⁵⁰ In response, the Inspector General made a number of recommendations in a February 2007 report. DHS should implement the following of those recommendations: (1) ICE must improve its monitoring of detainees' cases so that the 90-day and six-month reviews are completed in a timely fashion; (2) detainees should have access to automated information about the status of their post-custody reviews; and (3) ICE should prioritize securing travel documents for non-citizens who present a threat of violence to the public or to national security.¹⁵¹

b. DHS Should Implement Catholic Legal Immigration Network's Recommendations.

In a 2005 report, the Catholic Legal Immigration Network ("CLINIC") recommended that ICE should establish more systematic standards for determining whether removal is "imminent" at the time of a non-citizen's 90-day review or "foreseeable" at the time of the six-month review.¹⁵² ICE presently focuses principally on whether the non-citizen's home country lacks a repatriation agreement with the United States¹⁵³ (such countries include Laos, Cuba, and Vietnam).¹⁵⁴ ICE may not be able to remove a non-citizen for other indi-

vidual factors such as when the country of removal has no record of the detainee's birth or citizenship.¹⁵⁵

In addition, CLINIC has recommended that ICE provide non-citizens with guidance concerning what they must show to demonstrate that they have cooperated with the government's attempt to secure travel documents for their departure.¹⁵⁶ Presently, ICE frequently denies non-citizens' parole requests at their 90-day reviews based on a finding that the non-citizen failed to help the government secure such documents.¹⁵⁷ DHS should implement both of these recommendations.

c. DHS Should Institute an Administrative Complaint Process for Untimely Six-Month Reviews.

Currently, when DHS fails to conduct a non-citizen's six-month review, the individual's chief recourse is to file a *habeas corpus* petition in federal district court. Non-citizens, however, often are unable to secure legal counsel to assist with such petitions. Additionally, a *habeas corpus* petition is a slow and often costly process, both for the government and the non-citizen. DHS should therefore implement an administrative complaint mechanism for non-citizens who have received final orders of removal and whose six-month reviews are untimely.

II. Access to Counsel

Under federal law, a non-citizen in removal proceedings is provided with "the privilege of being represented" by counsel, but "at no expense to the Government."¹⁵⁸ As a result, in 2008, approximately 60 percent of non-citizens in removal procedures were not represented by counsel.¹⁵⁹

In recent years, the importance of legal representation in removal proceedings has markedly increased. Recourse to appellate courts, both at the administrative and federal level, has been effectively limited, increasing the importance of a just result before immigration courts.¹⁶⁰ In addition, since September 11, 2001, the federal government has used the removal process as a tool in its fight against terrorism, belying the nominally civil nature of the proceedings.¹⁶¹ As previously discussed in Part I, the number of non-citizens detained while their removal proceedings are pending has increased significantly as a result.

The first section below assesses representation rates and the dramatic disparity in outcomes associated with represented versus non-represented non-citizens. The next section provides an overview of the opportunities for appeal available to individuals who receive an adverse decision in immigration court. The third section reviews the constitutional principles governing access to counsel in these proceedings. In its statement, the Committee endorses a series of recommendations to provide non-citizens with access to counsel, and these recommendations are further explained in the final section.

The current regime must be reformed. Appointing or facilitating the appointment of counsel to indigent non-citizens in removal proceedings would not only serve non-citizens' interests but would benefit the federal government as well. The removal process may become more focused and easier to process, as attorneys present well-organized cases that clearly and concisely identify issues relevant to relief. These efficiencies may in turn decrease detention times and thereby lower costs to the government.¹⁶² And, most importantly, the participation of counsel will increase the likelihood of a just result.¹⁶³

A. Representation Rates

As discussed in Part I, when non-citizens are faced with removal proceedings, they may challenge the grounds for their removal, claim asylum in the United States, plead for relief under CAT, request a "cancellation of removal," or request an adjustment to lawful permanent resident status, among other options. In most of these circumstances, the case will be heard in a formal proceeding before an immigration court. In fiscal year 2008, U.S. immigration courts completed 281,041 proceedings,¹⁶⁴ 274,469 of which were removal proceedings.¹⁶⁵ In only 112,231, or approximately 40 percent, of all proceedings did non-citizens have counsel.¹⁶⁶

Statistics from previous years show that represented non-citizens are far more likely to be granted relief from removal, particularly in asylum cases. In 2003, for example, 39 percent of non-detained, represented asylum-seekers were granted relief, compared with only 14 percent of non-detained asylum-seekers without counsel.¹⁶⁷ That same year, detained asylum-seekers with counsel were granted relief in 18 percent of cases, compared to only 3 percent of those without counsel.¹⁶⁸

This discrepancy is similarly pronounced when the analysis is limited to expedited removal proceedings. As explained in Part I, expedited removal proceedings, over which an immigration judge presides, serve as checks on USCIS determinations. If the immigration judge disagrees with the USCIS determination that a non-citizen does not have a credible fear, the non-citizen is placed in standard removal proceedings, where he or she can pursue an asylum claim. If the immigration judge agrees with the USCIS determination, however, the non-citizen is ordered removed from the United States. From 2000 to 2004, approximately 25 percent of represented non-citizens in expedited removal proceedings were ultimately granted asylum or relief under CAT.¹⁶⁹ During those same years, the rate of success for unrepresented non-citizens stood at only about two percent.¹⁷⁰ This difference is of particular consequence because individuals in expedited removal procedures have no right to appeal.¹⁷¹

In 2006, before the Board of Immigration Appeals ("BIA"), the appellate body responsible for reviewing immigration courts' removal orders, non-citizens were represented in 25,885 of 36,350, or approximately 71 percent, of appeals.¹⁷² Non-citizens without counsel, however, remain disadvantaged—unrepresented non-citizens were successful in only 10 percent of appeals,¹⁷³ while their represented counterparts succeeded 40 percent of the time.¹⁷⁴

B. Opportunities for Appeal

Non-citizens who receive an adverse decision before the immigration court may appeal the decision to the BIA, the administrative appellate court responsible for immigration proceedings. If unsuccessful before the BIA, non-citizens may then appeal to the federal appeals court with jurisdiction over their cases. Recent changes to the appellate process, however, have significantly limited opportunities for appeal.¹⁷⁵

Among these changes is a provision in IIRAIRA that bars non-citizens from filing appeals based on claims not raised at the administrative level.¹⁷⁶ Individuals without counsel at the administrative court level, however, are likely to make mistakes and therefore fail to raise some meritorious claims.¹⁷⁷ It is therefore critical that non-citizens secure counsel to help identify all potential administrative remedies.

In addition, in March 2002, the BIA expanded the practice of using single-judge affirmances without opinions (“AWOs”) to affirm immigration court decisions.¹⁷⁸ Previously, the BIA had typically decided cases using three-judge panels.¹⁷⁹ Today, however, such panels review only limited cases.¹⁸⁰

In August 2002, DOJ issued a regulation that limited the authority of the BIA to make new factual findings to situations where an immigration judge has made a “clearly erroneous” finding.¹⁸¹ In the same year, the number of BIA judges was reduced by half, from 23 to 11 judges. These changes, part of new “streamlining” regulations, further increased the use of single-judge AWOs.¹⁸² Indeed, a study of 1,400 appeals to the BIA in September 2002 found single-judge AWOs, each only one sentence in length, in 80 percent of cases.¹⁸³ This study also found that non-citizens were far less likely to succeed on appeal to the BIA under the new rules—only 5 percent of appeals were successful in September 2002, compared with 25 percent previously.¹⁸⁴

The changes to the BIA, including the drastic reduction in the number of BIA judges and the expansion of the use of single judge AWOs, have led to a significant increase in the number of appeals to federal appellate courts.¹⁸⁵ As of 2005, approximately 25 percent of BIA decisions were appealed to the federal courts, up from 5 percent before the changes were adopted.¹⁸⁶ As of 2005, federal courts fielded between approximately 1,000 and 1,200 petitions for review each month, up from an average of only 125.¹⁸⁷ This increase, coupled with often inadequate records of the proceedings below, has made the jobs of federal judges considerably more difficult. As stated by Judge Jon O. Newman of the U.S. Court of Appeals for the Second Circuit: “When overburdened [immigration judges] decide their high volume of cases hurriedly with oral findings dictated into the record and then their decisions are affirmed in a one-word ruling, the courts of appeals often lack the reasoned explication that is to be expected of a properly functioning administrative process.”¹⁸⁸

