



March 28, 2017

Restoring Enforcement of Our Nation's Immigration Laws

Subcommittee on Immigration and Border Security, Committee on the Judiciary, United States House of Representatives, One Hundred Fifteenth Congress, First Session

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Restoring Enforcement of our Nation's Immigration Laws

Thomas M. Hodgson

Sheriff of Bristol County, Massachusetts

3/28/2017

Introduction

Illegal immigration is the most dangerous issue facing legal residents of the United States and national security.

The cost in dollars is staggering.

The human cost and emotional impact of crimes committed by illegals is beyond measure.

The time has come to protect Americans by having lawmakers and law enforcement, Washington and Main Street, officials and neighbors all work together to secure our borders and enforce immigration law.

The future of our country depends on it.

Illegal immigration by the numbers

Illegal immigration has an incredible strain on every level of our nation's infrastructure, which is backed up by data from the Federation for American Immigration Reform (FAIR) and the Center for Immigration Studies (CIS):

- **Jobs:** All net new jobs went to immigrants from November 2007 to November 2015, according to the CIS. That's less jobs for legal U.S. residents.
- **Education:** Educating the children of illegal aliens in grades K-12 costs U.S. taxpayers \$51.3 billion a year, according to FAIR.
- **Poverty:** According to FAIR, 71 percent of households with children headed by illegal aliens used at least one welfare program. Families with illegal alien members are the fastest growing family group in the Temporary Assistance for Needy Families (TANF) program.
- **Health care:** About 60 percent of illegal aliens are uninsured (twice the number of legal immigrants; four times the number of U.S.-born).
- **Taxes:** FAIR estimates that in 2010, after deducting taxes paid by illegal aliens, the cost to U.S. taxpayers from illegal immigration was \$99.2 billion.

Criminal illegal aliens

Last summer, a twice-deported illegal alien named Walter DaSilva shot and killed his 19-year-old daughter, Sabrina, in a small parking lot outside her residence. Walter was previously convicted of attempted murder in 2002 and sentenced to 8-10 years in prison.

The Boston Globe reported that, aside from confessing to the crime, The Brazilian native smiled ear to ear at his arraignment.

This tragedy occurred in New Bedford, Massachusetts, which is in my district in Bristol County.

He is one of hundreds of thousands of illegal aliens committing crimes and victimizing U.S. citizens from coast to coast. According to FAIR, almost 300,000 criminal illegal aliens are in U.S. jails and prisons, costing U.S. taxpayers, between federal and local levels, more than \$15 billion annually.

There are three main areas immigration law needs to attack and the laws need to be enforced to protect our citizens: Sanctuary cities, border security and law enforcement programs.

Sanctuary cities

As a sworn Sheriff, as a sworn law enforcement officer, as a sworn elected official and public servant, I took an oath to protect the citizens of my county and uphold the U.S. Constitution. I am binded by oath and duty to follow and enforce the law regardless if I disagree with it or not.

This law includes immigration law, which some around the country turn a blind eye to. Our federal government is just as guilty. The title of this hearing is, after all, "Restoring Enforcement of our Nation's Immigration Law," with the key word being "restoring."

The law in question is Title 8 Chapter 12 of the U.S. Code which states specifically that it is illegal to "knowing(ly) or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation."

That is exactly what these elected officials are doing by declaring their states, counties, cities and towns as sanctuaries for illegals.

These officials pledge not to cooperate with federal immigration enforcement, Immigration and Customs Enforcement (ICE), on detaining criminal illegal aliens.

Imagine that. A person elected to lead by his or her peers, a person who the public put their trust in, telling those people that they will not cooperate with federal law enforcement, they will not do all they can to keep them safe.

These sanctuary communities are magnets for illegals who are looking to lay low, not be bothered, and commit crimes or plan terrorist attacks.

I received a call from a U.S. border agent in San Diego a few years ago when I was pushing for the Secure Communities program in Massachusetts. This border agent, calling out of the blue because he read about my position on immigration in media reports, called to say that the word in the illegal immigrant community is to cross the border and go to Massachusetts and other areas that have sanctuary cities.

At best, these sanctuary policies are a direct breach of the oath these elected and appointed officials took to protect their constituents at all costs. At worst, they are careless, illegal and extremely dangerous acts done for the sake of political pandering.

Longstanding immigration law is crystal clear. It's a jail-able offense to harbor or conceal criminal illegal aliens from ICE. Those that do so and obstruct federal law enforcement should be arrested and charged.

No one is above the law, and the officials of these sanctuary cities who obstruct law enforcement should be held to the same legal standards and face the same punishment as would you or I.

Law enforcement programs and 287(g)

In January, the Bristol County Sheriff's Department became the second organization in New England to sign a memorandum of agreement with ICE to officially enter into the 287(g) immigration enforcement program.

I stood in front of a room full of TV cameras and reporters and answered every tough question from the mostly liberal media about immigration enforcement. The questions weren't tough for me to answer, because I believe in my heart of hearts that there needs to be more cooperation among law enforcement, more sharing of intelligence, and more sharing of resources.

The program allows Bristol County correctional officers to receive extensive training to identify, process and assist in all immigration enforcement functions.

If someone is arrested by local or state police, brought to one of my jail facilities and is identified as foreign-born, these specially trained officers have full authority and training to conduct immigration screenings and report the results to regional ICE supervisors. They can then assist ICE in whatever direction the supervisors want to take, from releasing the person to detaining them to getting the deportation process rolling.

These officers will get access to the ICE databases where they can see and add intelligence on criminal illegal aliens in real time. The faster information is shared, the more information is shared, the safer the citizens of our communities will be.

ICE officials will be installing some technological upgrades to our facility soon, and this summer, our officers will travel to South Carolina for four weeks of training. Upon completion of this training, they will be de facto ICE officers. This not only helps increase public safety in my county, but helps ICE redistribute its limited resources to more areas of need.

More than 400,000 illegal immigrants were identified for deportation through the 287(g) program from 2006-2015, according to the Department of Homeland Security.

About 13,000 foreign-born individuals have been processed in our jail facilities over the last five years.

If the 287(g) program can help us identify, detain and possible deport even one dangerous criminal illegal alien, it will be a smashing success and a huge boost to public safety.

Border security

Walter DaSilva was deported twice before killing his daughter in Bristol County. If our borders and points of entry were secure, he never would have had the opportunity to commit this heinous crime.

Securing the southern border is of utmost importance to the safety and security of the American people. The United States needs a combination of physical and electronic barriers to protect our citizens.

The wall is a no-brainer. I've been to the border three times. I've seen first-hand how illegals are pouring into our country. Our nation needs a strong physical structure at the southern border, where applicable, to protect our safety and security.

Not all the terrain down south is conducive for a wall. Therefore, we need biometric sensors, drones and other technology to reinforce the weak points in the physical structure.

Let's bring in the Israelis, the masters of border security and policy, and work with them to create a comprehensive border security plan.

People with very limited resources cross the border illegally every day in droves. And the ones we do catch are being sent here, there and everywhere with a summons to appear in court at a later date. How many of them actually show up?

Progress is starting to be made on this front as immigration judges have recently been dispatched to the border. Illegals who are caught entering the country will now have a hearing right at the border and sent back in very little time.

These ideas stretch beyond the southern border to other ports of entry such as airports and seaports. They need to be as secure as possible.

Our nation is a nation of immigrants. My father was an immigrant from England who came here and became a citizen the right, legal way. We need to continue accepting immigrants who follow the rules and go through the legal process, not reward those who come here illegally.

Solutions

Illegal immigration is such a huge and dangerous problem that solving it overnight is not going to happen. However, starting today, we can take some steps to stem the tide of illegals flooding into our country, and apprehend and deport those illegals who are committing crimes and victimizing our legal residents.

How can we do that? Some suggestions:

- **End sanctuary cities:** Issue arrest warrants and charge these officials who pledge to violate federal law by harboring and concealing illegals. Sanctuary cities will start to fade if their leaders start running into legal trouble.
- **Expand the 287(g) program:** This partnership between local and federal law enforcement should be hailed as a model, not by the liberals as a disaster. Every corrections facility should have staff trained to identify criminal illegal aliens to keep them off the streets. ICE has a tremendously hard job ahead of it as President Trump's immigration ideas move forward, and the organization needs as many resources as it can get. By working with our federal teammates, we can keep our communities safe and help ICE keep our country safe.
- **Have immigration judges available at night:** Some sanctuary communities say they won't honor ICE detainer requests because there is no criminal warrant. Well if immigration judges were available beyond business hours, when most crimes are committed, we could send affidavits to judges and, if granted, turn them into warrants in little time. This could prevent the bail or release of a dangerous criminal illegal alien.
- **Secure the border:** Physical and technological structures must be constructed along the southern border where the hordes of illegals are coming from. Once we stem the tide, we can focus on the problem here without it getting worse.

Restoring Enforcement of Our Nation's Immigration Laws
U.S. House Judiciary Committee
Subcommittee on Immigration and Border Security
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Statement of Jessica M. Vaughan
Center for Immigration Studies

Thank you, Chairman Sensenbrenner and Ranking Member Lofgren, for the opportunity to testify on the state of immigration law enforcement and how it might be improved. Obama administration policies left immigration enforcement in a state of collapse. Interior enforcement was systematically dismantled to a fraction of previous years, we experienced a surge of new illegal arrivals at the southwest border seeking to take advantage of catch and release policies and lenient rules for claiming asylum; and the size of the illegal population ticked upward again. The suppression of enforcement has imposed enormous costs on American communities in the form of lost job opportunities and stagnant wages for native workers, higher tax bills to cover increasing outlays for social services and benefits, compromised national security, and public safety threats. The Trump administration has begun using executive authority to restore enforcement in many important ways. But there is only so much that can be done by the president. Under our constitution, Congress is really the lead branch of government on immigration law, and action from Congress is necessary to fully address the most important weak spots in immigration control. Specifically, Congress needs to address the problem of illegal hiring; tackle the problem of sanctuaries; update the laws supporting gang-related enforcement; and reduce opportunities for executive abuse of authority on work permits, parole, deferred action, and other gimmicks that have been used to offer legal status to people not authorized by Congress.

Dramatic Decline in Enforcement Under Obama – Department of Homeland Security (DHS) statistics illustrate the collapse in enforcement under Obama administration policies, which became particularly acute since the set of executive actions issued in late November, 2014 that imposed severe restrictions on the immigration enforcement agencies, and exempted most illegal immigrants, including many new illegal arrivals, from being targeted for deportation.

- 1) *Catch and Release at the Border.* A variety of sources indicate that over the last several years a huge number of people have successfully entered the country without authorization or legal status, either by evading the Border Patrol or by asking for political asylum. For instance, a report commissioned by DHS found that while there has been a steep drop in total illegal entries over the past 15 years, there has not been a steep rise in the probability of apprehension over the same time period. In 2015, the estimated apprehension rate of illegal aliens between ports of entry on the southern border was only 54 percent. The report also noted that in 2015 only 39 percent of the people trying to enter illegally at land ports of entry (such as with fake IDs or hidden in vehicles) were apprehended.¹

Even many of those who were caught were allowed to stay under Obama-era catch and release policies. A recent Government Accountability Office (GAO) report found that 38 percent of the aliens apprehended by the Border Patrol along the southwest border in 2014 and 2015 may still have been in the United States as of May 2016 – totaling more than 220,000 illegal aliens allowed to stay in those years. Breaking it down by type of apprehension, the GAO found further that 93

¹ Institute for Defense Analyses, *Assessing Southern Border Security*, May 2016, <http://cis.org/sites/cis.org/files/Border-Crossing-Stats-Report.pdf>.

percent of family units apprehended and 42 percent of individuals apprehended for the first-time in 2014 and 2015 were still here as of May, 2016.²

Many of those caught attempting illegal entry or arriving without visas at the ports of entry were permitted to enter the country to pursue an asylum claim under Obama-era policies. Under these lenient policies, the number of asylum claims originating at the southern border spiked from 17,000 requests in 2009 to 170,000 requests by 2014.

