SEVERING A LIFELINE:
The Neglect of Citizen Children in America’s Immigration Enforcement Policy

A Report by Dorsey & Whitney LLP
to The Urban Institute
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“Each child represents either a potential addition to the protective capacity and enlightened citizenship of the nation or, if allowed to suffer from neglect, a potential addition to the destructive forces of a community. . . . The interests of the nation are involved in the welfare of this array of children no less than in our great material affairs.”

— Theodore Roosevelt

“No one is born a good citizen; no nation is born a democracy. Rather, both are processes that continue to evolve over a lifetime. Young people must be included from birth. A society that cuts off from its youth severs its lifeline.”

— Kofi Annan

“The rights to conceive and to raise one’s children have been deemed ‘essential,’ ‘basic civil rights of man,’ and ‘rights far more precious than property rights.’”

— U.S. Supreme Court, Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)
I. Executive Summary

Of the approximately 5 million children of undocumented immigrants residing in the United States, more than 3 million are U.S. citizens. Born here, these children derive their citizenship from the Fourteenth Amendment to the Constitution. Current immigration law and enforcement policy is marginalizing what it means for these children to be U.S. citizens.

Increased interior immigration enforcement action by ICE, in the form of high-profile worksite raids and home raids, has resulted in the arrest, detention and deportation of record numbers of undocumented immigrants over the past several years. In the process, tens of thousands of children of undocumented immigrants, including citizen children, have seen their families torn apart, or experienced the effective deportation of the entire family to countries as foreign to them as they are to other American children. The harm threatened or visited upon the citizen child in these circumstances is palpable and long-lasting.

U.S. citizen children are the victims of immigration laws that are out of step with the manner in which we address child welfare issues in other areas of the law. The “best interests” of the child find little or no hearing in the process of detaining and deporting undocumented parents. The harm suffered by the citizen child who loses a parent to deportation, or the citizen child who loses his or her prospective future in the United States in the interest of maintaining family unity, is thus the natural consequence of systemic shortcomings in U.S. immigration law and policy.

The primary goal of this report is to reveal, and to prompt meaningful and reasoned debate regarding, the deficiencies in this country’s immigration laws and enforcement scheme relative to the interests of our citizen children. Our hope is that this discussion will lead to a more humane immigration policy that does not dismiss the harm to the citizen child as unavoidable, collateral damage.

In preparing this report, the authors have researched the events surrounding, and impact of, recent worksite and home raids conducted by ICE across the nation. In addition to reviewing available literature and published reports regarding immigration enforcement actions nationally, the authors gathered data and information directly from several Minnesota communities that have been the sites of recent enforcement actions, including Worthington (site of one of the December 12, 2006, Swift plant raids), Willmar and Austin, Minnesota (both sites of several
home raids). The authors interviewed local government officials, religious leaders, representatives of immigrant community support organizations, school personnel, union representatives, and affected family members. In addition, the authors undertook extensive research into historic and current immigration law and policy, and the manner and extent to which the “best interests of the child” have become a hallmark of state laws in areas implicating child welfare issues.

**Demographic Background:** Often lost in the heated debate surrounding immigration enforcement and reform is recognition of the conditions giving rise to an undocumented population of some 12 million. With little or no meaningful avenue for lawful entry to the U.S., undocumented immigrants have come to this country over the past several decades in pursuit of economic opportunity all but absent in their countries of origin. Service sector and other low-paying jobs that native-born workers do not want or cannot fill have drawn immigrant labor to the U.S. economy. Undocumented immigrants have settled in large and small communities across the nation, working for wages that most native-born workers scoff at, but that often represent a tenfold or greater increase in potential earnings in their impoverished countries of origin. In the process they have established homes, they have reinvigorated and enriched the communities in which they live and work, and they have become mothers and fathers. Their U.S.-born citizen children, who now number some 3.1 million, have been raised, socialized and schooled as Americans. It is these children – American children – who are bearing the brunt of enforcement actions targeted at the detention and deportation of their parents. According to estimates from The Urban Institute, one citizen child is affected for every two adults arrested in ICE enforcement actions. With deportations numbering greater than 1.9 million in this decade, it is safe to conclude that hundreds of thousands of citizen children have suffered the loss of one or both parents, or effective deportation to a foreign land, as a consequence of enforcement actions over the past several years.

**The Non-Existent Queue for Lawful Entry:** Some may seek to dismiss, or downplay, the harm to citizen children as a necessary consequence of the "sins" of their parents. The choice of the parent to enter unlawfully, they say, mitigates governmental and societal responsibility for adverse consequences visited upon the innocent child when the parent is detained and deported. In reality, however, the avenues for lawful entry into the U.S. by the lower-skilled, lower educated immigrant that makes up the vast majority of the undocumented population are
virtually non-existent. Despite the clear demand of U.S. business for relatively low-skilled, immigrant labor that cannot be met by native-born workers, the number of permanent visas available for the lawful entry of less-skilled workers is limited to 5,000 per year. Similarly, the ability of lower-skilled workers to obtain temporary works visas is constrained by numerical caps and substantive limitations. Family-sponsored admissions are also limited and plagued by bureaucratic delays often decades in length. Moreover, a U.S. citizen child under age 21 has no ability to seek legal immigration status for a parent or other family member. In short, the oft-stated refrain that the undocumented immigrant should have simply "gotten in line" for a visa and entered lawfully is based on a false premise – there was and is no meaningful line for the immigrant to “get in.”

The Threat to the Welfare of Citizen Children: Innocent children have been the unintended victims of increasingly aggressive enforcement efforts by ICE. The harm visited upon children of undocumented immigrants stems from the immediate and longer term detention of one or both parents, the tactics employed by ICE in carrying out enforcement actions (particularly home raids), and an immigration law that fails to consider the “best interests” of the child in detaining and deporting his or her parent.

Worksite Raids: Although ICE appropriately recognizes childcare responsibilities as a ground for release with monitoring and/or reporting in lieu of detention, it has failed to implement protocols promoting the effective and timely identification of child welfare issues at the time of the raids. Asking the undocumented parent who has just been arrested and restrained to disclose whether he or she has children in need of care is not effective. Given the intimidating nature of enforcement actions, and the uncertainty within the undocumented community regarding the impact of a parent’s undocumented status on his or her children, persons arrested in worksite raids are understandably reluctant to disclose whether they have children in need of care. Despite its awareness of this reticence, ICE has been reluctant to provide advance notification of planned raids to state and local social service agencies who could serve as intermediaries for the purpose of identifying arrestees with primary childcare responsibilities. In addition, current immigration law mandating the detention of certain undocumented immigrants (e.g., those who have outstanding orders of deportation and/or who failed to appear for immigration proceedings, as well as immigrants characterized as “aggravated felons” as a result of convictions for even petty offenses) precludes ICE and immigration judges from
releasing undocumented parents on humanitarian grounds. As a consequence, ICE raids have left children without parents and feeling abandoned, separated nursing babies from their mothers, separated pregnant wives from their husbands, and compelled local communities and organizations to scramble to address child welfare crises in their wake.

**Home Raids:** The manner in which ICE has conducted “home raids” is equally pernicious relative to the safety and well-being of children. The practice of “knock and talk” searches (i.e., forced entry into homes without information that the target of a fugitive warrant is present in the home), in addition to its questionable constitutional validity, has harmed children who have encountered ICE agents (at times with guns drawn) in their homes, experienced the aggressive questioning of occupants regarding their immigration status, and witnessed loved ones not identified in any arrest warrant led away in handcuffs.

**Coercive Detention Practices:** ICE has further impeded the timely identification of child welfare and other humanitarian concerns that might warrant release of the arrested parent in lieu of detention by transporting arrested immigrants to detention facilities often hundreds of miles from the enforcement site. In many instances, days or weeks have gone by before concerned family and community members have been able to determine the location of an arrested loved one, let alone address humanitarian requests for release to government officials. Although the use of remote detention facilities is, in part, a consequence of the absence of sufficient detention space nearer the raid sites, it is clear that ICE has utilized the tactic of isolation and threats of extended detention to extract voluntary removal agreements from undocumented immigrants. Needless to say, the message to a concerned parent that he or she can remain in detention and fight deportation for six or more months, or agree to voluntary deportation and potentially reunite with his or her family outside the U.S. in a matter of weeks, is a powerful tool in the hands of government agents seeking to convince an undocumented immigrant to waive his or her rights under U.S. immigration law. In addition to raising a host of moral issues, such tactics call into question the true voluntariness and validity of deportations effected through “voluntary removal” agreements.

ICE took the coercive use of detention to a new level in connection with the large-scale raid of Agriprocessors in Postville, Iowa in May 2008. Employing dubious criminal charges and threats of extended incarceration to an unprecedented
extent, and a “fast track” system of “justice” entailing group arraignments and court proceedings, ICE obtained plea agreements from some 300 undocumented immigrants resulting in their imprisonment for at least five months followed by their immediate deportation.

**Long Term Harm to Children:** The adverse impacts of increased enforcement on children are not limited to the trauma experienced in the immediate aftermath of the enforcement action. The separation of the family due to the detention and ultimate removal of a parent visits devastating and long-lasting financial and emotional harm on the children left behind. Families left without their primary breadwinner, many consisting of stay-at-home mothers who themselves are undocumented and cannot work, have encountered significant difficulties providing even the basic necessities to their children. While the financial struggles have been taxing, they pale in comparison to the emotional harm that children, including citizen children, have experienced with the sudden loss of a mother, father, or both. Psychologists, teachers, and family members have reported significant increases in instances of anxiety, depression, feelings of abandonment, eating and sleeping disorders, post-traumatic stress disorder, and behavioral changes among children who have experienced the loss of a loved one or who witnessed ICE in action. Once well-adjusted children who were doing well in school have become withdrawn and suffered serious setbacks in their educational progress. In a country that emphasizes the importance of family unity in the socialization and upbringing of its children, an immigration system that promotes family separation is a broken system.

**The Effective Deportation of Citizen Children:** There is, of course, an alternative to family separation. The child can join his or her deported parent in the parent’s country of origin. For the citizen child of the undocumented parent, however, this is an exceedingly harsh and life-altering trade-off. For the citizen child, born and raised in the United States, a parent’s country of origin is as foreign as it would be to any American child. In addition to uprooting the child from the only life he or she has ever known, effective deportation of the undocumented immigrant family exposes the child to economic and educational deprivation, and in many instances physical harm. An American child of an undocumented immigrant parent deported to Mexico, Guatemala, Honduras, Haiti and other countries that are the origins of the vast majority of the undocumented population will find himself or herself living in abject poverty, experiencing substandard (if any) schooling, and witnessing
(if not experiencing) gang and criminal violence of a degree and nature that is completely foreign to the streets of Worthington, Minnesota; Postville, Iowa; Greeley, Colorado; New Bedford, Massachusetts and other American communities where undocumented immigrants have been swept up in ICE raids. The effective deportation of the citizen child in the interest of family unity deprives the child of the opportunities presented by life in the United States that is his or her birthright. An immigration system that compels the choice between family unity and the American dream marginalizes what it means for these children to be U.S. Citizens.

The Neglected Child Under Current U.S. Immigration Law: Current U.S. immigration law neglects the citizen child of undocumented immigrants and the tenets of family unity that it is supposed to promote. Undocumented parents of citizen children do not have a meaningful path to legal status that would permit them to remain a full family in the United States. An undocumented immigrant who initially entered the U.S. unlawfully cannot seek readjustment of his immigration status without first leaving the country. In that circumstance, however, the immigrant's unlawful presence in the U.S. will serve as a bar to re-entry for up to 10 years, regardless of the presence of one or more citizen children in the family. Moreover, the law does not permit a citizen child under the age of 21 to petition for the admission of a parent, or to provide a parent with a path to lawful status in the U.S.

U.S. immigration law includes a mechanism through which undocumented immigrants can seek cancellation of removal (i.e., deportation). However, the standards under the current law are such that obtaining relief from removal based on the harm that will be experienced by the citizen child who will be separated from his or her parent or effectively deported with the parent is virtually impossible. In short, the “best interests” of the citizen child – a concept deeply imbedded and often controlling legal determinations in other areas of the law – is all but irrelevant under U.S. immigration law.

Conclusions and Recommendations: Current U.S. immigration law and enforcement policy is failing its most vulnerable citizens – the U.S.-born children of undocumented immigrants. With the hope of prompting a reasoned debate and the development of a more humane U.S. immigration policy that protects, rather than dismisses, the interests of citizen children, this report makes recommendations designed to (1) address the systemic barriers to lawful entry
and/or presence in the United States that have led to the large, undocumented population; (2) afford the undocumented, immigrant parent of a citizen child a reasonable opportunity to make his or her case for remaining in the United States based on consideration of the “best interests” of the citizen child, bringing immigration law and policy into conformity with other areas of the law where the interests of children are recognized; and (3) minimize the harm to children in the aftermath of enforcement actions by suggesting changes to arrest and/or detention practices without compromising law enforcement.

The following is a condensed list of recommendations addressed in detail in Section X, “Conclusions and Recommendations”:

• Congress should address and eliminate the systemic barriers to lawful immigration status by amending the INA to (1) recapture visa numbers that have gone unused as a consequence of bureaucratic delays, increase the number of annual visas available to lower-skilled, less educated immigrants to meet the continued demand for low-cost labor in the U.S. economy, and eliminate restrictions that impede family unity; (2) allow a U.S. citizen child under age 21, or the legal guardian of such a child, to petition for the lawful admission and/or residency of a parent; (3) permit parents and their citizen children to remain in the United States while awaiting the issuance of a visa; (4) provide a humanitarian mechanism that promotes family unity and allows undocumented immigrants an opportunity to seek “adjustment” of their immigration status while remaining in the United States with their children; and (5) impose reasonable standards and provide for judicial review of re-entry bar waiver determinations.

• Congress should recognize the “best interests of the citizen child” as a factor to be considered in deportation proceedings, amending the INA to (1) grant immigration judges the discretion to consider the “best interests” of the citizen child in deportation and removal proceedings; (2) provide for consideration of the “best interests” of the citizen child in considering petitions for relief from removal (i.e., deportation) or, alternatively, returning to the standard for “suspension of removal” in place prior to the 1996 amendments to the INA; (3) eliminate the prohibition of relief from removal applicable to undocumented immigrants characterized as “aggravated felons” when such persons have U.S. citizen children and relief from removal would be in the “best interests” of the citizen child, and redefine “aggravated felon” to exclude convictions for petty and other offenses that do not result in any jail time; (4) provide for judicial
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review of cancellation of removal determinations in U.S. District Courts where the interests of citizen children are involved; (5) provide for the appointment of a guardian ad litem to protect and advocate for the interests of the citizen child in all immigration proceedings involving the child's parent; and (6) eliminate the mandatory detention of undocumented immigrants where childcare and similar humanitarian issues are involved, and encourage the release of undocumented immigrants with monitoring and/or reporting in lieu of detention pending deportation proceedings.

- Congress should exercise increased oversight of immigration enforcement and its impact on citizen children by (1) appropriating funds to enable states and local governments to meaningfully assess and address the impact of current immigration law and enforcement policies on citizen children; and (2) requiring ICE to gather demographic and other data regarding citizen children affected by immigration enforcement actions, to document specific actions taken to minimize harm to children, and to report such data annually to Congress.

- ICE's “Guidelines for Identifying Humanitarian Concerns Among Administrative Arrestees When Conducting Worksite Enforcement Operations” should be made mandatory in all enforcement actions and modified to promote the timely and effective identification of childcare and other humanitarian issues warranting release with monitoring and/or reporting in lieu of detention, and to discourage detention whenever the same would be contrary to the best interests of a minor child of the arrestee.

- ICE should develop guidelines for conducting home raids that ensure that such enforcement actions are truly “targeted” and minimize the prospect of potential harm to children.

- ICE should develop detention guidelines that favor the release of undocumented immigrant parents of minor children with appropriate monitoring and/or reporting in lieu of detention.

- Immigration judges should be required to consider the “best interests” of the citizen child in rendering detention and deportation decisions, and the citizen child and/or the child's guardian ad litem should be permitted to appear and present argument and evidence in all immigration judicial proceedings.

- State and Local Social Service Agencies should establish and train
Humanitarian Response Teams to serve as an intermediary in connection with ICE enforcement actions for the purpose of timely and effectively identifying and addressing child welfare and other humanitarian issues warranting release of arrested immigrants in lieu of detention.

- State and local governments should assess whether the participation of local law enforcement personnel in immigration enforcement actions complies with state child welfare, due process and detention standards, and whether such participation jeopardizes public safety or otherwise interferes with the performance of traditional local child welfare and law enforcement activities.

- States and local governments should assess the educational, health, and economic impact which raids have upon children and affected communities.
II. Introduction

Miguel (a pseudonym) was a second-grade student attending elementary school in Worthington, Minnesota. His mother, an undocumented immigrant from El Salvador, was employed at the Swift & Company plant in Worthington. Miguel was described by his teacher as a “happy little boy,” making real progress in school ... until December 12, 2006. On that day, armed agents from U.S. Immigration and Customs Enforcement (“ICE”) raided the Swift plant in Worthington, detaining Miguel’s mother and more than 200 other immigrants who came to this rural community in southwestern Minnesota seeking a better life for themselves and their children. Returning home after school, Miguel discovered his mother and father missing, and his two-year-old brother alone. For the next week, Miguel stayed at home caring for his brother, not knowing what had become of his parents. Not until a week after the raid, when his grandmother was able to make her way to Worthington to care for her frightened grandchildren, was Miguel able to return to school. According to his teacher, this previously “happy little boy” had become “absolutely catatonic.” His attendance became spotty at best. His grades plummeted. At the end of the school year, Miguel was not able to advance to the third grade with the rest of his class.

Miguel and his brother—citizens born in the United States—are but two of the millions of citizen children of undocumented immigrants placed at risk by increasingly aggressive immigration policy and enforcement. They are our children—American children. In the politically charged atmosphere of immigration reform the citizenship of these American children has been discounted, marginalized or ignored all too often. The best interests of the child—an overriding concern imbedded in our laws and jurisprudence for decades—find little or no place in our current system of immigration enforcement. As a consequence, citizen children of undocumented immigrants swept up in immigration raids are themselves facing effective deportation to countries they have never known, thereby depriving them of the educational and economic opportunity that is their birthright as U.S. citizens. The alternative, of course, is breaking up the family—deporting the undocumented...
mother and/or father, with the citizen child remaining in the U.S. An enforcement-only scheme that compels such an untenable choice at the direct expense of the most vulnerable members of society—its children—is clearly a broken system.

Current immigration laws and enforcement policy are out of step with the way we treat children in other areas of our laws, the approach of most western democracies, and even our immigration laws themselves, with their long-standing, fundamental goal of family unity. This fundamental disconnect was the premise of the Bush Administration's failed immigration reform initiative. President Bush shined a light on the economic and human conditions driving undocumented immigration in 2005, stating: “I want to remind people that family values do not stop at the Rio Grande River. People are coming to our country to do jobs that Americans won’t do, to be able to feed their families.”

Undocumented immigrants, drawn to this country by the promise of safety, economic opportunity, and/or family unity often lacking in their countries of origin but with little or no means of establishing lawful residence in the United States, have lived, worked, and raised families among us for years — some for a decade or more. Despite increasingly aggressive enforcement efforts, the undocumented immigrant population in the United States remains large. According to recent estimates, there are between 11.4 and 12.4 million undocumented immigrants residing in the United States. The vast majority work hard in low-paying jobs to provide for their families. There are currently some 8.1 million undocumented in the U.S. labor force, making up 5% of the total U.S. workforce.

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Undocumented immigrants have settled in our communities, done work that the native-born population shuns, and raised families. There are more than five million children of undocumented immigrants, three million of whom are U.S. citizens.4

President Bush's immigration reform initiative endeavored to address the dilemma of the undocumented immigrants who live and work within our communities. The “five main pillars” of reform identified by the Bush Administration include “bringing illegal aliens who are now in the U.S. out of the shadows,” establishing a “lawful mechanism so that in the future, foreign workers can come into the United States on a temporary basis to fill jobs that U.S. workers do not want,” and “promoting assimilation of new immigrants into our society.”5 Unfortunately, the near-term prospects for meaningful reform died in Congressional debate in July 2007.

As a consequence, we are left with an enforcement-only approach epitomized by increasing numbers of worksite and home raids, the detention and deportation of undocumented immigrants (including mothers and fathers) in record numbers, and the promise of much more to come. The roundup and removal of immigrants who are contributing members of our communities is unprecedented in recent times, with significant unintended consequences for our nation’s children. Current immigration enforcement policy ignores and thereby threatens families and children, including the many children who are U.S. citizens by birth.

In his April 2007 testimony before the House Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, Professor Hiroshi Motomura (currently at UCLA Law School) succinctly framed the troubling shortcomings of an enforcement-only approach in relation to the effects on U.S. citizen children and other family members of undocumented immigrants:6

Perhaps it would be enough to say that our American system of justice is based on the rule of law, and anything that undermines the rule of law is fundamentally corrupting of American justice as a whole. But there is even more at stake. When we decide how seriously we take the rule of law in the immigration context, the real question is: what mistakes are we willing to tolerate? . . .

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If noncitizens of the United States are the only ones who suffer, that might seem to make the outcome less troubling. It is tempting to think that justice in immigration law can be justice on the cheap. But the real world of immigration law doesn't divide neatly into citizens and aliens. An enforcement-only approach to the rule of law leads to mistakes that cause devastating harm to many U.S. citizens who may be a noncitizen's husband or wife, father or mother, or child. When our immigration law system doesn't adhere to the rule of law, then we diminish and devalue what it means for them to be American citizens.

This report provides an in-depth legal analysis of the treatment of citizen children of undocumented immigrants under current immigration law and enforcement policy. The report addresses the central significance of the “best interests of the child” in American law and jurisprudence on child welfare, as well as international human rights norms and law. It is our conclusion that the treatment of citizen children under current immigration law and enforcement policy is out of step with these well-established legal standards. The interests of the citizen child, let alone the “best interests” of the child, find little or no hearing in the current system. As a consequence, citizen children increasingly find themselves separated from one or both parents, or effectively deported with their parents. The system imposes an untenable choice for the undocumented parent facing deportation – keep the family together by removing the citizen child to a foreign land, or break up the family to preserve the child's educational and economic opportunity as a birthright citizen. In short, current immigration law and enforcement policy marginalizes what it means for these children to be citizens of the United States.

To provide appropriate context for the legal analysis, the authors have researched the events surrounding, and impact of, worksite and home raids conducted by ICE across the nation. In addition to reviewing available literature and published reports regarding immigration enforcement actions nationally, the authors gathered data and information directly from several Minnesota communities that have been the sites of enforcement actions, including Worthington (site of one of the December 2006 Swift plant raids), Willmar, and Austin, Minnesota (both sites of several home raids). These efforts included interviews of local government officials, religious leaders, immigrant community support organizations, school

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officials, and affected family members in Worthington, as well as government and community leaders in Willmar and Austin, Minnesota. In addition, the authors focused on the high-profile enforcement action undertaken in Postville, Iowa in May 2008. The reader will see qualitative data gathered from these communities interspersed throughout the report.

Our goal is to reveal, and to prompt meaningful and reasoned debate regarding, the shortcomings in this country’s present immigration laws and enforcement scheme relative to the interests of our citizen children. Our hope is that this discussion will lead to a more humane immigration policy that does not dismiss harm to the citizen child, the nation's future, as unavoidable, collateral damage.
III. Demographic Background

A. The Undocumented Population

Undocumented immigrants, drawn to the United States by economic and social opportunities often lacking in their countries of origin, have settled in large and small communities across the country. According to the Pew Hispanic Center, there were approximately 11.9 million undocumented immigrants living in the United States as of March 2008.7 Approximately 44% of this population arrived in the U.S. in this decade, including some 3.7 million from 2000 to 2004.8 The undocumented population includes approximately 5.1 million persons who came to the U.S. in the 1990s, more than half of whom have now lived and worked here for more than 13 years.9 Undocumented Mexican immigrants make up the largest portion (59%) of the undocumented population by far, numbering some 7 million as of March 2008.10 Although the growth of the undocumented population has slowed in recent years, the Pew Hispanic Center estimates that approximately 275,000 undocumented immigrants have come to the U.S. annually in the period since 2005.11

The influx of undocumented immigrants correlates with a demand for workers to fill lower-skilled jobs. The Bureau of Labor Statistics projects that there will be some 25 million job openings for workers with a high-school diploma or less—amounting to 45% of all job openings—in the period from 2004 through 2014.12 At the same time, the interest of native-born workers in filling these positions has diminished as the native-born workforce ages and becomes better educated.13 “The total demand will far exceed the rate of growth in the workforce that will occur from natural expansion and the entry afforded by current immigration policy, leaving a potential gap of tens of millions of laborers.”14 Immigrant workers thus fill a pressing need in the U.S. economy that, in recent times, has not been met by the native-born workforce.