C. Constitutional Principles Governing Access to Counsel

In a recent opinion, Judge Robert Katzmann of the U.S. Court of Appeals for the Second Circuit wrote:

The importance of quality representation is especially acute to immigrants, a vulnerable population who come to this country searching for a better life, and who often arrive unfamiliar with our language and culture, in economic deprivation and in fear. In immigration matters, so much is at stake—the right to remain in this country, to reunite a family, or to work. While ... aliens in deportation proceedings have ‘no specific right to counsel,’ the Fifth Amendment does require that such proceedings comport with due process of the law.¹⁸⁹

It is firmly established that non-citizens have a basic due process right in removal proceedings.¹⁹⁰ Under the due process standard, courts examine whether a non-citizen is entitled to government-appointed counsel on a case-by-case basis.¹⁹¹ As explained by the Sixth Circuit Court of Appeals, “[t]he test for whether due process requires the appointment of counsel for an indigent alien is whether, in a given case, the assistance of counsel would be necessary to provide ‘fundamental fairness—the touchstone of due process.’”¹⁹² Although this language seems strong, its application has been weak. Indeed, in case after case, courts have held that the absence of counsel did not affect the outcome.¹⁹³

In *Gideon v. Wainwright*, drawing from language in a previous case, the Supreme Court explained:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. ... He lacks both the skill and knowledge adequately to prepare his defense, even though he have [sic] a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.¹⁹⁴

The Court has emphasized that removal proceedings, unlike the proceedings in *Gideon*, are civil in nature rather than criminal,¹⁹⁵ and thus there is no constitutional right to government-funded counsel for indigent immigration detainees. Nonetheless, the concerns discussed in *Gideon* are equally applicable to the removal context. Removal proceedings are fundamentally similar to criminal trials: the proceedings are adversarial and held before a judge; the individual subject of the proceeding is often detained; and the penalty (removal from the United States) is so severe that one judge has likened it to “banishment.”¹⁹⁶

Supporting this analogy is the fact that indigent litigants are provided government-funded counsel in a variety of other extraordinary civil proceedings. For example, in 1967 the Supreme Court held that a juvenile has a due process right to government-funded counsel in

delinquency proceedings.¹⁹⁷ In reaching that conclusion, the Court focused on the characteristics of the proceedings and the liberty interest of the juvenile rather than the civil designation of the proceeding.¹⁹⁸ The Court has also adopted a case-by-case approach to determining whether appointment of counsel is appropriate in probation revocation and parental termination proceedings.¹⁹⁹ In addition, federal statutory law provides government-funded counsel in child-abuse and neglect cases, and some state statutes allow indigent persons to be appointed counsel in a variety of civil cases.²⁰⁰

D. Recommendations for Reform with Respect to Access to Counsel

The Committee's recommendations reflect the concerns raised in the preceding analysis and, where noted, have been proposed by other organizations.

1. Aspirational Goal for Providing Government-Funded Counsel: Provide Government-Funded Counsel to All Indigent Non-Citizens in Standard Removal Proceedings Where *Pro Bono* Services Are Unavailable.

All indigent non-citizens in standard immigration removal proceedings should have access to government appointed and funded counsel where *pro bono* services are not available, using the same standard for establishing indigence as in the criminal context. Providing government-funded counsel to indigent non-citizens will help facilitate a process that is fundamentally fair and that may be more focused and easier for immigration courts to process. For example, attorneys may be more able than unrepresented non-citizens to identify and articulate the facts that entitle non-citizens to relief from removal. In addition, attorneys will help identify and encourage those individuals without legitimate claims to consent to removal earlier in the process, lowering costs to the government as proceedings and detention periods shorten in length.

The benefits of appointed counsel at the immigration court level would also apply in appeals, as counsel may help the immigration court develop a better record. In addition, when appropriate, counsel may advise a non-citizen who receives an adverse ruling from an immigration judge that he or she has a limited likelihood of success on appeal, thus lowering the total number of cases on the appellate docket.

2. Short-Term Recommendation for Government-Funded Counsel: Provide Immigration Judges with Discretion to Appoint Counsel for Indigent Non-Citizens in All Standard Removal Proceedings.

Recognizing that the above aspirational goal would be costly and is not likely to be feasible at the present time, the Committee recommends passage of legislation in the short term providing for more immediate relief. Specifically, Congress should pass legislation to allow immigration judges the discretion to appoint counsel for indigent non-citizens in all standard removal

proceedings. This legislation should be modeled upon the *habeas corpus* statute's provision authorizing the appointment of counsel.²⁰¹ The funding for such counsel should come from a system independent of the federal public defender office.

Immigration judges should be required to appoint counsel for indigent non-citizens in certain standard immigration removal proceedings where at least one of the following factors is present: (1) the legal and/or factual issues involved are particularly complex; (2) a non-citizen child is unaccompanied by an adult; (3) non-citizens are unable to represent themselves due to mental illness, extreme emotional distress, or other disability; (4) non-citizens seek relief under CAT; and (5) removal would impose a greater than usual hardship due to the extent of the non-citizen's ties to the United States and/or the lack of ties to the person's country of origin. In such proceedings, immigration judges should consider the availability of *pro bono* representation before determining whether to appoint government-funded counsel.

In exercising discretion as to whether to appoint counsel in a removal proceeding not involving one of the mandatory factors listed above, an immigration judge should consider whether the charged violation of immigration law leading to the removal proceedings is a relatively minor or technical violation. In cases where the charged violation is minor or technical, the assistance of counsel should be particularly encouraged, as it could help prevent what would threaten to be an unwarranted removal order.

With respect to unaccompanied minors, according to a December 2, 2006 report by the Associated Press, of approximately 7,800 unaccompanied children in removal proceedings during fiscal 2006, more than half are believed to have been unrepresented by counsel.²⁰² Precise figures, however, are unavailable because U.S. authorities do not monitor the issue.²⁰³ That unaccompanied children are unlikely to understand the issues presented in removal proceedings is uncontroversial. But in addition, many children may be eligible for unique forms of relief that are unavailable to adults and may only be accessible with the help of counsel.²⁰⁴ The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPPRA"), enacted on December 23, 2008, should give unaccompanied children greater access to legal counsel to assist them with their removal proceedings. Under TVPPRA, the Secretary of Health and Human Services is obliged to provide these children access to counsel, including *pro bono* counsel, "[t]o the greatest extent practicable."²⁰⁵

With respect to non-citizens seeking relief under CAT, the government should ensure that individuals with credible claims thereunder are provided with legal representation in removal proceedings. Immigration judges should be granted the authority to determine whether the non-citizen has made a credible claim.

In addition, mentally ill or disabled persons are currently left to navigate the removal process on their own without the assistance of counsel. As in the case of unaccompanied children, mentally ill or disabled persons are unlikely to understand the legal issues presented in

removal proceedings. Appropriate measures should therefore be taken to protect these individuals throughout the removal process.

E. Recommendations for Facilitating *Pro Bono* Representation

1. The BIA Pro Bono Project Should Be Expanded to Accommodate a Larger Percentage of the Board's Caseload.

The BIA Pro Bono Project (“the Project”), established in January 2001 by EOIR, is designed to help unrepresented litigants who have filed appeals to the BIA or who are respondents in government appeals of an immigration judge’s order to obtain *pro bono* counsel.²⁰⁶ According to an October 2004 independent review of the Project, it has “increased the level and quality of pro bono presentation” before the BIA.²⁰⁷ From 2001 to 2004, the Project helped match nearly 300 non-citizens with *pro bono* counsel.²⁰⁸ The independent review found that the Project produced “more and better briefs” for review by the BIA—unsurprisingly, litigants without counsel typically fail to submit a brief.²⁰⁹ The increased number and quality of briefs makes the appellate process more efficient by helping both appellate judges and government counsel better understand issues on appeal.²¹⁰

Additionally, the independent review found the Project to be “universally welcomed and praised within EOIR.”²¹¹ The Project “presents very little additional resource burdens on administrative case processing, facilitates legal review, and enjoys a high success rate on appeal.”²¹² The independent review of the Project concluded that “[i]n the eyes of its stakeholders, the [Project] is a success.”²¹³

Although the Project has achieved success, it only accommodates a small percentage of the individuals whose cases make up BIA’s caseload.²¹⁴ In addition, the Project attempts to identify the most meritorious appeals already filed with BIA,²¹⁵ leaving non-citizens who may have potential claims without assistance. EOIR should expand the Project to accommodate a larger percentage of BIA’s caseload.