Following the imposition of extreme prosecutorial discretion and prioritization policies on the Border Patrol, as first revealed at a hearing before the House Judiciary committee in early 2015, agents were told to ignore cases in which the encountered aliens said they had been in the country since 2014. Brandon Judd, president of the National Border Patrol Council has testified that about 80 percent of the aliens encountered by agents were not arrested and not processed for deportation.

- 2) *Overstays.* In 2015, an estimated 527,000 foreign visitors did not depart as required when their authorized stay expired, according to the first annual report on overstays from DHS, published about a year ago. About 416,500 apparently still had not departed as of January 4, 2016. Of these overstays, 43 percent had entered on a business or tourist visa, 29 percent had entered under the visa waiver program, and 28 percent had entered from Canada or Mexico.³ The report analyzed the records only of a small sub-set of foreign visitors -- air and sea travelers who entered for the purpose of business or pleasure. It did not examine the records of visitors who entered by land, which is more than three-quarters of all admissions to the United States. Nor did it track the records of visitors granted visas for purposes other than business or pleasure, such as students, guest workers or exchange visitors.

Little government effort is dedicated specifically to preventing or finding overstays; according to the GAO, in recent years only a tiny share of the enforcement resources of Immigration and Customs Enforcement (ICE) went for overstay enforcement. In the most recent year for which information is available, only about three percent (11,596 out of 368,485) of the aliens deported by ICE were overstays, out of a total estimated population of four to 5.5 million overstays in the United States.

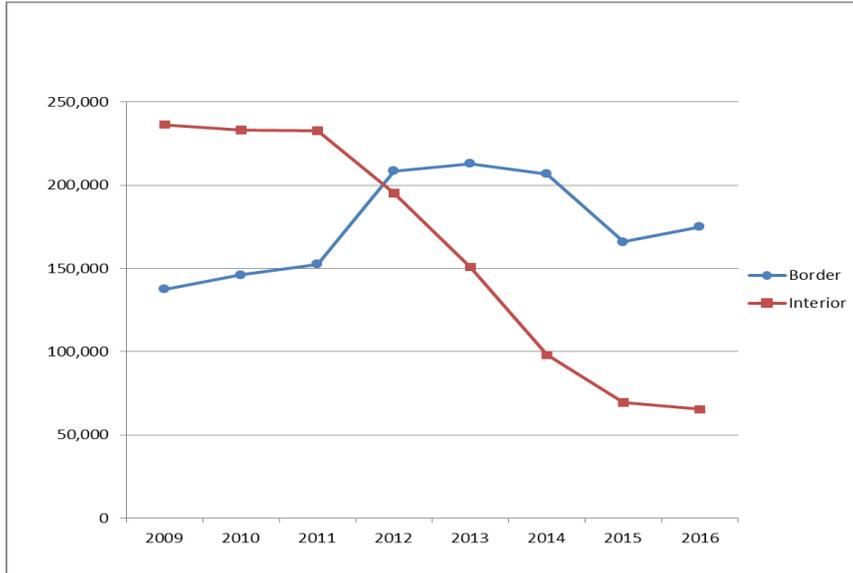
- 3) *ICE Interior Enforcement.* Under the Obama administration, ICE's deportation case load shifted from mostly aliens who were arrested in the interior to mostly aliens who were arrested by the Border Patrol and turned over to ICE for deportation. This change in case load enabled the Obama administration to claim "record" deportations while simultaneously masking the steep decline in interior enforcement.

The number of ICE deportations from the interior dropped more than 70 percent since the peak in 2009, from about 236,000 to 65,000 in 2016, and is the lowest number of deportations in 10 years.

² Government Accountability Office report GAO-17-66, *Border Patrol: Actions Needed to Improve Oversight of Post-Apprehension Consequences*, January 2017, <http://www.gao.gov/assets/690/682074.pdf>.

³ DHS, "Entry-Exit Overstay Report: 2015," <http://cis.org/sites/cis.org/files/16-0029%20FY%2015%20CBP%20Entry%20and%20Exit%20Overstay%20Report%20FINAL%2001.19.16.pdf>.

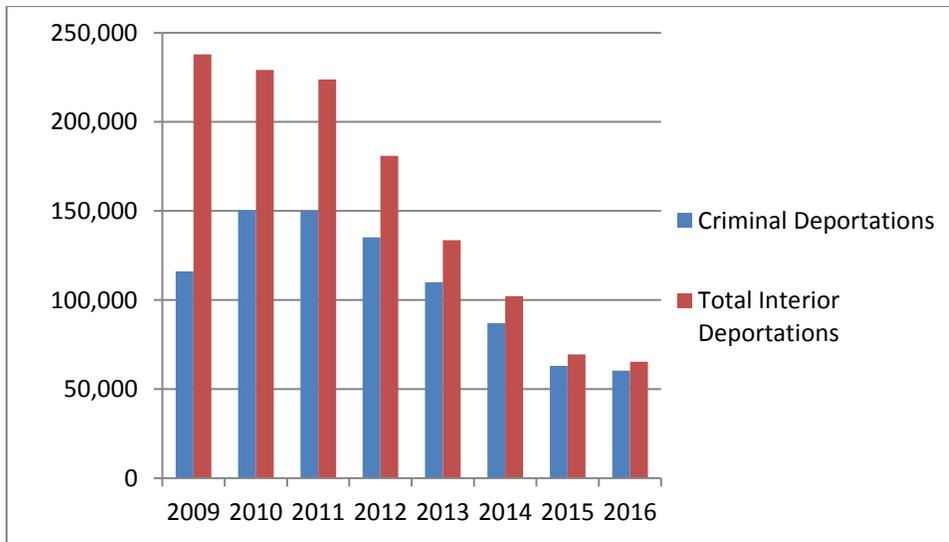
ICE Deportations: Border and Interior Cases



Source: ICE

- 4) *Criminal Deportations.* The number of criminal aliens deported from the interior declined by 60 percent from the peak in 2011, from 150,000 to 60,000 in 2016. This occurred despite the nationwide implementation of the Secure Communities program, which linked DHS databases to the national fingerprint matching system, giving ICE the ability to identify more criminal aliens than ever before.

ICE Criminal Alien Deportations: 2009-2016



Source: ICE

Some of the decline in criminal alien deportations is likely due to limitations placed the popular and effective 287(g) partnership program, which at one point was responsible for an estimated 20 percent of ICE's criminal alien arrests.⁴

- 5) *Criminal Releases.* Under the interior version of catch and release, from 2013 to 2015, ICE released from its custody more than 86,000 aliens with criminal convictions.⁵ Hundreds of these individuals had been convicted of very serious crimes including homicide, sexual assault and kidnapping. ICE released these aliens for a variety of reasons, including grants of prosecutorial discretion, court orders, experimentation with alternatives to detention, and recalcitrant countries refusing to cooperate in taking their citizens back for deportation. Thousands of these aliens were arrested and convicted again for new crimes after their release from ICE custody.⁶

As of June, 2016 there were 176,126 convicted criminal aliens who had received final orders of removal and exhausted all appeals, but who had not departed and were still at large in the United States. In addition, there were 191,161 convicted criminals with pending deportation proceedings who were at large in the United States.⁷

- 6) *Increase in Transnational Gang Violence.* The number of gang-related arrests in targeted operations by Homeland Security Investigations (HSI) agents also declined considerably under the Obama administration. According to ICE records, the number of gang arrests declined from 5,080 arrests in 2012 to 1,578 in 2014, a drop of nearly 70 percent.⁸

Hundreds of gang members have been able to avoid deportation after being granted deferred action under the Obama Deferred Action for Childhood Arrivals program. Within a year of the start of the program, there were at least 280 gang members whose DACA status had to be terminated because of gang ties. As of July 2015, only 89 of them had been removed; 10 were in custody, 77 of them had been released from ICE custody and 89 of them were never booked into ICE custody at all.⁹

The FBI and many local gang investigators have stated that there has been a noticeable increase in gang violence that coincides with the years-long surge in illegal arrivals of unaccompanied minors from Central America.

Some gang investigators have told me of instances in which gang leaders have taken advantage of the lenient catch and release policies to bring in new recruits to boost the gang's numbers in certain areas of the United States. For example, one local MS-13 clique leader, who had received a DACA work permit and was employed as a custodian at a middle school in Frederick, Md., and who was recently incarcerated for various gang-related crimes, reportedly was told by

⁴ Jessica M. Vaughan and James R. Edwards Jr., "The 287(g) Program: Protecting Home Towns and Homeland," Center for Immigration Studies, October, 2009, <http://cis.org/287greport>.

⁵ Jessica M. Vaughan, "ICE Released 19,723 Criminal Aliens in 2015," Center for Immigration Studies, April 27, 2016, <http://cis.org/vaughan/ice-releases-19723-criminal-aliens-2015>.

⁶ DHS records provided to Sen. Chuck Grassley, released on January 30, 2015, <http://www.grassley.senate.gov/sites/default/files/news/upload/Immigration%2C%2001-30-15%2C%20Breakdown%20of%20Subsequent%20Crimes%20List.pdf>.

⁷ ICE Weekly Departures and Detention Report, June 20, 2016.

⁸ Source is ICE records obtained by the author through a FOIA request.

⁹ DHS Response to Questions for the Record from Sen. Chuck Grassley, Senate Judiciary Committee, September 10, 2015.

gang leaders in El Salvador to take advantage of the lenient policies at the U.S. border to bring in new recruits, knowing that they would be allowed to resettle in the area with few questions asked. Several of these unaccompanied minors now have been arrested and incarcerated for various crimes, including a vicious random attack on a sheriff's deputy in 2015. According to local gang investigators, these gangs have been aggressively recruiting recently- arrived Central American children as young as 10 years old.

My colleague Joseph Kolb has identified 126 communities, 72 percent in suburban locations, in 24 states that in the last two years have experienced crimes attributed to MS-13, which is one of the most notorious Central American gangs, with a large share of its members who are illegal aliens or children of illegal aliens. The hot spots for this crime spree included the Washington DC suburbs, Long Island NY, greater Boston, and Houston.

Among the crimes attributed to MS-13 members were 38 homicides, numerous attempted murders, arson, extortion, drug trafficking, firearms violations, rape, robbery, and witness tampering. During the period studied, there were 42 alleged MS-13 homicide victims. Sixty-nine percent of the victims were under the age of 21. Of the 81 suspects identified, 57 percent were under age 21. Forty percent of the murder suspects have been identified in open sources or by local law enforcement agencies to be illegal aliens; for about half of the suspects, no immigration status information was made public.¹⁰

- 7) *Proliferation of Sanctuary Policies.* Currently there are approximately 300 jurisdictions (states, counties and municipalities) that have laws or policies that interfere with immigration enforcement.¹¹ These policies have resulted in the release of hundreds of deportable criminal aliens per week since 2014, according to ICE records I obtained through a FOIA request. Most of the offenders released by the sanctuaries had prior arrests, and one-fourth were already felons at the time of release. Many of these offenders committed new crimes soon after their release; during one brief time period studied, nearly one-fourth were arrested again for a criminal offense within eight months of their release. The 1,867 offenders were arrested 4,298 times during the eight-month period studied, accumulating 7,491 new charges in total, after their release.¹²

Just last week ICE began releasing information on criminal aliens released by sanctuary jurisdictions, documenting 206 cases discovered during the week of January 28, 2017. During that week, detainers were rejected by 46 different jails in 16 different states. More than two-thirds of the arrests occurred in Travis County, Texas, where a newly-elected sheriff adopted one of the more extreme policies in the country on January 20, 2017. These releases appear to have occurred in a very short period of time, amounting to a kind of sheriff-engineered jail break following adoption of the policy.