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8 Id., p.3
9 Id.
10 Id., pp. 3-4.
11 Id., p.2.
13 Id. (noting that “the share of native-born adults age 25 and older with less than a high-school diploma dropped from about 23 percent in 1990 to 11 percent in 2006”); Perryman, M. Ray, An Essential Resource: An Analysis of the Economic Impact of Undocumented Workers on Business Activity in the US with Estimated Effects by State and by Industry, The Perryman Group, April 2008, pp. 30-32 (“In 1960, about 50% of men in this country joined the low-skilled labor force without completing high school; the number is now less than 10%.”) (http://www.americansforimmigrationreform.com/files/Impact_of_the_Undocumented_Workforce.pdf).
The impact of the current economic recession on the population of undocumented immigrants is uncertain. Data suggests that growth of this population is slowed in periods of economic downturn, reflecting a correlation between undocumented immigration and the demand for lower-skilled workers in the U.S. economy.15 However, notwithstanding some anecdotal reports, there is little evidence to suggest that the recession is prompting return migration of undocumented immigrants in statistically significant numbers. A recent report from the Migration Policy Institute assessing the effect of the economic crisis on immigration concludes that the current downturn is unlikely to foster above-normal return migration “unless the U.S. economic downturn turns out to be particularly prolonged or severe, economic conditions show consistent improvement in origin countries (which appears unrealistic in the near term), and potential leavers are guaranteed that they would be allowed to return to the United States when economic conditions change.”16

The debate among economists regarding the economic impact of the undocumented population is a heated one with little area of general agreement.17 While the economics of undocumented immigration is beyond the scope of this report, recent studies suggest that elimination of the undocumented workforce could have significant economic consequences. In an April 2008 report, The Perryman Group concluded that “the immediate effect of eliminating the undocumented workforce would include an estimated $1.757 trillion in annual lost spending, $651.511 billion in annual lost output, and 8.1 million job losses.”18 After market adjustments, the sustained loss to the U.S. economy through “foregone economic activity (based on the size of the national economy in 2008) would include some $551.569 billion in annual spending, $244.971 billion in annual output, and more than 2.8 million lost jobs.”19

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19 Id., p. 41.
The economic benefits derived from the currently undocumented labor force, and the potential adverse consequences of strict enforcement in lieu of meaningful reform, are significant at both a macro and micro level. In rural communities such as Worthington, Minnesota, where native population growth has been stagnant at best and economic opportunity waning over the past several decades, the relatively recent influx of immigrant workers and their families has revitalized local economies. According to The Perryman Group, removal of the approximately 69,000 undocumented workers from Minnesota—a state with a growing but comparatively small immigrant population—would result in billions of dollars of immediate and long-term economic losses and the permanent loss of more than 24,000 jobs.

The May 2008 high profile raid of Agriprocessors in Postville, Iowa (discussed further in Section V.B.4.) – a rural community with a population of approximately 2,300 in northeast Iowa – provides recent and compelling evidence of the costs of worksite raids to relatively small communities. The consequences of the Postville raid have been far-reaching, extending beyond the humanitarian problems created. The raid itself cost the U.S. taxpayer more than $5.2 million. Notably, this figure includes only ICE’s expenditures. It does not include the costs of the court and U.S. Attorney’s office, nor does it capture the costs of imprisoning hundreds of immigrants for several months.

The costs to the small community of Postville have been significant and cannot be measured in dollars alone. Approximately one-half of Postville’s population of roughly

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21 Based on data from the 2000 Census, Dr. Bruce Corrie (Professor of Economics, Concordia University—St. Paul, Minnesota) estimated that the buying power of Latinos in Worthington, Minnesota was $27 million.
22 In a September 2000 report, economist James Kielkopf concluded that undocumented labor in six segments of the Minnesota workforce (eating/drinking, hotels/lodges, building services, roofing/residential maintenance and repair, agriculture, and meat/poultry processing) “accounts for at least $1.56 billion, and more likely $3.8 billion, of value added in the Minnesota economy each year.” Kielkopf, J., The Economic Impact of Undocumented Workers in Minnesota, Hispanic Advocacy and Community Empowerment through Research, September 2000, p.2. This study further estimates that the removal of undocumented workers from the Minnesota economy would reduce economic growth by 40% and result in one job loss elsewhere in Minnesota for each undocumented worker removed. Id.
23 Petroski, W., Taxpayers’ Costs Top $5 Million for May Raid at Postville, The Des Moines Register, October 14, 2008.
24 Id.
2,300 worked at Agriprocessors prior to the May 12, 2008, raid. The community lost roughly one-third of its population virtually overnight, with the bulk of the population loss consisting of families with school-age children. School attendance plummeted following the raid with the loss of one-third of elementary and middle school students, and children of U.S. natives experienced nightmares and other trauma as a result of the government's show of force and the sudden absence of friends and classmates. School superintendent David Strudthoff described the raid and its affects as “just like having a tornado that wiped out an entire part of town.” Postville Mayor Bob Penrod similarly reported that the raid “literally blew our town away.”

“\textit{They say this is the largest single raid that’s happened in U.S. history, and imagine that raid happening in a town that is less than 3,000 people. We are in the process of losing one-third to one-half of our population almost overnight.}” Rev. Steve Brackett, St. Paul Lutheran Church, Postville, Iowa (video interview at http://fairimmigration.wordpress.com/)

More than two months after the raid, Postville continued to struggle to deal with the raid fallout. As reported by the Des Moines Register in a July 27, 2008, article, the Postville of today is a vastly different and less safe place than it was before the raid:

Ten weeks after the largest workplace immigration raid in U.S. history, this is the new Postville:

Drunken brawls. A food pantry that is almost bare. Women afraid to walk alone at night.

Postville is now home to hundreds of men and women from tough towns and tough lives, brought to this northeast Iowa community by recruiters who entered homeless shelters in dusty Texas border towns offering $15 and a one-way bus ticket.

The impact is evident: New laborers are changing Postville. The Agriprocessors Inc. meatpacking plant, the site of the immigration raid, once employed men and women with families. Now, its workers are mostly young, single people with no stake in the community and nothing to lose.

26 See Dr. Erik Camayd-Freixas, \textit{Interpreting after the Largest ICE Raid in US History: A Personal Account}, p. 3.
27 Id.; Basu, R., \textit{After show of raid, what next?}, Des Moines Register, May 18, 2008 (available at http://www.alipac.us.topics-11569-0-days0-orderasc-.html).
28 Basu, R., \textit{After show of raid, what next?}, Des Moines Register, May 18, 2008.
29 Id.
The rise in crime rate has strained Postville's tiny police department. ...

[The workers brought in by Agriprocessors to fill the void left by the raid] brought with them the promise of helping the plant get back on its feet. They also brought the dangers associated with an influx of uprooted people from the margins of society to the fragile ecosystem of this small, agrarian town.

Although the initial and long-term impact of the Postville raid is magnified by its occurrence in a relatively small community whose population was employed predominantly by one entity, it provides valuable insight into the harmful humanitarian and economic consequences of a strict-enforcement approach to addressing the undocumented immigrant issue.

B. The Citizen Children Population

As discussed at length later in this report, the escalation of worksite and other interior enforcement activities has resulted in record numbers of arrests, detentions and deportations. Immigrant families, many with U.S. citizen children, have been split apart as a consequence. The threat to family unity and the welfare of American children as a result of current immigration law and enforcement policy is significant. A full appreciation of the actual and potential harm to citizen children of undocumented immigrants requires an understanding of the large number of children exposed to the very real prospect of losing a parent to detention and deportation, and losing their place in American Society — and rights as U.S. citizens — through their effective deportation to maintain family unity.

Hard data on the population of potentially impacted children is not available, and ICE statistics on the number of children of immigrants arrested, detained, and/or deported are woefully inadequate. Researchers have estimated that there are 4.9 million children of undocumented immigrants in the United States, 3.1 million (approximately 64%) of whom are U.S.-born citizens.31

Virtually all of the younger, more vulnerable children of immigrants are U.S.-born citizens. According to national data analyzed by The Urban Institute, over 90 percent of children under age 6 with immigrant parents are U.S.-born citizens. For adolescents ages 11-17, the share that are U.S.-born drops to 72%.
This pattern holds for children of undocumented immigrants—the vast majority of young children of undocumented immigrants are U.S.-born citizens, while a smaller percentage of older children are U.S. citizens. Based on national data and an analysis of three large-scale worksite raids, The Urban Institute estimates that one U.S.-born citizen child is affected by ICE enforcement actions for every two adults arrested.\footnote{The National Council of La Raza and The Urban Institute, Paying the Price: The Impact of Immigration Raids on America’s Children, October 2007, pp. 16-18.}

The Urban Institute found that the 900 immigrants arrested in the three worksite raids studied had 500 children among them, approximately two-thirds of whom were U.S.-born citizens.\footnote{Id.} Notably, these figures and estimates do not include children living in extended households (e.g., with aunts, uncles, etc.) who experienced the loss of the head of the household as a consequence of the raids.\footnote{Id.} Extrapolating from this data and information regarding the number of undocumented immigrants deported from the U.S., one can safely conclude that tens of thousands—perhaps hundreds of thousands—of U.S. citizen children have been adversely affected by the detention and/or deportation of one or both parents in this decade.

In a recent report, the U.S. Department of Homeland Security Office of Inspector General cited data from ICE reflecting that 108,434 undocumented parents of U.S. citizen children were removed from the U.S. between FYs 1998 and 2007.\footnote{Department of Homeland Security, Office of Inspector General, Removals Involving Illegal Alien Parents of United States Citizen Children, January 2009, pp 5-6. This report stemmed from a Congressional directive to report on detentions and removals involving U.S. citizen children and their parents over the past 10 years. \textit{Id.}, p.1. The requested data included: (1) the total number of aliens removed from the United States; (2) the number of instances in which one or both parents of a U.S. citizen child were removed; (3) the reason for the parents’ removal; (4) the length of time the parents lived in the United States before removal; (5) whether the U.S. citizen children remained in the U.S. after the parents’ removal; and (6) the number of days a U.S. citizen child was held in detention.} This data is admittedly incomplete because ICE does not require the collection of data regarding the status or age of an undocumented immigrant’s children and ICE’s data collection systems do not include information regarding undocumented immigrants who depart without an order of removal (i.e., voluntary returns after apprehension).\footnote{Id., p. 6. Several government reports have noted deficiencies in ICE’s data collection systems and practices, including untimely and inconsistent data entries, insufficient user training and oversight, and lack of written standards to ensure data quality. \textit{Id.}, p.3.} The report concludes that “[a] more complete data set is paramount in evaluating proposed legislative and policy options to reduce or prevent parent removal in specific circumstances,” including “[n]ew data on children’s age [which would] help establish the effect of alien parent removals on
U.S. citizen children who are minors.\textsuperscript{37} ICE has agreed to initiate a study to assess the feasibility of collecting this data.\textsuperscript{38}
IV. The Non-Existent Path to Lawful Status in the “Enforcement Only” Era

The inequities of our current approach to immigration policy, particularly in light of the harm to citizen children stemming from today’s “enforcement only” approach, are self-evident. Having tacitly invited the undocumented immigrant to our communities and workplaces, we now seek to turn him out – depriving his citizen children of alternatively a unified family life or the economic, educational and social opportunities of a life in the United States.

This section of the report addresses (1) the systemic barriers to lawful entry and legal status affecting the vast majority of the undocumented immigrant population; and (2) the escalation of interior immigration enforcement efforts.

A. The Disconnect: Immigration Law, Instead of Facilitating Family Unity and Lawful Status, Creates Systemic Barriers

Proponents of increased enforcement of current immigration laws assign blame for the adverse effects visited upon children and families to the parent or parents who made the decision to enter the United States unlawfully. They dismiss the collateral harm to children as an unfortunate consequence of the undocumented parent’s decision to shun lawful avenues for admission to the U.S. However, the premise of this argument – that there are meaningful paths to lawful admission by the lower skilled immigrant making up the vast majority of the undocumented population – ignores reality.

The paths to lawful entry for the vast majority of the undocumented population are virtually non-existent. Plagued by arbitrary caps on visas that are out of step with the demands of the U.S. economy, as well as extensive backlogs of a decade or more in length, immigrants seeking to come to the United States to join other family members or improve the lives of their children are faced with an untenable choice. They can wait in line to obtain a visa that, if it is ever granted, will not be received for 10, 15 or 20 years, or they can enter the country without documentation. In light of the economic and educational deprivation, as well as the threats to safety and well-being, that are often prevalent in their countries of origin, it is not surprising that so many immigrants have concluded that the needs of their families leave them with no meaningful choice but to enter the U.S. illegally.
1. Family-Based Immigration

Despite the large number of undocumented immigrants that are part of U.S. families, family-sponsored admission categories offer few meaningful paths for the parent of a citizen child to lawfully enter the United States. U.S. immigration law permits a U.S. citizen to petition for the admission of certain eligible, foreign-born family members to the United States. However, citizen children are precluded from petitioning for their parents. Under current immigration law, children—i.e., anyone younger than 21—have no ability to seek legal status for a parent or other family member. Adult lawful permanent residents may petition for their spouse and unmarried children. However the number of available visas is extremely limited.

“[T]he family immigration provisions of immigration law turn a blind eye to families in which only children hold legal immigration status. Children’s interests in family integrity do not serve as a basis for possible extension of immigration status.”


The hurdle to lawful entry stemming from the limited number of visas allotted to family-sponsored preference categories becomes an almost insurmountable obstacle when one considers the extensive backlog of petitions in the system. An approved preference petition for a family member merely affords the opportunity to join a waiting line for a visa number that is years—and sometimes decades—long. For example, the September 2008 Visa Bulletin issued by the State Department shows that visas for the Mexican spouse and children of a lawful permanent resident were unavailable. Thus, no matter how long they have been waiting in line, no spouses, even those with small, U.S. citizen children, were unable to immigrate in this category. The current cut-off date for unmarried, adult children of lawful permanent residents is 1992 – reflecting a waiting time of as much as 16 years. The paltry number of available visas and long wait times are exacerbated by bureaucratic inefficiencies that have resulted in hundreds of thousands of applications being backlogged.

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39 See 8 U.S.C. § 1151 and 1153. An adult citizen can apply for a visa for a spouse, parent or unmarried child under the age of 21, and there are no numeric limitations on visas in their circumstances.


41 Family preference visas are limited to a base of 226,000 per year divided between four categories, three of which limit visa issuance to relatives of U.S. citizens. See Visa Bulletin for September 2008 at Appendix B.


of thousands available visa numbers going unused.\textsuperscript{44} Wait times of this duration, compounded by governmental processing delays or inefficiencies, cannot be reconciled with the family-reunification goals of our immigration laws and the needs of our children.

2. Employment-Based Immigration

The shortcomings of the family-based immigration system are mirrored in the employment-based admission system. The path to lawful entry to the United States by the less skilled, lower educated immigrant is virtually non-existent.\textsuperscript{45} The claim that immigrants seeking to fill unmet, low-skilled labor demands in the United States can and should “get in line for a green card” rings hollow—there is no meaningful “line” for them to “get in.”

Under the Immigration and Nationality Act’s (INA) preference system, the number of non-citizens who may be admitted to the United States as lawful permanent residents based upon their prospective employment is limited to 140,000 individuals per year.\textsuperscript{46} Further, the INA additionally limits the number of preference admissions to no more than 25,620 individuals from any given country.\textsuperscript{47}

The number of permanent visas available for the lawful entry of less-skilled workers is limited to 5,000 per year worldwide, rendering the path to lawful entry illusory for the vast majority of those who comprise the undocumented population.\textsuperscript{48} In addition, the ability of lower-skilled immigrants to obtain temporary work visas is constrained by numerical caps and substantive limitations. H-2A temporary visas are restricted to agricultural workers, and the program is plagued by bureaucratic complexities and delays that have impeded the ability of agricultural employers to meet their labor demands with temporary immigrant workers.\textsuperscript{49} H-2B temporary visas are capped at 66,000 annually and limited to “seasonal” or otherwise “temporary” work that is defined so restrictively as to

\textsuperscript{44} According to State Department data reported by the Citizenship and Immigration Services Ombudsman, there were more than 200,000 unused family preference visa numbers and more than 500,000 unused employment preference numbers from FY 1992 to FY 2006. Citizenship and Immigration Services Ombudsman, 2007 Annual Report to Congress, p. 34 (available at www.gov/cis/ombudsman). On August 1, 2008, The House Judiciary Subcommittee on Immigration approved H.R. 5882, a bi-partisan bill that would recapture unused visa numbers from the 15-year period from 1992-2007. The bill also seeks to prevent the future loss of visa numbers due to governmental delay.


\textsuperscript{46} See 8 U.S.C. § 1153(b).

\textsuperscript{47} See 8 U.S.C § 1152; September 2008 Visa Bulletin.


\textsuperscript{49} See American Immigration Lawyers Association, Making the Case for Comprehensive Immigration Reform, p. 28 (available at http://www.aila.org/content/fileviewer.aspx?docid=21713&linkid=157219).
disqualify workers from positions in industries, such as meat processing, with chronic labor shortages.\(^{50}\)

These systemic barriers to lawful entry, together with the demand for low-skilled labor and years of tacit complicity by the government in the influx of undocumented workers to meet that demand, have created the significant, undocumented population in this country. The moral, ethical and legal questions the era of strict enforcement presents is whether the shortcomings of our system should be visited upon its most innocent victims – the American children of undocumented parents.

**B. The Escalation of Interior Enforcement Efforts**

The immigration enforcement activities most directly impacting citizen children of undocumented immigrants are the responsibility of U.S. Bureau of Immigration and Customs Enforcement (“ICE”). ICE was established in March 2003 within the Department of Homeland Security for the stated purpose of “closing down our nation’s vulnerabilities by targeting the people, money and materials that support terrorism and other criminal activities.”\(^{51}\) Since then, initiatives to bolster interior enforcement of immigration laws have included the hiring of thousands of additional agents and other personnel involved in the apprehension, detention and removal of undocumented immigrants; significant expansion of detention capacity; and increased emphasis on the training and delegation of enforcement authority to local and state law enforcement officers.\(^{52}\) The ICE budget has grown from $3.67 billion in FY 2004 to $5.9 billion in FY 2009.\(^ {53}\)

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\(^{50}\) Id., p. 37; Parel, R., *No Way In: U.S. Immigration Policy Leaves Few Legal Options for Mexican Workers*, Immigration Policy in Focus, July 2005, p. 4


With the stated goal of “removing all removable aliens” by 2012, ICE has significantly escalated interior enforcement efforts. According to ICE, on any given day it makes more than 200 arrests, prepares 2,462 cases for removal, and obtains 450 final orders of removal. ICE's increased interior enforcement efforts have taken the form of high-profile worksite raids, as well as home raids, that sweep undocumented immigrants from the families and communities in which they live and work.

1. **Worksite Investigations and Raids**

The number of worksite investigations initiated by ICE has increased rapidly, more than doubling from FY 2004 to FY 2007. High-profile worksite raids, often involving hundreds of ICE agents and other law enforcement personnel have become commonplace. For example:

- On December 12, 2006, in an enforcement action dubbed “Operation Wagon Train,” ICE simultaneously raided six facilities operated by Swift & Company in Worthington, Minnesota; Greeley, Colorado; Grand Island, Nebraska; Cactus, Texas; Hyrum, Utah; and Marshalltown, Iowa. ICE arrested 1,297 employees on administrative immigration violations, and criminally charged 274 of those arrested for the possession and/or distribution of fraudulent identity documents, re-entry after deportation, or entry without inspection.

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55 Id. at ix.


• On March 6, 2007, ICE raided Michael Bianco, Inc. in New Bedford, Massachusetts, arresting 360—more than half the company’s workforce—on administrative charges.

• In what was then the largest worksite enforcement action in history, ICE raided AgriProcessors, Inc. in Postville, Iowa on May 12, 2008, arresting 389 undocumented workers. As discussed later in this Report, the Postville raid was unique in its use of criminal prosecutions and threats of extended imprisonment to facilitate group plea bargains in which individuals waived any available defenses to deportation.

Worksite raids continue to occur with frequency. Since October 1, 2007, more than 4,000 people have been arrested in worksite enforcement actions across the country. The following is an illustrative listing of some of these raids:

<table>
<thead>
<tr>
<th>DATE</th>
<th>EMPLOYER</th>
<th>LOCATION(S)</th>
<th>ARRESTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>10/23/07</td>
<td>Nanack Hotel Group</td>
<td>Burlington, Vermont</td>
<td>10</td>
</tr>
<tr>
<td>10/31/07</td>
<td>ANNA II Inc.</td>
<td>Joliet, Illinois</td>
<td>23</td>
</tr>
<tr>
<td>11/7/07</td>
<td>Ideal Staffing Solutions</td>
<td>Chicago, Illinois</td>
<td>23</td>
</tr>
<tr>
<td>11/14/07</td>
<td>Chinese Restaurants</td>
<td>Louisville, Kentucky</td>
<td>15</td>
</tr>
<tr>
<td>2/7/08</td>
<td>Micro Solutions Enterprises</td>
<td>Van Nuys, California</td>
<td>138</td>
</tr>
<tr>
<td>2/8/08</td>
<td>Universal Industrial Sales Inc.</td>
<td>Lindon, Utah</td>
<td>57</td>
</tr>
<tr>
<td>3/25/08</td>
<td>Contractor</td>
<td>(Memphis Int'l Airport)</td>
<td>34</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Memphis, Tennessee</td>
<td></td>
</tr>
<tr>
<td>4/2/08</td>
<td>Specialty Inc. Wood Products</td>
<td>Homedale, Idaho</td>
<td>13</td>
</tr>
<tr>
<td>4/16/08</td>
<td>Pilgrim’s Pride</td>
<td>Mount Pleasant, Texas</td>
<td>311</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Live Oak, Florida</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Chattanooga, Tennessee</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Batesville, Arkansas</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Moorefield, West Virginia</td>
<td></td>
</tr>
<tr>
<td>4/25/08</td>
<td>Nash Gardens</td>
<td>West El Paso, Texas</td>
<td>28</td>
</tr>
<tr>
<td>4/30/08</td>
<td>Naylor Concrete</td>
<td>Little Rock, Arkansas</td>
<td>24</td>
</tr>
<tr>
<td>5/2/08</td>
<td>El Balazo Restaurants</td>
<td>San Francisco, California</td>
<td>63</td>
</tr>
<tr>
<td>5/2/08</td>
<td>Cheeseburger Restaurants</td>
<td>Maui, Hawaii</td>
<td>22</td>
</tr>
<tr>
<td>5/7/08</td>
<td>Construction Contractor</td>
<td>Richmond, Virginia</td>
<td>33</td>
</tr>
<tr>
<td>5/12/08</td>
<td>Agriprocessors Inc.</td>
<td>Postville, Iowa</td>
<td>389</td>
</tr>
<tr>
<td>5/15/08</td>
<td>French Gourmet Restaurant</td>
<td>San Diego, California</td>
<td>18</td>
</tr>
<tr>
<td>6/4/08</td>
<td>Boss 4 Packing</td>
<td>Heber, California</td>
<td>32</td>
</tr>
<tr>
<td></td>
<td>(farm labor contractor)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>6/25/08</td>
<td>Action Rags USA</td>
<td>Houston, TX</td>
<td>160</td>
</tr>
<tr>
<td>6/26/08</td>
<td>Aerospace Mfg. Technologies Inc.</td>
<td>Arlington, WA</td>
<td>32</td>
</tr>
<tr>
<td>6/30/08</td>
<td>Painting Co.</td>
<td>Baltimore, MD</td>
<td>45</td>
</tr>
</tbody>
</table>
Not surprisingly, more aggressive enforcement efforts have led to increased arrests. Worksite enforcement arrests have escalated sharply to more than 4,900 in FY 2007 and 6,200 in FY 2008.\textsuperscript{58} Over the last six years, worksite administrative arrests have increased more than tenfold — from 485 arrests in FY 2002 to 5,173 arrests in FY 2008 (which ended September 30, 2008).\textsuperscript{59}

\begin{center}
\textbf{Worksite Enforcement Arrests}
\end{center}

\begin{figure}
\centering
\includegraphics[width=\textwidth]{worksite_enforcement_arrests.png}
\caption{Worksite Enforcement Arrests}
\end{figure}

Source: ICE Fact Sheet, October 23, 2008

\textsuperscript{58} See U.S. Immigration and Customs Enforcement, Fact Sheet, October 23, 2008.
\textsuperscript{59} Id.
Significantly, the vast majority of arrests made by ICE in worksite raids are administrative arrests for civil law immigration violations, not criminal arrests. In other words, most of those detained in worksite enforcement actions have not been charged with crimes such as identity theft. Absent other circumstances, presence in the United States without appropriate documentation is not a crime.

Of the 18,761 worksite enforcement arrests made by ICE from FY 2002 through FY 2008, 83% (15,648) were administrative arrests while only 17% (3,113) were criminal arrests. The number of criminal arrests can be misleading and does not reflect criminal activity by immigrants. A significant portion of the criminally charged are U.S. citizens who allegedly committed crimes ranging from harboring to knowingly hiring undocumented workers.

For example, the raid in Worthington and at the other Swift plants was the culmination of a 10-month investigation of what ICE characterized as a large-scale identity theft scheme. However, the vast majority of those detained—1,023 of the 1,297 arrestees—were arrested on civil administrative charges for immigration status violations. In Worthington, only 20 immigrants were criminally arrested with 19 ultimately indicted for identity-related theft.

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**Swift Plant Raids: Administrative v. Criminal Arrests**

<table>
<thead>
<tr>
<th>All Raid Sites</th>
<th>Worthington Raid</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Criminal Arrests</strong></td>
<td>274 / 21%</td>
</tr>
<tr>
<td><strong>Administrative Arrests</strong></td>
<td>1,297 / 79%</td>
</tr>
</tbody>
</table>

Source: ICE Fact Sheet, Worksite Enforcement: Operation Wagon Train, March 1, 2007
2. Home Raids

The increasing number of workers arrested at their jobs is just a portion of those swept up in ICE enforcement actions. ICE also has ratcheted up the number of its home raids conducted without search warrants, what ICE refers to euphemistically as “knock-and-talk searches.”