2. Expand the Federal Legal Orientation Program to All Respondents in Removal Proceedings.

As explained above, federal law affords non-citizens the “privilege” of being represented by counsel, but “at no expense to the Government.”²¹⁶ The quoted provision of federal law, Section 292 of the INA, does not explicitly address programs that “supplement or promote” legal representation.²¹⁷ Indeed, in 1995, the former INS Office of General Counsel concluded that the statute’s “no expense” language did not prohibit the federal government from funding programs that “facilitate” legal representation.²¹⁸ The INS opinion made way for the launch of the federally-funded Legal Orientation Program for non-citizens held in detention during their removal proceedings. The program is supported by federal grants to non-profit agencies. An attorney or paralegal from one of the funded non-profit agencies meets with

and educates detainees on relevant immigration law and explains the removal process.²¹⁹ Detainees then have at least some understanding of applicable law and procedures and whether they qualify for relief.²²⁰ According to an ABA report, an “overwhelming majority” of detainees subject to instruction understand that they have no basis for relief and accept removal.²²¹ Meanwhile, approximately ten percent of detainees do have potential bases and may be referred by non-profit agencies to *pro bono* counsel.²²²

DOJ evaluations of the Legal Orientation Program have concluded that it “improve[s] the administration of justice and save[s] the government money by expediting case completions and leading detainees to spend less time in detention.”²²³ In addition, the United States Commission on International and Religious Freedom found the program “to be an effective and efficient model of facilitating representation for asylum seekers and other detainees.”²²⁴ As of February 2006, however, the Legal Orientation Program operated in only six of 330 detention facilities nationwide.²²⁵ This program could be expanded at a modest cost. In 2002, for example, federal funding of \$1 million allowed the program to reach 17,041 detainees.²²⁶

3. Establish a Federally-Funded System To Refer Indigent Non-Citizens in Removal Proceedings to *Pro Bono* Attorneys.

The Immigration Representation Project, described in the Migration Policy Institute’s April 2005 edition of *Insight* regarding the need for appointed counsel in immigration proceedings, provides an excellent example of a successful screening and referral program.²²⁷ The program, which serves non-citizens in New York City and detainees in the Jamaica, New York, and Elizabeth, New Jersey, detention facilities, provides for attorney screening of all cases and referral of counsel in those cases with possible claims for relief.²²⁸ Participating non-profit agencies run the screening process and sometimes represent eligible non-citizens or refer their cases to *pro bono* attorneys.²²⁹ Federal grant funding supports the agencies that administer the program.²³⁰ Such funding should be increased to support similar projects in each of the country’s 52 immigration courts.

4. DOJ and EOIR Should Provide Guidance to Immigration Judges on How to Encourage *Pro Bono* Representation.

According to Human Rights First, “[w]hile the vast majority of immigration judges are supportive of *pro bono* efforts, some immigration judges regularly deny requests for adjournments that are necessary to provide representation by law school clinics or other *pro bono* providers, and some berate or insult *pro bono* volunteers or law students.”²³¹ Such actions are counterproductive to the goal of ensuring that persons before the immigration courts are provided with competent counsel.

A February 1995 memorandum issued by the Office of the Chief Immigration Judge discusses how immigration judges can help facilitate *pro bono* representation.²³² This memorandum,

with updated information, should be re-issued to all immigration judges.²³³ Among other things, the memorandum should instruct immigration judges to adjourn removal proceedings to allow non-citizens sufficient time to: secure representation from law school clinics, *pro bono* programs and attorneys, and non-profit organizations; to hold regularly-scheduled meetings with local *pro bono* providers; and to provide non-citizens in removal proceedings with information about how to contact law school clinics, *pro bono* programs and attorneys, and non-profit organizations.²³⁴

Unless a non-citizen awaiting a removal proceeding is subject to mandatory detention,²³⁵ he or she may be released by DHS on bond, recognizance, or conditional parole until the date of the removal hearing.²³⁶ A DHS official decides whether or not to allow release of the non-citizen and, if applicable, initially sets the bond amount or conditions for parole.²³⁷ The non-citizen may challenge DHS's decision to deny release or, if bond or parole was granted, may challenge the amount of the bond or conditions of parole at a proceeding known as a "bond/custody redetermination hearing."²³⁸ Traditionally, *pro bono* attorneys have been reluctant to represent indigent non-citizens in bond/custody redetermination hearings because of the prospect that their potential clients may be transferred out of district (and, in many cases out of state) after the conclusion of the bond proceedings. In cases where bond is denied, non-citizens are often moved to whichever detention facility happens to have available bedspace—such facility could be located a considerable distance away. The EOIR should instruct immigration judges to permit *pro bono* attorneys to enter appearances on behalf of non-citizens for the limited purpose of representing them through their bond hearings. If the non-citizen is unsuccessful at the bond hearing, the counsel may at that point determine whether to enter an appearance for the removal proceeding.

F. Recommendations for Removing Barriers to the Attorney-Client Relationship

1. Discourage the Involuntary Transfer of Detainees When Transfer Would Adversely Affect an Existing Attorney-Client Relationship.

DHS and DOJ should adopt regulations requiring that agencies consider, in determining whether to transfer a detainee, whether such a transfer would adversely affect an existing attorney-client relationship. If there would be such an adverse effect to an existing attorney-client relationship, the agencies should weigh this as an important factor against any such transfer.

2. Discourage the Construction and Use of Detention Facilities in Geographic Areas Without Sufficient Access to Interpreters and Attorneys.

DHS and DOJ should adopt regulations requiring that, in determining the locations for construction and use of detention facilities, agencies take into particular account whether the geographic areas under consideration provide sufficient access to interpreters and attorneys.

3. Allow Respondents Sufficient Time To Secure Representation for Appeals Before the BIA.

Following receipt of the immigration court's decision, a non-citizen presently has only 30 days to file a Notice to Appeal with the BIA. This period of time is often not of sufficient length for a non-citizen to locate and retain counsel. Non-citizens wishing to appeal should be afforded 60 days to locate and retain counsel.

4. Provide Information on Federal Court Petitions for Review in BIA Decisions Rejecting Appeals.

Unrepresented non-citizens faced with removal are unlikely to be aware of applicable procedures for, or all possible grounds of, appeal. As a result, in opinions rejecting appeals, the BIA should inform non-citizens, in clear and conspicuous language, that they may petition for review of adverse decisions in a United States Court of Appeals.

Conclusion

The fast-growing population of immigration detainees has drawn increased attention to poor living conditions at immigration detention facilities and to the barriers detainees face in seeking representation of counsel in removal proceedings. DHS should revise its detention regulations in the three areas identified above (expedited removal, mandatory pre-removal-hearing detention, and post-removal-hearing detention) in order for immigration detention to preserve fairness while serving both of its two stated goals of ensuring effective removal procedures and protecting public safety. The revised detention policies should reflect due consideration for the vulnerability of asylum-seekers and for the community ties that lawful permanent residents have developed in the United States.

In the area of access to counsel, agency-level reforms are less likely to effect the change that is sorely needed. Congressional action is necessary to ensure fair process for non-citizens subject to removal. Congress should amend the INA to afford immigration judges discretion to appoint counsel for indigent non-citizens in standard removal proceedings.