Most of the offenses associated with the released criminal aliens are serious, and include one homicide suspect released by the Philadelphia Police Department, 51 convicted or charged with Assault, Aggravated Assault or Battery; 40 for DUI; 30 for Domestic Violence; 19 for Robbery, Burglary or Auto Theft; 17 for Drugs; and 14 for Rape or other Sex Assaults.

¹⁰ Joseph J. Kolb, "UAC Footprint Leaves Criminal Trail Across the United States," forthcoming, Center for Immigration Studies, April, 2017.

¹¹ Map of sanctuary jurisdictions, Center for Immigration Studies, updated March 23, 2017, <http://cis.org/Sanctuary-Cities-Map>.

¹² Jessica Vaughan, "Rejecting Detainers, Endangering Communities," Center for Immigration Studies, July 2015, <http://cis.org/ignoring-detainers-endangering-communities>.

- 8) *The Non-Departed*. The number of aliens who have received a final order of removal, but who are still in the United States, had risen to 954,000 by June, 2015, according to ICE records. This number has grown by 50,000 in just two and one-half years. Part of the reason is that, even with the administration's mass dismissals of "non-priority" cases in lieu of immigration hearings, many of the aliens whose case are completed and who are ordered removed simply do not comply with the due process if they are not detained, or they skip out on the proceedings at some point. Under Obama policies, removal orders and enforcement actions taken before January 2014 involving "non-criminals" were specifically nullified.
- 9) *Dismantling Worksite Enforcement and Fraud Control*. Successful programs to address illegal employment (the main magnet for illegal immigration), identity theft, and benefits fraud have been de-prioritized and starved of resources. This ensures that those who make it past the Border Patrol or through visa controls have been able to work illegally, steal identities, use false documents, make false claims, avoid taxes, collect social services, and commit traffic offenses, all without much fear of deportation. There is no more powerful incentive for people to keep trying to come here illegally than the realistic understanding that your illegal presence is tolerated and crimes and infractions committed in connection with your illegal status will be ignored. Moreover, without meaningful worksite enforcement, there is no incentive for employers to maintain a legal workforce, and they will continue to hire illegal workers.
- 10) *Issuance of Work Permits*. In addition to suspending enforcement against all but the most serious criminals, the Obama administration egregiously abused its authority to issue work permits. According to USCIS records, from 2009 to 2014, the agency issued 5,461,568 *new* work permits to aliens – these are work permits issued *in addition to* legal immigrant and guest worker admissions. Of these 5.5 million new work permits, more than 3 million were issued to illegal aliens and aliens admitted on temporary business, tourist, visa waiver, or student visa statuses that do not allow employment. Some do not qualify for any legal status and are in deportation proceedings, including some arrested by ICE but released on an order of supervision; aliens seeking suspension of deportation or a stay of removal; criminal and non-criminal aliens ordered removed but whose countries will not take them back; asylum applicants; and illegal aliens paroled into the country after arriving from Central America in the border surge of 2012-14.¹³

Trump Administration Dismantling Obama Policies – The Trump administration has already taken steps to reverse some of the most problematic policies that suppressed enforcement, including:

- Ending the catch and release policies at the border;
- Discarding the strict prioritization scheme that exempted most illegal aliens from deportation;
- Deploying immigration judges and asylum officers to the border area;
- Expanding the 287(g) program;
- Beginning work on new border infrastructure, including a wall;

¹³ Jessica Vaughan, "Government Data Reveal Millions of New Work Permits Issued Since 2009," Center for Immigration Studies, February 2015, <http://cis.org/government-data-reveal-millions-of-new-work-permits>.

- Utilizing accelerated forms of due process;
- Reviving task forces focused on smuggling, gangs and other transnational crime.

The full effect of these steps cannot be fully measured yet, but there are a number of positive indicators already. DHS has reported a steep and seasonally uncharacteristic drop in apprehensions by the Border Patrol since January.¹⁴ In addition, a number of law enforcement agencies in the border area say that smuggling prices have increased significantly, which is usually taken as a sign that it has become more difficult to succeed in illegal entry.

Last week ICE reported that it had issued more than 3,000 detainers in a single week, and that field offices are expected to be issuing even more going forward. That number is twice as many as the average weekly number of detainers issued in the last two years of the Obama administration -- in 2015 and 2016, ICE issued a weekly average of 1,863 and 1,596 detainers, respectively. In contrast, in 2011, which was the peak year for interior criminal alien enforcement, when the Secure Communities program was nearing full implementation, ICE issued an average of 6,080 detainers per week, or double the recent rate. This indicates that ICE has the capacity to further increase the level of enforcement activity.

One ICE officer told me that the Trump policies are benefiting public safety on a daily basis:

“It's been a major change. We are now going by what the law says.... Obviously we're not kicking down doors to arrest grandma, but with the new orders, we can finally get the guys that have been arrested multiple times, and not convicted, or the guy that has no prior criminal history, but was charged with a horrendous crime. Under Obama they had to be convicted before we could take action. In fact, I just placed a detainer on a guy who had never been arrested before, but was charged with routinely sexually assaulting a [very young]girl... and [police are investigating other serious charges].”

Action Congress Must Take to Address Enforcement Needs – Having a president who is committed to enforcing immigration laws is of course essential to the integrity and security of our immigration system, but there are some problems that require Congressional attention as well. After all, our Constitution gives Congress the lead role in determining immigration policy, and it is time for Congress to take action.

No matter how many miles of barriers are built, or how many ICE agents are hired, or how much more rigorous our vetting system becomes, as long as employers think that they can get away with hiring illegal workers, they will keep doing it; and as long as there is someone who will hire them, people in other countries will keep trying to come or stay illegally. Now Congress needs to do its part by enacting a phased-in universal E-Verify requirement. Years of experience with E-Verify and SSNVS at the state level have demonstrated that a universal mandate is feasible and makes a big difference, especially if done in concert with other federal worksite enforcement efforts.

In addition, Congress needs to fortify a number of weak spots in the immigration law that have begun to hamper enforcement and sow confusion among local law enforcement partners and the courts. These problem areas are addressed by the Davis Oliver Act, which was passed by this committee in the last congress. The reform measures would:

¹⁴ CBP Southwest Border Total Apprehensions, <https://www.cbp.gov/sites/default/files/cbp-southwest-border-total-apps-graph-20170308.png>.

- Establish federal supremacy in immigration law, but preserve the ability of state and local governments to enact and enforce ordinances within certain parameters, allowing them to take action if the federal government does not.
- Encourages local law enforcement agencies to assist in enforcement, balancing a mandate for local agencies to cooperate with ICE with a requirement for ICE to respond to local requests to take custody of criminal aliens.
- Clarifies that local jails must not release criminals who will be deported and penalizes sanctuary jurisdictions that obstruct enforcement.
- Makes it easier to disrupt and remove terrorists, gang members, fraudsters, and other dangerous people who exploit the vulnerabilities in our system, and harder for them to receive visas, asylum, green cards, citizenship, or other benefits.
- Deals more firmly with deportable aliens arrested for drunk driving, sex crimes, gang crimes, espionage, identity theft, immigration fraud, repeat offenders, and other serious offenses by providing for expedited removal and limiting appeals and waivers.
- Permits designation of criminal street gangs, whose alien members and associates would become deportable upon designation, and updates the statutory definition of criminal gang activity.

The problem of sanctuary jurisdictions also requires special attention from Congress. In addition to clarifying the authority of ICE to issue detainers and the expectation that local law enforcement agencies can and should cooperate with ICE, the sections of the law that prohibits sanctuary policies (8 USC 1373 and 1644) should be strengthened, so as to provide additional consequences for obstructive and uncooperative jurisdictions besides potential loss of funding. This should include the possibility of criminal penalties, civil legal action, and a private right of action against officials who impose or carry out sanctuary policies. I have included suggested legislative language drafted by a colleague as an attachment to this testimony.

Further, Congress should replace the State Criminal Alien Assistance Program with a new reimbursement program that offers reimbursement to local LEAs for the expenses incurred for honoring immigration detainers (as opposed to merely incarcerating certain illegal alien inmates arrested on local charges without the expectation of cooperation with ICE). The new reimbursement program should include language that provides qualified immunity to the LEAs for holding the alien on an ICE detainer.

Finally, Congress needs to reduce opportunities for executive abuse of authority on work permits, parole, deferred action, and other gimmicks that have been used by presidents in the past to give de facto legal presence to large numbers of people who otherwise have no realistic claim to stay here.

Jessica M. Vaughan
Director of Policy Studies
Center for Immigration Studies
Washington, DC

Attachment

**8 U.S.C., Section 1373 — Communication between government agencies and the
~~Immigration and Naturalization Service~~ **Federal Homeland Security Agencies**
 (as proposed for amendment)**

(a) IN GENERAL

Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the ~~Immigration and Naturalization Service~~ **Department of Homeland Security agencies Immigration and Customs Enforcement, Customs and Border Protection, or U.S. Citizenship and Immigration Services**, information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

(b) ADDITIONAL AUTHORITY OF GOVERNMENT ENTITIES

Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:

- (1) Sending such information to, or requesting or receiving such information from, the ~~Immigration and Naturalization Service~~ **Department of Homeland Security agencies Immigration and Customs Enforcement, Customs and Border Protection, or U.S. Citizenship and Immigration Services.**
- (2) Maintaining such information.
- (3) Exchanging such information with any other Federal, State, or local government entity.

(c) OBLIGATION TO RESPOND TO INQUIRIES

The ~~Immigration and Naturalization Service~~ **Department of Homeland Security agencies Immigration and Customs Enforcement, Customs and Border Protection, or U.S. Citizenship and Immigration Services** shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.

(d) CRIMINAL PENALTIES

Any employee, or any person acting for or on behalf, of a Federal, State or local government entity or official, who withholds, restricts, or refuses to provide the information described in subsection (a), or who directs or commands the withholding, restriction, or refusal to provide such information, including by policy, ordinance or statute, shall (except as further provided by subsection (e))—

- (1) For the first commission of any such offense, be fined not more than \$3,000 for each instance with respect to which such a violation occurs, imprisoned for not more than six months, or both, and,
- (2) For a subsequent commission of any such offense, be fined not more than \$10,000 with respect to which such a violation occurs, or imprisoned not more than 2 years, or both.

(e) ENHANCED PENALTIES

For withholding, restricting, or refusing to provide information that leads to the release of an alien from official custody who later commits crimes resulting in serious bodily injury (as defined in section 1365 of title 18) or the death of any person, the offender shall be fined not more than \$50,000, imprisoned not more than 10 years, or both.

(f) FEDERAL DEBARMENT

Any person convicted under this provision of law shall be barred from civilian employment by the Federal government.

(g) CEASE AND DESIST LETTER

Whenever the Secretary of Homeland Security has reasonable cause to believe that a Federal, State or local government entity is engaged in a violation of subsection (a) of (b) by means of a policy, procedure, practice, rule, ordinance or statute, the Secretary may issue a cease and desist letter to the entity. The letter shall require the entity to respond within 30 days advising what steps have been taken to rescind the policy, procedure, practice, rule, ordinance or statute. If there is no response, or if the response is deemed insufficient, the Secretary shall refer the matter to the Attorney General for action as provided in subsection (i). Such letter and subsequent actions by the Attorney General shall be in addition to, and separate from, any prosecutions taken pursuant to subsections (d) or (e).

(i) ENJOINING OF VIOLATIONS

Whenever the Attorney General receives a referral from the Secretary pursuant to subsection (g), or otherwise has reasonable cause to believe that a Federal, State or local government entity is in violation of subsection (a) or (b), the Attorney General may bring a civil action in the appropriate district court of the United States requesting such relief, including a permanent or temporary injunction, restraining order, or other order against the person or entity, as the Attorney General deems necessary.

(f) NO SAVINGS CLAUSE EXEMPTION

The existence of a generalized or pro forma savings clause contained within a policy, procedure, practice, rule, ordinance or statute, which purports to assure compliance with Federal information sharing requirements, shall not act to shield such policy, procedure, practice, rule, ordinance or statute from scrutiny, nor a person from prosecution for violation of this section. The adequacy of such a savings clause will be determined by the triers of fact who shall consider, among other things, whether by actual intent or outcome, the policy, procedure, practice, rule, ordinance or statute has had a chilling effect on the unrestricted provision of information of the type described in subsection (a).