Home raids are typically conducted by ICE Fugitive Operations Teams charged with the responsibility of locating, arresting and removing “fugitive aliens.” Fugitive aliens should not be confused with “criminal aliens,” who are typically lawful immigrants who face removal for criminal activity that includes both serious and petty crimes. A ICE fugitive is defined as an alien who has failed to depart the United States based upon a final order of removal, deportation, or exclusion from a U.S. immigration judge, or who has failed to report to ICE after receiving notice to do so. The vast majority of fugitive aliens—457,000 of the estimated 572,000 “ICE fugitives” in the United States—have no criminal histories and are simply persons who remained in the U.S. following a removal order or failed to appear for an immigration hearing.

Since the first Fugitive Operations Teams (FOTs) were established in 2003, arrests stemming from home raids and community sweeps have increased dramatically.

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65 See ICE Fiscal Year 2007 Annual Report, pp. 4-5.
67 Some “fugitive” aliens never received notice of their immigration hearing and, therefore, are unaware they were required to appear or that an order of removal was entered against them.
from just 1,900 in FY 2003 to 33,997 in FY 2008. As of the end of FY 2008, there were more than 100 FOTs deployed nationwide.

Fugitive Operations Team Arrests by Fiscal Year

![Graph showing Fugitive Operations Team Arrests by Fiscal Year]


Although ICE maintains that its FOTs “give top priority to cases involving aliens who pose a threat to national security and community safety, including members of transnational street gangs, child sex offenders, and aliens with prior convictions for violent crimes,” many of those arrested by such Teams are persons who are not “fugitive aliens” at all—they are undocumented immigrants who just happen to be at a home, often with U.S. citizen children, or other locations that ICE agents raid. According to an April 6, 2007, report from the Associated Press, ICE data reflects that 37% of the 18,149 arrests by FOTs between May 26, 2006 and February 23, 2007 were such “collateral” arrests—including more than 50 percent of arrests in Dallas and El Paso, Texas (59%), New York (54%), and San Diego (57%).

Since the Associated Press obtained this data from ICE, “collateral” arrests have continued to account for a substantial percentage of arrests made in supposedly targeted fugitive alien operations. Of the 30,048 immigrants arrested in “fugitive” raids in 2007, more than 8,000 were collateral, undocumented immigrants. For

example, a two-week sweep in San Diego in March and April 2007 that targeted 300 fugitive aliens resulted in the arrests of 297 non-fugitive immigrants and just 62 fugitives.\textsuperscript{73} After a recent sweep in Chattanooga, Tennessee, resulted in the arrest of 48 undocumented immigrants, an ICE official acknowledged that persons, including children, who are not the specific target of administrative warrants of deportation and arrest are routinely restrained and questioned regarding their immigration status when the target is not at the address or known to the occupants of the home. “If someone is detained even though they’re not the original target, ‘they just happened to be at the wrong address,’” said Phillip Miller, deputy field office director for the detention and removal program for ICE for the Southeast Region.\textsuperscript{74}

In addition to an acknowledged lack of reliable identity and address information as the basis for truly “targeted” enforcement operations, the tactics employed in conducting home raids raise serious constitutional questions. Under current law, ICE agents have the right to question anyone “believed to be an alien” about his or her immigration status, and to enter homes without judicial warrants when consent is given. With this authority, and under the guise of targeting “fugitive aliens,” armed ICE agents announcing themselves as “police” have entered homes, restrained and questioned anyone present who looks like an immigrant, and frightened children. Although ICE maintains that its entry to homes and subsequent collateral arrests are lawful, legal experts have questioned whether informed consent is being obtained in light of the tactics being employed—such as the massive show of armed force and announcing themselves as “police.”\textsuperscript{75}

Moreover, reports abound of ICE agents breaking down or pushing their way through doors in circumstances that could not possibly be construed as informed consent to enter.\textsuperscript{76} For example:

\textsuperscript{73} Id.
\textsuperscript{76} See also Berstein, N., Raids Were a Shambles, Nassau Complains to U.S., The New York Times, October 3, 2007 (ICE agents conducted home raids wearing cowboy hats and brandishing shotguns and automatic weapons at home occupants including U.S. citizens and lawful residents); Nicodemus, A., Illegal Aliens Arrested in Raids; Feds Nab 15 in Milford, Sunday Telegram (Massachusetts), December 9, 2007 (ICE agents broke through front door of home in the early morning hours with guns drawn); Llorente, E., Suits: Feds Play Dirty; Immigration Officials Say Raids on Illegals are Within the Law, The Record (Hackensack, NJ), January 2, 2008 (armed ICE agents showed up at homes at 5:00 a.m., banged on doors, kicked in doors or used ruses to gain entry, then went room-to-room ripping covers off people in their beds and questioning them); Hernandez, S., ICE Increases Use of Home Raids, Daily Journal, March 26, 2008 (ICE agents came to a home of an immigration attorney looking for another person; when the attorney closed his door and asked them to leave the premises because they could not produce a search warrant, the agents threatened to break his door down); Bernstein, N., Immigrant Workers Caught in Net Cast for Gangs, The New York Times, November 25, 2007 (Nassau County police commissioner describes the “cowboy mentality” of ICE agents who raided Long Island homes, including armed raids on the wrong homes); Forester, S., Immigration Raids Spark Anger in San Valley Area: One Family of Legal Residents Say they were Terrorized, The Idaho Statesman, September 21, 2007.
• “Doors were smashed in, glass was shattered and guns were thrust in the faces of whole families last Monday when Immigration and Customs Enforcement agents backed by county police officers raided at least 15 Annapolis (Maryland)-area homes, arresting 46 undocumented immigrants. ... ICE, which sent 75 agents on the raids, justifies the tactics used in the raids. Breaking down doors, carrying guns and using handcuffs is necessary to protect police and the community, said Scot R. Rittenberg, an assistant special agent for ICE. ... But the people whose doors were forced open—and their families—think differently. Their only crime is working without papers, yet they were served with violence, they say."

• In New Haven, Connecticut, “[e]yewitness reports describe federal agents pushing their way into houses; brusquely ordering men, women and children to common areas, and leading family members and loved ones away in handcuffs.” "The City has sighted a number of areas in which DHS violated protocol including constitutional violations, entry into homes without warrants, search of homes without warrants, no proof of identification, racial profiling and coercion and duress.”

• ICE agents raided several homes and arrested 20 undocumented immigrants during a May 30-31, 2007, sweep in Austin, Minnesota. ICE stated that the raids were targeted at locating and arresting 5 criminal aliens (“This is a targeted enforcement action. We’re looking for specific individuals”), but “came across” about 15 others without documentation in the course of carrying out the raid. According to Ramiro Castillo, a worker at Hormel who has lived in the United States for 20 years, ICE agents knocked on his door, “forced their way in” when he had barely opened the door. “They twisted my arm and kept pushing me, telling me to put my hands over my head.” ICE agents handcuffed and arrested two people in the apartment, a father and his son who had been asleep in the living room. At no time did the ICE agents inform Castillo that they were looking for someone specific. The Austin raids in May 2007 followed home raids in December 2006 in both Austin, Minnesota, and Albert Lea, Minnesota, resulting in the arrest of 45 undocumented immigrants.

• As part of an “antigang sweep” on Long Island in September 2007, more than a
dozen ICE agents pushed their way into the home of Peggy Delarosa-Delgado
after her 17-year-old son answered the knock at the door. Ms. Delarosa-
Delgado, an immigrant from the Dominican Republic, has been a U.S. citizen
since 1990 and has three minor, citizen children. After forcing their way into
Ms. Delarosa-Delgado’s home, agents herded her three children and other
persons in the home—including a family friend staying in the basement aroused
at gunpoint—into the living room. Only then did the agents discover that they
had raided the wrong house—for the second time. In the summer of 2006, ICE
agents looking for a deportable immigrant named Miguel had “stormed” into
her home before dawn, only to learn that no one named Miguel had lived at the
residence since Ms. Delarosa-Delgado purchased the home in 2003.81

• ICE agents and local law enforcement authorities conducted a series of home
raids in Willmar, Minnesota, between April 10 and 14, 2007.82 This operation
and the tactics employed by agents prompted the filing of a lawsuit in the
U.S. District Court for the District of Minnesota.83 A July 27, 2007, Amended
Complaint alleges that “ICE agents entered and searched Plaintiffs' private
homes without warrants, without probable cause or exigent circumstances,
and without the consent of the Plaintiffs, then detained, interrogated and
in some cases arrested Plaintiffs in their homes. ... In addition, [ICE agents]
conducted a campaign of intimidation in and around the city of Willmar
by identifying locations such as trailer parks and apartment buildings with
known concentrations of Latino residents, then conducted unconstitutional
stops and detentions of individuals based solely on the individual’s race or
apparent national origin.”84 The Amended Complaint further alleges that ICE
agents loudly banged on windows and doors, falsely identified themselves
as the “police,” and either broke in or forced their way through doors that
were opened slightly by residents seeking to determine the identity of those
outside.85 Finally, the Amended Complaint details a litany of derogatory and
insensitive actions by agents, including waking up and interrogating frightened
children.86 “Plaintiff children now suffer from waning appetites, disrupted
sleep, nightmares, and behavioral difficulties from the loss of a parent and/or
from the aggressive encounter with Defendants.”87

83 See Arias et al. v. U.S. Immigrations and Customs Enforcement et al., Civil No. 07-CV-1959 ADM/JSM (D. Minn. 2007).
84 See Amended Complaint, ¶¶ 2–3.
85 Id., ¶¶ 70–78.
86 Id., ¶¶ 84–90.
87 Id., ¶ 90.
On April 3, 2008, a lawsuit was filed against ICE and others stemming from eight home raids in New Jersey between August 2006 and January 2008.88 The raids follow a similar pattern, in which immigration agents forced their way into each plaintiff’s home in the early morning hours with a judicial warrant or the occupants’ consent. Most of the plaintiffs were awakened by loud pounding on their doors and answered the door, fearing an emergency. ICE agents subsequently either lied about their identity or purpose to gain entry, or simply shoved their way into the home. During each raid the agents swept through the house and, displaying guns, rounded up all the residents for questioning. In some cases they ordered children out of their beds, shouted obscenities, shoved guns into residents’ chests, and forbade detained individuals from calling their lawyers. In at least half the raids, the officers purported to be searching for a person who did not even live at the address raided.89

In addition to those noted above, several other lawsuits have been filed challenging the constitutionality of ICE’s practices relating to home raids.90 Although few of these cases have as yet resulted in any substantive decisions regarding the propriety of ICE’s “knock and talk” tactics, a recent decision by the U.S. Court of Appeals for the Fifth Circuit is highly critical of the practice. In United States v. Gomez-Moreno, 479 F.3d 350 (5th Cir. 2007), the Court suppressed evidence obtained in an ICE warrantless knock-and-talk search, stating:

The purpose of a “knock and talk” is not to create a show of force, nor to make demands on occupants, nor to raid a residence. Instead, the purpose of a “knock and talk” approach is to make investigatory inquiry or, if officers reasonably suspect criminal activity, to gain the occupants’ consent to search. [citation omitted.] Here, the officers did not engage in a proper “knock and talk” but instead created a show of force when ten to twelve armed officers met at the park, drove to the residence, and formed two groups—one for each of the two houses—with a helicopter hovering overhead and several officers remaining in the general area surrounding the two houses. When no one responded to the officers’ knocking, the officers impermissibly checked the knob on the door to the front house to determine if it would open, and simultaneously, at the back house, announced their presence while demanding that the occupants open the door. When officers demand entry into a home without a warrant,

they have gone beyond the reasonable “knock and talk” strategy of investigation. To have conducted a valid, reasonable “knock and talk,” the officers could have knocked on the front door to the front house and awaited a response; they might have then knocked on the back door or the door to the back house. When no one answered, the officers should have ended the “knock and talk” and changed their strategy by retreating cautiously, seeking a search warrant, or conducting further surveillance. Here, however, the officers made a show of force, demanded entrance, and raided the residence, all in the name of a “knock and talk.” The officers’ “knock and talk” strategy was unreasonable . . . .

In addition to the questionable legality of the home raids, the tactics ICE uses in conducting such actions raises serious questions regarding the potential adverse impacts of such raids on children.

3. Detention and Removal in the Escalated Enforcement Environment

Not surprisingly, more aggressive enforcement efforts have led to record numbers of immigrants held in detention facilities and removed from the United States. In its five-year existence, more than 1 million persons have been detained by ICE. The detainee population has increased by more than 30 percent from a total of 227,000 detainees in FY 2003 to more than 332,000 detainees in FY 2007. ICE reports that on any given day in FY 2007, it “housed” an average of 29,786 undocumented immigrants in facilities nationwide. This represents a more than 500 percent increase in the average daily population of undocumented immigrants in detention since the mid-1990s.

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91 479 F.3d at 355-56.
92 The majority of those held in detention facilities have not been charged with any crimes, but rather are subject to removal for civil law immigration violations. The General Accountability Office reported that as of December 31, 2006, 58% of the detained undocumented immigrant population—more than 16,000 persons—were “noncriminal aliens.” See U.S. Government Accountability Office, Alien Detention Standards, July 2007, p. 48.
In its FY 2009 budget, ICE received $71.7 million to fund "1,400 new detention beds, removal costs, and support personnel" to meet the "demand generated by increased enforcement activities."96

Removals (i.e., deportations) of undocumented immigrants have increased more than 50% in this decade, from approximately 187,000 in FY 2001 to more than 285,000 in FY 2007.97 Through June 30, 2008, approximately 235,000 undocumented immigrants have been removed in 2008 alone.98

Total Deportations
FY 2000 - June 30, 2008
Here, again, the majority of removal orders—more than 60%—stem from administrative arrests for civil immigration violations where the undocumented immigrant is not charged with any crime.\(^9^9\)

**Non-Criminal v. Criminal Deportations**

**FY 2000 – June 30, 2008**

![Pie chart showing non-criminal and criminal deportations](chart.png)


V. Collateral Damage: The Impact of Interior Enforcement on Citizen Children

“[O]ur government effectively deports their United States citizen children and denies those children their birthrights. ... The government’s conduct violates due process by forcing the children to accept de facto expulsion from their native land or give up their constitutionally protected right to remain with their parents.” — Cornelio Arcos Memije and Maria Del Rosario Rendon Velez v. Gonzales, 481 F.3d 1163 (9th Cir. 2007) (Judge Harry Pregerson, dissenting)

A fundamental tenet underlying U.S. law and policy is that our collective, societal interests are advanced by promoting family unity. U.S. immigration law is no exception. Keeping families together has long been a fundamental pillar of U.S. immigration law. Since its inception in 1952, the Immigration and Nationality Act (INA) reflected an awareness of the familial value and underlying concern for the family unit. For instance, the House Committee Report pertaining to the INA emphasized the “well-established policy of maintaining the family unit whenever possible.”

However, the value of family unity has been marginalized in today’s environment of increased interior immigration enforcement. The detention and deportation of undocumented parents of citizen children has alternatively torn families apart or effectively forced the removal of U.S. citizen children from their home country to foreign lands, depriving these children of the economic, educational and social opportunity represented by their U.S. citizenship.

In this section, we address (1) the child welfare crisis in the immediate aftermath of raids; (2) detention practices that unnecessarily separate parents from children; (3) the longterm harm to children threatened by current immigration law and enforcement policy; and (4) the callousness of an immigration law and policy that gives little or no consideration to the “best interests” of the citizen child in deporting one or both of the child’s parents.

100 House Report No. 1365 (1952); 1952 U.S. Code Congressional and Administrative News1653, 1689.
A. The Child Welfare Crisis in the Immediate Aftermath of Raids

1. Worksite Raids

The December 12, 2006, Swift plant raid in Worthington, like those at other Swift locations the same day, was distinguished by an overwhelming show of force and a notable lack of appreciation and preparation for the humanitarian crisis that would ensue. Dozens of armed ICE agents entered the plant in the early morning hours, shut down plant operations, rounded up workers, and proceeded to question employees aggressively—some repeatedly over several hours—regarding their immigration status.  

ICE maintains that it took “extraordinary steps” to respect the rights of those arrested, including “unprecedented steps to determine if arrestees had minor dependents and to ensure that children were not separated from their parents.” Agents purportedly asked arrestees about “dependent obligations prior to transporting any arrestees away from the location of the arrest,” worked with Swift human resources personnel to ascertain whether arrestees had minor children at home, and “took steps to ensure that the children were cared for.”  

ICE also reports making phones available for use by undocumented immigrants at the arrest locations, processing centers and detention facilities. As a result of these efforts, ICE states that it “released more than 100 aliens after administrative processing for humanitarian reasons” at the 6 Swift raid sites.

Given the show of force and aggressive tactics in questioning detainees such as those employed in Worthington, however, it is not surprising that many undocumented immigrants did not disclose to ICE that they had children out of

104 Id.
105 Id.
106 Id.
fear that their children would be detained or placed into foster care. With no trusted intermediary at raid sites with whom parents feel comfortable addressing child welfare issues, ICE wound up detaining numerous undocumented immigrants with primary childcare responsibilities.

In Worthington, for example, while some of those arrested were released on site because of child care issues, many more parents were detained. School officials, churches and other community organizations, union officials, friends, neighbors and relatives were caught unaware and unprepared to identify and attend to the needs of children left without caregivers in the immediate aftermath of the raid. In an interview for this report, Sharon Johnson, Coordinator of the Nobles County Integration Collaborative, stated that an estimated 60 students were without parents the night of the raid. Similar problems stemming from the separation of children from their immigrant parents have been reported across the country.

Worthington school officials confirmed that the raid caught them by surprise, and that the inability to get accurate information from ICE regarding the identity of detainees created significant confusion and increased stress among staff and students (a problem identified in many raids). “For us, this came out of nowhere,” said John Langaard, Worthington’s school superintendent. “There’s no manual for something like this. The question is, is it fair to the kids? They’re the ones getting hurt in this deal.” At the end of the school day, children were sent home with phone numbers provided by teachers and instructions to call if they found themselves without a parent. Teachers remained at the school late into the evening to field calls and provide assistance to students, if necessary.

Ultimately, students did not use these resources, as immigrant community organizations and local churches mobilized to assist affected family members and facilitate the placement of children with relatives or other community members.

108 See Minneapolis Star Tribune, Display of Force at Swift Plants Scuttled, December 25, 2006 (reporting that an ICE official stated that “about 24 people, mainly parents with child care issues, were allowed to leave on humanitarian ground”).
111 Id.
Communidad Cristiana de Worthington Church and St. Mary’s Catholic Church were particularly instrumental in avoiding a larger humanitarian crisis, serving as places of gathering, refuge, and support for hundreds of children and other affected family members on December 12, 2006, and the days that followed. Those working on the front line saw the impact firsthand. Pastor Hector Andrade stated:

Families have been torn apart. Children were left behind; some of them came back after school to find themselves locked out and nowhere to go. We have five children completely alone because both their parents were detained. The most serious case we saw is the case of a 4-month-old baby who was brought by a desperate babysitter and asked us to look after her because she feared to be detained. This is a very tough situation for them. Most of them are citizens and now they are helpless. We still don’t know how many of them are out there all by themselves waiting for someone to come help them.112

A similar avoidable child welfare crisis accompanied the New Bedford raid. There, requests by State Department of Social Services personnel to be “on the ground as the raid was happening, so we could have IDed [identified] caretakers and children immediately” were rejected by ICE.113 Concerned about the effect of the raid on families and the efforts being taken by ICE to address post-raid family care issues, the office of Massachusetts public safety inspector Kevin Burke was regularly in contact with ICE officials over the course of two months leading up to the raid.114 “I raised this on every occasion and [ICE] assured me they had done this before, they would be compassionate, and there wouldn’t be any unnecessary separation of children and mothers,” said Burke. “I knew [the problems] could expand beyond what they may have anticipated, but they did not want DSS directly involved.”115

Burke’s instincts proved prescient. The March 6, 2007, New Bedford raid left children stranded and without caregivers, and local social service agencies,

112 Fernandez Landoni, M., Worthington Raid Hits Workers, Businesses Hard, La Prensa De Minnesota, December 17, 2006 (available at http://www.tcdailyplanet.net/node/3154kprint=1#).
113 Id.; See also Testimony of Simon Romo, Chief Counsel of New Mexico Child Protective Services, before the Subcommittee on Workforce Protections of the Education and Labor Committee, U.S. House of Representatives, May 20, 2008 (“[The New Mexico Children, Youth and Families Department] is not informed of enforcement operations before they happen, and so is not able to respond to children and assess for their safety in a timely manner. Instead, relatives, neighbors, friends, and community agencies have been absorbing the responsibility of caring for children left without parents. This lack of initial involvement of the state agency responsible for assuring the safety, permanency and well-being of children places those who are separated from their parents at an additional risk of entering into the system later, as they are often shuffled around unstable situations with minimal supports/resources.”).
115 Id.
community organizations and churches scrambling to fill the void.116 “Many [of those detained] ... were women whose detention separated them from their children, some of whom were stranded at day-care centers, schools, or friends’ or relatives’ homes.”117 Approximately 60 detainees were released because they were sole or primary caregivers, but only after several days in detention.118

ICE officials are undoubtedly sincere in their desire to avoid leaving children without caregivers. However, ICE has failed to recognize and meaningfully address the understandable reluctance of arrestees to disclose the existence and whereabouts of their children. The presence of state and local social service agencies at raid sites to act as third-party intermediaries in the identification and assessment of child welfare needs would promote disclosure. However, notwithstanding its awareness of the reluctance of detainees to disclose whether they have children in need of care, ICE has been disinclined to notify and involve child welfare agencies in advance of planned raids, purportedly for fear that doing so might jeopardize the law enforcement operation.119

2. Home Raids

ICE’s home raid tactics raise considerable public policy concerns relative to the welfare of children, including citizen children, who have experienced the sudden invasion of their homes by armed agents. “Child psychology experts say children suffer most from the disruption of armed agents coming into their homes and taking away their parents—and sometimes themselves. Children can experience stress, depression and anxiety disorders, ... [and] children who witness their parents being taken into custody lose trust in the parents’ ability to keep them safe and begin to see danger everywhere.”120

One notable example is the case of Kebin Reyes, a seven-year-old citizen child of an undocumented immigrant whose father—his sole caregiver—was arrested in a

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120 Hendricks, T., *The Human Face of Immigration Raids in Bay Area: Arrests of Parents Can Deeply Traumatize Children Caught in the Fray, Experts Say*, The San Francisco Chronicle, April 27, 2007 (quoting Dr. Alicia Lieberman, director of the Child Trauma Research Project at UCSF; and Dr. Amana Ayoub, a psychologist at the Center for Survivors of Torture).
home raid in San Rafael, California in the early morning hours of March 6, 2007. In a press release announcing the filing of a lawsuit, the events of that day were described as follows:121

On March 6, 2007 ICE agents came to the apartment where Kebin and his father, Noe were living. Agents pounded on the door and stormed into the apartment, where they rounded up all the occupants, demanding their immigration papers and passports. Noe immediately gave the ICE agents his son’s U.S. passport, identifying Kebin as a U.S. citizen. An ICE agent then told Noe to wake up his son and said they would take them in for only an hour or two. Noe asked several times to make a phone call so that he could arrange for a family member or family friend to care for Kebin. Each of these requests was denied, and Kebin was forced to watch as his father was handcuffed and taken away. The immigration officers then told Kebin to place his own hands behind his back, like his father’s.

At the ICE processing center in San Francisco, Noe’s additional requests to make a phone call were denied and ICE agents made no efforts to seek alternative care for his son. Kebin and his father were placed in a locked room and for the remainder of the day were only provided with bread and water. Kebin was finally released that evening, only after Kebin’s uncle learned about the incident from neighbors. Kebin’s uncle rushed to the ICE office and had to wait several hours before Kebin was finally released.