ENDNOTES

- ¹ See U.S. Department of Justice, Executive Office for Immigration Review, *FY 2008 Statistical Year Book*, at C4 (March 2009) (hereinafter “DOJ 2008 Year Book”). The U.S. government’s fiscal year runs from October 1 through September 30.
- ² On August 6, 2009, the U.S. Immigration and Customs Enforcement Assistant Secretary John Morton announced several reforms that address some aspects of the immigration detention system, in particular the conditions of detention. Further, on October 6, 2009, Department of Homeland Security Secretary Janet Napolitano announced comprehensive reforms to the immigration detention system, focusing on the conditions of detention and alternatives to detention. While these initial efforts are a welcome step, the details of these policies have yet to be developed, and it remains to be seen whether they will be implemented effectively and what further steps will be taken to respond to the other concerns raised in this report.
- ³ United States Government Accountability Office, *DHS Organizational Structure and Resources for Providing Health Care to Immigration Detainees*, GAO-09-308R, at 2 (February 2009). The average daily detention population increased from 28,000 in fiscal year 2007 to nearly 34,000 in fiscal year 2008. See Department of Homeland Security, Office of Inspector General, *Immigration and Custom Enforcement Detention Bedspace Management*, OIG-09-52, at 2 (April 2009).
- ⁴ United States Government Accountability Office, *DHS Organizational Structure and Resources for Providing Health Care to Immigration Detainees*, GAO-09-308R, at 2 (February 2009).
- ⁵ *Id.* at 37.
- ⁶ National Immigration Forum, *The Math of Immigration Detention*, at 1 (July 7, 2009). Available at: <http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf>.
- ⁷ *Id.*
- ⁸ *Id.*
- ⁹ *Id.*
- ¹⁰ See generally Amnesty International, *Jailed Without Justice: Immigration Detention in the USA* (March 25, 2009); See also Human Rights First, *U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison*, at 17–22 (April 2009) (hereinafter “Human Rights First Report”).
- ¹¹ Amnesty International, *Jailed Without Justice: Immigration Detention in the USA*, at 29 (March 25, 2009).
- ¹² See generally National Immigration Law Center, *A Broken System: Confidential Reports Reveal Failures in U.S. Immigrant Detention Centers* (July 2009) (hereinafter “NILC Report”) (explaining the relevance of these types of deficiencies with respect to a non-citizen’s access to counsel).
- ¹³ *Id.* at I–II.
- ¹⁴ See, e.g., *Id.* at 2 (describing the case of Mr. M, whose wife lost the lease to the couple’s small business while Mr. M was detained and had no income on which to raise her children).
- ¹⁵ See, e.g., *Id.* at 27 (describing the account of an anonymous detainee who missed the birth of his child while in detention).
- ¹⁶ See, e.g., Priest & Goldstein, *System of Neglect*, Wash. Post, at A1 (May 11, 2008).
- ¹⁷ U.S. Immigration and Customs Enforcement, *Detention Management Program*. Available at: <http://www.ice.gov/partners/dro/dmp.htm?searchstring=detention%20AND&management%20AND%20control%20AND%20program>.
- ¹⁸ Department of Homeland Security, Office of Inspector General, *Immigration and Custom Enforcement Detention Bedspace Management*, OIG-09-52, at 2 (April 2009).
- ¹⁹ *Id.*
- ²⁰ In fiscal year 2007, almost 65% of the average daily population was held in IGSA facilities. United States Government Accountability Office, *DHS Organizational Structure and Resources for Providing Health Care to Immigration Detainees*, GAO-09-308R, at 15 (February 2009).
- ²¹ Human Rights First Report, at 18–30.
- ²² Department of Homeland Security, Office of Inspector General, *ICE Policies Related to Detainee Deaths and the Oversight of Immigration Detention Facilities*, OIG-08-52, at 13 (June 2008).

- ²³ *Medical Care and Deaths in ICE Custody*: Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and Int'l Law (July 9, 2007) (statement of Tom Jawetz, ACLU National Prison Project); *Staff Briefing on Medical Treatment at Immigration Detention Centers*: Before the House Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law (July 9, 2007) (statement of Michael Garnett McKenzie, Minnesota Advocates for Human Rights); *Staff Briefing on Medical Treatment at Immigration Detention Centers*: Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and Int'l Law (July 9, 2007) (statement of June Everett); Priest & Goldstein, *System of Neglect*, Wash. Post, at A1 (May 11, 2008).
- ²⁴ Human Rights First Report, at 5; ACLU, *Conditions of Confinement in Immigration Detention Facilities*, at 3 (June 27, 2007); Goldstein & Priest, *System of Neglect*, Wash. Post, at A1 (May 12, 2008).
- ²⁵ ACLU, *Conditions of Confinement in Immigration Detention Facilities*, at 13–14 (June 27, 2007); Priest & Goldstein, *System of Neglect*, Wash. Post, at A1 (May 13, 2008).
- ²⁶ See NILC Report, at 16.
- ²⁷ Amnesty International, *Jailed Without Justice: Immigration Detention in the USA*, at 37 (March 25, 2009).
- ²⁸ See, e.g., *Id.* at 42–43 (describing accounts of verbal and physical abuse perpetrated by guards in detention facilities).
- ²⁹ See, e.g., ACLU, *Detention and Deportation in the Age of ICE*, at 8 (December 10, 2008) (describing the overcrowding problems in Massachusetts county jails that house immigration detainees).
- ³⁰ *Id.*
- ³¹ See generally Amnesty International, *Why Am I Here? Unaccompanied Children in Immigration Detention* (June 2, 2003).
- ³² *Id.*
- ³³ The United States Immigration and Naturalization Service (“INS”), which ceased to exist in 2003, formerly performed many of the functions that are now performed by USCIS, ICE, and CBP.
- ³⁴ ICE’s Performance Based National Detention Standards were adopted in 2008 and are available at <http://www.ice.gov/partners/dro/PBND/index.htm> (hereinafter “ICE 2008 Detention Standards”).
- ³⁵ NILC Report, at 4–5. Facing a petition in federal court from former detainees and other interested parties, DHS recently declined to propagate a set of standards that would be legally enforceable. Bernstein, *U.S. Rejects Call for Immigration Detention Rules*, The New York Times (July 29, 2009). Available at: http://www.nytimes.com/2009/07/29/nyregion/29detain.html?_r=1&ref=us.
- ³⁶ *Id.* at 1–13; Department of Homeland Security, Office of Inspector General, *Immigration and Customs Enforcement’s Tracking and Transfers of Detainees*, OIG-09-41, at 8–10 (March 2009); Department of Homeland Security, Office of Inspector General, *ICE Policies Related to Detainee Deaths and the Oversight of Immigration Detention Facilities*, OIG-08-52, at 12, 21–23 (June 2008).
- ³⁷ See, e.g., Donald Kerwin, “Revisiting the Need for Appointed Counsel,” *MPI Insight*, No. 4, at 1 (April 2005) (hereinafter “Migration Policy Institute Report”).
- ³⁸ *Id.*
- ³⁹ *Id.*
- ⁴⁰ *Id.* at 1–2.
- ⁴¹ *Id.* at 2–3.
- ⁴² See DOJ 2008 Year Book, at G1.
- ⁴³ 8 C.F.R. § 235.3(b).
- ⁴⁴ 8 C.F.R. § 235.3(b)(4).
- ⁴⁵ *Id.*; 8 C.F.R. § 208.30.
- ⁴⁶ INA § 235(b)(1)(A)(ii), 8 U.S.C. § 1225(b)(1)(A)(ii). The “credible fear” standard is less stringent than the “well-founded fear” standard required for a non-citizen to be granted asylum in the United States. INA § 235(b)(1)(B)(v), 8 U.S.C. § 1225(b)(1)(B)(v) (defining the “credible fear” standard as being met where “there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum”); cf. 8 C.F.R. § 208.13(b)(2)(i) (defining the “well-founded fear” standard as being met where “(A) The applicant has a fear of persecution in his or her country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion; (B) There is a reasonable possibility of suffering such persecution if he or she were to

return to that country; and (C) He or she is unable or unwilling to return to, or avail himself or herself of the protection of, that country because of such fear.” This definition is also subject to certain exclusions.). Meeting the “credible fear” standard does not guarantee that one will meet the “well-founded fear” standard. *See* 8 C.F.R. §§ 208.13(a) and (b)(2). From 2000 to 2004, an estimated 93% of individuals referred for a credible fear interview “passed,” but by 2008, that statistic dropped to 59%. Human Rights First Report, at 15.