(g) PRIVATE RIGHT OF ACTION

Any person residing in the jurisdiction of a governmental entity, who has reason to believe that said entity is in violation of subsection (a) or (b), shall have standing to bring a civil action in the appropriate district court of the United States requesting relief, including a permanent or temporary injunction, restraining order, or other order against the governmental entity such as is necessary to bring that entity into compliance.

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Testimony of Andrew R. Arthur

To the Subcommittee on Immigration and Border Security,
United States House of Representatives
Committee on the Judiciary

For A Hearing Titled:
Restoring Enforcement of our Nation's Immigration Laws

March 28, 2017
10:30 AM
2141 Rayburn House Office Building
Washington, DC 20515

Mr. Chairman, Ranking Member Lofgren, and Subcommittee Members, it is an honor for me to be here today to contribute to your efforts aimed at improving the enforcement of our Nation's immigration laws.

Before I proceed with my testimony, please allow me to provide you with some background information about myself. I am currently on sabbatical after having retired following more than 24 years of federal government service.

I began my career through the Attorney General's Honors Program as a clerk to Administrative Law Judge Joseph E. McGuire in the Office of the Chief Administrative Hearing Officer at the Executive Office for Immigration Review (EOIR). This office has jurisdiction over employer sanctions, document fraud, and unfair immigration-related employment practices cases, under sections 274A, 274B, and 274C of the Immigration and Nationality Act (INA), respectively. In this position, I assisted Judge McGuire in his issuance of many precedential decisions, which set standards that are still followed to this day.

After my two-year clerkship, I received a second Honors Program appointment as a Trial Attorney in the former Immigration and Naturalization Service's San Francisco District Counsel's Office, and later its Baltimore District Counsel's Office. As a Trial Attorney, I represented the United States in more than a thousand deportation, exclusion, and removal cases before the Immigration Courts. Of particular note, as a Trial Attorney I represented the INS in cases involving convicted spies and suspected terrorists.

In addition, in San Francisco, I also was one of two attorneys who handled, part-time, employer sanctions cases in a district that ran from Kern County, California, to the Oregon border.

In 1999, I was promoted to the INS's General Counsel's Office in Washington DC, first as an Assistant General Counsel, and later as an Associate General Counsel and Acting Chief of the National Security Law Division. In the General Counsel's Office, I supervised attorneys in the field who were handling so-called "special interest" cases, that is, cases involving espionage,

terrorism, and persecutors; and advised the Attorney General, Deputy Attorney General, and INS Commissioner on issues relating to national security.

In July of 2001, I left the INS to become a Counsel on this Committee, performing oversight of immigration issues. After five years at House Judiciary, I was appointed to the immigration bench, serving as an Immigration Judge at the York Immigration Court in York, Pennsylvania.

In my more than eight years as an Immigration Judge, I heard anywhere between 15,000 and 20,000 cases involving credible fear, bond, removability, and relief. I also had the honor of swearing in hundreds of new citizens at naturalization ceremonies.

At the beginning of the 114th Congress, I left the bench and came back to Capitol Hill, where I served as Staff Director of the National Security Subcommittee at House Oversight and Government Reform before taking retirement in September 2016.

My career has provided me with what I believe are valuable insights into immigration generally, immigration policy, and immigration enforcement. I have seen the process from beginning to end: inspections at the ports of entry; arrests at the ports, in the interior, and along the border; the issuance of charging documents, master calendar hearings, removal orders, administrative appeals, and Circuit Court petitions for review; to physical removal of aliens and the naturalization of new citizens.

With respect to immigration enforcement, there are many areas for improvement.

For example, as of July of last year, there were more than 953,000 aliens at large in the United States who were under final orders of removal, that is, who had been accorded their rights to removal proceedings, been ordered removed, and either exhausted their appeals or failed to take appeals.¹ Undoubtedly, that number has risen in the last eight months, because removals have been largely in decline for the last five years, going from 409,849 removals in FY 2012 to 240,255 removals in FY 2016, a 41 percent decrease.²

In fact, this decline is worse than it looks, because the numbers are largely bolstered by an increase in removals of individuals apprehended at or near the border or ports of entry, as opposed to in the interior of the United States. In FY 2016, ICE conducted 65,332 removals of individuals apprehended by ICE officers (i.e., interior removals).³ This is down from 69,478

¹ *Recalcitrant Countries: Denying Visas to Countries that Refuse to Take Back Their Deported Nationals: Hearing Before the House Comm. on Oversight and Gov't Reform*, 114th Cong. (2016), available at: <https://oversight.house.gov/hearing/recalcitrant-countries-denying-visas-to-countries-that-refuse-to-take-back-their-deported-nationals/>

² *FY 2016 ICE Immigration Removals*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, available at: <https://www.ice.gov/removal-statistics/2016>

³ *Id.*

interior removals in FY 2015⁴, which was down from 102,224 interior removals in FY 2014⁵, which was down from 133,551 interior removals in FY 2013⁶.

A failure to remove aliens from the interior of the United States, and in particular aliens under final orders of removal, indicates to those who would enter the United States illegally that this country is not serious about its immigration laws. This encourages others to enter the United States illegally, knowing that if they are able to enter illegally, the odds of being removed are low.

ICE does not bear the burden of the failure to remove aliens alone, however. According to the Pew Research Center, there were 11.1 million aliens unlawfully present in the United States in 2014, a number that Pew found has held steady since 2009.⁷ There are currently, however, only 6,000 ICE Enforcement and Removal Operations Officers for the entire United States⁸, or about 100 officers fewer than the Philadelphia Police Department.⁹ This is plainly too few officers to respond effectively to the large number of aliens present unlawfully in our country.

Significant attention has been directed to these issues in the past year, and during the Presidential campaign. One issue that has not received a significant amount of attention, however, and that I want to address is the issue of benefit fraud, and in particular asylum fraud in the credible fear process.

There are many different immigration benefits that an alien who is seeking to enter and remain in the United States may pursue. Family-based visas are available to those with qualifying relatives, and employment-based visas may be pursued by those with needed skills. If an alien has neither an employer nor a family member to file a petition, the alien could pursue a diversity visa through the visa lottery.

For many seeking to enter the United States without a visa, however, an asylum application is the vehicle they choose.

⁴ FY 2015 ICE Immigration Removals, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *available at*: <https://www.ice.gov/removal-statistics/2015>

⁵ *DHS releases end of year statistics*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Dec. 18, 2014), *available at*: <https://www.ice.gov/news/releases/dhs-releases-end-year-statistics>

⁶ *ERO Annual Report, FY 2013 ICE Immigration Removals*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *available at*: <https://www.ice.gov/doclib/about/offices/ero/pdf/2013-ice-immigration-removals.pdf>

⁷ Jeffrey S. Passel and D'Vera Cohn, *Overall Number of U.S. Unauthorized Immigrants Holds Steady Since 2009*, PEW RESEARCH CENTER (Sep. 20, 2016), *available at*: <http://www.pewhispanic.org/2016/09/20/overall-number-of-u-s-unauthorized-immigrants-holds-steady-since-2009/>

⁸ *Criminal Aliens Released by the Department of Homeland Security: Hearing Before the House Comm. on Oversight and Government Reform*, 114th Cong. (2016) (statement of ICE Director Sarah Saldaña), *available at*: <https://www.dhs.gov/news/2016/04/28/written-testimony-ice-director-house-committee-oversight-and-government-reform>

⁹ *About the Department*, PHILADELPHIA POLICE DEPARTMENT, *available at*: <http://www.phillypolice.com/about/>

An applicant for asylum has the burden to demonstrate that he or she is eligible for that protection.¹⁰ To satisfy that burden, the applicant must prove that he or she is a refugee.¹¹ A “refugee” is a person outside of his or her country of nationality or habitual residence who is “unable or unwilling” to return to that country “because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”¹²

There are generally two different processes by which an alien may file for asylum: the affirmative asylum process and the defensive asylum process.¹³ To obtain asylum through the affirmative asylum process, an alien must be physically present in the United States, and may apply for asylum status regardless of how the alien arrived in the United States or the alien’s current immigration status.¹⁴ Those applications are filed with U.S. Citizenship and Immigration Services (USCIS), followed by a non-adversarial interview (that is, without confrontation by a government attorney) by an Asylum Officer; if that application is denied, the alien can renew the application in removal proceedings before an Immigration Judge.¹⁵

A defensive application for asylum is filed when an alien is seeking asylum as a defense against removal from the United States.¹⁶ For asylum processing to be defensive, the alien must be in removal proceedings in Immigration Court.¹⁷ Before an alien can file such an application, the Immigration Judge must have found that the alien is removable, because the alien entered without inspection or on some other ground.¹⁸ Those proceedings are adversarial, with the United States represented by an attorney from ICE.¹⁹

As the Government Accountability Office (GAO) has noted:

Asylum decisions can have serious consequences. Granting asylum to an applicant with a genuine claim protects the asylee from being returned to a country where he or she has been or could in the future be persecuted. On the other hand, granting asylum to an individual with a fraudulent claim jeopardizes the integrity of the asylum system by enabling the individual to remain in the United States, apply for certain federal benefits, and pursue a path to citizenship.²⁰

In addition, fraudulent asylum applications delay the consideration of other, more meritorious applications, delaying the granting of benefits to aliens who are in legitimate need of protection.

¹⁰ 8 C.F.R. § 1208.13(a).

¹¹ See section 208(b) of the Immigration and Nationality Act (INA).

¹² Section 101(a)(42) of the INA.

¹³ See *Obtaining Asylum in the United States*, U.S. CITIZENSHIP AND IMMIG. SERVS., available at: <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states>

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Asylum: Additional Actions Needed to Assess and Address Fraud Risk*, GOV’T ACCOUNTABILITY OFFICE, GAO-16-50, at 1 (Dec. 2015), available at: <http://www.gao.gov/assets/680/673941.pdf>

Due to the nature of fraud, it is impossible to assess the extent of the problem itself. As Denise N. Slavin, then-Vice President of the National Association of Immigration Judges, told the New York Times in 2011, however: “Fraud in immigration asylum is a huge issue and a major problem.”²¹ In perhaps one of the more substantive examinations of asylum fraud, USCIS’s Fraud Detection and National Security Directorate (FDNS) partially completed an asylum-based Benefits Fraud and Compliance Assessment (BFCA), which was described in testimony before this Subcommittee in February 2014 by Louis D. Crocetti, Jr., former Associate Director of FDNS.²² The asylum-based BFCA Program was designed “[t]o determine the scope and types of fraud, and the application and utility of existing fraud detection methods” and “[t]o identify weaknesses and vulnerabilities, and propose/undertake corrective action.”

The Program consisted of a “random sampling of [239 out of 8,555] pending and completed (approved/referred) [affirmative asylum applications filed] with USCIS between May 1 and October 31, 2005.”²³ Of those 239 cases, 29 (or 12 percent) were determined to be fraudulent; 12 of those 29 cases had already been granted.²⁴ While 72 (or 30 percent) of the cases did not contain any fraud indicators, 138 (or 58 percent) “exhibited possible indicators of fraud.”²⁵

Anecdotally, in recent years, a number of immigration practitioners have been charged in high-profile cases in connection with the filing of fraudulent asylum applications:

- In May 2016, for example, an immigration lawyer in suburban Chicago “was convicted by a federal jury of falsifying paperwork in a bid to help clients win asylum in the United States on bogus claims of torture and religious persecution.”²⁶
- In April 2014, two lawyers and an office worker in New York were found guilty of conspiracy to commit immigration fraud.²⁷ The three were arrested in a December 2012 FBI sweep that targeted lawyers and staffers suspected of coaching Chinese immigrants on how to lie about their past to be eligible for asylum.²⁸

²¹ Sam Dolnick, *Immigrants May Be Fed False Stories to Bolster Asylum Pleas*, NEW YORK TIMES (Jul. 11, 2001), available at: <http://www.nytimes.com/2011/07/12/nyregion/immigrants-may-be-fed-false-stories-to-bolster-asylum-pleas.html?pagewanted=all>

²² *Asylum Fraud: Abusing America’s Compassion?: Hearing Before the House Judiciary Committee Subcommittee on Immigration and Border Security*, 113th Cong. (2014)(statement of Louis D. Crocetti, Jr.)