According to the complaint filed in the resulting lawsuit, “Kebin thought he was in jail. ... Kebin was hungry and crying. He did not know when he would be free to leave.”122 More than six weeks after his ordeal, Kebin continued to suffer from nightmares.123

Although the government denied the factual allegations underlying Kebin Reyes’ lawsuit, it entered into a settlement agreement resolving the case.124 According to the June 20, 2008, Joint Motion Seeking Approval of Settlement, the government agreed to pay $30,000 to settle the case.125 In addition, the government agreed that Kebin’s father “shall receive a two-year period of deferred action status, 121 April 26, 2007, Press Release available at http://www.ailf.org/lac/clearinghouse_122106_ICE.shtml.
124 The terms of the settlement (outlined in a June 20, 2008, Joint Motion Seeking Approval of Settlement) and the June 25, 2008, court order approving the settlement are available at http://www.ailf.org/lac/clearinghouse_122106_ICE.shtml.
subject to biennial reviews for extension of such status, if a final order of removal is ultimately entered against [him]."126 The purpose of this settlement, which effectively permits Noe Reyes to remain in the United States with his young, citizen son, is further explained with reference to Kebin’s rights as a U.S. citizen and the adverse impact that immediate removal of his father (and hence him) would have on his educational advancement and ability to adjust to life in the U.S. if he elects to return without his father later in life:

This will directly benefit Kebin Reyes because it means that Kebin can continue to live in the United States and be educated here during the period of deferred action status. Even if Kebin’s father is ultimately required to leave the United States (and Kebin leaves with him), having been educated for several more years in the United States will make it easier for Kebin, a United States citizen, to adjust to life here, if he later chooses to return to the United States.127

Unfortunately, it took a rather extreme deprivation of liberty that violated the rights of a citizen child, and more than a year of litigation, to reach this end. Moreover, it is likely that the government will dismiss the Reyes outcome as the product of unusual circumstances; choosing to continue its tactics rather than exercise its prosecutorial discretion to limit the collateral harm caused by the raids.128 ICE’s failure to use its discretion to ease the humanitarian crisis created by raids demands that others, such as immigration judges, be provided with discretion to protect the interest of children.129

In response to increasing criticism of its “fugitive alien” enforcement practices, including warrantless home raids and the separation of families, ICE announced on

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126 Joint Motion, ¶ 3.
127 Id.
128 Prosecutorial and law enforcement discretion is the “authority of an agency charged with enforcing a law to decide whether to enforce, or not to enforce, the law against someone.” In the context of immigration, these decisions apply at almost every stage of the process. For example, discretion may be exercised in deciding whether to: issue, serve or file a Notice to Appear (“NTA”); allocate investigative resources to focus on particular offenses or conduct; stop, question and arrest particular individuals; hold aliens in custody; seek expedited removal; settle or dismiss a proceeding; stay a final order of removal; allow voluntary departure; pursue an appeal; or execute a removal order. See Meisner, D., memorandum to Regional and District Directors, Chief Patrol Agents, Regional and District Counsel re Exercising Prosecutorial Discretion (November 17, 2000); Howard, W.J., Memorandum for All OPLA Chief Counsel re Prosecutorial Discretion (October 24, 2005). Memoranda on Prosecutorial Discretion available at Appendix C & D.
129 The 1996 statutory amendments limited the ability of immigration judges to provide relief in many cases. See Meisner Memorandum re Prosecutorial Discretion (Appendix C) at 1.
July 31, 2008, the launch of a pilot program called “Scheduled Departure.” The program allowed “fugitive aliens” who have no criminal history and pose no threat to the community an opportunity to remain out of custody while they coordinate their removal with ICE, and to arrange for their families to depart together.

According to Julie Myers, Homeland Security Assistant Secretary for ICE:

This program addresses concerns raised by aliens, community groups, and immigration attorneys who say ICE unnecessarily disrupts families while enforcing the law. By participating in the Scheduled Departure Program, those who have had their day in court and have been ordered to leave the country have an opportunity to comply with the law and gain control of how their families are affected by their removal.

ICE maintained that participation in the program would end the risk of sudden arrest and detention for certain non-criminal fugitives. Upon its announcement, “Scheduled Departure” was assailed by critics as little more than a thinly disguised justification for continued home raids, and an effort to deflect congressional inquiries and action designed to reveal and address ICE’s tactics. As stated succinctly by the National Immigration Forum in a press release addressing this pilot program:

We are not going to deport our way out of our current immigration mess, nor is it likely that most or even many of the estimated 12 million undocumented immigrants here will choose to leave on their own. …

This new policy is a tacit recognition on the part of ICE and Ms. Myers that raids in homes and businesses are terrorizing immigrant communities and families. … But even as we escalate police-state tactics, the majority of immigrants are not going to give up on their American Dream, nor the dreams they have for their children. The majority of the undocumented have been here for years, have careers, friends, mortgages, and children—often U.S. citizens—that bind them to their American communities.

The folly of “Scheduled Departure” was revealed through a two and a half week “test run” in five cities: Charlotte, NC, Chicago, Phoenix, San Diego and Santa Ana. Of an estimated 30,000 eligible immigrants in these areas, only eight availed themselves of the “self deportation” option. On August 22, 2008, ICE scrapped

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the program and its sensitivity to families and children while vowing to “continue 
our enforcement of immigration law whether it is convenient for people, or whether 
it's not convenient.”133

Just three days later, ICE made good on its promise. In a worksite raid conducted 
at Howard Industries, Inc. in Laurel, Mississippi, ICE arrested 595 undocumented 
immigrants in the largest worksite raid to date.134

B. ICE Detention Practices Exacerbate The Child 
Welfare Crisis

The practices employed by ICE relative to the detention and removal of 
undocumented parents have not been effective in preventing or addressing child 
welfare issues in the immediate and short-term aftermath of enforcement actions. 
Children have been left without their primary caregivers as a consequence of 
a system that has failed to recognize and address the lack of trust inhibiting 
detainees from disclosing child care issues to government officials. The problem 
has only been exacerbated by the detention of undocumented parents in remote 
locations, often without meaningful notification of who is being held and where for 
days following enforcement actions.

1. Those Left Behind Struggle to Locate Detainees and Secure 
Releases on Humanitarian Grounds

The problem of timely identifying and addressing child care issues of 
undocumented immigrants arrested in worksite raids is exacerbated by the 
transportation of those arrested to detention facilities often hundreds of miles 
from raid sites, typically within 24 hours of the enforcement action, and ineffective 
communication by ICE as to the identity and location of detainees. For example, 
many detainees from the Worthington raid were sent to Fort Dodge, Iowa, and 
some then on to detention facilities in Georgia and other remote locations. Often 
there are few, if any, resources available to provide legal services to immigrants in 
these remote locations.

In New Bedford, many detained workers — including parents of small children 
— were flown out of state to detention facilities, including many to a facility in 
Texas, in the day or two following the raid. ICE’s almost immediate actions to 
remove detainees out of state prevented Massachusetts social service officials 
from meeting with detainees and identifying child welfare issues for several days

133  Id. 
134  See ICE Press Release, August 26, 2008 (available at www.ice.gov)
following the raid. This action, which ICE attributed to insufficient local bed space for detainees, was decried by Massachusetts Governor Deval Patrick as “a race to the airport” and prompted legal action to halt the practice. On March 9, 2007, a Massachusetts federal judge issued an order precluding ICE from moving New Bedford detainees out of the state. The next day, Massachusetts Department of Social Services personnel traveled to Texas, to interview detainees regarding their children. The release of twenty of these immigrants—mostly single parents with young children—occurred only after strong protests by Massachusetts elected officials and the extraordinary efforts by DSS personnel to gain access to and interview detainees in Texas regarding child welfare issues—and only after a week or more in detention, separated from their children.

STORIES FROM NEW BEDFORD:

- One single mother was located in Texas after her 7-year-old child called a hotline that state officials had created to reunite families.

- Marta Escoto, a single mother of two young citizen children, was detained and flown to the Texas detention center. “Daniel, 2, asked for her constantly, while relatives worried about the care of frail 4-year-old Jessie—who cannot walk and suffers from an illness that prevents her from absorbing enough nutrition. Both children were in day care when their mother was arrested, leaving Escoto’s sister scrambling to care for them along with her own two children. ... Escoto was quickly flown to Texas and held at Port Isabel, near the border. For three days she was not allowed to make phone calls, she said. On the third day, she was allowed a five-minute call to tell her family where she was. Jessie had missed an appointment with a gastroenterologist to discuss inserting a feeding tube.” Escoto was released after more than one week in detention.

- 8-month-old Keylan Zusana Lopez Ayala, a U.S. citizen infant, was hospitalized for pneumonia and possible dehydration after her mother was detained in the New Bedford raid and unable to breast-feed her.

136 Kevin Burke, Massachusetts Public Safety Secretary (reported in the Boston Globe, Patrick Says Promises Broken in Raid, March 15, 2007.)
139 Id.; The National Council of La Raza and The Urban Institute, Paying the Price: The Impact of Immigration Raids on America’s Children, October 2007, pp. 35-36.
Worthington school and community leaders interviewed for this report said they encountered substantial difficulty in their efforts to assist non-detained family members determine the whereabouts of their loved ones arrested by ICE. In several instances, it took several days to determine where individuals were being held. Many were simply unable to track down a detained family member and had no knowledge of the family member’s well-being and location until the arrested family member was able to make contact with them — often a week or more after his or her arrest and, on some occasions, after the family member already had been deported.

Even when detainees were located and humanitarian reasons for release were brought to the attention of government officials, securing a detainee’s release was neither simple nor quick. For example, a 25-year-old Guatemalan woman arrested in the Worthington raid was detained for almost a week following the raid while the babysitter of her 13-month-old citizen son struggled to discover the mother’s whereabouts. A prayer vigil outside the Nobles County Jail brought attention to her situation, and she was finally released from custody shortly thereafter. In another case, the young mother of a 4-year-old citizen son informed ICE officials about her child care obligations, but was held in jail for more than 24 hours before being released on her own recognizance at 10:00 p.m. on December 13.

2. **ICE’s Humanitarian Guidelines Fall Short**

In an effort to facilitate the more timely and effective identification of child welfare and other humanitarian concerns that might prompt the release, rather than detention, of immigrants arrested in worksite raids, ICE promulgated “Guidelines for Identifying Humanitarian Concerns among Administrative Arrestees When Conducting Worksite Enforcement Operations” in November 2007. The Guidelines provide for several measures aimed at identifying humanitarian issues, including the following:

- In any worksite enforcement operation “targeting the arrest of more than 150 persons,” the development of a “comprehensive plan to identify, at the earliest possible point, any individuals arrested on administrative charges who may be sole care givers or who have other humanitarian concerns, including those

17, 2007. In a similar incident, a Honduran woman was arrested and detained in Ohio for 11 days, separated from her 9-month-old, breast-fed daughter. The child did not eat for three days, refusing to take formula from a bottle. Preston, L., *Case of Mother Torn from Baby Reflects Immigration Quandry*, The New York Times, November 17, 2007.


with serious medical conditions that require special attention, pregnant women, nursing mothers, parents who are the sole caretakers of minor children or disabled or seriously ill relatives, and parents who are needed to support their spouses in caring for sick or special needs children or relatives."

- Coordination with, and the involvement of personnel from, the Department of Health and Human Services, Division of Immigration Health Services (DIHS), to provide same-day assessments of humanitarian issues. “DIHS should be given prompt access to all arrestees under safe and humane conditions on the day of the action. ... DIHS personnel should be given the time necessary to assess each arrestee’s individual circumstances. ... To the greatest extent possible, the information provided in the course of the assessments should be used exclusively for humanitarian purposes.”

- Where DIHS support is not possible, “ICE should consider coordinating with an appropriate state or local social service agency (SSSA) or utilizing contracted personnel to provide humanitarian screening.”

- ICE is to take humanitarian issues raised by DIHS or an SSSA into consideration, although these concerns are to be “weighed against other factors, including the arrestee’s criminal record, an existing removal order and other factors that would normally mandate detention.”

- Detainees should not be transferred out of the general area until the humanitarian assessments have been completed.

- Notice to nongovernmental organizations (NGOs) “once an operation is underway,” with a request that the NGOs assist in identifying humanitarian issues not brought to the attention of ICE and providing the NGOs with the name and contact information of an ICE representative. “In compelling cases, ICE may consider the possibility of release on humanitarian grounds” based on information provided by NGOs.

- Giving detainees “adequate notice and access (by phone at a minimum) to relatives so that s/he may make plans for dependents.”\textsuperscript{145}

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\textsuperscript{145} The Guidelines are included in Appendix E.
steps to identify, document, and appropriately address humanitarian concerns of all those we encounter during law enforcement operations and in particular during [ICE’s] worksite enforcement operations.\textsuperscript{146} She emphasized that the above-described “guidelines” were “developed to ensure that parents who have been arrested and who have unattended minors or family members with disabilities or health concerns are identified at the earliest point possible,” that “ICE takes this responsibility very seriously,” and that “humanitarian factors are carefully taken into account when ICE makes custody decisions.”\textsuperscript{147} Forman characterized the consideration ICE gives to “identifying and resolving personal family issues” as “unparalleled and unique in law enforcement,” and specifically cited the Postville raid as an example of the extraordinary care and effectiveness of ICE’s “humanitarian plan” in conducting worksite raids.\textsuperscript{148}

Empirical data is not available to permit analysis of the implementation and impact of the new ICE Guidelines because ICE does not gather or maintain such information. This is indeed one of the important changes in the law that is sorely needed—a requirement that ICE gather and maintain sufficient data regarding its actions to permit Congress to exercise its oversight responsibilities effectively. Despite the dearth of data presently available, information regarding actions by ICE in connection with more recent worksite raids suggests that the Guidelines are not being applied consistently or effectively.

In Congressional testimony on May 20, 2008, before the House Subcommittee on Workforce Protections, the President and CEO of the National Council of La Raza (Janet Murguia) described several shortcomings with ICE’s application of the guidelines:\textsuperscript{149}

There are ... significant concerns about ICE officials failing to fully implement the ICE guidelines regarding nursing mothers. NCLR has learned that some nursing mothers were released for humanitarian reasons, however, in at least a couple of cases, there were substantial delays and inadequate nutrition provided to a mother in detention.

In addition, two major provisions of ICE humanitarian guidelines specifically intended to protect children appear not to have been followed in Postville:

\textsuperscript{147} Id., p. 2.
\textsuperscript{148} Id., pp. 2, 4.; See also Statement of James C. Spero, Deputy Assistant Director of Office of Investigations before the House Subcommittee on Workplace Protection, May 20, 2008, included in Appendix E.
• Access to intermediaries: ICE has said that it will allow for third-party intermediary entities—either federal health officials, or state and local social services, or other contracted third-party groups—to screen detainees for humanitarian reasons. This is important because many immigrants are reluctant to reveal to ICE that they are parents for fear that their children will also be detained. NCLR’s contacts in Iowa have been unable to substantiate that any intermediary party assisted in screening of detainees.

• Communication: ICE has said that it will facilitate access to free telephones. According to NCLR contacts in Iowa, very few families have been able to communicate with a detained family member. This complicates the ability of parents in detention to make alternative arrangements for their children and considerably increases the stress on non-detained family members, including children. Similarly, it adds a layer of uncertainty for school systems, child care centers, and social service agencies that are dealing with issues of finding appropriate adult supervision for children whose parents have been detained.

More significantly, the aftermath of the May 2008 Postville raid (discussed at greater length in Section V.B.4.) reveals that the new ICE Guidelines have done little to ameliorate the significant, immediate child welfare issues that have been a persistent feature of large-scale, worksite raids. As confirmed through numerous reports, despite the release by ICE of some 60 parents and minors on humanitarian grounds, chaos reigned in Postville as children flocked to St. Bridget’s Catholic Church for assistance. Approximately 150 children, most of whom are U.S. citizens and had loved ones detained, spent the night at the church. More than 400 children were fed by the church during the first 24 hours following the raid. More than 24 hours after the raid, there were still at least 150 people at the church attempting to match up children with a relative.150

Similarly, the August 25, 2008, raid of Howard Industries in Laurel, Mississippi, resulting in the arrest of 595 undocumented workers, has separated parents from their citizen children. Although ICE states that 106 workers “were identified as being eligible for an alternative to detention based on humanitarian reasons,”151 community leaders and immigrant attorneys report the widespread separation of

150 Id., p. 9.
parents and children.\textsuperscript{152} Most of those released in lieu of detention appear to be mothers, with their husbands and the fathers of their children detained.\textsuperscript{153}

Although the ICE Guidelines represent a step in the right direction, their potential benefits are limited by the fact that they are both nonbinding and self-limiting. They only apply to worksite enforcement actions “targeting the arrest of more than 150 persons”\textsuperscript{154} and vest ICE with complete discretion to determine what constitutes a humanitarian circumstance warranting release, including the authority to detain an individual notwithstanding the identification of humanitarian issues. Moreover, by not requiring advance notification to and planning with state and local social service agencies, a repetition of the kind of immediate, community crisis conditions that attended the Worthington, New Bedford, and other raids is inevitable. “The guidelines ... fail to address the undue burden placed on schools, early childhood centers, child welfare agencies, churches, and community-based organizations that are left to play the role of first responder in the aftermath of a raid”\textsuperscript{155}

3. Reasonable Alternatives to Detention and Removal Are Not Adequately Pursued

The more extensive use of alternatives to detention, such as release on own recognizance (ROR) without a bond, release with a reasonably-priced bond, and monitored release, would help minimize the considerable disruption and harm to children stemming from the detention of immigrant parents.

Ironically, ICE has recognized the importance of “[k]eeping families together” in detention facilities when the entire family is undocumented and subject to deportation.\textsuperscript{156} According to ICE, family detention “ensures that illegal alien

\textsuperscript{152} See Mohr, H., \textit{Fear Grips Immigrants After Mississippi Plant Raid}, Associated Press, August 26, 2008 (available at http://ap.google.com/a77de/ALegM5j09weZomijd6rzonKDKV40abjykgdD92Qj6000).

\textsuperscript{153} \textit{Id.}

\textsuperscript{154} The Guidelines provide for their application to smaller enforcement actions, but only “where practical” and “at the direction of the Assistant Secretary.”


children remain with parents, their best caregivers." In the context of worksite enforcement actions involving the arrests of undocumented parents with citizen children, however, ICE has not consistently recognized that the best interests of the children are served by alternatives to detention that permit these “best caregivers” to remain with their children. Rather, all too frequently, parents “rounded up in immigration raids disappear into detention far from home and family.”

Current immigration law ties the hands of ICE and immigration judges by mandating the detention of certain immigrants. Even when release on bond is available, however, the setting of bonds at levels beyond the financial means of immigrants has prevented or delayed the release of immigrants detained in enforcement actions. Although the IIRIRA specifies a minimum bond of $1,500, ICE has requested and obtained significantly higher bond amounts—in some cases as much as $10,000. In some detention locations, immigrants otherwise eligible for release on bond have been detained for extended periods before being released or denied release altogether by immigration judges. According to The Urban Institute, one immigration judge held almost all detainees for at least four months, ultimately releasing only 16% of those who were eligible for release on bond.

Faced with the prospect of months in detention away from their families, and often before they have had an opportunity to obtain legal advice or other third-party assistance, many detained immigrants have acceded to ICE requests to accept voluntary removal. An immigrant accepting voluntary removal agrees to leave the country without an order of removal, foregoing the assertion of any defenses to deportation or rights he or she may have in the deportation process. Voluntary removal is an expedited process, often resulting in the transfer of an immigrant out of the country within days of his or her arrest. ICE reports that 40,534 undocumented immigrants agreed to voluntary removal in FY 2007.

The deportation of undocumented immigrants through the voluntary removal mechanism was prevalent in the December 2006 Swift plant raids. According to ICE, 50% of the undocumented immigrants arrested in these raids had been

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157 Id.
158 February 5, 2009, Bipartisan Letter from Minnesota Legislators to Obama Administration.
159 The Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA) compels the detention of certain immigrants without bond, including immigrants subject to removal on the basis of an expanded list of criminal convictions, immigrants posing a national security risk, and persons under final orders of removal who have been illegally present in the country.
160 The Urban Institute, Paying the Price: The Impact of Immigration Raids on America’s Children, October 2007, p. 29.
161 Id.
removed from the United States by March 1, 2007. In its study, The Urban Institute found that of the 128 Mexicans arrested in the Swift plant raid in Greeley, Colorado, 86 signed “voluntary” removal papers and were flown to the southwestern border within 48 hours of their arrest. These immigrants were removed from the country before they had access to counsel or officials from the Mexican Consulate. In addition, most of the 94 Guatemalan immigrants arrested in Greeley signed “voluntary” removal papers and were deported within 40 days of the enforcement action. Similarly, 72 of the 105 Mexican immigrants arrested during Swift raid in Grand Island, Nebraska signed “voluntary” removal papers. As discussed below, the more recent tactic employed in Postville of using inflated criminal charges as a means of pressuring undocumented immigrants into agreeing to judicial orders of deportation serves to move individuals through the judicial system even faster and with little or no consideration to their rights under immigration law. Ironically, this speedy “justice” meant that many of the Postville arrests had to stay in the U.S. longer than they would have had they been given the opportunity to take voluntary departure, as most were required to serve 5-month prison sentences.

Questions have been raised about the coercive effects of ICE’s detention practices, particularly the transfer of detainees to remote detention facilities with limited access to counsel and other support services. From data collected though a Freedom of Information Act request, the National Immigrant Justice Center found that 94% of the 80,844 stipulated orders of removal signed between April 1997 and February 2008 were by immigrants who spoke primarily Spanish, suggesting that immigrants in detention face language barriers that prevent them from fully understanding what they are being asked to consider and sign when presented with voluntary removal papers. Recognizing the potential for misunderstandings and/or coercion in the detention environment, one federal court afforded detainees from the Swift plant raid in Greeley, Colorado, an opportunity to contest the legitimacy of voluntary removal papers that had been signed.

“Mandatory detention operates as a coercive mechanism, pressuring those detained to abandon meritorious claims for relief in order to avoid continued or prolonged detention and the onerous conditions and consequences it imposes. ...”"165

164 As discussed above, ICE does not collect and track data permitting assessment of the number of parents of citizen children who voluntarily depart the U.S. without an order of removal, let alone the number and disposition of the affected U.S. citizen children.
165 The Urban Institute, Paying the Price: The Impact of Immigration Raids on America’s Children, October 2007, p. 24.
166 See supra, Note 179.
168 The United Food and Commercial Workers Union filed a petition for habeas corpus and a complaint seeking...
A recent report to the United Nations Human Rights Council by the Special Rapporteur on the Human Rights of Migrants (attached at Appendix I) also highlights the impact of present detention policies and practices on detainee rights. Addressing the affects of detention practices and the pressure on immigrants to accept voluntary removal, the report states:

Faced with the prospect of mandatory and prolonged detention, detainees often abandon claims to legal relief from removal, contrary to international standards that require non-citizens to be able to submit reasons against their deportation to the competent authorities. Mandatory detention operates as a coercive mechanism, pressuring those detained to abandon meritorious claims for relief in order to avoid continued or prolonged detention and the onerous conditions and consequences it imposes. ... 

In addition to the devastating effect that mandatory detention has on detained individuals, the policy has an overwhelmingly negative impact on the families of detainees, many of whom are citizens of the United States. ... Children can suffer trauma and severe loss from the sudden, prolonged, and sometimes permanent absence of that parent. The absence of a family member can result in irreparable economic and other injury to an entire family structure. ... Mandatory detention and deportation policy, therefore, has significant effects on United States citizens and the children of permanent residents, and other family members. Families consistently bear many of the psychological, geographic, economic, and emotional costs of detention and deportation.170

4. Postville: A Study in the Coercive Use of Detention

Although criminal arrests have been the exception rather than the norm in most worksite enforcement actions the past several years, recent experience suggests that ICE has shifted its tactics to increase the frequency and number of criminal arrests. The May 12, 2008, raid at Agriprocessors Inc. in Postville, Iowa, resulted in the arrest of 389 undocumented immigrants, including some 290 Guatemalans and 93 Mexicans.171 Approximately 77% of those arrested in the Postville raid—306 of declaratory and injunctive relief on behalf of all employees detained by ICE during the raid of the Swift plant in Greeley, Colorado. See Yarrito v. Meyers, 06-CV-2494 (D. Colo. 2006). Among other things, this action challenged the voluntariness of “voluntary” removal orders obtained by ICE. In early January 2007, the court ordered that bond hearings for the detainees be held within 48 hours and ruled that any of the detainees who claimed that their agreement to a voluntary removal order had been fraudulently or wrongfully obtained could withdraw their agreement to voluntary removal.


170 Id., ¶¶ 71, 74, 76 and 77.

389 undocumented immigrants—were charged with criminal offenses for working with false papers, including Social Security Fraud under 42 U.S.C. § 408(a)(7)(B) and Aggravated Identity Theft under 18 U.S.C. § 1028(a)(1). Within approximately ten days of the raid, 297 of those criminally charged had pleaded guilty to criminal charges and been sentenced (most to prison terms of five months).

The remarkable speed with which almost all of the Postville detainees were criminally arraigned, pleaded guilty and sentenced stemmed from a “Fast Tracking” system developed and implemented by ICE, the Office of the U.S. Attorney for the Northern District of Iowa, and the U.S. District Court for the Northern District of Iowa. Under the guise of conducting a training exercise, ICE converted the 60-acre National Cattle Congress grounds in Waterloo, Iowa, into a makeshift detention and processing center, and the U.S. District Court for the Northern District of Iowa temporarily relocated to the facility to conduct criminal proceedings. On the day of the raid, approximately 18 criminal defense attorneys from the federal panel for the Northern District of Iowa were called to the Federal Courthouse to meet with representatives of the U.S. Attorney’s Office. The defense attorneys were informed of the procedures that would be implemented to process detainees who were suspected of being undocumented immigrants and were also being charged with violations of federal criminal statutes. The attorneys were given a procedures manual, advised that they would be representing groups of detainees rather than individuals, told of the potential pleas their potential clients would be offered, and informed that they and

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173 In a May 23, 2008, News Release, ICE reported that 230 defendants were sentenced to five months in prison and three years of supervision for using false identification belonging to another person to obtain employment; 30 defendants were sentenced to five months in prison and three years supervision for falsely using a social security number or card belonging to another person; eight defendants were sentenced to five months in prison and three years supervision for illegally re-entering the United States after being deported; two defendants were sentenced to 12 months and a day in prison, and three years of supervision, for using false identification belonging to another person to obtain employment; 21 defendants were sentenced to five years of probation for using false identification to obtain fraudulent documents that did not belong to an actual person; two defendants were sentenced to five years of probation for falsely using a social security number or card where the number did not belong to an actual person; and four defendants were sentenced to five years of probation for illegally re-entering the United States after being deported. Immigration and Customs Enforcement News Release, May 23, 2008 (available at http://www.ice.gov/pi/news/newsreleases/articles/080515waterloo.htm).
their clients would have a limited number of days to make a decision to accept or reject the plea offers.\textsuperscript{177}

At the makeshift facility in Waterloo, detainees were assigned criminal defense counsel and arraigned in groups of ten. Defense counsel were given files on each of their clients along with the plea agreement being offered to their client groups. Detainees and their counsel were given just seven days from the detainee’s first court appearance to accept or reject the non-negotiable plea agreement.\textsuperscript{178} All of the detainees facing criminal charges accepted the plea agreement. They were brought before a magistrate judge for a plea hearing and then a U.S. District Court judge for sentencing—again in groups of ten.\textsuperscript{179}

Serious questions have been raised regarding the “assembly line justice” meted out in the immediate aftermath of the Postville raid. Indeed, the fact that each of the 300 or so persons charged criminally, represented by a mere 18 criminal defense lawyers collectively, accepted the government’s plea offers within such an abbreviated period of time is itself cause for concern regarding the degree to which individual due process rights were recognized and respected in this unprecedented process.