47 8 C.F.R. § 235.3(b)(4)(ii).

48 Human Rights First Report, at 37–38.

49 INA § 235(b)(1)(B)(ii), 8 U.S.C. § 1225(b)(1)(B)(ii); 8 C.F.R. § 208.30(f).

50 8 C.F.R. §§ 208.30(g)(ii) and (iii).

51 INA §§ 235(b)(1)(B)(iii)(I) and (IV), 8 U.S.C. § 1225(b)(1)(B)(iii)(I) and (IV).

52 INA § 235(b)(1)(B)(iii)(III), 8 U.S.C. § 1225(b)(1)(B)(iii)(III); 8 C.F.R. § 208.30(g)(2).

53 Department of Justice, Interim Rule With Comment, Inspection and Expedited Removal of Aliens, 62 Fed. Reg. 10,312, 10,313 (Mar. 6, 1997); 8 C.F.R. § 1.1(q).

54 Department of Justice, Notice Designating Aliens Subject to Expedited Removal, 67 Fed. Reg. 68,924 (Nov. 13, 2002). *See* INA § 235(b)(1)(iii), 8 U.S.C. § 1225(b)(1)(iii).

55 Department of Homeland Security, Bureau of Customs and Border Protection, Order Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877, 48,880 (Aug. 11, 2004). DHS first applied this policy only to certain sections of the U.S. border with Mexico. The policy was later extended to include the entire U.S. land border, both with Mexico and Canada. The policy does not apply to Mexican and Canadian nationals, who are deported immediately upon apprehension. Congressional Research Service, *Immigration Policy on Expedited Removal of Aliens*, at 7 (May 2006).

56 News Release, Department of Homeland Security, *DHS Closes Loophole by Expanding Expedited Removal to Cover Illegal Alien Families* (May 15, 2006). Available at: <http://www.aila.org/content/default.aspx?bc=1016%7C6715%7C12053%7C26286%7C26307%7C19408>; *Bush to Seek More Funding for Border Security*, Fox News (May 15, 2006). Available at <http://www.foxnews.com>.

57 8 C.F.R. § 235.3(b)(2)(iii). Prior to the adoption of the expedited removal process, non-citizens whom immigration authorities apprehended at the U.S. border without valid entrance documents were released until their removal hearings, a policy that was criticized as encouraging absenteeism.

58 U.S. Immigration and Customs Enforcement, Parole of Arriving Aliens Found to Have a “Credible Fear” of Persecution or Torture (November 6, 2007), ¶¶ 8.2, 8.3 (citing 8 C.F.R. § 212.5(b)).

59 *Id.* at ¶¶ 4, 8.3.

60 *Id.* at ¶¶ 4, 8.3.5.

61 U.S. Comm’n on Int’l Religious Freedom, 2005 Annual Report, at 148–52 (May 2005) (hereinafter “USCIRF Report”).

62 USCIRF Report, at 21; *See also* Eleanor Acer, *Living Up to America’s Values: Reforming the U.S. Detention System for Asylum Seekers*, Refuge, vol. 20, No. 3, at 48.

63 USCIRF Report, at 62.

64 This recommendation is not intended to interfere with the application of the Safe Third Country Doctrine to expedited removal proceedings. This doctrine states that when an asylum applicant could have previously sought protection in another safe country, it is reasonable and appropriate to require the applicant to return to that country to do so. If the government demonstrates that a non-citizen applicant has used a nonimmigrant visa in an attempt to circumvent the requirements of the Safe Third Country Doctrine, then the non-citizen is not eligible for asylum in the United States. Under the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (P.L. 110-457) (“TVPPRA”), section 208 of the INA is amended to specifically exempt unaccompanied alien children from the standard Safe Third Country Doctrine.

65 USCIRF Report, at 22.

66 8 C.F.R. §§ 208.30 and 235.3(b)(4).

67 ICE 2008 Detention Standards at Parts II(19) and V(I)(1).

68 8 C.F.R. §§ 235.3(b)(2)(iii) and (b)(4)(ii).

69 *See, e.g.*, ACLU, *Detention and Deportation in the Age of ICE*, at 13–15 (December 10, 2008).

70 Jaggi, *Preacher’s death prompts protest*, The Guardian (November 20, 2004). Available at: <http://www.nchr.org/irp/Preacher%20death.pdf>.

- ⁷¹ The term “arriving alien” is defined as “an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport.” 8 C.F.R. § 1.1(q).
- ⁷² See 8 C.F.R. § 212.5(b); U.S. Immigration and Customs Enforcement, Parole of Arriving Aliens Found to Have a “Credible Fear” of Persecution or Torture (November 6, 2007), ¶ 4.
- ⁷³ *Id.*
- ⁷⁴ *Id.*
- ⁷⁵ Letter from Eleanor Acer, Director, Refugee Protection Program, Human Rights First, to Julie Myers, Assistant Secretary, ICE, Department of Homeland Security (November 15, 2007). Available at: <http://www.human-rightsfirst.info/pdf/071120-asy-hrf-ltr-ice-parole-dir.pdf>.
- ⁷⁶ See *id.*
- ⁷⁷ USCIRF Report, at 48. See Memorandum from Michael A. Pearson, INS Executive Associate Commissioner, Office of Field Operations, to Regional Directors, “Detention Guidelines Effective October 9, 1998” (October 7, 1998) (“Although parole is discretionary in all cases where it is available, it is INS policy to favor release of aliens found to have a credible fear of persecution, provided that they do not pose a risk of flight or danger to the community.”); *cf.*, Memorandum from Julie L. Myers, Assistant Secretary, U.S. Immigration and Customs Enforcement, to Detention and Removal Field Office Personnel, “Parole of Arriving Aliens Found to Have a ‘Fear’ of Persecution or Torture,” November 6, 2007 (“[A]liens are only to be paroled in limited circumstances and on a case-by-case basis.”). Both memoranda refer to the application of 8 C.F.R. § 212.5(b).
- ⁷⁸ For example, in 2005 the USCIRF reported that in Harlingen, Texas, 97.6% of asylum-seekers approved for credible fear were released on parole before their asylum hearings, whereas in New Orleans, Louisiana only .5% were similarly released. USCIRF Report, at 151.
- ⁷⁹ 8 C.F.R. § 1003.19(h)(2)(i).
- ⁸⁰ See *Matter of X-K-*, 23 I&N Dec. 731 (BIA 2005).
- ⁸¹ Such an amendment would likely occur at 8 C.F.R. § 235.3(e).
- ⁸² 69 Fed. Reg. 48,880 (Aug. 11, 2004).
- ⁸³ Human Rights First Report, at 55 (describing the location of remote detention centers, several of which are located in the vicinity of the US-Mexico border).
- ⁸⁴ Joseph A. Vail, Essentials of Removal and Relief 110 (2006) (citing *Matter of Patel*, 15 I&N Dec. 666 (BIA 1976)).
- ⁸⁵ See INA § 236(c), 8 U.S.C. § 1226(c); 8 C.F.R. § 236.1(c)(3).
- ⁸⁶ INA § 236(c), 8 U.S.C. § 1226(c). These provisions apply only to those who were released from custody after October 8, 1998.
- ⁸⁷ A new section, 236a, was added to the INA. See 8 U.S.C. § 1226a (governing the mandatory detention of suspected terrorists), although this detention authority has not yet been used.
- ⁸⁸ INA § 236(c)(2), 8 U.S.C. § 1226(c)(2).
- ⁸⁹ 8 C.F.R. § 1003.19(h)(2)(ii).
- ⁹⁰ *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999).
- ⁹¹ 8 C.F.R. § 1003.19(h)(2)(ii).
- ⁹² INA § 236(a), 8 U.S.C. § 1226(a).
- ⁹³ It is not unheard of for even *U.S. citizens* to find themselves ensnared in removal proceedings, under the mistaken accusation that they are non-citizens. U.S. citizens have even been mistakenly deported. Hendricks, *U.S. Citizens Wrongly Detained, Deported by ICE*, San Francisco Chronicle (July 27, 2009). Available at: <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/07/27/MNGQ17C8GC.DTL>.
- ⁹⁴ See, e.g., *Demore v. Kim*, 538 U.S. 510, 544 (2003) (Souter, J., concurring in part and dissenting in part) (noting that the *habeas corpus* petitioner moved to the United States at age six, became a lawful permanent resident at age eight, and had no reason to feel firm ties to any country but the United States).
- ⁹⁵ See CLINIC, *The Needless Detention of Immigrants in the United States*, at 2 (August 2000) (hereinafter “CLINIC, Needless Detention”).
- ⁹⁶ Office of Probation and Pretrial Services, Administrative Office of the U.S. Courts, *Court & Community: Home Confinement* (2007). Available at: http://www.kywp.uscourts.gov/court_comm/cchome.pdf. In a 2003 survey by the Bureau of Justice Statistics, 54% of state and local government pretrial programs used some form of