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Jason Meisner, *Local immigration lawyer convicted of fraud in winning asylum for Iraqis*, CHICAGO TRIBUNE (May 9, 2016), available at: <http://www.chicagotribune.com/news/local/breaking/ct-immigration-lawyer-phony-asylum-guilty-met-20160509-story.html>

²⁷ Albert Samaha, *Thirty People Have Been Convicted for Participating in Asylum Fraud Ring*, VILLAGE VOICE (Apr. 16, 2014), available at: <http://www.villagevoice.com/news/thirty-people-have-been-convicted-for-participating-in-asylum-fraud-ring-6689299>

²⁸ *Id.*

- In a December 2015 report, the GAO noted that: “As of March 2014, a joint fraud investigation led by the U.S. Attorney’s Office for the Southern District of New York, the Federal Bureau of Investigation (FBI), the New York City Police Department, and USCIS, known as Operation Fiction Writer, resulted in charges against 30 defendants, including 8 attorneys, for their alleged participation in immigration fraud schemes in New York City. According to discussions with USCIS officials and a FBI press release, allegations regarding these defendants generally involved the preparation of fraudulent asylum applications that often followed one of three fact patterns: (1) forced abortions performed pursuant to China’s family planning policy; (2) persecution based on the applicant’s belief in Christianity; or (3) political or ideological persecution, typically for membership in China’s Democratic Party or followers of Falun Gong. Attorneys and preparers charged in Operation Fiction Writer filed 5,773 affirmative asylum applications with USCIS, and USCIS granted asylum to 829 of those affirmative asylum applicants. According to EOIR data, 3,709 individuals who were connected to attorneys and preparers convicted in Operation Fiction Writer were granted asylum in immigration court; this includes both affirmative asylum claims referred from USCIS as well as defensive asylum claims.”²⁹
- In June 2010, three California lawyers and two office workers were convicted “of charges related to a scheme to defraud [USCIS] by filing hundreds of false asylum claims between 2000 and 2004.”³⁰
- Most significantly, in April 2005, “the leader of [a] Fairfax-based immigration fraud ring . . . pleaded guilty to falsifying documents for more than 1,900 Indonesians who are in the United States illegally.”³¹ According to press reports, the case involved hundreds of aliens who “were coached to tell asylum officers or immigration judges false stories of beatings or rapes they endured in Indonesia at the hands of Muslims because they were either ethnic Chinese or Christians.”³²

The fraud referenced in these cases involved both affirmative and defensive asylum applications.

A credible fear application is a hybrid of both forms of asylum applications, and is filed by an alien in expedited removal proceedings under section 235(b) of the Immigration and Nationality Act (INA). That section of the INA allows immigration officers—rather than judges—to order the deportation of aliens who have failed to establish that they have been in the United States continuously for two years and who have been charged with inadmissibility under section 212(a)(6)(c) (fraud or misrepresentation) and/or section 212(a)(7) (no documentation) of

²⁹ *Asylum: Additional Actions Needed to Assess and Address Fraud Risk*, GOV’T ACCOUNTABILITY OFFICE, GAO-16-50, at 1 (Dec. 2015), available at: <http://www.gao.gov/assets/680/673941.pdf>

³⁰ *Discovery Bay attorney sentenced for false asylum fraud*, MERCURY NEWS (Sept. 24, 2010), available at: <http://www.mercurynews.com/2010/09/24/discovery-bay-attorney-sentenced-for-false-asylum-fraud/>

³¹ *ICE mulls fraud case*, WASHINGTON TIMES (Apr. 28, 2005), available at: <http://www.washingtontimes.com/news/2005/apr/28/20050428-105546-3247r/>

³² *Id.*

the INA. The Department of Homeland Security (DHS) has expanded its use of expedited removal over the years.

The most common instance in which DHS uses expedited removal is when it apprehends an alien seeking admission without a proper entry document at a port of entry or an alien who is attempting to enter or has entered illegally along the border. If the alien asserts a fear of persecution, the arresting officer will refer the alien to an Asylum Officer for a “credible fear interview.”³³ If the Asylum Officer determines that the alien has a credible fear, the alien is placed in removal proceedings before an Immigration Judge, where the alien can file his or her application for asylum.

Under section 235(b)(1)(B)(v) of the INA, the term “‘credible fear of persecution’ means that 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 under section 208.”

This process is vulnerable to fraud for a number of reasons, the main one of which is resources. There are 328 ports of entry in the United States,³⁴ and the U.S.-Mexican border spans 1,954 miles.³⁵ There are, however, only about 360 Asylum Officers stationed at eight Asylum Offices in the United States: in Arlington, Virginia; Chicago, Illinois; Houston, Texas; Miami, Florida; Newark, New Jersey; New York, New York; Los Angeles, California; and San Francisco, California.³⁶ The low number of Asylum Officers limits the amount of time that any given Asylum Officer can spend on any given credible fear claim, a problem exacerbated by a recent increase in credible fear claims, discussed below.

The Asylum Officers are assisted by officers from the Fraud Detection and National Security Directorate (FDNS) in identifying fraud. USCIS created FDNS in 2004 “to help ensure immigration benefits are not granted to individuals who pose a threat to national security or public safety or who seek to defraud the immigration system.”³⁷ According to GAO, as of FY 2015, USCIS had deployed 35 FDNS immigration officers and four supervisory immigration officers to work across all eight asylum offices.³⁸ Those FDNS officers in Asylum Offices “are tasked with conducting background checks to resolve national security ‘hits’ and fraud concerns, which arise when asylum officers conduct required background checks of asylum applicants; addressing fraud-related leads provided by asylum officers and other sources; and liaising with law enforcement entities, such as [ICE Homeland Security Investigations], to provide logistical support in law enforcement and national security matters.”³⁹

³³ See section 235(b)(1)(A)(ii) of the INA.

³⁴ *At Ports of Entry*, U.S. CUSTOMS AND BORDER PROTECTION, available at: <https://www.cbp.gov/border-security/ports-entry>

³⁵ *U.S.-Mexico Border, Fences and deaths*, NATIONAL GEOGRAPHIC, available at: <http://www.nationalgeographic.org/media/tijuana-border-fence/>

³⁶ *Asylum: Additional Actions Needed to Assess and Address Fraud Risk*, GOV’T ACCOUNTABILITY OFFICE, GAO-16-50, at 1 (Dec. 2015), available at: <http://www.gao.gov/assets/680/673941.pdf>

³⁷ *Id.* at 29.

³⁸ *Id.*

³⁹ *Id.*

In a December 2015 report, GAO reviewed the status of the asylum system.⁴⁰ The difficulty of the task facing those FDNS officers (and their EOIR counterparts) is best summarized by that report, in which GAO concluded:

USCIS and [EOIR] have limited capabilities to detect asylum fraud. First, while both USCIS and EOIR have mechanisms to investigate fraud in individual applications, neither agency has assessed fraud risks across the asylum process, in accordance with leading practices for managing fraud risks. . . . Without regular assessments of fraud risks, USCIS and EOIR lack reasonable assurance that they have implemented controls to mitigate those risks. Second, USCIS’s capability to identify patterns of fraud across asylum applications is hindered because USCIS relies on a paper-based system for asylum applications and does not electronically capture some key information that could be used to detect fraud, such as the applicant’s written statement. Asylum officers and [FDNS] immigration officers told GAO that they can identify potential fraud by analyzing trends across asylum applications; however, they must rely on labor-intensive methods to do so. Identifying and implementing additional fraud detection tools could enable USCIS to detect fraud more effectively while using resources more efficiently. Third, FDNS has not established clear fraud detection responsibilities for its immigration officers in asylum offices; FDNS officers we spoke with at all eight asylum offices told GAO they have limited guidance with respect to fraud. FDNS standard operating procedures for fraud detection are intended to apply across USCIS, and therefore do not reflect the unique features of the asylum system. Developing asylum-specific guidance for fraud detection, in accordance with federal internal control standards, would better position FDNS officers to understand their roles and responsibilities in the asylum process.⁴¹

The difficulty of the task facing both USCIS and the Immigration Court in identifying fraud is compounded by the significant increase in the number of expedited removal cases, and credible fear claims, over the past eight years.⁴² Specifically, in FY 2009, USCIS completed 5,523 credible fear cases.⁴³ In FY 2016, USCIS received 94,048 credible fear cases, and

⁴⁰ See *Asylum: Additional Actions Needed to Assess and Address Fraud Risk*, GOV’T ACCOUNTABILITY OFFICE, GAO-16-50, at 1 (Dec. 2015), available at: <http://www.gao.gov/assets/680/673941.pdf>

⁴¹ *Id.*

⁴² The reasons for this increase are unclear and to some degree, in dispute. In one of the most comprehensive assessments of the issue, however, Scott Rempell, Associate Professor of Law at South Texas College of Law/Houston, evaluated the various explanations for this “surge.” Scott Rempell, Credible Fears, Unaccompanied Minors, and the Causes of the Southwestern Border Surge, 18 Chapman L. Rev. 337 (2015). Professor Rempell “concludes that the word of mouth effect and, to a lesser extent, changes in country conditions in the Northern Triangle [of El Salvador, Honduras, and Guatemala], have primarily caused the surge in crossings by credible fear claimants and” unaccompanied alien children. *Id.* at 376. In describing the “word of mouth effect,” Professor Rempell states: “Individuals learn about actual or allegedly successful ways to enter the United States and mimic the pattern that has been successful.” An article that he referenced provides several anecdotes to support the “word of mouth effect.” See *id.*; Julia Preston, *Migrants Flow in South Texas, as Do Rumors*, N.Y. TIMES (Jun. 17, 2014) (“At the church, some women said the talk about the entry permit, which has intensified in the last two months, had prompted them to set out on the risk-filled journey across Mexico.”).

⁴³ *FACT SHEET: Asylum in the United States*, AMERICAN IMMIGRATION COUNCIL, available at: <https://www.americanimmigrationcouncil.org/research/asylum-united-states>

conducted 82,660 credible fear interviews.⁴⁴ All told, in the fourth quarter of FY 2016, there were 194,986 asylum applications pending at USCIS.⁴⁵ While 360 Asylum Officers and 35 FDNS officers may seem like a significant number in the abstract, the difficulty that they face in identifying, let alone addressing, fraud in credible fear cases is clear from the sheer volume of cases that those officers have to handle.

Other factors complicate this task even further. It is important to note that aliens in expedited removal are subject to mandatory detention until they are found to have a credible fear.⁴⁶ Because of the large number of cases and the lack of detention space along the border, many aliens subject to expedited removal are sent to detention facilities throughout the country, including to the York County, Pennsylvania County Jail, where my courtroom was located. Due to the distance between this facility and the Newark Asylum Office (which has jurisdiction over York), most of the credible fear interviews occur by telephone. Most of the aliens in these proceedings do not speak English, and so the Asylum Officers need to use interpreters, many of whom also appear telephonically. From experience, it is difficult enough to identify deception when hearing testimony in a courtroom through an interpreter; this task becomes all the more difficult when the finder of fact cannot assess demeanor.

As the number of cases of aliens seeking credible fear has increased, so has the number of aliens found to have a credible fear. As Temple Law School Professor Jan Ting told the House Oversight Committee last March: “The percentage of all referred cases where credible fear was found by asylum officers has fluctuated from year to year but the trend has been generally upwards from 64.15% in FY 2008 to 77.72% in the first quarter of FY 2016.”⁴⁷ In FY 2016, USCIS issued 92,990 decisions in credible fear cases; in 73,078 of those cases, or 78.59 percent, credible fear was established.