Due process was marginalized by the fact that defense counsel were overburdened and generally lacked the expertise necessary to advise their clients properly on the immigration implications of the plea agreements, let alone meaningfully consider and explore any defenses to deportation available to individual detainees in the limited, 7-day timeframe imposed by the government. Criminal defense counsel were assigned at a ratio of 17 detainees to one lawyer, affording counsel minimal time to meet with and develop the cases of their individual clients.\textsuperscript{181}

Moreover, assigned defense counsel were not expert in immigration law and

\textsuperscript{177} Id.
\textsuperscript{178} See July 24, 2008, Statement of Deborah J. Rhodes, pp. 6, 8-10.
\textsuperscript{179} Id.
\textsuperscript{180} See July 24, 2008, Statement of David W. Leopold before the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law.
\textsuperscript{181} See July 24, 2008, Statement of David Leopold, p. 4; July 24, 2008, Statement of Deborah J. Rhodes, p. 6 (noting that “[a]pproximately 18 defense counsel were present at the fairgrounds to meet with the detainees”).
immigration lawyers were initially denied access to detainees.\footnote{182} In his July 24, 2008, testimony before Congress, Professor Robert Rigg, Director of the Criminal Defense Program at Drake University Law School, noted that a "strong case can be made that the procedures adopted [for the Postville raid] are flawed" and "call into question ... [the] constitutional guarantee of due process," citing as examples (1) the limited amount of time the lawyers were given to adequately investigate client cases and perform necessary research associated with criminal cases with immigration issues; (2) the appointment of groups of individuals to attorneys rather than individual clients which, together with the compressed time frame, resulted in lawyers spending an hour or less with clients; (3) the absence of attorneys with immigration law expertise and insufficient time for defense counsel to become more familiar with immigration issues; and (4) having groups of detainees appearing before judges for the purpose of entering guilty pleas, creating "the appearance of assembly-line justice not associated with the decorum of Federal courts."\footnote{183}

Equally pernicious was the decision to charge detainees with Aggravated Identity Theft under 18 U.S.C. § 1028A(a)(1). This criminal statute imposes a mandatory two-year term of imprisonment for certain enumerated felonies if, "during and in relation to" the felony, the perpetrator "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." The propriety of leveling this charge against the Postville detainees is questionable. Although there is a split among federal circuit courts of appeal, several courts have concluded that a defendant must know that the means of identification transferred, possessed or used during the commission of an enumerated felony belonged to another person, not merely that the number or means of identification was not properly the defendant’s and might belong to another person.\footnote{184} The information

\footnote{182} See July 24, 2008, Statement of Professor Robert Rigg, pp. 5-6; July 24, 2008, Statement of David W. Leopold, pp. 5-6; Dr. Erik Camayd-Freixas, Interpreting after the Largest ICE Raid in US History: A Personal Account, p. 7; The Minnesota Independent, Local Immigration Attorneys and Advocates Say Postville Raid Reflected “A Complete Lack of Due Process” (available at http://www.minnesotaindependent.com/view/local-immigration). ICE maintains that immigration attorneys were afforded an opportunity to meet with their clients as and when clients were located, and were able to advise their clients before any guilty pleas were entered. See July 24, 2008, Statement of Deborah J. Rhodes, p. 5. Although some detainees may have received the benefit of advice from immigration attorneys, the fact remains that the compressed time frame imposed by the government effectively precluded detainees and their counsel from fully and reasonably exploring any defenses to deportation.

\footnote{183} July 24, 2008, Statement of Professor Robert Rigg, pp. 5-6.

\footnote{184} Three Circuit Courts of Appeal—the First, Ninth, and D.C. Circuits—have held that the knowledge requirement of § 1028A(a)(1) extends to the “of another person” element of the offense, requiring the Government to prove that the defendant did not simply invent a false identification number but knew that he was using the means of identification belonging to another actual person. See U.S. v. Godin, 2008 WL 2780646, at *1 (1st Cir. July 18, 2008) (\"[W]\)e hold that the ‘knowingly’ mens rea requirement extends to ‘of another person.’ In other words, to obtain a conviction under § 1028A(a)(1), the government must prove that the defendant knew that the means of identification transferred, possessed, or used during the commission of an enumerated felony belonged to another person\")\); U.S. v. Miranda-Lopez, 2008 WL 2762393, at *5 (9th Cir. July 17, 2008) (\"[W]\)e thus hold that the government was required to prove that Miranda-Lopez knew that the identification belonged to another person\); U.S. v. Villanueva-Soto, 515 F.3d 1234, 1235 (D.C. Cir. 2008) (\"[W]\)e hold that section 1028(a)(1)’s mens rea requirement extends to the phrase ‘of another
underlying the criminal charges against the Postville detainees, as reflected in the May 9, 2008, Application and Affidavit for Search Warrant filed by the government, is devoid of evidence that detainees had knowledge that any social security or other identification numbers they were using belonged to another actual person.\footnote{185}

Information that has surfaced following the Postville raid and criminal proceedings suggests that the inflated, Aggravated Identify Theft charges were asserted as a means of pressuring detainees to accept the government’s non-negotiable plea offers. In a June 13, 2008, essay describing his first-hand observations and experience as a federally certified interpreter during the “Fast Tracking” process, Dr. Erik Camayd-Frexias described the inordinate pressure on detainees to accept the government’s “offer” without regard to their actual guilt or innocence. Dr. Camayd-Frexias recounted jail interviews between criminal defense counsel and frightened clients forced to choose between pleading guilty to crimes they may not have committed, and facing prolonged incarceration and absence from families dependent on them for life’s necessities:\footnote{186}

It came to my first jail interview. The purpose was for the attorney to explain the uniform Plea Agreement that the government was offering. The explanation, which we repeated over and over to each client, went like this. There are three possibilities. If you plead guilty to the charge of “knowingly using a false Social Security number,” the government will withdraw the heavier charge of “aggravated identity theft,” and you will serve 5 months in jail, be deported without a hearing, and placed on supervised release for 3 years. If you plead not guilty, you could wait in jail 6 to 8 months for a trial (without a person, meaning that the government must prove the defendant actually knew the identification in question belonged to someone else\footnote{185}). The Fourth, Eighth and Eleventh Circuits have held to the contrary. See U.S. v. Mendoza-Gonzales, 520 F.3d 912, 915 (8th Cir. 2008), petition for cert. filed. (U.S. July 15, 2008) (No. 08-5316); U.S. v. Hurtado, 508 F.3d 603, 610 (11th Cir. 2007) (per curiam), cert. denied, 128 S. Ct. 2903 (2008); U.S. v. Montejo, 442 F.3d 213, 217 (4th Cir. 2006). On July 22, 2008, a Petition for Writ of Certiorari was filed with the Supreme Court in Ignacio Flores-Figueroa v. U.S., seeking review of the affirmance by the Eighth Circuit of a conviction under § 1028A(a)(1) absent evidence of the defendant’s knowledge that the identification in question belonged to another person (following the Eighth Circuit’s precedent in \\footnote{185}).

\footnote{185} The Application and Affidavit for Search Warrant states that in February 2008 ICE agents received social security “no match” information from the SSA for leading them to conclude that “about 737 current Agriprocessors employees are believed to be using a social security number not lawfully issued to that person,” including 147 SSNs confirmed by the SSA as being invalid (i.e. never issued) numbers and about 590 valid SSNs. \footnote{185} See U.S. v. Mendoza-Gonzales, 520 F.3d 912, 915 (8th Cir. 2008), petition for cert. filed, (U.S. July 15, 2008) (No. 08-5316); U.S. v. Hurtado, 508 F.3d 603, 610 (11th Cir. 2007) (per curiam), cert. denied, 128 S. Ct. 2903 (2008); U.S. v. Montejo, 442 F.3d 213, 217 (4th Cir. 2006). On July 22, 2008, a Petition for Writ of Certiorari was filed with the Supreme Court in Ignacio Flores-Figueroa v. U.S., seeking review of the affirmance by the Eighth Circuit of a conviction under § 1028A(a)(1) absent evidence of the defendant’s knowledge that the identification in question belonged to another person (following the Eighth Circuit’s precedent in \\footnote{185}).

\footnote{186} The Application and Affidavit for Search Warrant is available at http://eyeonagriprocessors.org/docs/Application%20and%20Affidavit%20for%20Search%20Warrant.PDF.

\footnote{186} The Application and Affidavit for Search Warrant states that in February 2008 ICE agents received social security “no match” information from the SSA for leading them to conclude that “about 737 current Agriprocessors employees are believed to be using a social security number not lawfully issued to that person,” including 147 SSNs confirmed by the SSA as being invalid (i.e. never issued) numbers and about 590 valid SSNs. See also Testimony of Dr. Erik Canayd Freixas before the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, July 24, 2008 at Appendix J.
right to bail since you are on an immigration detainer). Even if you win at trial, you will still be deported, and could end up waiting longer in jail than if you just pled guilty. You would also risk losing at trial and receiving a 2-year minimum sentence, before being deported. Some clients understood their “options” better than others.

That first interview, though, took three hours. The client, a Guatemalan peasant afraid for his family, spent most of that time weeping at our table, in a corner of the crowded jailhouse visiting room. How did he come here from Guatemala? “I walked.” What? “I walked for a month and ten days until I crossed the river.” We understood immediately how desperate his family’s situation was. He crossed alone, met other immigrants, and hitched a truck ride to Dallas, then Postville, where he heard there was sure work. He slept in an apartment hallway with other immigrants until employed. He had scarcely been working a couple of months when he was arrested.... “The Good Lord knows that I was just working and not doing anyone any harm.” This man, like many others, was in fact not guilty. “Knowingly” and “intent” are necessary elements of the charges, but most of the clients we interviewed did not even know what a Social Security number was or what purpose it served. This worker simply had the papers filled out for him at the plant, since he could not read or write Spanish, let alone English. But the lawyer still had to advise him that pleading guilty was in this best interest. He was unable to make a decision. “You all do and undo,” he said. “So you can do whatever you want with me.” To him we were part of the system keeping him from being deported back to his country, where his children, wife, mother, and sister depended on him. He was their sole support and did not know how they were going to make it with him in jail for 5 months. None of the “options” really mattered to him. Caught between despair and hopelessness, he just wept. ... Before he signed with a scribble, he said: “God knows you are just doing your job to support your families, and that job is to keep me from supporting mine.” ...

Many of the Guatemalans had the same predicament. One of them, a 19-year-old, worried that his parents were too old to work, and that he was the only support for his family back home. ...

Many of these workers were sole earners begging to be deported, desperate to feed their families, for whom every day counted. “If you want to see your children or don’t want your family to starve, sign here”—that is what their deal amounted to. Their Plea Agreement was coerced.

Detainees were thus presented with a stark choice—plead guilty to social security fraud with a five month prison sentence and a stipulated judicial order of deportation; or plead not guilty and face six or seven months of mandatory
incarceration awaiting a criminal trial and the prospect of at least two additional years of imprisonment if ultimately convicted, followed by deportation. As aptly described by David Leopold in his July 24, 2008, Congressional testimony:

Stated simply, the “Fast-Tracking” system depended on threatening the workers with a two (2) year prison sentence, their inability to receive adequate attention from counsel, and their ignorance of the charges leveled against them. The government made the undocumented workers an offer they couldn’t refuse. Faced with the choice of 5 months in prison and deportation, or 6 months in prison waiting for a trial which could lead to 2 years in prison and deportation, what choice did the workers really have? Needless to say the scheme left little room for the fundamental protections offered by the Constitution. The spectacle was a national disgrace.187

In the environment manufactured by the government, immigration law and defenses to deportation took a backseat to the criminal charges and the attendant threat of extended imprisonment. By criminalizing conduct that previously had been addressed through civil administrative removal proceedings, assigning defense counsel with little or no immigration law expertise, employing an unusually expedited criminal law process, and imposing a 7-day time limit on consideration of plea agreements, the government effectively coerced detainees to forego their rights. As a consequence, every one of the detainees charged criminally pled guilty and stipulated to a judicial order of deportation within approximately ten days of the Postville raid.188 The coerced nature of pleas in an artificially compressed time period effectively precluded immigration relief, denying defendants the opportunity for protection from harm and children an opportunity to remain united with their parents. Given the long and well-documented history of human rights abuses in Guatemala, it is likely that many detainees—the vast majority of whom were Guatemalans—could have

188 The propriety of the government’s tactic of demanding a judicial order of deportation as a non-negotiable term of every plea agreement is questionable. In his July 24, 2008, statement before Congress, David Leopold noted that the “stipulated orders of deportation may have been improperly used against many of the defendants in the Agriprocessors cases.” July 24, 2008, Statement of David W. Leopold, pp. 7-8. Leopold points out that a statutory condition to judicial orders of deportation based on criminal convictions is that the alien have been “lawfully admitted to the United States.” Id. at 7 (citing 8 U.S.C. § 1227(a)(2)(A)). The uniform plea agreement, however, alleged that the “Defendant entered the United States illegally without admission or parole and is unlawfully present in the United States.” Id. (emphasis added).
made out a case for asylum and withholding of removal. “The government clearly understood that many of the impoverished workers in Postville may have suffered persecution or have had well founded fear of future persecution or faced a threat to their life or liberty if they were forcibly returned to Guatemala.”189 Moreover, detainees may have been eligible for other forms of immigration relief. In his essay, Dr. Camayd-Frexias described how workers abandoned immigration relief when faced with the impossible dilemma imposed upon them by the government’s “Fast Tracking” process and non-negotiable position:

Another client, a young Mexican, had an altogether different case. He had worked at the plant for ten years and had two American born daughters, a 2-year-old and a newborn. He had a good case with Immigration for an adjustment of status which would allow him to stay. But if he took the Plea Agreement, he would lose that chance and face deportation as a felon convicted of a crime of “moral turpitude.” On the other hand, if he pled “not guilty” he had to wait several months in jail for trial, and risk getting a 2-year sentence. After an agonizing decision, he concluded that he had to take the 5-month deal and deportation, because as he put it, “I cannot be away from my children for so long. His case was complicated; it needed research in immigration law, a change in the Plea Agreement, and, above all, more time. There were other similar cases in court that week.190

The shift in tactics reflected by the events of the Postville raid evince an intent on the part of the government to criminalize immigration violations as a means of forcing undocumented workers to forego their rights under immigration law. As reflected by the story of the young Mexican worker recounted above, such an approach further marginalizes the need and interests of citizen children of undocumented workers. Indeed, it ignores the best interests of the citizen child and ensures that such interests have no hearing in the deportation process.

This heavy-handed approach to enforcement of our immigration laws cannot be reconciled with fundamental notions of due process, the family reunification goals underlying immigration law, and the constitutional rights and benefits accorded citizen children of undocumented immigrants as their birthright. Although the prevention and prosecution of social security fraud and identity theft is certainly important, criminalizing undocumented workers who are supplied with false identification papers—many by or through unscrupulous employers—and whose sole intent is to earn a modest wage to support their families is, at best, bad policy and, at worst, unconscionable.191

190 Dr. Erik Camayd-Freixas, Interpreting after the Largest ICE Raid in US History: A Personal Account, pp. 6–7.
191 Leadership of the Evangelical Lutheran Church in America designated Postville a “domestic disaster” and issued a
C. The Threat of Longterm Harm to American Children of Undocumented Immigrants

The adverse effects of increased enforcement on children are not limited to the trauma experienced in the immediate aftermath of the enforcement action. The separation of the family due to the detention and ultimate removal of a parent visits devastating and long-lasting financial and emotional harm on those left behind.

1. The Financial Struggle of Separated Families

The arrest, detention and/or deportation of undocumented immigrant parents as a result of worksite enforcement actions has caused significant financial hardship for immigrant families, including their citizen children members. In many instances, the detained immigrant is the family’s sole breadwinner. According to analysis of the migrant population by the Pew Hispanic Center, only 54% of undocumented women were in the U.S. labor force as of March 2005, a participation percentage 18 points lower than native-born women.192 The lower representation of undocumented women in the workforce can be attributed to the greater prevalence of marriage and the presence of young children in this population.193

In the aftermath of the Worthington raid, immigrant families struggled to make ends meet in the absence of a steady paycheck.194 Having lost their jobs at Swift, and without documentation permitting them to work, even those undocumented immigrants who were not detained and/or deported soon after the raid were left with no means to provide financially for their families pending their removal from the United States.195

The struggle to provide for their families has been particularly acute for women whose husbands were detained and deported. Community leaders interviewed for this report described the continuing difficulties of wives/mothers left without their husbands, including the lack of any means of support because they have remained at home raising their children, lack of means of transport because they do not drive, and lack of familiarity with bank accounts and financial obligations because those responsibilities had been their husbands’. In addition, some 15-20 pregnant

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Resolution on Immigration reform. See Appendix K.


193 Id.


195 A lack of resources significantly limits the opportunity for legal representation in removal proceedings, making the right to counsel and relief from removal hollow protections beyond the reach of most immigrants.
women found themselves alone and without support as a consequence of the detention and/or deportation of their husbands.

The Worthington community did much to help the families of undocumented workers meet their immediate needs following the raid. Basic necessities, such as food and diapers were sent to Worthington by concerned Minnesota citizens and distributed to families by the local union and community organizations. In addition, monetary donations totaling approximately $110,000 (including $25,000 from Swift) were made available through Community Connectors (a United Way organization) to assist affected families in paying rent, utility bills and the like. Ultimately 110 individuals received financial assistance through Community Connectors, although available funds limited the amount a person or family could receive to a maximum of $1,200.

Although the considerable community efforts in Worthington provided invaluable assistance to affected families in the immediate aftermath of the raid, such efforts have not been a viable substitute for a paycheck in the longer term. In an interview for this report more than six months after the raid, a Guatemalan woman with two citizen children reported that she was struggling to feed her children following the deportation of her husband and in light of her own undocumented status and consequential inability to work. Another woman—a native-born American married to an undocumented immigrant—similarly reported extreme financial hardship stemming from her husband's inability to work pending removal. Adding to this family's difficulties was their loss of health insurance or other financial means to provide their son with a needed kidney transplant.

In addition to relatively limited resources, persistent fear within the immigrant community proved to be a considerable impediment to furnishing aid to families in need. News of the Swift raid prompted many immigrant families in Worthington to go into hiding. For example, one mother of several small children (including an


infant) remained hidden in her home with her children for several days following the raid. When Sister Karen Thein from the local Catholic Church attempted to deliver diapers and food for the baby, she found a dark home and no answer to her knocks at the door. When the mother answered the door after several delivery attempts, she was “absolutely petrified.”

2. The Emotional Trauma Caused By Family Separation

With increased worksite and home raids has come a pervasive and heightened sense of isolation and fear within the undocumented immigrant population. Although some may say that this is a natural consequence of an undocumented immigrant’s decision to enter and remain in the United States unlawfully, this ignores the emotional trauma and long-term harm visited upon citizen children whose parents are suddenly and dramatically absent from their everyday lives as a consequence of detention pending removal and/or deportation.

“Increasing workplace and household raids by ICE agents have terrorized immigrant communities. Besides their frequent disregard of due process, these raids have left an indelible mark by forcibly separating many families. In practically every state in the country, ICE raids have separated children from their parents. Testimonies from children and parents, as well as from social service providers, faith leaders, and elected officials, speak of the widespread social devastation caused by ICE raids.”

In Paying the Price: The Impact of Immigration Raids on America’s Children, the National Council of La Raza and The Urban Institute identified and described the psychological trauma experienced by children of undocumented immigrants detained in raids in New Bedford, Massachusetts, Greeley, Colorado, and Grand Island, Nebraska:

Although children can be resilient under difficult and unstable circumstances, the severe disruptions caused by the raids in the three study sites led to behavioral problems and psychological distress for some children. Separation from arrested parents caused emotional trauma in some children, especially because it happened suddenly and unexpectedly. The trauma of separation was greater when it continued for an extended period of time. Community-wide fear and social isolation accentuated the psychological impact on children. Yet, few parents sought or received mental health care for themselves or their children. ...

Even if the parent returned within a day or soon thereafter, the period of separation remained current in the child’s memory and created ongoing anxiety in many cases. Psychologists interviewed for the study associated this pervasive sense of insecurity and the anxiety it produced in children with conditions ranging from separation anxiety to attachment disorder and post-traumatic stress disorder. Children—as well as some parents—felt “the ongoing stress that any day things can change, [that there is a] constant chance of separation.” ... Some parents said that, months after the raids, their children still cried in the morning when getting dropped off at school or day care, something that they rarely used to do. Children were said to obsess over whether their parents were going to pick them up from school or if—like on the day of the raid—someone else would show up. Even children whose parents were not arrested developed many of these same fears. ... 

Some children said things to parents, other caregivers, or teachers which revealed how they had begun to personalize the cause of the separation. Especially among very young children, who could not understand the concept of parents not having “papers,” sudden separation was considered personal abandonment. In some cases, separation triggered sadness; in others, it led to anger toward the parent who left or the one who remained. ... Psychologists were concerned that [statements made by children in the aftermath of the raids and family separation] could indicate the onset of depression and other mental health challenges for children. ... 

Psychologists and other mental health professionals interviewed for the study suggested that social exclusion and isolation following the raids might induce depression and accentuate psychological distress among some parents and children. Many children absorbed the feeling of being outcasts from the broader community, even from their own previous social networks. Some children were warned not to identify who their parents were to anyone. Children’s social networks in some cases exacerbated social exclusion, for instance, when they were harassed by other children or branded as criminals because their parents were arrested.199

Parents, teachers and other caregivers reported troublesome behavioral changes among children indicative of emotional and psychological harm following the raids:

Many children exhibited outward signs of stress. For instance, some lost their appetites, ate less, and lost weight. Others became more aggressive or increasingly displayed “acting out” behaviors. Some children also had more trouble than usual falling asleep or sleeping through the night. While impossible to evaluate in the context of

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199 The National Council of La Raza and The Urban Institute, Paying the Price: The Impact of Immigration Raids on America’s Children, October 2007, pp. 50-52.
this study, mental health professionals suggested that many of these symptoms can lead to or are consistent with depression, post-traumatic stress disorder, or separation anxiety. One ten-year-old boy whose mother was briefly detained was diagnosed with major depression. ... [Another eight-year-old boy whose mother was released on the evening of the raid] experienced repeated nightmares from which he sometimes awoke with uncontrollable shaking and loss of breath. He was taken to the hospital twice, and doctors diagnosed him with major anxiety disorder resulting from post-raid stress.\textsuperscript{200}

Reports of the emotional trauma and harm experienced by children in the immediate and longer-term aftermath of raids, such as that described by The Urban Institute, have been widespread. For example, in testimony before the House Subcommittee on Workforce Protections of the Education and Labor Committee on May 20, 2008, Kathryn Gibney, principal of the San Pedro Elementary School in San Rafael, California, noted the continuing adverse impact of ICE home raids on the emotional well-being of students more than one year after ICE agents raided homes in San Rafael on March 6, 2007:

My school serves 400 kindergarten through fifth-grade students, 96\% of whom are Latino, with the largest cultural groups coming from Guatemala, El Salvador, and Mexico. These children, and other students in our district have suffered severe trauma as the result of ICE raids in the low-income Canal neighborhoods of San Rafael. ... The impact of these raids has been devastating. Absentee rates have soared. Test scores have dropped. Students who do make it to school remain distracted as they worry about whether their families will be at home when they return. Families lose sleep at night as they worry about possible home interrogations. Families whose breadwinners have been seized are struggling to survive. Even when family members were successful in proving their right to be in this country and were allowed to return home, the memories of the children remain—the memories of U.S. agents banging on their doors at dawn, shining flashlights in their faces and taking their parents away in handcuffs. Mental health services have been substantially increased to address the on-going emotional fragility of San Pedro students.\textsuperscript{201}

Just two days after Ms. Gibney’s testimony, ICE conducted another raid in San Rafael. “ICE vans parked near school bus stops terrified children as they left their parents and boarded their school buses. Absentee rates at the schools increased dramatically. One of the schools canceled its Open House planned for that night
\textsuperscript{200} Id., pp. 52-53.
out of fear for the safety of parents and children."\textsuperscript{202} ICE's decision to conduct enforcement activities near schools, including pre-schools, conflicts with state and federal goals for early childhood education.\textsuperscript{203}

In a June 2008 article, the Los Angeles Times reported that a 12-year-old U.S. citizen child could barely sleep for weeks and lived in constant fear that her mother (an undocumented immigrant) would be taken from her after she witnessed ICE agents handcuff and arrest her pajama-clad father in their home. Another 12-year-old and her 7-year-old brother, both U.S. citizens, began sleeping in their mother's bed and were afraid to go to school after their father, who had been missing for three days during which their mother (an epileptic) was ill and needed help, called to say that he had been arrested by immigration authorities.