electronic monitoring. Bureau of Justice Statistics, *Pretrial Services Programming at the Start of the 21st Century*, at 41 (July 2003).

- 97 See, e.g., Justice 2000, *Program Element: In-Home Detention/Electronic Monitoring* (2009) (indicating that during the period from March 2006 to July 2008, the use of a pre-trial release electronic monitoring program resulted in a 98.3% appearance rate for participating defendants in the Milwaukee County Circuit Court system). Available at: <http://www.prettrial.org/PrettrialServices/EssentialFunctions/Pages/MonitoringAndSupervision.aspx>. In addition, the former INS experienced success with a similar program of supervised release of asylum-seekers in 1997–2000, in which 93% of asylum-seekers appeared for all of their required hearings. CLINIC, *Needless Detention* at 5 (citing Root, National Director, Appearance and Assistance Program, Vera Institute for Justice, “The Appearance Assistance Program: An Alternative to Detention for Noncitizens in U.S. Immigration Removal Proceedings,” presentation at the 8th Migration Policy Forum (May 3, 2000)).
- 98 *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). Following this reasoning, the Court’s dissenters in *Demore v. Kim* concluded that lawful permanent residents of the United States should be entitled to heightened due process protections when detained by immigration authorities. *Kim*, 538 U.S. at 549 (Souter, J., concurring in part and dissenting in part) (protections to include “an impartial decisionmaker’s finding that detention is necessary to a governmental purpose.”).
- 99 Such an amendment would most likely occur by revising INA § 236(c), 8 U.S.C. § 1226(c).
- 100 These previously applicable rules were referred to as the “Transition Period Custody Rules.” When IIRAIRA was enacted, Congress recognized that INS had limited detention capabilities. The law therefore provided that if the Attorney General notified Congress within 10 days of enactment that INS had insufficient detention space and personnel available to effectuate its new detention responsibilities, a stay on the law’s mandatory detention provisions would take effect. Attorney General Janet Reno made such a notification, and the resultant two-year period was known as the “Transition Period.” 8 C.F.R. § 236.1(c)(6).
- 101 8 C.F.R. § 241.4(h)(7). See *Zadvydas v. Davis et al.*, 533 U.S. 678, 688–99 (2001).
- 102 Courts have recognized that the absence of a repatriation agreement counsels in favor of release in the pre-removal setting just as it does in post-removal detention. In *Ly v. Hansen*, decided in 2003, the Sixth Circuit applied *Zadvydas*’ concept of a “presumptively reasonable period of detention” to pre-removal detention, upholding the grant of *habeas corpus* to a Vietnamese national who was detained for almost seventeen months without a hearing. Vietnam did not have a repatriation agreement with the United States. 351 F.3d 263 (6th Cir. 2003).
- 103 INA § 236(c)(2), 8 U.S.C. § 1226(c)(2); 8 C.F.R. § 1003.19(h)(2)(ii).
- 104 *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999). See INA § 236(c), 8 U.S.C. § 1226(c); 8 C.F.R. 236.1(c).
- 105 *Kim*, 538 U.S. at 578 (Breyer, J., concurring in part and dissenting in part).
- 106 *Tijani v. Willis*, 430 F.3d 1241, 1244 (9th Cir. 2005) (Tashima, J., concurring) (citing *Zadvydas*, 533 U.S. at 690 (“Freedom from imprisonment—from government custody, detention or other forms of physical restraint—lies at the heart of the liberty [the Due Process] Clause protects.”)).
- 107 *Id.* at 1246 (Tashima, J., concurring).
- 108 *Id.* at 1244–45 (Tashima, J., concurring) (citing *Addington v. Texas*, 441 U.S. 418 (1979) (requiring the government of Texas to show by clear and convincing evidence that the civil commitment of an individual was warranted); *Cooper v. Oklahoma*, 517 U.S. 348 (1996) (striking an Oklahoma law that placed the burden of showing competency to stand trial on criminal defendants); *Foucha v. Louisiana*, 504 U.S. 71 (1992) (striking a Louisiana law requiring civilly committed individuals to show that they were not a danger to society prior to their release)).
- 109 *Id.* at 1246 (Tashima, J., concurring).
- 110 *Id.* at 1244, n.2 (Tashima, J., concurring) (citing *Matthews v. Diaz*, 426 U.S. 67, 77 (“The Fifth Amendment, as well as the Fourteenth Amendment, protects every [alien] from deprivation of life, liberty, and property without due process of law.”)).
- 111 *Id.* at 1244 (Tashima, J., concurring) (citing *Zadvydas v. Davis*, 533 U.S. 678 (2001)).
- 112 *Kim*, 538 U.S. at 531.
- 113 According to the DHS Office of Inspector General, in fiscal year 2007, ICE detained more than 311,000 non-citizens, with an average detention length of 37 days. Department of Homeland Security, Office of Inspector General, *Immigration and Customs Enforcement’s Tracking and Transfers of Detainees*, OIG-09-41, at 2 (March