The number of countries of origin of aliens claiming credible fear has also increased. When I first became an Immigration Judge in November 2006, I heard a handful of referred credible fear cases per year. By the time that I left the court in January 2015, a significant portion of my docket consisted of such cases. The few credible fear claims that I heard when I first became a judge almost exclusively involved aliens from Central America and Mexico, but by the time I stepped down from the bench, a number involved aliens from Africa and Asia. This is apparently similar to the experience of my former colleagues: While the bulk of the credible fear claims nationally between October 2014 and September 2015 were made by aliens

⁴⁴ *Credible Fear Workload Report Summary, FY 2016 Total Caseload*, U.S. CITIZENSHIP AND IMMIG. SERVS., available at: https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_CredibleFearReasonableFearStatisticsNationalityReport.pdf

⁴⁵ *Number of Service-wide Forms by Fiscal Year To-Date, Quarter, and Form Status 2016*, U.S. CITIZENSHIP AND IMMIG. SERVS. (Dec. 23, 2016), available at: https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/all_forms_performancedata_fy2016_qtr4.pdf

⁴⁶ Section 235(b)(1)(B)(iii)(IV) of the INA.

⁴⁷ *Testimony of Testimony of Jan C. Ting, Professor of Law, Temple University Beasley School of Law, Before the United States House of Representatives Committee on Oversight and Government Reform, Subcommittees on National Security and Government Operations* (Mar. 23, 2016), available at: <https://oversight.house.gov/wp-content/uploads/2016/03/2016-03-23-Ting-Testimony-Temple.pdf>

from Central America and Mexico, 80 were made by Syrian nationals, 191 were made by Pakistani nationals, and 776 were made by Somali nationals.⁴⁸

When questioned about their travel to the United States, most aliens in expedited removal in my court who had come from outside the Western Hemisphere told a similar story: they had flown to Ecuador or Brazil, and made their way with a smuggler by foot, car, or bus through Colombia, Central America, and Mexico before crossing the U.S. border. Many claimed to have been arrested along the way before being released by local authorities with a 10- to 30-day “permission” to leave the country and continue along their route. Notably, many of the countries that they had transited (including Mexico⁴⁹) provide for the granting of asylum and refugee status, but none of the aliens who appeared before me had requested such protection before arriving in the United States.⁵⁰

I would note that, generally, asylum cases in which aliens are unable to provide documentary support for their claims present a particular challenge for the court, because the judge is largely dependent on credible testimony in determining whether to grant or deny relief, making credibility a key issue. Congress provided the Immigration Courts with significant assistance in making credibility determinations in the REAL ID Act of 2005, Pub. L. 109-13 (2005), of which the Subcommittee Chairman, Rep. Sensenbrenner, was the primary sponsor.

Section 101(a)(3) of the REAL ID Act added a subparagraph (B) to section 208(b)(1) of the INA, which states:

BURDEN OF PROOF-

(i) IN GENERAL- The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 101(a)(42)(A). To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.

(ii) SUSTAINING BURDEN- The testimony of the applicant may be sufficient to sustain the applicant’s burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the

⁴⁸ William La Jeunesse, *Immigrants from terror hubs claiming 'credible fear' to seek US asylum*, FOX NEWS (Mar. 22, 2016), available at: <http://www.foxnews.com/politics/2016/03/22/gaming-system-immigrants-from-terror-hubs-claiming-credible-fear-to-seek-us-asylum.html>

⁴⁹ See *Country Reports on Human Rights Practices for 2016, Mexico*, U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR (“The government cooperated with the Office of the UN High Commissioner for Refugees (UNHCR) and other humanitarian organizations in providing protection and assistance to internally displaced persons, refugees, returning refugees, asylum seekers, stateless persons, or other persons of concern.”), available at: <https://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper>

⁵⁰ I would often ask individuals who had followed this route, particularly aliens who appeared vulnerable to trafficking, whether they had been coerced or forced into making this trip; none asserted that he or she had. Further, none of the ICE attorneys who appeared in these matters were aware of any DHS investigations into the smuggling organizations that had assisted these individuals on their journeys.

applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.

(iii) CREDIBILITY DETERMINATION- Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

As the House Conference Report stated with respect to this latter provision:

Proposed new clause 208(b)(1)(B)(iii) of the INA codifies factors identified in case law on which an adjudicator may make a credibility determination, including demeanor, candor, responsiveness, inherent plausibility of the account, consistency between the written and oral statements (regardless of when it was made and whether it was under oath, and considering the circumstances under which the statements were made), internal consistency of a statement, consistency of statements with the country conditions in the country from which the applicant claims asylum, and any inaccuracies or falsehoods in such statements. This section reiterates the rule that an asylum adjudicator is entitled to consider credible testimony along with other evidence.

* * * *

This clause will allow Immigration Judges and the BIA to follow commonsense standards in assessing the credibility of asylum applicants better allowing them to identify and reject fraudulent claims.

These amendments have provided significant assistance to Immigration Judges by setting clear standards for credibility determinations.

Even with this guidance, however, I often had little on which to base my decisions in asylum cases, aside from the word of the applicant, due to the fact that many applicants presented no documentary evidence and submitted only cursory applications, and the fact that the government attorneys who appeared before me had a heavy workload and only limited ability to otherwise offer direct, pertinent evidence.

Most of the aliens in credible fear cases that I heard from Central and South America possessed identity documents (such as a voter card or a national identification card), and were able to supply at least some documentary evidence (such as affidavits or police reports) in support of their claims. Many aliens who had been in expedited removal from outside the Western Hemisphere, however, had few, if any, verifiable identity documents. Many of these individuals also struggled to explain how they had obtained the funds to pay for their trips to the United States. In addition, many of these aliens had been living outside of their home countries in what are termed “third countries” before coming to the United States, including a number who had been living for years in refugee camps abroad before attempting to enter the United States illegally.

I note that the ICE attorneys who appeared before me were diligent, and would usually insert background evidence on country conditions into the record, including articles supporting the aliens’ claims. Given the sheer volume of the docket, however, their efforts in this regard were necessarily limited.⁵¹

Further, while Immigration Judges have the authority to submit background evidence for the record, such submissions can subject the judge to complaints about the impartiality of the court. If a judge has questions about the validity of a claim, the judge can also request comments from the State Department.⁵² This is a complicated and time-consuming process, however, and for that reason is not often used.

A lack of resources also limited my ability to assess inconsistencies between applicants’ statements and other evidence of record. In many cases, there were discrepancies among and between the initial statements made by aliens in expedited removal proceedings, the statements that those aliens had made to Asylum Officers, the aliens’ statements in the asylum applications themselves, and/or the alien’s testimony in court. One conclusion that could be drawn from such discrepancies is that the claim had become “inflated” or “bolstered” over time, calling the applicant’s credibility into question. The time and distance between the preparations of those various statements would often minimize my ability to rely on such inconsistencies, however, particularly when the applicant denied making a given statement. It should be noted that unlike Immigration Judges, Asylum Officers’ and Border Patrol Agents’ interviews are not recorded electronically.

Often, however, I would face the opposite issue, that is, a voluminous record filled with background evidence, much of which had little or no bearing on the case at hand. All of these documents required review, however, in order to assure that the alien’s claim received a full and fair hearing. This brings up the next issue—that is, a lack of resources for the court.

As of February 2017, there were 542,411 cases pending before 302 Immigration Judges, or just less than 1,800 cases per judge.⁵³ Each judge, however, has just about six hours per week

⁵¹ Further, I have since been informed anecdotally that micromanagement at upper levels of ICE limited the ability of those attorneys to call country-conditions experts in individual cases.

⁵² 8 C.F.R. § 1208.11.

⁵³ *Immigration Court Backlog Tool, Pending Cases and Length of Wait in Immigration Courts*, TRAC IMMIGRATION (Feb. 2017), available at: http://trac.syr.edu/phptools/immigration/court_backlog/

to prepare for the week's docket; the rest of the time is spent on the bench hearing cases. Given the fact that each judge could be assigned eight or more asylum cases (any one of which could have hundreds of pages of background evidence) each week, the ability for any given judge to have full familiarity with any given case is limited. This problem is compounded by the fact that many claims, particularly claims from the same country, can have similar facts.

One of the best ways to reduce fraud in the asylum process is to ensure that the judges are familiar with the record in each case, in order to identify discrepancies and inconsistencies in the record when they arise. The best way to ensure that the judges hearing asylum claims are familiar with the record in each case is to hire more judges, thereby giving the judges more time to review the record and to hear each individual case.⁵⁴

It should be noted, as GAO did in its report, that EOIR does have an antifraud officer, which was established in September 2007 by the Department of Justice through regulation.⁵⁵ That regulation states that the antifraud officer is to: (1) serve as a point of contact relating to concerns about fraud, particularly with respect to fraudulent applications or documents affecting multiple removal proceedings, applications for relief from removal, appeals, or other proceedings before EOIR; (2) coordinate with DHS and Department of Justice investigative authorities with respect to the identification of and response to fraud; and (3) notify EOIR's Disciplinary Counsel and other appropriate authorities as to instances of fraud, misrepresentation, or abuse related to an attorney or accredited representative.⁵⁶ This office does not, however, provide assistance in identifying fraud in individual cases.

The limited number of judges also means that there are significant backlogs between the time that applications are filed and the time that hearings are held on those applications. Mine was a detained court, meaning that all of the cases I heard involved detained aliens. ICE has only limited detention space, however, and aliens would often be released before I could hear their claims. In a non-detained court, years can pass before an asylum application is heard.⁵⁷

Throughout the Presidential campaign and since the inauguration, much attention has been directed to the issue of refugees from countries of concern, and the potential danger that such individuals may pose. There is legitimacy in those concerns. As Director of National Intelligence James Clapper said at a security industry conference in September 2015: "I don't, obviously, put it past the likes of ISIL to infiltrate operatives among these refugees, so that's a

⁵⁴ More judges alone, however, are not the answer. As a judge, I shared one law clerk with another judge, and that clerk's primary responsibilities involved drafting proposed orders, reviewing motions, and researching the effects of various criminal convictions from various states on different grounds of removability, largely freeing me and my fellow judge to review applications for relief and the supporting evidence for those applications. I was also supported by a legal technician who kept the courtroom running, and a front office staff that ensured submissions were docketed and filed. Ideally, for each additional judge hired, there would also be an additional law clerk and technician, as well as support staff.

⁵⁵ *Asylum: Additional Actions Needed to Assess and Address Fraud Risk*, GOV'T ACCOUNTABILITY OFFICE, GAO-16-50, at 30 (Dec. 2015), available at: <http://www.gao.gov/assets/680/673941.pdf>

⁵⁶ 8 C.F.R. § 1003.0(e)(2).

⁵⁷ Julia Preston, *Deluged Immigration Courts, Where Cases Stall for Years, Begin to Buckle*, NEW YORK TIMES (Dec. 1, 2016), available at: <https://www.nytimes.com/2016/12/01/us/deluged-immigration-courts-where-cases-stall-for-years-begin-to-buckle.html>

huge concern of ours.”⁵⁸ Further, as FBI Director James Comey noted, although the refugee screening process has since “improved dramatically” since “a number of people who were of serious concern” slipped through the screening of Iraq War refugees, refugees from Syria will be even harder to check because, unlike the situation in Iraq, the United States government has not been collecting information on the local population in that country.⁵⁹ “If we don’t know much about somebody, there won’t be anything in our data,” Comey stated, adding: “I can’t sit here and offer anybody an absolute assurance that there’s no risk associated with this.”⁶⁰

Stated succinctly, the vetting process for any given refugee will only be as good as the background information against which that refugee’s claim can be compared. For example, if an applicant claimed to have been born in Somalia during that country’s decades-long civil war when there was no functioning government⁶¹, the applicant would likely have no birth certificate and few if any documents to establish identity. If a Syrian applicant offered a document issued in an area of that country currently occupied by ISIS⁶², the validity of the document could not be independently verified.