In interviews conducted for this report, family members, as well as community and school leaders, noted the psychological trauma experienced by children who witnessed the arrest of a loved one or experienced the loss of a parent as a consequence of immigration enforcement actions. For example, the undocumented mother of an 8-year-old who saw friends and family handcuffed and led away by ICE agents in Willmar reported that her son lives in constant fear that she will be taken from him, experiencing significant separation anxiety whenever he is not with her. Willmar school and community officials similarly reported a significant drop in school attendance by minority students following the home raids, and stated that fear among this student population was palpable. A clinical psychologist who met with affected families in Willmar concluded that the level of post-traumatic stress disorder and anxiety rivaled that seen in war torn countries like Bosnia. “The kids can't concentrate, and are being mistakenly diagnosed as having behavioral problems when their symptoms are actually caused by stress, depression and anxiety resulting from the raids. Younger children are having frequent nightmares, are wetting their beds because they are so afraid.”

\textsuperscript{203} See Appendix H (May 16, 2008 letter from Senator Edward Kennedy to ICE).
The emotional trauma experienced by children of detained and/or deported immigrants is perpetuated (and likely exacerbated) by cultural and systemic barriers to the delivery of needed social services to immigrant children. Children of immigrants who have been detained do not receive the social services to which they are entitled and which other children receive because of a fear to come forward and/or a “hesitancy” by some “understaffed and under-funded” rural social service agencies to open files for “immigrant children.”

Pre-existing reticence among the immigrant population to seek out and obtain needed assistance from social service agencies has only increased with more aggressive enforcement efforts and the fear and isolation it engenders. In a recent report addressing the child welfare system’s under service of immigrant children, University of Minnesota Professor Esther Wattenberg stated:

The unequal treatment of children in immigrant families is a striking and troubling phenomenon. Citizen status determines to a significant extent the availability of health, financial, and social services. In the case of mixed-status families (most often the child, born in the USA has citizen status and the parents are undocumented), the child suffers in direct and indirect ways: living in households with scarce resources and in an environment of fear and anxiety intensified by the threat of escalating raids.

As the foregoing examples show, separation of parent and child as a result of increased detention and removal threatens the emotional well-being of the citizen child in the short-term and portends long-term emotional harm in the absence of meaningful access to social services.

\[205\] Id.

\[206\] Id., p. 11. The differential treatment of the citizen children of immigrant parents may constitute unlawful discrimination or violation of Constitutional equal protection rights. See, e.g., Plyer v. Doe, 457 U.S. 202 (1982) (Supreme Court held that it Texas statute withholding state funds from public schools for undocumented students violated the Equal Protection Clause of the U.S. Constitution (“Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent’s misconduct against his children does not comport with fundamental conceptions of fairness.”); Lewis v. Thompson, 252 F.3d 567 (2nd Cir. 2001) (denial of Medicaid eligibility to citizen children of undocumented immigrants violated Equal Protection; court noted that the “highly deferential” standard that typically applies in immigration matters was inapplicable when the claim was asserted on behalf of a citizen and further noted that “a disadvantage need not be especially onerous to merit assessment under the Equal Protection Clause”).
VI. Removal Proceedings and the Neglected Child

As discussed above, a foundational element of our immigration law is the notion that societal well-being is promoted by family unity. The reality, however, is that this laudable principle is being roundly disregarded in practice and in our legal framework. In particular, the interests of citizen children and the goal of maintaining family unity is given little to no consideration in the context of removal proceedings against the undocumented parents of these American children.\textsuperscript{207}

Immigration judges generally are not permitted under the law to give consideration to the interests of citizen children in determining whether the parent should be deported. In the few instances in which the interests of the children are considered, the legal standards applied in determining whether relief from deportation should be granted are inconsistent with the best interests standard prevalent in U.S. jurisprudence. “By denying undocumented parents cancellation of removal, our government effectively deports their United States citizen children and denies those children their birthrights. ... The government’s conduct violates due process by forcing the children to accept de facto expulsion from their native land or give up their constitutionally protected right to remain with their parents.”\textsuperscript{208}

A review of several prominent forms of relief illustrates the failure of immigration law to adequately protect the interests of citizen children whose parents face deportation.

1. Adjustment of Status

U.S. immigration law provides a mechanism for immigrants who entered the country lawfully to seek adjustment of their immigration status. For example, an immigrant in the U.S. under a temporary work visa can apply for lawful permanent residency. Such immigrants may remain in the U.S. pending a determination of their status adjustment request.

Undocumented immigrants, however, have no ability to seek adjustment of their status while remaining in the U.S. with their citizen children. Because they initially entered the U.S. unlawfully, undocumented immigrants may only seek an immigrant


\textsuperscript{208} Dissenting Opinion of Judge Harry Pregerson, \textit{Cornelio Arcos Memije and Maria Del Rosario Rendon Velez v. Gonzales}, 461 F.3d 1163 (9th Cir. 2007).
visa through U.S. consulates in their countries of origin. In other words, the only way for undocumented immigrants to attain legal status is to first leave the U.S.

Departure from the U.S., however, presents additional barriers to obtaining lawful status and reuniting with family in the U.S. Immigrants typically become undocumented because they enter the U.S. without inspection or fall out of status. Time spent in the U.S. without status can result in the accrual of “unlawful presence”. Those who were unlawfully present in the U.S. for more than 180 days before departing to obtain an immigrant visa are barred from re-entering the U.S. for three years. If the immigrant was unlawfully present in the U.S. for more than 365 days prior to departure, the bar to re-entry is ten years. Since the vast majority of undocumented immigrants entered the U.S. without inspection and remained here unlawfully for more than one year, the law precludes them from seeking to return to the U.S. lawfully for 10 years following their departure.

There is also a permanent bar to admission that, while neutral on its face, disparately impacts the undocumented from Mexico and Central America. It provides that immigrants who were unlawfully present in the U.S. for an aggregate period of more than one year or who have been ordered removed, and who subsequently enter or attempt to enter the U.S. without being lawfully admitted, are precluded from lawfully entering. Such an immigrant can request a waiver of the permanent bar, but only after he or she has been out of the U.S. for more than 10 years.

The system as currently structured thus places the undocumented immigrant in a Catch-22 situation:

- He must enter the U.S. unlawfully, if at all, because there is no meaningful path to lawful entry for the lower-skilled, less educated immigrants.
- Regardless of his length of stay, community ties, law-abiding and productive conduct, and family bonds and responsibilities in the U.S., he cannot seek to adjust his immigration status without first leaving the country and re-entering lawfully.

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209 An immigrant must be lawfully admitted to the U.S. to adjust his or her status to permanent resident. See INA 245(a).
210 See http://pewhispanic.org/files/reports/61.pdf on p. 2
211 The 3 year bar also applies to individuals, such as detainees entering into voluntary return agreements, who depart prior to the commencement of removal proceedings. See INA 212(a)(9)(B)(i)(I).
212 See INA 212(a)(9)(B)(i)(I) and (II).
213 See INA 212(a)(9)(C).
If he has been in the U.S. for any appreciable period of time, he will be barred from seeking re-entry for 3 or 10 years, depending on the length of his unlawful presence. If he happens to have travelled back and forth across the U.S. border while undocumented, he faces a permanent re-entry bar that can be waived only after he has been out of the U.S. for 10 years.

Even when there is no bar to entry, he may need to wait 10-20 years to receive a visa, assuming he is lucky enough to ever receive a visa.

While there is a limited waiver available to excuse the 3 and 10 year bars, it provides a poignant example of the lack of consideration for citizen children in enforcement actions against a parent. The INA permits the Attorney General at his sole discretion to waive the 3/10 year bar in the case of an immigrant who is the spouse or son or daughter of a United States citizen but only if the refusal of readmission would result in extreme hardship to the U.S. citizen or LPR spouse or parent. The hardship to a U.S. citizen child, even hardship that threatens the child's life, is not a grounds for waiving the bar to admission. Furthermore, the discretionary nature of the waiver presents another opportunity for the government to make decisions that are not subject to legal standards or meaningful administrative or judicial review.

The notion, therefore, that leaving the U.S. and returning lawfully is a viable option for undocumented immigrants with U.S. citizen children, obviating the need for reform to address the issue of undocumented immigrants in the U.S., is folly.

The automatic bars to readmission accompanying departures and removals, together with the disregard for the interests of the citizen children of such immigrants under the re-admission waiver provision, promotes extended family separation and/or the effective deportation of citizen children. The thousands of parents of citizen children swept up in ICE raids who have been ordered removed or opted for voluntary removal in the face of threats of extended incarceration – a level of duress that, as discussed previously, calls into question the voluntariness of such decisions – have little or no recourse or effective means of reuniting with their citizen children in the U.S. or returning with their citizen children to the U.S. for years following deportation. While some will say that this is the price an

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undocumented immigrant parent must pay for the decision to enter and/or remain in the United States unlawfully, this is an extraordinarily harsh penalty visited upon the citizen child – one which could doom the citizen child to psychological harm and, if effectively deported with the parent, a lifetime of educational and economic deprivation.

Prior to 1996, the INA provided a limited way for immigrants, who were not lawfully admitted, to obtain lawful permanent resident status without leaving the United States. In such instances, the immigrant was required to meet all other admission criteria and pay a significant fine for his or her unlawful entry. This humanitarian provision provided a way for families to remain united while allowing their children to retain ties to the U.S. and continue their education and life here. The reintroduction of this statutory section would go far in easing the crisis facing many citizen children.

2. Cancellation of Removal

The INA permits certain undocumented immigrants facing deportation to seek “cancellation of removal.” If granted, cancellation of removal permits the deportable immigrant to remain in the U.S. as a lawful permanent resident. To qualify for relief, an undocumented immigrant must establish each of the following four requirements:

1. he/she “has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application”;
2. he/she “has been a person of good moral character during such period”;
3. he/she has not been convicted of certain crimes; and
4. he/she “establishes that removal would result in exceptional and extremely unusual hardship to the alien’s spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.”

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217 See INA 245(i).
218 See INA § 240A(b), 8 U.S.C. §1229b(b).
219 Id. (emphasis added). In addition to cancellation of removal under INA § 240A(b), relief is available under INA § 240A(a) to immigrants who have been lawful permanent residents for at least five years, have lived in the U.S. for a minimum of seven years, and have not been convicted of an “aggravated felony.” As a practical matter, the lawful permanent residency requirement eliminates this relief option for most undocumented immigrants. Even when that criteria is satisfied, many are excluded as a result of the broad definition of “aggravated felony.” See INA § 101(a)(43). Disqualifying convictions include petty crimes such as misdemeanor offenses for which the individual did not receive a prison sentence.
A grant of relief is discretionary with an immigration judge, and the law prohibits appellate or other judicial review of denials. 220

The requirements for cancellation of removal are much stricter now than they were prior to 1996, when the INA was amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Prior to 1996, cancellation of removal (or what was referred to as “suspension of deportation”) only required that the person lived in the United States for seven continuous years (rather than ten), the Attorney General was permitted to consider the hardship to the person applying for a waiver, and (most importantly for purposes of this report) the impact upon the child (or spouse or parent) of the person being deported needed only to be “extreme hardship.” Apparently Congress did not believe that “extreme hardship” was a sufficiently narrow criterion, changing the law to require “exceptional and extremely unusual hardship.” A return to the pre-1996 standard would at least afford immigration judges some reasonable ability to consider the harm to children in making cancellation determinations. 221

The painfully narrow standard of “exceptional and extremely unusual hardship” is illustrated by the following cases in which relief was denied:

**In re Monreal, 23 I. & N. Dec. 56 (BIA 2001):**

This “sad” case, as characterized by the Board of Immigration Appeals (“BIA”), reflects how the change in the law to require “exceptional and extremely unusual hardship” has stripped immigration judges of the discretion to cancel deportation of an undocumented parent based

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220 Federal courts have generally concluded that they lack jurisdiction to review “hardship” decisions of the Board of Immigration Appeals. See, e.g., *Romero-Torres v. Ashcroft*, 327 F.3d 887 (9th Cir. 2003) (“Because the BIA, acting for the Attorney General, is vested with the discretion to determine whether an alien has demonstrated the requisite hardship, we are without jurisdiction to review the BIA’s hardship determinations under IIRIRA.”).

221 The legislative history makes clear that Congress “deliberately changed the required showing of hardship from ‘extreme hardship’ to ‘exceptional and extremely unusual hardship’ to emphasize that the alien must provide evidence of harm... substantially beyond that which ordinarily would be expected to result from the alien’s deportation.” (Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, *Immigration Law and Procedure* § 63.04[3][a] (2006).) The House of Representatives Report on this legislative change states that the intent was to “limit[] the categories of illegal aliens eligible for...relief and the circumstances under which it may be granted.” 104 H. Rpt. 828. The legislative history also notes that cancellation of removal is available “in truly exceptional cases,” (Bruce A. Hake, *Hardship Standards*, 7 Bender’s Immigr. Bull. 59 at 72 (Jan. 15, 2002).) and the House Report further clarified that the hardship under the new statute must be “beyond that which ordinarily would be expected to result from the alien’s deportation.” Id. It also expressly concluded that U.S. “immigration law and policy clearly provide that an alien parent may not derive immigration benefits through his or her child who is a United States Citizen.” Id. For a discussion generally of hardship standards and various cases applying such standards, See Bruce A. Hake, *Hardship Standards*, 7 Bender’s Immigr. Bull. 59 (Jan. 15, 2002) and Bruce A. Hake and David L. Bank, *The Hake Hardship Scale: A Quantitative System for Assessment of Hardship in Immigration Cases Based on a Statistical Analysis of AAO Decisions*, 10-5 Bender’s Immigr. Bull. 1 (Mar. 1, 2005). See, also, Testimony of Paul W. Virtue before the House Judiciary Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, concerning Hearings on Shortfalls of 1996 Immigration Reform Legislation, April 20, 2007.
on harm to his or her citizen child. It demonstrates that the economic, educational and social harm visited upon the citizen child effectively deported with an undocumented parent is all but irrelevant under current immigration law.

Monreal was a 34-year old native and citizen of Mexico, who had been living in the United States for over twenty years. He was employed and had three U.S. citizen children, ages 12, 8, and an infant. Monreal's wife had been deported from the U.S., taking the infant child with her. Monreal's parents, who maintained a close relationship with their son and grandchildren, were lawful permanent residents of the U.S. Additionally, seven of Monreal's siblings were living lawfully in America. Only one brother remained in Mexico.

Monreal's two older citizen children, ages 12 and 8, had been socialized and had lived their entire lives in the U.S., had learned American values, and were enrolled in school in the United States. If sent to Mexico with their father, the children faced "a dramatic change in their day-to-day lives. Even putting the potential change in their economic circumstances and standard of living aside, they faced a change of geography, climate, cuisine, culture, language, and social mores. They faced a loss of their home, their childhood roots, their friends, and their customary family circle. They faced separation from their grandparents. They face(d) a completely different school system and classes taught in a completely different language."  

The BIA concluded that the hardship the children would experience in Mexico did not rise to the level of "exceptional and extremely unusual hardship" required for cancellation of removal. The BIA recognized that this "sad" result was dictated by the statutory change that raised the standard of harm children must suffer from "extreme hardship" to "exceptional and extremely unusual hardship." It stated:

"Were this a suspension of deportation case [under the pre-1996 statutory scheme], where only extreme hardship is required and where hardship to the respondent himself could be considered, the respondent might well have been found eligible for that relief. The hardship to the respondent, particularly in view of his 20 years of residence after his entry at age 14, his loss of long-standing

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222 Id. at 71.
employment, the adverse effect of his forced departure from this country on his two school-age United States citizen children, and the separation from his lawful permanent resident parents would likely have been found to rise to the level of “extreme” hardship by a majority of this Board.”

_In re Andazola-Rivas, 23 I. & N. Dec. 319 (BIA 2002):_

In _Andazola-Rivas_, the undocumented mother had lived in the U.S. for over 15 years. She had a job, a house, two cars, and other assets. She had two U.S. citizen children, ages 6 and 11. She was not married but was living with her children’s father, who was supporting them financially. All of her family members were living in the United States, but only her mother had legal immigration status.

The BIA concluded that the more limited economic and educational opportunities for the children in Mexico did not satisfy the hardship requirement. For a different result, the BIA indicated, Andazola-Rivas would have had to show that her children would be deprived of _all_ schooling or an opportunity to obtain _any_ education. The BIA refused to consider the fact that Andazola-Rivas’s entire family was living in the U.S., since only her mother was documented. The BIA also relied upon the fact that Andazola-Rivas had financial resources that would help her in Mexico. She could receive money from her relatives in the U.S., rely on her accumulated assets, turn to the father of her children for support, and apply the job skills she learned in the U.S. to a new job in Mexico, the BIA said.

One judge disagreed with the decision, emphasizing that subjecting the citizen children to a lower standard of living and education would cause “a lifetime hardship.” Another, noting that the undocumented mother was a single parent with no means of support in Mexico, concluded that her deportation would create significant hardship for the citizen children warranting relief from removal.

### 3. Seeking Protection from Persecution

Some parents facing removal legitimately fear that citizen children, who are expected to accompany the parent abroad, will face persecution. Individuals who fear persecution are eligible to apply for protection in the U.S._223_ Notably, however,

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223 See INA Sections 208 and 241(b)(3).
current immigration law does not extend asylum protection to instances where U.S. citizen children face the threat of persecution upon effective deportation with their parent(s).

Ironically, the rights of noncitizen children and their parents to seek relief from removal on persecution grounds are better than the rights of citizen children and their parents. The anomaly in the law that extends more protection to the noncitizen child than the citizen child is reflected in immigration court decisions concerning the practice of female genital mutilation ("FGM").

In *In re A-K*, 24 I&N Dec. 275 (BIA 2007), the BIA reversed the decision of an immigration judge granting cancellation of removal premised on the prospect that the father’s two minor U.S. citizen daughters would be subjected to FGM if he was deported to Senegal and his children accompanied him. The Board premised its decision first and foremost on the fact that the citizen children had the legal right to remain in the United States with their mother (who was not then subject to removal proceedings), stating:

> [T]here is no dispute that the two minor children in question are both United States citizens and have a legal right to remain in this country. ... [T]he children in the instant matter could avoid [the risk of FGM] altogether by remaining in the United States, which they are legally entitled to do, either by staying with the parent who is not currently in removal proceedings, or through the appointment of a guardian to ensure their welfare until such time as they reach majority.

The BIA distinguished other cases in which the threat of FGM to non-citizen children was held sufficient to warrant relief from removal. In this circumstance, therefore, the U.S. citizenship of the affected children was a hindrance to cancellation of removal of their father.

Even when citizen children are without another parent in the U.S., courts have denied relief finding that a parent cannot derive protection through a child. Instead of receiving a grant of protection, parents are given the choice of abandoning their citizen child, which can have lifelong consequences for the child, or subjecting the child to threatened harm that causes permanent disfigurement and suffering.

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225 See *Gumaneh v. Mukasey* 515 F.3d 872, 881 (8th Cir. 2008)
The foregoing review of relief from removal shows the untenable choice facing undocumented immigrant parents of citizen children imbedded in U.S. immigration law and policy. The opportunity to obtain relief from deportation based on the potential consequences of the effective deportation of citizen children or permanent break-up of the family is virtually non-existent.
VII. The Effective Deportation of Citizen Children

The effective deportation of citizen children of undocumented immigrants is a troubling consequence of immigration law and policy that does not consider the best interest of children in removal proceedings. According to the Urban Institute, approximately half of all working-age undocumented adults have at least one child, and, on average, one child is likely to be affected for every two workers arrested. In FY 2007, ICE removed more than 275,000 undocumented immigrants from the U.S. We can conclude, therefore, that deportations in FY 2007 alone affected tens of thousands of children, if not well over 100,000 children.

Undocumented immigrant parents of citizen children facing deportation are presented with a wrenching choice—keep the family together by taking the children with them to their native land, or leave the children behind in the care of friends, relatives or the state. This choice is neither an easy nor simple one. In many cases, parents of citizen children came to the United States to escape impoverishment, lack of meaningful economic and educational opportunities, and physical violence in their native lands. Keeping the family together following deportation entails subjecting their American children to these conditions.

Interviews of several parents facing deportation, or who have had a spouse deported, as a consequence of the Worthington raid spoke of the emotional dilemma they face with respect to the future of their citizen children:

- A young mother facing deportation noted a strong emotional desire to take her 2-year-old citizen son with her to Mexico, but acknowledged that the significantly greater economic and educational opportunities for him in the United States may require her to leave him behind with relatives in California.

- A Salvadoran mother of a 4-year-old citizen child noted at the time of the interview that she was struggling to decide what to do with her child when she is deported. Her son is already involved in schooling in Worthington, and the

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226 The Urban Institute, *Paying the Price* at 15-16
228 Concrete and verifiable data regarding the number of affected families are not available. Human rights Watch estimates that since 1997 “1.6 million family members, including husbands, wives, sons and daughters, have been separated from loved ones by deportations,” including an estimated 540,000 of these affected family members who are U.S. citizens by birth or naturalization. Human Rights Watch, *Forced Apart: Families Separated and Immigrants Harmed by United States Deportation Policy*, July 2007, p.44. The New York Times estimates that “at least 13,000 American children have seen one or both parents deported in the past two years after round-ups in factories and neighborhoods.” This number is expected to grow as a consequence of the fact that most immigrants who are deported take their children with them, even if the children are U.S. citizens. New York Times, *Immigration rules Tackle issue of Parents with Citizen Children*, November 17, 2007.
only life he has known is here. While she believes it is important for a child to be with his or her mother, she stated that there would be no educational opportunities for her son if he returned with her to El Salvador.

- A young Guatemalan woman and her husband came to the United States several years prior to the Swift plant raid. They came to the United States after floods destroyed their home in Guatemala. They established a home in Worthington, and have since had two children—both boys, now 2- and 3-years-old. Her husband, who was working at Swift, was arrested and detained during the raid. Within one month, he had been returned to Guatemala. Following the raid, she remained in Worthington without documentation and unable to work. The family separation has had a significant emotional toll on her and her children, and they continue to live in fear that she will soon be arrested by ICE. She and the children have continued to remain here rather than joining her husband because there are no educational opportunities for the children in Guatemala.

Similar instances of the actual or potential separation of families, and the effective deportation of citizen children, have occurred across the country in the aftermath of ICE's increased enforcement efforts:

- In Palo Alto, California, four citizen children—ages 6, 10, 12 and 16—face leaving their country, schools, and friends after their undocumented immigrant parents were arrested by ICE and ordered to be deported to Mexico. "The Ramirez children are among thousands of U.S. citizen children of undocumented parents who are facing deportation and have to decide whether to bring their children with them—taking them away from the educational opportunities they have a right to in the United States—or let them stay and be forced into foster care."229 Notwithstanding the significant emotional trauma that will accompany the separation of the children from their American life, and their worries about enrolling their children (who cannot write in Spanish) in Mexican schools, the family will reportedly go to Mexico together.230

- The undocumented parents of four citizen children—ages 5, 8, 12 and 13—residing in Liberal, Kansas, were arrested and charged with filing fraudulent documents, the victims of attorneys who advised them to remain in the United States and seek political asylum when their visas expired. The father, a

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230 Id.
resident of the United States for 18 years, was deported to Mexico after an immigration judge rejected a request for cancellation of removal based on the hardship that deportation of him and his wife would have on their four citizen children. The children, who have never been to Mexico and neither read nor write Spanish well, will accompany their parents to Mexico to keep the family together. “They and other parents agonize over whether to leave their U.S. citizen children in this country, or take them to Mexico, where they will likely face impoverished conditions.”

- After his wife was deported to Honduras following her arrest in the New Bedford raid, the husband—he himself an undocumented immigrant facing deportation—was faced with the choice of splitting the family or subjecting his two citizen children to impoverished and dangerous living conditions in Honduras. “He must decide, he said, whether to press his case in the United States or declare defeat and take the boys to rejoin their mother in Honduras. If forced to depart, he will weigh whether to leave his sons with friends in New Bedford to get a quality of schooling he believes they will not have in Honduras. Mr. Mancia said he and his wife had decided to leave their home in San Pedro Sula, Honduras, for their safety, because criminal gangs used the streets as a combat zone. [His wife’s] sister was on a public bus returning from Christmas shopping on Dec. 23, 2004, when gang gunmen shot it up, killing her and 27 other passengers, he said.”

- A 23-year-old senior at the University of Texas was forced into the role of mother for her three, younger siblings—ages 13, 15 and 16, all U.S. citizens—after her mother was deported in March 2007 as a “criminal alien.” The mother lost her residency and was sentenced to 4 months for transporting illegal immigrants in her car. The children, living on their sister’s wages from a part-time job and $400 a month in food stamps, have suffered in the absence of their mother.