- 2009). Amnesty International reports that some detainees “languish” in detention for years, especially those who have been ordered deported to home countries unwilling to accept their return or that do not have diplomatic relations with the U.S. Amnesty International, *Jailed Without Justice: Immigration Detention in the USA*, at 6 (March 25, 2009).
- ¹¹⁴ See 8 C.F.R. § 1003.18.
- ¹¹⁵ Speedy Trial Act, 18 U.S.C. §§ 3161–3174 (2008). The Speedy Trial Act applies in the context of federal criminal law, and “places time limits for completing the various stages of a federal criminal prosecution.” See United States Department of Justice, United States Attorneys’ Manual, Speedy Trial Act. Available at: http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crmoo628.htm.
- ¹¹⁶ See *id.*
- ¹¹⁷ GAO, *DHS Has Incorporated Immigration Enforcement Objectives and Is Addressing Future Planning Requirements*, GAO-05-66, at 12 (October 2004).
- ¹¹⁸ *Id.*
- ¹¹⁹ United States Department of Justice, Office of the Inspector General, Audit Division, *Audit Report: Immigration & Naturalization Service Institutional Removal Program*, at 2 (September 2002).
- ¹²⁰ Department of Homeland Security, Office of Inspector General, *Immigration and Custom Enforcement Detention Bedspace Management*, OIG-09-52, at 2 (April 2009).
- ¹²¹ Human Rights First Report, at 47–50.
- ¹²² U.S. Immigration and Customs Enforcement, *Factsheet—Alternatives to Detention* (March 16, 2009). Available at <http://www.ice.gov/pi/news/factsheets/o8o115alternativestodetention.htm>.
- ¹²³ *Id.*
- ¹²⁴ *Id.*
- ¹²⁵ *Id.*
- ¹²⁶ *Id.*
- ¹²⁷ While the average nightly cost per detainee has been quoted as \$99 per bed, when ICE’s operational expenses are included in the calculation, the cost increases to \$141 per bed. National Immigration Forum, *The Math of Immigration Detention*, at 1 (July 7, 2009) (citing DHS, US Immigration and Customs Enforcement Salaries and Expenses, Fiscal Year 2009 Congressional Justification, at 45). See H.R. Rep. 109-476, at *38 (2006) (indicating that the average daily cost of administering ISAP is \$22/person).
- ¹²⁸ U.S. Immigration and Customs Enforcement, *Factsheet—Alternatives to Detention* (March 16, 2009).
- ¹²⁹ *Id.*
- ¹³⁰ *Id.*
- ¹³¹ *Id.*
- ¹³² *Id.*
- ¹³³ *Id.*
- ¹³⁴ *Id.*
- ¹³⁵ *Id.*
- ¹³⁶ INA § 241(a)(2). Congress included this provision in IIRAIRA after government findings that immigration authorities were able to remove only 13% of removable non-citizens when such individuals were released prior to their planned removal from the United States. Memorandum from Glenn A. Fine, Inspector General, DOJ, to Michael J. Garcia, Acting Commissioner, INS (February 25, 2003).
- ¹³⁷ INA § 241(a)(1).
- ¹³⁸ United States Department of Homeland Security, Office of Inspector General, *ICE’s Compliance with Detention Limits for Aliens with a Final Order of Removal From the United States*, at 3 (February 2007).
- ¹³⁹ *Id.* at 11–13 (February 2007). For nationals of entirely “non-cooperative” countries—countries such as Cuba, Laos, and Vietnam, with which the United States has no repatriation agreement—detention times are shorter, because it is readily established that removal is not foreseeable.
- ¹⁴⁰ *Zadvydas*, 533 U.S. at 688–99.
- ¹⁴¹ *Id.* at 701.
- ¹⁴² *Id.* In a 2005 decision, *Clark v. Martinez*, the Supreme Court extended the *Zadvydas* holding to encompass inadmissible non-citizens. *Clark v. Martinez*, 543 U.S. 371 (2005). Although the cases in which the Supreme Court has announced this rule concern the detention of non-citizens in *post-removal* detention, two Circuit Courts of Appeals have also applied their rationale to require the release of non-citizens detained for excessive

periods of time in *pre-removal* detention. See, e.g., *Ly v. Hansen*, 351 F.3d 263, 273 (6th Cir. 2003) (applying *Zadvydas* to reverse the denial of *habeas corpus* relief to a pre-removal-hearing detainee held for 17 months); *Tijani*, 430 F.3d at 1242 (applying *Zadvydas* in requiring a District Court to grant *habeas corpus* relief to a pre-removal-hearing detainee held for two years and eight months unless a bail hearing was held within 60 days). Note, however, that in *Demore v. Kim*, the Court distinguished *Zadvydas*, contrasting the “limited period” of pre-removal detention with the “potentially permanent” detention of aliens with final orders of removal.

¹⁴³ *Zadvydas*, 533 U.S. at 701.

¹⁴⁴ *Id.*

¹⁴⁵ 8 C.F.R. § 241.4(e). In fact, DHS may consider a number of other factors as well, including whether the detainee has been disciplined while in custody, the severity and nature of any past criminal convictions, the detainee’s mental health, evidence of rehabilitation, the detainee’s ties, if any, to the United States, and any other relevant information. 8 C.F.R. § 241.4(f).

¹⁴⁶ 8 C.F.R. § 241.4(k)(4)(i).

¹⁴⁷ Department of Homeland Security, Office of Inspector General, *ICE’s Compliance with Detention Limits for Aliens with a Final Order of Removal From the United States*, OIG-07-28, at 4 (February 2007); 8 C.F.R. § 241.13(c).

¹⁴⁸ 8 C.F.R. § 241.13(f).

¹⁴⁹ Department of Homeland Security, Office of Inspector General, *ICE’s Compliance with Detention Limits for Aliens with a Final Order of Removal From the United States*, OIG-07-28, at 5 (February 2007); 8 C.F.R. § 241.14(e)(6). In order to be considered “specially dangerous” an alien must have committed one or more crimes of violence, or been diagnosed with a mental condition or personality disorder which make him likely to engage in acts of violence in the future, and no conditions of release can ensure public safety. 8 C.F.R. § 241.14(b)–(e).

¹⁵⁰ A DHS Office of Inspector General report noted the need for greater consistency in completing required post-order custody reviews, and ensuring that such reviews are timely. Of the cases analyzed in the report, ICE had failed to conduct 90-day reviews of almost 10% of the cases that required them. Additionally, 19% of the 90-day review cases were untimely and 34% of the six-month reviews were untimely. Department of Homeland Security, Office of Inspector General, *ICE’s Compliance with Detention Limits for Aliens with a Final Order of Removal From the United States*, OIG-07-28, at 16–17 (February 2007).

¹⁵¹ *Id.* at 37–40.

¹⁵² Catholic Legal Immigration Network, *Systematic Problems Persist in U.S. ICE Custody Reviews for “Indefinite” Detainees* (2005), at 35. Available at <http://idc.rfbf.com.au/wp-content/uploads/2009/06/clinicindefinitereport-final.pdf> (hereinafter “CLINIC, Indefinite Detainees”).

¹⁵³ See *id.* at 6.

¹⁵⁴ See *id.*

¹⁵⁵ CLINIC, *Needless Detention*, at 8.

¹⁵⁶ CLINIC, *Indefinite Detainees*, at 26.

¹⁵⁷ 8 C.F.R. § 241.1(g)(1)(ii).

¹⁵⁸ INA § 292, 8 U.S.C. § 1362.

¹⁵⁹ See DOJ 2008 Year Book, at G1.

¹⁶⁰ See Migration Policy Institute Report, at 2.

¹⁶¹ See *id.*

¹⁶² See U.S. Department of Justice, Executive Office for Immigration Review, *Evaluation of the Rights Presentation*, at 8, 11 (1998).

¹⁶³ See, e.g., Migration Policy Institute Report, at 2 (explaining that a lawful permanent resident ordered removed as “an aggravated felon” following a drunk driving conviction would not have obtained relief but for counsel assistance).

¹⁶⁴ DOJ 2008 Year Book, at G1.

¹⁶⁵ *Id.* at C4.

¹⁶⁶ *Id.* at G1. (This rate of representation includes proceedings where the non-citizen failed to appear. Had these proceedings not been counted in the total figure, the representation rate would be 48%.)

¹⁶⁷ See Richard Pena, *The Quest to Fulfill Our Nation’s Promise of Liberty and Justice for All: ABA Policies on Issues Affecting Immigrants and Refugees*, American Bar Association, at 7 (February 13, 2006) (hereinafter “ABA