That said, at least there is a fairly robust screening process in place for refugees, and a potential refugee could be denied travel documents to come to the United States. In the credible fear process, however, there is no screening before an alien enters the United States, and only limited screening after the alien enters this country.⁶³ Mr. Crocetti, in his testimony, discussed many of the shortcomings of the USCIS vetting process in his February 2014 testimony, and I would urge you to refer to his conclusions therein.⁶⁴ A finding of credible fear can be made without any corroborating evidence, or even identity documents, and once that finding is made, the alien can file an asylum application with an Immigration Court and seek release from custody. Even if release is initially denied, the alien may still be released to free up limited detention space.

This system presents a vulnerability to exploitation by an individual or group seeking to do harm to the United States, by traffickers seeking to bring victims to the United States, and by economic migrants seeking employment opportunities.

With respect to the first group, as the 9/11 Terrorist Travel monograph makes clear: “A number of terrorists [have] . . . abused the asylum system.”⁶⁵ For example, Ramzi Yousef and

⁵⁸ Jerry Markon, *Senior Obama officials have warned of challenges in screening refugees from Syria*, WASHINGTON POST (Nov. 17, 2015), available at: https://www.washingtonpost.com/news/federal-eye/wp/2015/11/17/senior-obama-officials-have-warned-of-challenges-in-screening-refugees-from-syria/?utm_term=.fec4eea68cdd

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ See The World Factbook: Somalia, CENTRAL INTELLIGENCE AGENCY, available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/so.html>

⁶² See *Islamic State and the crisis in Iraq and Syria in maps*, BBC (Jan. 20, 2017), available at: <http://www.bbc.com/news/world-middle-east-27838034>

⁶³ As noted above, there have been cases in which aliens in refugee camps have effectively bypassed the refugee screening system by entering or attempting to enter the United States illegally and claiming credible fear.

⁶⁴ See *Asylum Fraud: Abusing America’s Compassion?: Hearing Before the House Judiciary Committee Subcommittee on Immigration and Border Security*, 113th Cong. (2014)(statement of Louis D. Crocetti, Jr.)

⁶⁵ *9/11 and Terrorist Travel, A Staff Report of the National Commission on Terrorist Attacks upon the United States*, at 106 (2004).

Ahmad Ajaj, plotters of the first World Trade Center bombing, “concocted bogus political asylum stories when they arrived” to remain in the United States in 1992.⁶⁶ Similarly, the “Blind Sheikh,” Sheikh Abdul Rahman, “avoided being removed from the United States by filing an application for asylum and withholding of deportation to Egypt in . . . 1992.”⁶⁷

Information disclosed to Congress indicates that 299 aliens to whom the terrorism bar to asylum eligibility may apply⁶⁸ were found to have a credible fear in the first four months of FY 2015, and that 399 aliens to whom the terrorism bar to asylum eligibility may apply were found to have a credible fear in FY 2014.⁶⁹ While the nature and circumstances of those terrorism allegations are not clear, these facts raise the concern that individuals who have connections to terrorist activity have attempted to seek asylum through the credible-fear process.

Factors outside of the credible fear process may further hinder discovery of the terrorist ties of an alien who is applying for asylum through the credible fear process. The most significant of these factors is the regulation governing the confidentiality of asylum information, found at 8 C.F.R. § 1208.6. That regulation states:

Disclosure to third parties.

(a) Information contained in or pertaining to any asylum application, **records pertaining to any credible fear determination** conducted pursuant to § 1208.30, and records pertaining to any reasonable fear determination conducted pursuant to § 1208.31, **shall not be disclosed** without the written consent of the applicant, except as permitted by this section or at the discretion of the Attorney General.

(b) The confidentiality of other records kept by the Service and the Executive Office for Immigration Review **that indicate that a specific alien** has applied for asylum, **received a credible fear or reasonable fear interview, or received a credible fear or reasonable fear review shall also be protected from disclosure.** The Service will coordinate with the Department of State to ensure that the confidentiality of those records is maintained if they are transmitted to Department of State offices in other countries.

(c) This section shall not apply to any disclosure to:

(1) Any United States Government official or contractor having a need to examine information in connection with:

⁶⁶ *Id.* at 50.

⁶⁷ *Id.* at 55.

⁶⁸ See section 208(b)(2)(A)(v) of the INA (asylum may not be granted to “an alien if the Attorney General determines that - the alien is described in subclause (I), (II), (III), (IV), or (VI) of section 212(a)(3)(B)(i) or section 237(a)(4)(B) (relating to terrorist activity), unless, in the case only of an alien described in subclause (IV) of section 212(a)(3)(B)(i) , the Attorney General determines, in the Attorney General’s discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States.”).

⁶⁹ Letter from Chaffetz, Goodlatte, DeSantis, and Gowdy to Johnson of 5/20/15, at 1, *available at*: <https://oversight.house.gov/wp-content/uploads/2015/05/2015-05-20-JC-DeSantis-Goodlatte-Gowdy-to-Johnson-DHS-Credible-Fear-due-6-3.pdf>

- (i) The adjudication of asylum applications;
 - (ii) The consideration of a request for a credible fear or reasonable fear interview, or a credible fear or reasonable fear review;
 - (iii) The defense of any legal action arising from the adjudication of, or failure to adjudicate, the asylum application, or from a credible fear determination or reasonable fear determination under § 1208.30 or § 1208.31;
 - (iv) The defense of any legal action of which the asylum application, credible fear determination, or reasonable fear determination is a part; or
 - (v) Any United States Government investigation concerning any criminal or civil matter; or
- (2) Any Federal, State, or local court in the United States considering any legal action:
- (i) Arising from the adjudication of, or failure to adjudicate, the asylum application, or from a credible fear or reasonable fear determination under § 1208.30 or § 1208.31; or
 - (ii) Arising from the proceedings of which the asylum application, credible fear determination, or reasonable fear determination is a part.

(emphasis added).

Thus, information “pertaining to any credible fear determination . . . and records pertaining to any reasonable fear determination conducted” cannot “be disclosed without the written consent of the applicant, except as permitted by this section or at the discretion of the Attorney General.” It has been my experience, having handled or supervised scores of special interest cases, that discretion to disclose asylum information is rarely given. When it is, such disclosure risks a claim by the applicant that even if there was no fear of persecution before the disclosure, there is now, because the alien’s home country knows that the alien, in applying for asylum, is placing that country in a bad light.

This regulation hinders any attempt by ICE or other government agency to verify with the alien’s home government information provided during the credible fear process, or to use that information to determine whether the alien poses a terrorism risk.

One final note about expedited removal and credible fear. Expedited removal was added to the INA by section 302 of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).⁷⁰ While the apparent purpose of that provision was to facilitate the removal of aliens from the United States, by its terms it allows an alien to appear at a land port of entry, such as the

⁷⁰ Section 302 of Pub. L. 104-208 (1996).

Bridge of the Americas Port of Entry in El Paso, and request asylum.⁷¹ By statute, such aliens are referred to an Asylum Officer and begin the credible fear process, without having to establish that he or she sought and was denied asylum elsewhere.⁷²

In summary, as recent events have shown, it is reasonable for the United States government to screen individuals who are seeking to enter the United States closely for terrorist ties or other foreign affiliations that suggest they could pose a danger to the United States. Refugees are not the only class of alien seeking to enter the United States who could pose such a danger, however.

Aliens who are seeking to enter the United States through the credible fear process have not been screened before arriving in the United States. Many of these aliens come to the United States without documents, and arrive from countries in which there is significant terrorist activity. Appropriate resources must be directed to the review of the asylum applications filed by those individuals, to ensure that they are not able, through fraud, to enter the United States and do harm to the America people. Again, I would respectfully encourage this Subcommittee to consider the recommendations made by Mr. Crocetti for the vetting of asylum applications in his February 2014 testimony⁷³, and I would urge FDNS and EOIR to review the conclusions of the GAO in its December 2015 report⁷⁴, both of which are referenced above.

In addition, the United States government, in connection with its global partners, must disrupt the smuggling organizations that are preying on aliens who are seeking to come to the United States.

This concludes my testimony, and I again thank Chairman Goodlatte and all the Members of the committee for the invitation and opportunity to testify today.

⁷¹ Section 235(b)(1)(A)(i) of the INA.

⁷² See section 235(b)(1)(A)(ii) of the INA.

⁷³ *Asylum Fraud: Abusing America's Compassion?: Hearing Before the House Judiciary Committee Subcommittee on Immigration and Border Security*, 113th Cong. (2014)(statement of Louis D. Crocetti, Jr.)

⁷⁴ *Asylum: Additional Actions Needed to Assess and Address Fraud Risk*, GOV'T ACCOUNTABILITY OFFICE, GAO-16-50, at 1 (Dec. 2015), available at: <http://www.gao.gov/assets/680/673941.pdf>



Protecting Immigrant
Women and Girls
Fleeing Violence

Testimony of Archi Pyati
Chief of Policy and Programs, Tahirih Justice Center

Hearing: "Restoring Enforcement of our Nation's Immigration Laws"
Committee on the Judiciary of the U.S. House of Representatives
Subcommittee on Immigration and Border Security
March 28, 2017

Thank you, Chairman Sensenbrenner and distinguished members of the Subcommittee on Immigration and Border Security. I am the Chief of Policy and Programs at the Tahirih Justice Center, a national nonprofit that for 20 years has provided legal services to immigrant survivors of human trafficking, sexual violence, and domestic violence. We have offices in Baltimore, Maryland; Houston, Texas; San Francisco, California; and Falls Church, Virginia. We are a nonpartisan organization and advocate for laws and policies that help immigrant survivors of violence get themselves and their children to safety.

As an advocate for survivors of violence, I am honored to be invited to comment on the importance of protecting public safety and supporting victims of violence while enforcing our federal immigration laws.

Over the years, I have supported and represented hundreds of survivors of human trafficking, rape, and domestic violence. I have heard women and girls tell me their stories of exploitation and abuse by men who viciously capitalized on disparities in economic and social status to establish power and control over their victims. Given these dynamics, it can be painfully difficult for victims to recognize the abuse, have the courage to reach out for support, seek justice, and

Baltimore
201 N. Charles St.
Suite 920
Baltimore, MD 21201
Tel: 410-999-1900
Fax: 410-630-7539
Baltimore@tahirih.org

Greater DC | National
6402 Arlington Blvd.
Suite 300
Tel: 571-282-6161
Fax: 571-282-6162
TTY: 711
Falls Church, VA 22042
GreaterDC@tahirih.org
Justice@tahirih.org

Houston
1717 St. James Place
Suite 450
Houston, TX 77056
Tel: 713-496-0100
Fax: 713-481-1793
Houston@tahirih.org

San Francisco Bay Area
881 Sneath Lane
Suite 115
San Bruno, CA 94066
Tel: 650-270-2100
Fax: 650-466-0006
SFBayArea@tahirih.org

www.tahirih.org

finally break free. When a woman or girl is successful in doing this, she frees herself of the violence and finds a path to safety and independence for herself and her children.

Among the most vulnerable to this type of violence, immigrant women and girls face a number of barriers to accessing help, including language barriers, resources, inability to work legally, lack of access to public benefits, and fear of deportation. For example, in a 2015 survey of 800 Latinos and Latinas across America, 41 percent cited fear of deportation as the primary barrier preventing victims of domestic violence from seeking help.¹ Many abusers are well aware of this and therefore use a victim's immigration status against her, threatening to contact immigration authorities and report the victim if she discloses abuse.² Often, perpetrators will use a woman's lack of immigration status as a potent tool in creating and maintaining power and control by threatening that their victims could be deported away from their children. This is an all too familiar narrative for my organization's clients, many of whom have been harmed by U.S. citizen men who knew that they could get away with perpetrating violence because of their victims' fear of deportation.