- Eight-year-old Leslee Acuitlapa, her 13-year-old brother Justin and 3-year-old sister Sarah were born in the U.S. to a U.S. citizen mother and an undocumented father (José Acuitlapa). The family lived in a 3-bedroom home in Georgia, where José worked as a golf course groundskeeper. After José was detained and then deported to Malinalco, Mexico—a town of about 8,000 some 80 miles south of Mexico City—he went to the U.S. consulate in

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231 The Southwest Kansas Register, Do the children go or stay behind? Deportation orders split families, December 27, 2006.
Cuidad Juárez hoping to obtain approval for her husband’s green card based on her status as a U.S. citizen. She discovered that he was barred from re-entry into the U.S. for 10 years because he had entered the U.S. illegally. Unwilling to split up the family, mom and the children moved to Malinalco in October 2007. José is struggling to support his family in Mexico, working in construction and making a fraction of what he did in Georgia. Where they once lived in a 3-bedroom home, the entire family now sleeps in a single room. The children, uprooted from the only life they had ever known in the U.S., are struggling to adjust to life in impoverished conditions in a foreign land. “[The kids] miss Georgia . . . We were forced to come to a place we didn’t know . . . I hope the laws change in the U.S.”

Jorge Barraza, a 5-year-old U.S. citizen, now lives in Mesquite, Texas with his mother, but without his father, Juan Carlos Barraza. Juan Carlos, an undocumented immigrant, was detained and deported to his hometown of Recodo, Mexico. Because of the substandard schools and extensive drug trade in the Mexican state of Sinaloa, Jorge’s parents decided to keep their son in school in Mesquite. Juan Carlos now makes $25/week in Mexico, a fraction of the $600/week he sometimes earned as a chimney cleaner in Texas. His wife (a U.S. citizen) has been forced to give up the $70,000 home she had purchased as well as the family car, and she and Jorge now live with an aunt. Ms. Merano-Barraza works to support her husband in Mexico, sending him $100-200/month. She now takes medication for depression and insomnia.

The deprivations and dangers facing citizen children who are effectively deported with their parents are reflected in the Country Reports on Human Rights Practices prepared and published by the U.S. State Department. In countries that frequently have been the destination of immigrant families who have faced deportation—Mexico, Guatemala, Haiti, El Salvador, Honduras and the Dominican Republic—the State Department has identified problems in areas impacting the safety and well-being of children, including violence against women; poor educational opportunities, conditions, and/or attainment levels; child labor; inadequate employee wages; and little or no economic opportunity for advancement.

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235 Id.
In the countries of origin of the majority of undocumented immigrants, the State Department consistently reports that wages are woefully inadequate to support a decent standard of living for a worker and family:

- **Mexico**: “The minimum wage (slightly over $4 a day) did not provide a decent standard of living for a worker and family, and only a small fraction of the workers in the formal workforce received the minimum wage.”

- **Guatemala**: “The daily minimum wage was $5.94 . . . per day for agricultural work and $6.10 . . . for nonagricultural work. The National Statistics Institute estimated that the minimum food budget for a family of five was $221.97 . . . per month, 10.8 percent higher than in 2006. Labor representatives noted that even when both parents worked, the minimum wage did not allow the family to meet its basic needs. The minimum wage did not provide a decent standard of living for a worker and family. Noncompliance with minimum wage provisions in the informal sector was widespread.”

- **El Salvador**: “The minimum monthly wage was $182.05 for service employees, $178.79 for industrial laborers, and $161.97 for maquila workers. The agricultural minimum wage was $85.59, except for seasonal coffee harvesters ($93.56), sugarcane workers ($79.35), and cotton pickers ($71.38). The minimum wage did not provide a sufficient standard of living for a worker and family.”

- **Haiti**: “The legal minimum daily wage, which was approximately $2.00, . . . did not provide a decent standard of living for a worker and family . . . The majority of citizens worked in the informal sector and subsistence agriculture, where minimum wage legislation does not apply and daily wages of $0.42 . . . were common.”

- **Honduras**: “On March 18, [2007] the government announced a 9.7 percent general increase in the minimum wage retroactive to January 1. On December 26, [2007] the government announced an 11 percent general increase in the minimum wage to be effective January 1, 2008. According to government statistics, the minimum wage with the increases covered only 64 percent of the cost of feeding a family of five. The daily minimum wage scale is divided into 10 sectors based on the size of the worker's place of employment. The scale ranged between $2.88 . . . for unskilled labor and $7.13 . . . for workers in financial and insurance companies.”
• **Dominican Republic:** The minimum monthly salary ranged from approximately $139 to $200 in the private sector, and $81/month in the public sector. For hourly workers, the daily minimum wage was $4.70 based on a 10-hour day, with cane workers receiving only $2.50/day. “The national minimum wage did not provide a decent standard of living for a worker and family.”

Given the poor economic conditions and low wage rates in these countries, it is not surprising that child labor is a persistent problem. The inability of parents to earn even a nominal subsistence wage rate compels the family to remove children from school and put them to work. The State Department reports, for example, that “[c]hild labor was a widespread and serious problem” in Guatemala in 2007, and that “during the year almost one quarter of children had to work to survive.” Similar comments were made regarding children in El Salvador, Honduras, Haiti, and the Dominican Republic. In Mexico, 16% of children age five to 14 were involved in child labor activities, with the main sectors of child labor consisting of sexual exploitation of children (including trafficking for underage prostitution) and agriculture.

Similarly, the State Department reports that educational opportunities for children are lacking and/or accompanied by prohibitive costs, resulting in low participation and/or advancement rates in the countries of origin of undocumented immigrants:

• **Mexico:** “Although the government maintained programs to support maternal and infant health, provide stipends for educating poor children, subsidize food, and provide social workers, problems in children’s health and education remained pervasive.” While 91 percent of children between the ages of six and 14 attend school, only 68% of all children entering the first grade complete all nine years of compulsory education. The average educational attainment among the population 15 years of age and older is just 7.9 years.

• **Guatemala:** Although the constitution and law provide for free compulsory education for all children up to the sixth grade, less than half the population had completed primary education. The average nonindigenous child received 4.2 years of schooling, while the average indigenous child received just 1.3 years.

• **Haiti:** Although public primary education is free and compulsory, 40% of children never attend school due to an insufficient number of public schools.
Of those children attending school, fewer than 15% graduated from secondary school. More than 500,000 children ages six to 11 were not in school, and nearly 75% of adolescents were not in school.

- **El Salvador:** “Education is free, universal, and compulsory through ninth grade and nominally free through high school. In reality, children on average attended school for approximately 5.5 years. The law prohibits persons from impeding children’s access to school due to inability to pay fees or buy uniforms. Some public schools, however, continued to charge students fees, preventing poor children from attending school.”

- **Honduras:** “The education system . . . faced fundamental problems, including high dropout rates, low enrollment at the secondary level, unbalanced distribution of government spending, teacher absenteeism and low quality classroom education. Although the law provides for free, universal and compulsory education through the age of 13, . . . as many as 368,000 of the 1.7 million children ages five to 12 did not receive schooling during the year. In rural areas these were very few schools, some without books or other teaching materials for students. Most children in rural areas attended school only until the third grade and then began work in agricultural activities.”

- **Dominican Republic:** “Education is free, universal, and compulsory for all minors through the eighth grade, but legal mechanisms provide only for primary schooling, which was interpreted as extending through the fourth grade . . . [A] government study estimated that the average grade level achieved by children in public schools was the fifth grade in rural areas and the sixth grade in urban areas.”

In addition to economic and education deprivations, citizen children subject to effective deportation to their parents’ countries of origin often find themselves in environments marked by extreme and escalating violence. Mexico, in particular, has seen a sharp increase in gruesome killings in 2008 as drug cartels battle each other for lucrative turf and distribution channels, and the government to maintain their criminal enterprises.237 The drug war death toll in 2008 is already at 3,725, double the number of drug killings in 2006.238 Innocent persons, including children, have been caught in the crossfire. “[D]ozens if not hundreds of innocents have


been killed in the past year. Among them: a little girl in Cuidad Juarez; six people in front of a recreation center, also in Juarez; a 14-year-old girl in Acapulco; two small children in Tijuana.\(^{239}\) According to newspaper reports, some 50 children have been killed in the first half of this year.\(^{240}\)

Twelve-year-old Alexia Belen Moreno was afraid of living in her father’s house in Cuidad Juarez, where drug cartels are fighting a bloody war. She begged to move in with her mother just across the border in El Paso, Texas. Her parents agreed — but asked her to stay a few more weeks to finish school. Three days later, Alexia was shot in the head blocks from her home in broad daylight. Authorities believe she was caught in crossfire when gunmen killed two men riding with her in the car.\(^{245}\)

Mexican schoolchildren are being exposed to almost unimaginable scenes of gore and violence. On September 29, 2008, schoolchildren came across the bodies of 11 men and one woman in an abandoned lot across from their elementary school in Tijuana. The victims were bound and partially dressed, and each had their tongues cut out.\(^{241}\) Tijuana schools have had to resort to enclosing playgrounds with razor-wire fencing, and gun battles have forced school evacuations on several occasions.\(^{242}\) Across Mexico, the carnage is impossible to hide, with severed heads and decapitated bodies turning up on streets of towns from Chihuahua to Sinaloa, sometimes nearly a dozen at a time.\(^{243}\)

In addition to the threat to physical safety, the scenes of death and violence in Mexican streets threaten the emotional well-being of children. According to the Los Angeles Times, psychologists report significant fear and anxiety among children in Mexico, with anxieties increasingly manifesting themselves in eating and sleeping disorders.\(^{245}\) “Experts say the atrocities that young people are hearing about — and witnessing — are hardening them, traumatizing them, filling their heads with awful images that are hard to shake.”\(^{246}\)

In light of the increasing violence and crime in Mexico, the U.S. State Department has cautioned U.S. citizens traveling to Mexico to be vigilant and alert to safety and security concerns, to limit their travels to well-known tourist destinations and areas, to avoid traveling alone, and to limit travel to main roads during daylight hours.\(^{247}\) The State Department warns that the security situation in Mexico, particularly in

\(^{239}\) Id.


\(^{247}\) U.S. Department of State, Travel Alert – Mexico, October 14, 2008.
the northern border area, “remains fluid; the location and timing of future armed engagements cannot be predicted.” The dangers to U.S. citizens in northern Mexico has prompted the U.S. military to declare Cuidad Juarez off-limits to off-duty U.S. soldiers.

Clearly, the U.S. government is acting responsibly in warning citizens of the increasing dangers and risks of travel to Mexico. At the same time, however, the government is exposing citizen children of undocumented Mexican immigrants to these dangers through the deportation of their parents and the effective deportation of the family. Current immigration law and enforcement policy thus not only disregards the “best interests” of the citizen child by compelling family deportation, it is placing the citizen child who returns to Mexico with his or her undocumented parents in harm’s way.

Similar threats to safety and well-being await citizen children who return with their undocumented parents to other countries. A recent report commissioned by the United Nations Health Commissioner for Refugees, Status Determination and Protection Information section noted widespread subjugation and exploitation of, and violence against, children in Guatemala, El Salvador, Honduras and Nicaragua. Among the findings in this report were the following:

**Guatemala:** In part because of the impunity with which the “self-help” death squads operate, Guatemala has the highest rate of violent death among young people in Central America. In 2006, for example, 395 children suffered violent deaths; in 2007 the number increased to 417. Moreover, the death squad executions are usually accompanied by torture. Yet, the authorities do nothing to stop the killings and, like the murders of women and girls, they dismiss them as simply revenge killings between the members of warring gangs. Thousands of children living in Guatemala’s streets have faced routine beatings, thefts and sexual assaults at the hands of the National Police and private security guards.

**El Salvador:** Child abuse remains a serious and widespread problem in El Salvador. In addition to the malnutrition and inadequate education suffered by up to one-third of all Salvadoran children, many children are physically and

248 Id.
251 Id. at 12
psychologically abused, are forced into low paid employment at a young age and are even forced into child prostitution.\textsuperscript{252}

- **Honduras:** “Large numbers of Honduran children are victims of violence and other human rights violations. The country’s extreme poverty magnifies the problems of its children. Children are sick and dying due to a lack of medicines, oxygen, vehicles, and timely care... Both the police and members of the general population engage in violence against poor youth and children. The U.S. State Department reported in 2007 that Casa Alianza found that ‘66 percent of street children had been assaulted by police.’ Casa Alianza started monitoring violent deaths and extra judicial executions of children and youth under 23 years of age in Honduras in February 1998. Between February 1998 and June 2006, 3,674 children and youth were killed; some 1,255 of them (34 percent) were under the age of 18. Moreover, an increasing number of the victims showed signs of torture and characteristics of unlawful executions. By the end of 2007, the number killed had grown to 3,943.”\textsuperscript{253}

The growth in gangs and gang violence in Central America was the subject of a recent Report for Congress by the Congressional Research Services (CRS).\textsuperscript{254} The CRS reports that Latin America’s average rate of 27.5 homicides per 100,000 people is three times the world average of 8.8 homicides per 100,000 people.\textsuperscript{255} In 2005, the estimated murder rate per 100,000 people was roughly 56 in El Salvador, 41 in Honduras, and 38 in Guatemala.\textsuperscript{256} The CRS also reports that impoverished conditions and lack of educational opportunities in these countries increases the risk that children will be drawn to gang life.\textsuperscript{257}

The harsh conditions children face when effectively deported with their undocumented parents jeopardize not only their current well-being but also their
future. Current U.S. immigration law and policy is creating a large class of citizens who are denied not only basic opportunities this country offers – education, health care, relative safety and security, economic opportunities – but also the more fundamental opportunity to develop ties to their homeland.

The best interests of U.S. society are not served by the creation of a disaffected class of citizens forced from their homes and country during their formative childhood years. This portends long term harm to the peace and stability of all U.S. citizens. As a U.S. citizen, the child who is effectively deported with his parents is free to return to the U.S., and many undoubtedly will as adults. By depriving these citizens of the educational, economic and social benefits of America while they are children, we only increase the likelihood of antisocial behavior when they return to the U.S. as adults.
VIII. State Law Recognition of the “Best Interests” of the Child

In its almost complete disregard of the “best interests” of the citizen child, U.S. immigration law stands in stark contrast to the way U.S. society treats children in comparable circumstances when confronting issues and decisions regarding separation of children from their parents. Nearly every state specifically takes into account the best interests of the children when making custody decisions, protecting the relationship between parent and child. Rather than drawing a fictional line between parents and children and considering them separately, the rights of children are expressly considered under these state laws.

In addressing child custody issues, states consider various factors when determining the best interests of children, including:

- the wishes of the child's parent; 259
- the wishes of the child; 260
- the interaction and relationship of the child with the child's parents, siblings, and other important people in the child's life; 261
- the child's adjustment to home, school and community; 262
- the mental and physical health of the parents and children; 263
- the ability of one parent to allow frequent and meaningful contact with the other. 264

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• which parent has provided primary care for the child;\textsuperscript{265}
• the nature and extent of any duress used in obtaining an agreement regarding
custody, the health, safety, and welfare of the child generally;\textsuperscript{266}
• the developmental needs of the child;\textsuperscript{267}
• the capacity of the parent to take into account and meet the needs of the
child;\textsuperscript{268}
• the length of time the child has spent in a stable environment;\textsuperscript{269}
• and potential disruption of the child's life.\textsuperscript{270}

In fact, forty-two of the fifty states consider the child's interest at some point in
proceedings bearing upon child welfare and custody issues.\textsuperscript{271}

Similarly, state law takes into account the best interests of the child when a
custodial parent wants to remove a child from the jurisdiction over the objection
of a noncustodial parent.\textsuperscript{272} In order for a custodial parent to remove a child from
the jurisdiction, in some states there needs to be a "real advantage" for the best
interests of the child.\textsuperscript{273} In those states, there must be a "substantial improvement"
in the quality of life for the child.\textsuperscript{274} Other states consider the age, developmental
needs, and impact on the child;\textsuperscript{275} the child's preference;\textsuperscript{276} and the improvement
of quality of life for both the parent and the child.\textsuperscript{277} In the end, the primary goal is
to maximize "the child's prospects of a stable, comfortable and happy life."\textsuperscript{278}

In short, the states typically take into account the child's stated interests,
stability, contact with relatives, proximity to the parent, developmental needs, and

\begin{itemize}
\item \textsuperscript{265} See, e.g. Ariz. Stat. § 25-403(a); Minn. Stat. § 518.17
\item \textsuperscript{267} See, e.g., Conn. Stat. § 46b-56; Iowa, Stat. § 538.41; Mt. Stat. § 14-4-212; Nev. Stat. § 125.480; N.D. Stat. § 14-09-06.2;
§ 518.17; Mt. Stat. § 40-4-212; Ohio Stat. § 3107.161; Tenn. Stat. § 36-6-106; Wash. Code 26.09.002
\item \textsuperscript{270} See, e.g., DC Code § 16-914; Idaho Stat. § 32-717.
\item \textsuperscript{271} Letterer, R., \textit{Family Law: Child Custody and Support,} Thompson Gale 50 State Surveys (2005).
\item \textsuperscript{272} See, e.g. \textit{Gilbert v. Gilbert,} 730 N.W.2d 833, 836 (N.D. 2007); \textit{Ireland v. Ireland,} 717 A.2d 676, 685 (Conn. 1998).
\item \textsuperscript{273} \textit{Abbott v. Vimos,} 862 N.E.2d 52, 59 (Mass. Ct. App. 2007).
\item \textsuperscript{274} \textit{Ginther v. Ginther,} 583 A.2d 434, 439 (Penn. 1990).
\item \textsuperscript{275} See, e.g., Minn. Stat. § 518.175; Fla. Stat. § 61.13001; Colo. Stat. § 14-10-129 (including educational opportunities);
\item \textsuperscript{278} \textit{Tropea v. Tropea,} 665 N.E.2d 145, 151 (N.Y. 1996).
educational opportunities when dealing with custody between two parents that are frequently geographically close. Similar factors, such as the child’s preference, quality of life, developmental needs, and educational and economic opportunities, are taken into account when the custodial parent is moving away.

However, when the parent's immigration status is at issue, and the child faces a decision about whether to leave the country or leave his or her family unit, our immigration laws ignore the best interests of the child—including developmental, economic, and educational interests. The INA permits consideration of the interests of the child in only very narrow, discretionary circumstances (“exceptional and extremely unusual hardship”) that, as discussed above, are rarely met.279

There also is a disconnect in procedural protections between family law and immigration law. In order to determine the “best interest” of the child, the vast majority of states provide, in varying circumstances, for the appointment of a guardian ad litem (“GAL”) to determine and advocate for the best interests of the child280 or separate legal counsel to advocate for the child's interests directly.281 Similarly, the federal government has adopted the use of guardians ad litem in the Child Abuse Prevention and Treatment Act (CAPTA). In that law, Congress made the payment of funds to states dependent on the states’ use of GALs to promote the best interests of children in child abuse proceedings.282 Between CAPTA and state family law, guardians ad litem are widespread when it comes to protecting the best interests of children—protection that does not exist in the immigration setting.

The Federal government has on various occasions considered adopting a GAL program or something similar for unaccompanied child immigrants. Such a proposal became law on December 23, 2008, when the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (P.L. 110-457; “TVPRA”) went into effect. It authorizes the Secretary of Heath and Human Services to appoint independent child advocates for vulnerable unaccompanied children.283 These child advocates are intended to be a powerful voice for children.

279 See § 240A(b).
283 See Section 235(c)(6).
The statute specifically provides that child advocates receive “access to materials necessary to effectively advocate for the best interest of the child and protects the child advocate from being forced to testify or provide evidence received from the child.”\textsuperscript{284} Despite the Child Advocate requirement and various GAL proposals for unaccompanied immigrant children, such a proposal has not yet been made for citizen children, who are excluded completely from the proceedings of their immigrant parents.

The same principles and values at work in the context of domestic family law proceedings can and should be applied in U.S. immigration law, policy, and enforcement. The best interests of the U.S. citizen children are no less important or deserving of protection in the immigration setting than in state family law proceedings. U.S. immigration law should be revised to give due consideration to the best interests of U.S. citizen children, including provisions for GALs and/or separate legal counsel to advocate for their interests in deportation proceedings against their undocumented parents.

\textsuperscript{284} Id.
IX. International Norms and Law on The Rights Of Citizen Children

The United States has long played a leading role on the international stage promoting the recognition of, and respect for, international law on human rights. The U.S. government often touts its efforts in this regard, as reflected in public statements by the U.S. Department of State:285

The protection of fundamental human rights was a foundation stone in the establishment of the United States over 200 years ago. Since then, a central goal of U.S. foreign policy has been the promotion of respect for human rights, as embodied in the Universal Declaration of Human Rights. The United States understands that the existence of human rights helps secure the peace, deter aggression, promote the rule of law, combat crime and corruption, strengthen democracies, and prevent humanitarian crises.

The U.S. has expressed its commitment to norms of international human rights law as a signatory to several international conventions, including the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, the American Convention on Human Rights, the Convention on the Rights of the Child.286 This section of the report analyzes the extent to which current U.S. immigration law and policy comports with international human rights standards and law. It is our conclusion that the almost complete disregard of the best interests of the child and a penchant toward family separation under current U.S. immigration law and enforcement policy falls well short of compliance with international law.

A. International Law on the Protection of Family and Rights of Children

International law declares that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”287 Central to recognition of the family as the foundation of society is protection of the right of the family to live together and to be free from arbitrary, abusive or unlawful interference.288 The UN Human Rights Committee has emphasized:289

285 See http://www.state.gov/g/drl/hr/.
286 The United States ratified the ICCPR on June 8, 1992, and signed the American Convention on Human Rights on June 1, 1977. The United States signed the CRC on February 16, 1995, but has not ratified the CRC.
287 See ICCPR, Art. 23, Para. 1; UDHR, Art. 16, Para. 3; ACHR, Art. 17, Para. 1.
288 See ICCPR, Art. 17, Para. 1, and Art. 23; UDHR, Art. 12; ACHR, Art. 11, Para. 2.
289 See UN Human Rights Committee, “General Comment 19: Protection of the Family,” U.N. Doc. HRI/GEN/1/Rev. 1 at 26 (1994). See also Declaration of the Rights and Duties of Man, Arts.V (right to protection of private and family life) and VI (right to a family and protection thereof).
The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. … The right to found a family implies, in principle, the possibility to procreate and live together. … Similarly, the possibility to live together implies the adoption of appropriate measures, both at the internal level and as the case may be, in cooperation with other States, to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons.\(^\text{290}\)

In keeping with these principles, international law imposes limits on states’ powers to deport non-citizens. In at least two cases, the UN Human Rights Committee concluded that a state’s decision to deport the parent of a citizen child violated international conventions.\(^\text{291}\)

The promotion and protection of the best interests of children, find special recognition in the Convention on the Rights of the Child (CRC) which among other, things states:

\[\text{[T]he family, as the fundamental group of society and the natural environment for the growth and well-being of all of its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community; [and]}\]

\[\text{[T]he child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.]}\]

The CRC goes on to specify measures for the recognition of, and respect for, the interests of the child:

- In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.\(^\text{293}\)

\(^\text{290}\) The U.S. Supreme Court similarly has recognized that the “right to live together as a family” is an “enduring American tradition” meriting protection by the Constitution. See Moore v. City of East Cleveland, 431 U.S. 494, 500, 503 n. 12 (1977) (plurality).

\(^\text{291}\) See Winata v. Australia, Communication No. 930/2000, U.N. Doc. CCPR/C/72/D/930/2000 (2001) (finding that Australia’s efforts to deport the Indonesian parents of a citizen child arbitrarily interfered with the family’s right to unity under the ICCPR, rejecting Australia’s argument that deportation of the parents did not force the citizen child to leave Australia with his parents); Madaferri v. Australia, Communication No. 1011/2001, U.N. Doc. CCPR/C/81/D/1011/2001 (2004) (holding that the deportation of the parent of a citizen child violated the ICCPR, even though the parent was deportable due to a prior criminal conviction in his native Italy).

\(^\text{292}\) See CRC, Preamble, Paras. 5 and 6. The ICCPR also provides that “[e]very child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State,” ICCPR, Art. 24, Para. 1. See also ACHR, Art. 19 (“Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.”); UDHR, Art. 25 (“Motherhood and childhood are entitled to special care and assistance.”).

\(^\text{293}\) Id., Art. 3, Para. 1 (emphasis added).
• States Parties shall undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.294

• States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.296

• States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. … For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial or administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.296

• No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.297

• States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents, or as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.298

The CRC (as well as other sources of international law) also notes the importance of educational and economic opportunity to the well-being of family and children, and recognizes a child's “right to education” and a “standard of living adequate for the child's physical, mental, spiritual, moral and social development.”299

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294 Id., Art. 8, Para. 1.
295 Id., Art. 9, Para. 1. Article 9 goes on to state that in the event of separation of a child from one or both parents as a result of State action, such as the detention, imprisonment or deportation of the parent, the State “shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child.” Id., Para. 4.
296 Id., Art. 12.
297 Id., Art. 16, Para. 1.
298 Id., Art. 18, Para. 1.
299 Id., Arts. 27 and 28; see also American Declaration of the Rights and Duties of Man, Arts.VII (right to protection for children), XII (right to education), and XIV (right to work and to fair remuneration); UDHR, Art. 26 (“Everyone has the right to education … Education shall be directed to the full development of the human personality and to strengthening of respect for human rights and fundamental freedoms.”).
The CRC (and other international laws protecting the rights of children) was invoked by the Canadian Supreme Court and recognized as imposing limits on the government’s deportation authority in Baker v. Canada (Minister of Citizenship and Immigration). In Baker, the court held that when immigration authorities make decisions about the deportation of a non-citizen parent of citizen children, they must give “attentiveness and sensitivity to the importance of the rights of children, to their best interests, and to the hardship that may be caused to them by a negative decision.” The court concluded that, although the CRC and other international laws on children’s rights had not been incorporated into Canadian law by Parliament, the values and principles of international law reflected therein nevertheless should be respected in “humanitarian and compassionate” decisions under Canadian immigration law.