- Recommendations”) (citing Donald Kerwin, “Charitable Legal Programs for Immigrants: What They Do, Why They Matter, and How They Can Be Expanded,” *Immigration Briefing*, No. 04-06 (June 2004) at 11–12).
- ¹⁶⁸ See *id.*
- ¹⁶⁹ USCIRF Report, at 34.
- ¹⁷⁰ *Id.*
- ¹⁷¹ See U.S. Commission on International Religious Freedom, *Expedited Removal Study Report Card: 2 Years Later*, at 1 (February 2007).
- ¹⁷² DOJ 2006 Year Book, at W1.
- ¹⁷³ See U.S. Department of Justice, Executive Office for Immigration Review, *The BIA Pro Bono Project is Successful*, at Attachment E (October 2004) (hereinafter “EOIR Pro Bono Project Report”).
- ¹⁷⁴ See *id.*
- ¹⁷⁵ See Migration Policy Institute Report, at 2.
- ¹⁷⁶ See *id.* at 5 (citing INA § 242(d)(1)).
- ¹⁷⁷ See *id.*
- ¹⁷⁸ See *Summary of Recommendations Relating to the Comprehensive Review of the Immigration Courts and Board of Immigration Appeals*, Human Rights First, at 1 (hereinafter “Human Rights First Court Report”); See also Migration Policy Institute Report, at 4.
- ¹⁷⁹ Human Rights First Court Report, at 1.
- ¹⁸⁰ See Migration Policy Institute Report, at 4 & n.24 (explaining that “[p]anel review occurs only if necessary: (1) to settle inconsistent immigration judge rulings; (2) to establish precedent; (3) to review a decision not in conformity with the law or precedent; (4) to resolve cases or controversies of ‘major national import’; (5) to review a ‘clearly erroneous’ factual decision by an Immigration Judge; and (6) otherwise to reverse an Immigration Judge or other administrative decision”) (citing 8 C.F.R. § 1003.1(e)(6)).
- ¹⁸¹ See Migration Policy Institute Report, at 4 (citing 8 C.F.R. § 1003.1(d)(3)(i)).
- ¹⁸² See Human Rights First Court Report, at 1; See also Migration Policy Institute Report, at 4 (citing Dorsey & Whitney LLP, “Board of Immigration Appeals: Procedural Reforms to Improve Case Management,” Study for the American Bar Association Commission on Immigration Policy, Practice and Pro Bono, at 39–40 (October 2003)).
- ¹⁸³ See Human Rights First Court Report, at 1.
- ¹⁸⁴ *Id.* at 1–2.
- ¹⁸⁵ See Migration Policy Institute Report, at 4.
- ¹⁸⁶ See *id.*
- ¹⁸⁷ See *id.*
- ¹⁸⁸ Human Rights First Court Report, at 2 (citing *Immigration Litigation Reduction: Hearing Before the S. Comm. on the Judiciary*, 109th Cong., 2nd Sess. (April 3, 2006) (statement of Hon. Jon O. Newman, U.S. Court of Appeals for the Second Circuit)).
- ¹⁸⁹ *Aris v. Mukasey*, 517 F.3d 595, 600 (2d Cir. 2008).
- ¹⁹⁰ See *Yamataya v. Fisher*, 189 U.S. 86, 100 (1903).
- ¹⁹¹ See *Aguilera-Enriquez v. INS*, 516 F.2d 565, 568–69 (6th Cir. 1975).
- ¹⁹² *Id.* (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973)).
- ¹⁹³ See Beth J. Werlin, *Renewing the Call: Immigrants’ Right to Appointed Counsel in Deportation Proceedings*, 20 B.C. Third World L.J. 393, 401 (Spring 2000) (citing *De Bernardo v. Rogers*, 254 F.2d 81, 82 (D.C. Cir. 1958)); *In re Raimondi*, 126 F. Supp. 390, 391, 395 (N.D. Cal. 1954); *Henriques v. INS*, 465 F.2d 119, 120 (2d Cir. 1972)).
- ¹⁹⁴ *Gideon v. Wainwright*, 372 U.S. 335, 334–45 (1963) (quoting *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932)).
- ¹⁹⁵ See *Aguilera-Enriquez*, 516 F.2d at 568.
- ¹⁹⁶ See *id.*
- ¹⁹⁷ See Werlin, *supra* note 194, at 400 (citing *In re Gault*, 387 U.S. 1, 41 (1967)).
- ¹⁹⁸ See *id.* (citing *Gault*, 387 U.S. at 38–42); See also Migration Policy Institute Report, at 9.
- ¹⁹⁹ See Migration Policy Institute Report, at 9–10 (citing *Gagnon*, 411 U.S. at 786–87; *Lassiter v. Dep’t of Soc. Servs. of Durham County, N. C.*, 452 U.S. 18, 27 (1981)).
- ²⁰⁰ See *id.* at 10–11.
- ²⁰¹ See 18 U.S.C. § 3006A(a)(2).
- ²⁰² Cara Anna, *Few Aiding Children Facing Deportation*, Associated Press, December 2, 2006.

- ²⁰³ See Jacqueline Bhabha & Susan Schmidt, *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in the U.S.*, President and Fellows of Harvard College, at 15 (June 2006).
- ²⁰⁴ Minors who are under the age of 21 and are determined to be dependent on a juvenile court in the U.S. or have been placed under the custody of a state department or agency by a U.S. juvenile court and have been deemed eligible for long-term foster care due to abuse, neglect, or abandonment may be eligible for additional relief if it has been determined through judicial or administrative proceedings that it would not be in the child's best interest to be returned to his or her home country. Special Immigrant Juvenile Status (SIJS), created by the Immigration Act of 1990, allows these minors to obtain lawful permanent residency. Navigating the process whereby a minor obtains the orders and findings necessary to allow her to petition for an adjustment of status pursuant to SIJS is a difficult process that is best facilitated by counsel.
- ²⁰⁵ TVPRA § 235(a)(5)(D)(iii); *See also* TVPRA § 235(c)(5).
- ²⁰⁶ EOIR Pro Bono Project Report, at i, 1–2.
- ²⁰⁷ *Id.* at i.
- ²⁰⁸ *Id.*
- ²⁰⁹ *Id.*
- ²¹⁰ *Id.*
- ²¹¹ *Id.*
- ²¹² *Id.*
- ²¹³ *Id.*
- ²¹⁴ *See id.*
- ²¹⁵ *See id.*
- ²¹⁶ INA § 292, 8 U.S.C. § 1362.
- ²¹⁷ *See* ABA Recommendations at 6.
- ²¹⁸ *See id.* (citing INS Office of General Counsel, “Funding of a Pilot Project for the Representation of Aliens in Immigration Proceedings,” December 21, 1995).
- ²¹⁹ *Id.*
- ²²⁰ *Id.*
- ²²¹ *Id.*
- ²²² *Id.*
- ²²³ *Id.* (citing EOIR Pro Bono Project Report).
- ²²⁴ *See* Human Rights First Court Report at 3 (citing USCIRF Report, at 70).
- ²²⁵ *See* ABA Recommendations, at 6.
- ²²⁶ *See id.* (citing Migration Policy Institute Report, at 15).
- ²²⁷ *See* Migration Policy Institute Report, at 13–14.
- ²²⁸ *Id.*
- ²²⁹ *Id.*
- ²³⁰ *Id.* at 14.
- ²³¹ Human Rights First Court Report at 3.
- ²³² *See id.* at 3–4.
- ²³³ *See id.* at 4.
- ²³⁴ *See id.* at 3–4.
- ²³⁵ 8 C.F.R. § 236.1(c)(8); INA § 236(c)(1), 8 U.S.C. § 1226(c)(1). As discussed in Part I, the mandatory detention of a non-citizen may be triggered by a variety of offenses ranging from non-violent crimes, including drug and prostitution offenses and crimes involving moral turpitude, to firearm offenses and violent crimes.
- ²³⁶ INA § 236(a)(2), 8 U.S.C. § 1226(a)(2); 8 C.F.R. § 236.1(c)(8). In order to be released on bond, the non-citizen must demonstrate to the satisfaction of the DHS official that “such release would not pose a danger to property or persons, and that the [non-citizen] is likely to appear for any future proceeding.” *Id.*
- ²³⁷ 8 C.F.R. § 236.1(d).
- ²³⁸ 8 C.F.R. §§ 1003.19(h)(1)(ii), (h)(2)(ii); *See also* United States Department of Justice, Office of the Chief Immigration Judge, Immigration Court Practice Manual, § 9.3. Available at: http://www.usdoj.gov/eoir/vll/OCIJPracManual/ocij_page1.htm; *See also* Executive Office for Immigration Review, Immigration Judge Benchbook—Bond Guide. Available at: <http://www.usdoj.gov/eoir/vll/benchbook/tools/Bond%20Guide.htm>.



The Constitution Project is an independent think tank in Washington, D.C. that promotes and defends constitutional safeguards. Since 1997, the Project has assembled bipartisan coalitions of respected leaders who create consensus recommendations for policy reforms. Working with these influential and unlikely allies, the Project conducts strategic public education campaigns and helps create the political majorities needed to transform this consensus into sound public policy.

The Constitution Project
1200 18th Street, NW Suite 1000
Washington, DC 20036

(202) 580-6920 (tel)
(202) 580-6929 (fax)

info@constitutionproject.org
www.constitutionproject.org