Congress recognized this when, in 1994, with robust bipartisan support, it passed the Violence Against Women Act, stating that “[m]any immigrant women live trapped and isolated in violent homes, afraid to turn to anyone for help. They fear both continued abuse if they stay with their batterers and deportation if they attempt to leave.” That legislation not only provided for numerous services for all victims of domestic and other gender-based violence, it also created a process by which immigrant victims of violence at the hands of American men could reach out and ask for protection. Congress created the U and T visa programs in 2000 to “strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking...and other crimes...committed against aliens, while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States.” Furthermore, Congress created important confidentiality provisions to prevent abusers from using

the immigration system as a way to maintain power over survivors. These laws encourage victims to not only get help for themselves and their children, but to motivate them to report and cooperate with law enforcement to help seek justice for perpetrators of crime and make all of us safer.

But these absolutely critical protections and the public policy goals of community safety they serve are now at risk of being significantly undermined because of misguided immigration enforcement policies. The President's January 25, 2017 Executive Order on internal enforcement flattens deportation priorities in a way that unfairly sweeps up thousands of trafficking and abuse victims for removal who may have been charged with crimes as a result of their victimization and actually qualify for legal protection. It makes sensitive victim data potentially available to anyone, including traffickers and abusers just waiting for that bit of information that would allow them to track down and further harm their victims. And it revives harmful Secure Communities and 287(g) agreements while penalizing and shaming those jurisdictions that use tried, tested, and true community policing strategies that keep us all safer.

These harmful policies rely on a false narrative of lawlessness in jurisdictions that actually have robust and effective community policing strategies. There is no data to suggest that localities with community trust policies have more criminal activity than others, while there is data to suggest that localities with community trust policies have actually achieved a reduction in crime.³ In fact, the hundreds of jurisdictions nationwide that have enacted community policing strategies have done so precisely to serve the goal of enhancing public safety. Focusing on isolated acts of immigrant crime in localities with community trust policies will inaccurately mark these localities as reckless and unsafe, when in fact they may be safer – not only for immigrants, but for all of us. Placing a spotlight on the few incidents of crime committed by undocumented immigrants in communities with strategic policing practices is much easier than attempting to quantify the significant volume of crime that has been prevented, stopped, or successfully prosecuted because of community trust.

In the victim advocacy community, we know that victims and witnesses are much more likely to report crime and cooperate with investigations and prosecutions when they believe that there is little or no risk of deportation if they reach out. We know that local law enforcement relies heavily on these victims and witnesses to prevent and punish criminal activity. One law enforcement officer told me a few weeks ago about two undocumented men who witnessed the fatal shooting of a woman by her partner during broad daylight, but who would only offer their unique and essential evidence against this armed and violent man who had fled the scene if they could be assured that they would not be deported for doing so. For years, I have been able to convince my own clients to report abuse of themselves and their children to the police only with significant reassurance that they would not be separated from their children if they did so. Being able to report and cooperate with law enforcement can enable survivors to access immediate, short-term protections, such as emergency medical care, as well as longer-term benefits, such as restraining orders.⁴

But in jurisdictions where local police are seen as the enforcers of immigration laws, undocumented immigrants are afraid to drive, go to community organizations or churches, or even seek medical help for their children. In such jurisdictions, many survivors of domestic violence remain in the shadows—afraid to call the police, or even to reach out to organizations like mine for assistance. Effectively, for many vulnerable victims, reaching out to local law enforcement for assistance to address trafficking, assault, and domestic violence is removed as an option for safety.

The policies of the Executive Order are already having a devastating chilling effect on reporting criminal activity among immigrant survivors of trafficking, sexual assault, and domestic violence are no exception. Since January, fear has spread like wildfire through communities and victims are not reaching out for help from police. And the evidence shows that this is not an abstract fear.⁵ Less than three weeks after the President issued the Executive Order, and amidst widespread

reports of escalating immigration enforcement activity, Immigration and Customs Enforcement agents arrested an immigrant woman at a courthouse in El Paso, Texas, where she had gone to seek an order of protection from her abuser.⁶ In Denver, Colorado, City Attorney Kristin Bronson reported that since the issuance of the Executive Order, four domestic-violence victims have informed her office that they no longer wish to pursue charges against their abusers out of fear that doing so will place them at risk for deportation.⁷ The district attorney in Travis County, Texas similarly reported that at least one domestic violence case there recently stalled because the victim declined to press charges out of fear of deportation.⁸

Reports indicate that immigrant survivors of domestic and sexual violence across the country are living in fear as a result of the orders, which could “sweep up victims of domestic violence, putting them on a fast track to deportation before they can seek legal status ... or justice through the legal system.”⁹ In Los Angeles, police Chief Charlie Beck said that his city is already seeing evidence of this chilling effect: Reports of sexual assault have dropped by 25 percent and domestic violence by 10 percent among the Latino population since the beginning of the year.¹⁰

At the same time, staff at domestic-violence shelters and clinics operating in communities with large undocumented populations are reporting a “large drop in the number of women coming in for services,” indicating that undocumented victims “aren’t taking the next steps to escape abusers, such as pressing charges or moving into shelters.”¹¹ Advocacy projects are reporting a steep drop in the number of women asking for accompaniment to report crime and seek protection orders. Hotlines are reporting significant upticks in calls from immigrant victims, almost all of whom are requesting advice on working with police given their fear of deportation in light of the Executive Orders. Sometimes the questions are about abuse to adult immigrants, other times about abuse to citizen children. Thousands of advocates for victims of trafficking, sexual assault, and

domestic violence around the country report that they are uncertain how to advise immigrant survivors about what will happen if they call the police or go to court.

Policies such as 287(g) reduce the likelihood of prosecuting crimes such as trafficking, rape, and domestic violence. Studies show that when local officials enforce federal immigration law, immigrants are deterred from contacting local officials—be it in an emergency room or by dialing 911—out of fear that doing so will result in detention or deportation. For example, one study of an Alamance County, North Carolina, policy encouraging local police officers to assist in enforcing immigration laws found that after the policy took effect, immigrant interviewees were reluctant to leave their homes or drive, for fear of encountering the police.¹² When asked about crime-reporting practices, “the majority of Hispanic interviewees stated that they would hesitate before reporting crime to authorities out of fear that a friend, neighbor, or family member might be placed in danger of deportation.”¹³ Another recent report concluded that there are, on average, 35.5 *fewer* crimes committed per 10,000 people in so-called “sanctuary” counties than there are in non-sanctuary counties.¹⁴ For this reason, major policing groups, including the Major Cities Chiefs Association (“MCCA”), Major County Sheriffs Association, International Association of Chiefs of Police, and National Fraternal Order of Police have opposed efforts to defund so-called “sanctuary” jurisdictions.¹⁵ As the MCCA noted in response to the issuance of the Executive Order: “[c]ities that aim to build trusting and supportive relations with immigrant communities should not be punished because this is essential to reducing crime and helping victims.”¹⁶

As a victim advocate, I am deeply concerned that policies that mandate local police entanglement with immigration enforcement will strengthen the hand of violent perpetrators, helping them silence their victims and those who witness their crimes. By deterring immigrant women from reporting gender-based violence and accessing critical services, 287(g) and similar policies can make us all less safe. Mandating local law enforcement cooperation with immigration

enforcement will deter immigrant domestic violence survivors not only from reporting crimes, but also from seeking help for themselves and their children - depriving them not only of the law enforcement protection, but also of other critical resources and support in their communities. Building strong relationships between law enforcement and the community is important for safety in general, and it is particularly critical for victims of domestic violence.

¹ *New Study of Domestic Violence and Sexual Assault in the U.S. Latin@ Community Reveals Barriers to Reporting and High Willingness to Intervene to Help Survivors*, No Mas (Apr. 21, 2015), <http://bit.ly/1OHQ7NV>.

² Runner, *Intimate Partner Violence* at 4; PRI's The World, *Some Immigrant Women, Victims of Domestic Violence, Afraid to Seek Help* (Mar. 21, 2013), <http://bit.ly/2n4Dbi0> (quoting Sister Rosemary Welsh, Executive Director of Casa de Misericordia in Laredo, Texas, as follows: "One of the many ways men would keep [immigrant women] in a domestic violence situation was saying that 'I am a U.S. citizen' or 'I am a legal permanent resident, and you call the police, they will deport you and I will stay with the kids. ...'").

³ Tom K. Wong, *The Effects of Sanctuary Policies on Crime and the Economy*, The Center for American Progress (January 26, 2017) available at: <https://www.americanprogress.org/issues/immigration/reports/2017/01/26/297366/the-effects-of-sanctuary-policies-on-crime-and-the-economy/>

⁴ See The Superior court of California, County of Santa Clara, "Domestic Violence Restraining Orders," <http://bit.ly/2nOfVCJ>.

⁵ Brief for the Tahirih Justice Center, et al., as amicus curiae in *City and County of San Francisco v Donald J. Trump and County of Santa Clara v Donald J. Trump*, filed March 22, 2017, <http://www.tahirih.org/wp-content/uploads/2017/03/March-22-Amicus-Brief-as-Filed.pdf>.

⁶ Katie Mettler, *'This is Really Unprecedented': ICE Detains Woman Seeking Domestic Abuse Protection at Texas Courthouse*, Wash. Post (Feb. 16, 2017), <http://wapo.st/2nfpMOf>; see also Nicholas Kulish, Caitlin Dickerson, and Ron Nixon, *U.S. Immigration Agents Discover New Freedom to Deport Under Trump*, N.Y. Times (Feb. 25, 2017), <http://nyti.ms/2mie63i>.

⁷ Mark Joseph Stern, *Bad for Undocumented Immigrants, a Gift to Domestic Abusers*, Slate.com (Mar. 8, 2017), <http://slate.me/2mZIJvS>.

⁸ Nora Caplan-Bricker, *I Wish I'd Never Called the Police*, Slate.com (Mar. 19, 2017), <http://slate.me/2mYrYgC>.

⁹ Caplan-Bricker, *I Wish I'd Never Called the Police*.

¹⁰ James Queally, *Latinos are reporting fewer sexual assaults amid a climate of fear in immigrant communities*, LAPD says, L.A. Times (Mar. 21, 2017), <http://lat.ms/2nPwdva>.

¹¹ Tyler Kingkade, *Trump Deportation Vow Is Scaring Domestic Abuse Victims From Coming Forward*, BuzzFeed News (Mar. 16, 2017), <http://bzfd.it/2nNRX9L>.

¹² Mai Thi Nguyen and Hannah Gill, *Interior Immigration Enforcement: The Impacts of Expanding Local Law Enforcement Authority*, 53 Urb. Stud. J. 302, 14 (2015) https://planning.unc.edu/people/faculty/mainguyen/InteriorImmigrationEnforcement_UrbanStud2015Nguyen0042098014563029.pdf.

¹³ *Id.* at 15.

¹⁴ Tom K. Wong, *The Effects of Sanctuary Policies on Crime and the Economy*, 2, Center for American Progress (Jan. 26, 2017), <http://ampr.gs/2kxOcHX>.

¹⁵ Letter from the Major County Sheriffs' Association and Major City Chiefs Association Opposing S. 2146 (Oct. 20, 2015), <http://bit.ly/1RnPg7g>; Robbins, *Police Fear Trump Immigration Orders May Handcuff Effort to Fight Gangs* (quoting a statement by the International Association of Chiefs of Police); Andrea Noble, *Donald Trump, Police Union at Odds Over 'Sanctuary Cities' Funding*, Wash. Times (Nov. 22, 2016), <http://bit.ly/2nfrzJt> (citing National Fraternal Order of Police former Executive Director James Pasco).

¹⁶ Joint Statement, *U.S. Mayors, Police Chiefs Concerned With Sanctuary Cities Executive Order* (Jan. 25, 2017), <http://bit.ly/2n9zjf6>.