Similarly, judicial and administrative bodies of the European Union, applying the European Convention on Human Rights, have recognized that a Member State’s interest in enforcement of its immigration laws must be balanced against (and may be superceded by) the rights to family unity recognized under the Convention. The Council of the European Union has determined that a state’s immigration laws must “take due account of the nature and solidity of the person’s family relationships and the duration of his residence in the Member State and of the existence of family, cultural and social ties with his/her country of origin.”

B. U.S. Immigration Law and Policy Does Not Comply with International Law

In contrast to its sister nations to the north and in Europe, current U.S. immigration law and enforcement policies continue to diverge from widely-recognized standards of international human rights law in several respects. First and foremost, U.S. immigration law largely ignores the best interests of the child in the removal and deportation process. Not only is there no meaningful opportunity for

301 Id., ¶ 74.
302 Id., ¶¶ 69–71. Decisions since Baker was decided in 1999 have emphasized the “best interests” of the child, although the child’s “best interests” have not become a trump card for the parent seeking relief from deportation. See, e.g., Legault v. Canada (Minister of Citizenship and Immigration), 2001 FCT 315 (affirming immigration officer’s determination that criminal history of non-citizen father prevailed over any H&C factors because the child would not suffer “disproportionate hardship” from father’s deportation); Alexander v. Canada ( Solicitor General), 2005 FC 1147, ¶¶ 3–4 (Court rejected argument by non-citizen mother of two citizen children seeking a stay of her removal proceedings concluding that the mother could be deported without violating the rights of her children).
the child to be heard in the administrative and judicial process, the best interests of the child are deemed irrelevant in most instances.

In addition, the widespread separation of parents and children as a consequence of lengthy detention, as well as removal/deportation of parents, cannot be reconciled with the fundamental family unity goals underlying international human rights law and, ironically, U.S. immigration law. Finally, the effective deportation of citizen children – i.e., the departure of citizen children with their deported parent(s) – subjects the child in his or her formative years to clearly inferior educational opportunities (and, in some cases, no meaningful educational opportunity), economic impoverishment and significant health and safety risks, contrary to the letter and spirit of international human rights pronouncements.

The non-compliance of U.S. immigration law and policy with international human rights principles was highlighted in a March 5, 2008, Report of the Special Rapporteur on the Human Rights of Immigrants to the United Nations Human Rights Council:

In recent history, governments have allowed limits to be placed on their power regarding immigration policy, recognizing that it may only be exercised in ways that do not violate fundamental human rights. Therefore, while international law recognizes every State’s right to set immigration criteria and procedures, it does not allow unfettered discretion to set policies for detention or deportation of non-citizens without regard to human rights standards. …

Moreover, the rights of children to live together with their parents are violated by the lack of deportation procedures in which the State’s interest in deportation is balanced against the rights of the children. United States mandatory deportation laws harm the human rights of children of non-citizen parents. 305

The concerns expressed regarding mandatory deportation also hold true for all deportations that fail to consider the rights of children. Changes in U.S. immigration law and policy are clearly warranted if U.S. actions to protect children and advance human rights are to live up to the country’s ideals and rhetoric.

X. Conclusions and Recommendations

The policy decisions and legislative choices made during our current immigration crisis have generated heated debate. The advocates on both sides of the issues present reasoned and sincerely felt arguments. There are some basic principles, however, on which the most ardent advocates on both sides ought to be able to agree. One such area of agreement should be to protect and promote the best interests for children who are Constitutionally vested with the rights and privileges of U.S. citizenship.

Through this report, we have endeavored to examine the various harms visited upon U.S. citizen children of undocumented immigrants as a consequence of worksite and home raids that have, quite simply and clearly, torn families apart. The humanitarian crises that have stemmed from the unprecedented escalation of interior immigration enforcement over the last several years reveals the U.S. immigration for what it is – a clearly broken system. Interior immigration enforcement, conducted through worksite and home raids, clearly and directly harms children who are citizens of the United States and therefore have certain basic rights which presently are being disregarded. Our current immigration laws, policies, and enforcement scheme clash violently with the deep-seated and fundamental aim of protecting the best interests of our children in other areas of our law and society, as well as fundamental principles of human rights our nation champions and holds dear.

We offer the following recommendations to prompt meaningful and reasoned debate on the issues, with the hope that this will lead to a more humane immigration policy that does not dismiss the harm to citizen children as little more than collateral damage. We do so cognizant of the concern that the citizen child not be transformed into a *per se* ticket to lawful residency in the United States by the undocumented parent. These recommendations are designed to (1) address the systemic barriers to lawful entry and/or presence in the United States that have led to the large, undocumented population; (2) afford the undocumented, immigrant parent of a citizen child a reasonable opportunity to make his or her case for remaining in the United States based on consideration of the “best interests” of the child, bringing immigration law and policy into conformity with other areas of law where the interests of children are recognized; and (3) minimize the harm to children in the immediate aftermath of enforcement actions by suggesting changes to arrest and/or detention practices without compromising law enforcement.
Recommendations to Congress

Address Systemic Barriers to Lawful Status:

- Correct systemic problems with the lack of visa numbers available to meet the needs of U.S. employers and families by adopting a system that is responsive to labor market needs and promotes the goal of family unity.

- Enact legislation that recaptures visa numbers that have gone unused because of governmental delays and inefficiencies. Such legislation should include oversight to ensure the timely and fair adjudication of benefit petitions.

- Amend the INA to allow a citizen child to petition for the lawful admission and residency of a parent when such child is under 21 years of age. In the case of a citizen child under age 18, a legal guardian, acting in the best interests of the child, should be allowed to petition for a parent.306

- Amend the INA to permit the temporary admission of the parent of a citizen child to enable the parent to pursue immigration processing in the U.S. This will promote family unity and afford the citizen child an opportunity to pursue his or her education and integration in the U.S. during the period the parent is waiting for a visa number to become available. Currently, the lack of available visa numbers and bureaucratic delays in processing keep the parent seeking admission and, in cases where the parent is unwilling to split up the family, the citizen child out of the U.S. for an extended period of time.

- Congress should provide a humanitarian mechanism that promotes family unity and allows undocumented immigrants an opportunity to seek “adjustment” of their immigration status without first departing the U.S. Current immigration law operates to deprive undocumented immigrants of a meaningful opportunity to obtain lawful status by requiring them to leave the U.S. and apply for an immigrant visa at a U.S. consulate in their home countries. The majority of undocumented immigrants who leave the U.S. to obtain a visa, however, are barred from returning to the U.S. The law thus places the undocumented immigrant with family obligations in the U.S. in a “Catch 22” situation – he cannot adjust his status without leaving, but if he leaves he is barred from returning to the U.S. for up to 10 years. Congress should amend the INA to address this situation, promote family unity and afford undocumented immigrants with citizen children a meaningful path to lawful residence that

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306 In particular, the family-based “immediate relative” definition (INA Section 201(b)(2)(A)(i)) should be amended to provide that “the term ‘immediate relatives’ means the children, spouses, and parents of a citizen of the United States.”
does not compel the break-up or effective deportation of the family.\textsuperscript{307} Such a mechanism could include a “fine” for unlawful entry.

- Under current immigration law, the authority to waive the 3- or 10-year-bar to readmission to the U.S. (discussed in the immediately preceding bullet) rests entirely within the discretion of the Attorney General. There are inadequate legal standards governing the exercise of this discretion, and the law prohibits judicial review of waiver determinations. Congress should amend the law to require the exercise of the waiver authority reasonably and in good faith, with due regard for the best interests of the U.S. citizen children of the undocumented immigrant. In addition, Congress should amend the law to allow for judicial review of waiver determinations. Finally, Congress should afford the citizen child and/or his lawful guardian the ability to petition for a waiver on behalf of the parent, and provide the citizen child with legal standing to challenge an adverse determination by the Attorney General in U.S. federal courts.\textsuperscript{308}

**Meaningfully Address the “Best Interests” of Citizen Children in the Removal Process:**

- Congress should grant immigration judges the discretion to consider the “best interests” of the citizen child in deportation or removal proceedings. Under current immigration law, the best interests of the child – an overriding concern in other areas of the law – find no hearing and are accorded no weight. The amendment of the INA to at least permit immigration judges to consider child welfare issues in the deportation or removal process would restore the discretion available to immigration judges prior to the 1996 INA amendments.\textsuperscript{309}

- The provisions of the INA relating to relief from removal (\textit{i.e.}, deportation) should be amended to provide for consideration of the “best interests” of a child who is a citizen or lawful permanent resident of the United States. Current immigration law permits cancellation of removal only where the removal would result in “exceptional and extremely unusual hardship to the alien’s spouse, parent or child who is a citizen of the United States or an

\textsuperscript{307} This can be accomplished by amending INA Section 212(a)(9) to eliminate bars that preclude families from remaining in the United States while seeking adjustment of status. Alternatively, Congress should amend INA Sections 212(a)(9)(b)(v) and 212(a)(9)(C)(iii) to provide for a reasonable waiver of the bar to readmission to the United States – one that incorporates consideration of the best interests of citizen children of an immigrant who is inadmissible due to the accrual of unlawful presence.

\textsuperscript{308} These proposed changes would require the amendment of INA Section 212 and INA Section 242.

\textsuperscript{309} The INA should be amended to provide that: “In the case of an alien deportable under section 237 who is the parent of a child who is a citizen of the United States, the immigration judge may exercise discretion to decline to order the alien removed from the United States if the judge determines that such removal is clearly against the best interests of the child.”
alien lawfully admitted for permanent residence.” This heightened standard of hardship, enacted with the 1996 INA amendments, makes it virtually impossible to obtain relief from deportation based on the hardship to the citizen child. It thus serves as another barrier to family unity in the U.S. and promotes the effective deportation of citizen children with their undocumented parent(s).310

• Current immigration law precludes undocumented immigrants who are “aggravated felons” from obtaining relief from removal (i.e., deportation). However, the definition of an “aggravated felon” is extremely broad, encompassing persons convicted of petty offenses, including offenses that do not entail any jail time. The additional penalty of removal visited upon both undocumented and legal immigrants labeled an “aggravated felon” as a result of a minor offense cannot be reconciled with promoting the “best interests” of the citizen child. By amending the INA to permit such immigrants to seek relief from removal, Congress will afford immigration judges the discretion to make removal determinations based on the relevant facts and circumstances of each individual case, including consideration of the severity of the criminal offense, present danger to the community, and the “best interests” of affected citizen children.

• Current immigration law effectively prevents the review of cancellation of removal determinations made by immigration judges. Congress should amend the INA to provide for meaningful judicial review in U.S. federal courts of removal decisions adverse to the undocumented immigrant where the interests of citizen children are involved.311

• Unlike other areas of law involving child welfare issues, current immigration law does not provide for an appointment of a guardian ad litem to attend to and advocate for the best interests of affected children. To bring immigration law in line with child welfare laws, and to promote the full and fair consideration of the “best interests” of the citizen child in deportation proceedings, Congress should amend the INA to allow for participation of a guardian ad litem for a citizen child in any immigration proceeding against the child’s parent(s). In particular, the guardian ad litem should have standing to protect and advocate for the best interests of the citizen child in all immigration detention and removal proceedings.

310 Congress should amend INA Section 240A(b)(1)(D) to expressly provide for consideration of the “best interests” of the citizen child. Alternatively, this section of the INA should be amended to revert to the prior “suspension of removal” standard in place prior to the 1996 INA amendments.

311 INA Section 242 should be amended to provide for de novo review in U.S. federal courts of cancellation of removal determinations that are adverse to the interests of citizen children.
SEVERING A LIFELINE: The Neglect of Citizen Children in America’s Immigration Enforcement Policy

• Amend the INA to allow parents to derive asylum through their citizen children. In particular, the threat of persecution of the citizen child in the undocumented parent’s country of origin should be recognized as a basis for granting asylum to the parent.

• Amend the INA to eliminate mandatory detention of arrestees in circumstances involving child care issues, thereby affording ICE discretion to release undocumented immigrant parents of minor children with appropriate monitoring and/or reporting in lieu of detention. Mandatory detention of certain immigrants, regardless of primary child care responsibilities, should be eliminated.

Effective Congressional Oversight of Immigration Enforcement and Its Impact on Citizen Children:

• The potential for a child welfare crisis created by increased interior enforcement actions could shift a significant portion of raid costs to state and local governments. Congress should appropriate funds to enable state and local governments to meaningfully assess and address the impact of current immigration law and enforcement policies on citizen children.

• ICE should be required to gather demographic and other data regarding citizen children affected by immigration enforcement actions, and document specific actions undertaken to minimize the harm to children. ICE should be required to report such data annually to Congress.

Recommendations to U.S. Immigration and Customs Enforcement

ICE Enforcement Practices:

• ICE’s “Guidelines for Identifying Humanitarian Concerns Among Administrative Arrestees When Conducting Worksite Enforcement Operations” should be modified and made mandatory in all enforcement actions. The Guidelines should be modified as follows:

  1. State and Local humanitarian response teams must be given sufficient advance, confidential notice of a worksite enforcement action so that the teams can deploy and be present at the raid site at the time of the enforcement action to assess and address humanitarian issues warranting release rather than detention (hereafter, a “Humanitarian Assessment”);
2. ICE must provide interpreters capable of communicating with detainees in their native languages, and/or ICE must arrange to have federally certified interpreters available at the raid site to assist in communications between detainees and humanitarian response team members;

3. ICE must give reasonable consideration to the release recommendations of the humanitarian response team, and the rationale for rejecting any such recommendation must be documented;

4. Except in exigent circumstances where the safety of arrestees or law enforcement personnel is subject to imminent threat, no arrestee shall be removed from the site of the enforcement action until a Humanitarian Assessment and determination on any release recommendation has been completed;

5. If the parent of a minor child is to be detained, and care arrangements for the child are unknown or unsatisfactory to the humanitarian response team, ICE must take appropriate action to provide the parent and humanitarian response team with resources necessary to ensure that suitable arrangements are made for the care of the child while the parent is detained (including, without limitation, making care arrangements with local NGOs and community organizations, and/or arranging with state and/or local authorities to provide for the care of the child), and document the arrangements made with respect to each such child;

6. Before any arrestee subject to detention is removed from the site of the enforcement action, the individual must be afforded prompt, reasonable, confidential access to a telephone to make necessary arrangements for the care of children or other family members;

7. In the event it becomes necessary to transfer a detainee from the original detention facility to another detention facility, on the date of the transfer ICE must notify a designated representative of the humanitarian response team of the name of the detainee being moved, the date of transfer, and complete contact information for the new detention facility, and such information must be made immediately available to the public by the humanitarian response team;

8. In order to ensure that the immigration rights of the detainee, as well as the "best interests" of any citizen child, are adequately addressed and protected in the removal and deportation process, ICE must afford
detainees prompt access to immigration counsel (not merely criminal defense counsel);

9. In keeping with the immediately preceding paragraph, ICE may not ask detainees to consent to voluntary removal from the United States within 72 hours of their arrest and until detainees have been afforded a reasonable opportunity to consult an immigration lawyer, nor may ICE or other authorities exert pressure on detainees to agree to voluntary removal through threats of extended incarceration or other coercive means;

10. Any request by ICE or authorities that a detainee consider voluntary removal must explain to the detainee the immigration consequences of accepting voluntary removal, be presented in plain, understandable language in the detainee’s native language, and read to the detainee in his or her native language, and the detainee must be afforded a reasonable opportunity to consult with counsel and his family in the United States before consenting to voluntary removal; and

11. If a detainee is removed or deported, on the date of removal or deportation ICE shall notify the designated representative of the humanitarian response team of the name of the detainee, the date of removal, the departure location, and the removal destination, and such information must be made immediately available to the public by the humanitarian response team.

ICE should develop guidelines for conducting home raids that ensure that such enforcement actions are truly “targeted” and minimize the prospect of potential harm to children, as follows:

1. Except in the case of exigent circumstances implicating the safety of law enforcement personnel or other persons, raids of homes where children are or may be present should be discouraged and reasonable efforts should be made to identify and arrest the target of a warrant outside the home and the presence of children;

2. Random stops of persons at or near schools, school bus stops, and other locations where children are or may be present should be precluded, as should random checks of persons based on racial or ethnic profiling;

3. “Knock and talk” searches should be precluded absent a clear demonstration of probable cause to believe that the target of a home
enforcement action is present at the subject location, such as observation of the subject of an arrest warrant in or about the premises;

4. Denial of entry to a home by a resident, including closing an answered door, shall not be deemed adequate probable cause to permit forced entry to the home;

5. In the absence of demonstrable probable cause to believe that the subject of an arrest warrant is physically present at a location (such as by observation of the subject of the warrant in or about the premises), entry to the home must be premised on informed consent by an adult resident of the home with the right to provide such consent;

6. Except in the case of exigent circumstances implicating the safety of law enforcement personnel or other persons, reasonable efforts should be made to serve arrest warrants at a home at times when the potential harm or trauma to children is minimized, such as when children are more likely to be outside the home; and

7. Whenever an individual is arrested during a home raid, reasonable efforts must be undertaken to assess whether the detainee has child care responsibilities that cannot or may not be met by others, consistent with the ICE Guidelines for worksite raids (as modified above) and assessment of the best interest of the child, and ICE should give reasonable consideration to electronic monitoring of the arrestee in lieu of detention pending removal proceedings.

Detention/Prosecutorial Discretion:

- ICE should develop guidelines favoring the release of undocumented immigrant parents of minor children with appropriate monitoring and/or reporting in lieu of detention. The guidelines favoring release with monitoring and/or reporting in lieu of detention should extend to all parents of minor children, not only single parents, including the arrested father of children whose mother remains with the children and vice versa.

- ICE should be flexible and use their best judgment – in other words, use prosecutorial discretion – when making decisions about whether to arrest and detain parents. Where the presence of an undocumented immigrant with citizen children poses no immediate or identifiable threat to the safety
and welfare of others, and strict enforcement threatens harm to children, ICE should consider the harm to children in prioritizing enforcement activities.

**Recommendations to Immigration Courts**

- Upon amendment of the INA as recommended above, immigration judges should be required consider the “best interests” of the citizen child in rendering removal and deportation decisions, and the citizen child and/or his or her guardian ad litem shall be permitted to appear and present argument and evidence relating to the same in all immigration judicial proceedings.

- The immigration judiciary should establish mandatory guidelines favoring the release of detained parents of minor children present in the United States in lieu of continued detention. These guidelines should allow for the release of detained parents subject to electronic monitoring and/or regular reporting to immigration authorities, and/or the establishment of a reasonable bond that meaningfully takes into account the financial resources of the detainee.

**Recommendations to State and Local Governments/Agencies**

- Humanitarian Response Teams, consisting of state and local social service agency personnel and/or legal rights organizations, should be formed and trained to identify and respond to humanitarian issues in the course and aftermath of immigration enforcement actions. Immigration enforcement arrestees should be considered for release in lieu of detention due to humanitarian issues, including child care issues, at the time of enforcement actions. Wherever possible, the Team should include persons capable of communicating with potential targets of enforcement actions in the native language of such persons.

- Humanitarian Response Team members must not act in a law enforcement capacity, and arrestees must be informed that any information shared with a team member will not be communicated to ICE agents or other law enforcement personnel except with the written consent of the arrestee and as may be appropriate for ICE to assess the possible release of the arrestee on humanitarian grounds.

- State and local communities should assess the educational, health, and economic impact raids have upon children and affected communities.
State and local social service agencies should take steps to ensure that citizen children who are eligible for social services are not precluded from receiving benefits due to fear of removal of a parent.

State and local governments should assess whether the participation of local law enforcement personnel in immigration enforcement actions complies with state child welfare, due process and detention standards, and whether such participation jeopardizes public safety or otherwise interferes with the performance of traditional child welfare and local law enforcement activities.
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Appendix A:
INS Memorandum re:
“Exercising Prosecutorial Discretion,”
November 17, 2000
U.S. Department of Justice
Immigration and Naturalization Service

425 I Street NW
Washington, DC 20536

NOV 17 2000

MEMORANDUM TO REGIONAL DIRECTORS
DISTRICT DIRECTORS
CHIEF PATROL AGENTS
REGIONAL AND DISTRICT COUNSEL

FROM: Doris Meisner
Commissioner
Immigration and Naturalization Service

SUBJECT: Exercising Prosecutorial Discretion

Since the 1996 amendments to the Immigration and Nationality Act (INA) which limited the authority of immigration judges to provide relief from removal in many cases, there has been increased attention to the scope and exercise of the Immigration and Naturalization Service’s (INS or the Service) prosecutorial discretion. This memorandum describes the principles with which INS exercises prosecutorial discretion and the process to be followed in making and monitoring discretionary decisions. Service officers are not only authorized by law but expected to exercise discretion in a judicious manner at all stages of the enforcement process—from planning investigations to enforcing final orders—subject to their chains of command and to the particular responsibilities and authority applicable to their specific position. In exercising this discretion, officers must take into account the principles described below in order to promote the efficient and effective enforcement of the immigration laws and the interests of justice.

More specific guidance geared to exercising discretion in particular program areas already exists in some instances,¹ and other program-specific guidance will follow separately.

¹ For example, standards and procedures for placing an alien in deferred action status are provided in the Standard Operating Procedures for Enforcement Officers: Arrest, Detention, Processing, and Removal (Standard Operating Procedures), Part X. This memorandum is intended to provide general principles, and does not replace any previous specific guidance provided about particular INS actions, such as “Supplemental Guidelines on the Use of Cooperating Individuals and Confidential Informants Following the Enactment of IIRIRA,” dated December 29, 1997. This memorandum is not intended to address every situation in which the exercise of prosecutorial discretion may be appropriate. If INS personnel in the exercise of their duties recognize apparent conflict between any of their specific policy requirements and these general guidelines, they are encouraged to bring the matter to their supervisor’s attention, and any conflict between policies should be raised through the appropriate chain of command for resolution.
However, INS officers should continue to exercise their prosecutorial discretion in appropriate cases during the period before more specific program guidance is issued.

A statement of principles concerning discretion serves a number of important purposes. As described in the “Principles of Federal Prosecution,” 2 part of the U.S. Attorneys’ manual, such principles provide convenient reference points for the process of making prosecutorial decisions; facilitate the task of training new officers in the discharge of their duties; contribute to more effective management of the Government’s limited prosecutorial resources by promoting greater consistency among the prosecutorial activities of different offices and between their activities and the INS’ law enforcement priorities; make possible better coordination of investigative and prosecutorial activity by enhancing the understanding between the investigative and prosecutorial components; and inform the public of the careful process by which prosecutorial decisions are made.

Legal and Policy Background

“Prosecutorial discretion” is the authority of an agency charged with enforcing a law to decide whether to enforce, or not to enforce, the law against someone. The INS, like other law enforcement agencies, has prosecutorial discretion and exercises it every day. In the immigration context, the term applies not only to the decision to issue, serve, or file a Notice to Appear (NTA), but also to a broad range of other discretionary enforcement decisions, including among others: Focusing investigative resources on particular offenses or conduct; deciding whom to stop, question, and arrest; maintaining an alien in custody; seeking expedited removal or other forms of removal by means other than a removal proceeding; settling or dismissing a proceeding; granting deferred action or staying a final order; agreeing to voluntary departure, withdrawal of an application for admission, or other action in lieu of removing the alien; pursuing an appeal; and executing a removal order.

The “favorable exercise of prosecutorial discretion” means a discretionary decision not to assert the full scope of the INS’ enforcement authority as permitted under the law. Such decisions will take different forms, depending on the status of a particular matter, but include decisions such as not issuing an NTA (discussed in more detail below under “Initiating Proceedings”), not detaining an alien placed in proceedings (where discretion remains despite mandatory detention requirements), and approving deferred action.

2 For this discussion, and much else in this memorandum, we have relied heavily upon the Principles of Federal Prosecution, chapter 9-27.000 in the U.S. Department of Justice’s United States Attorneys’ Manual (Oct. 1997). There are significant differences, of course, between the role of the U.S. Attorneys’ offices in the criminal justice system, and INS responsibilities to enforce the immigration laws, but the general approach to prosecutorial discretion stated in this memorandum reflects that taken by the Principles of Federal Prosecution.
Courts recognize that prosecutorial discretion applies in the civil, administrative arena just as it does in criminal law. Moreover, the Supreme Court “has recognized on several occasions over many years that an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.” Heckler v. Chaney, 470 U.S. 821, 831 (1985). Both Congress and the Supreme Court have recently reaffirmed that the concept of prosecutorial discretion applies to INS enforcement activities, such as whether to place an individual in deportation proceedings. INA section 242(g); Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471 (1999). The “discretion” in prosecutorial discretion means that prosecutorial decisions are not subject to judicial review or reversal, except in extremely narrow circumstances. Consequently, it is a powerful tool that must be used responsibly.

As a law enforcement agency, the INS generally has prosecutorial discretion within its area of law enforcement responsibility unless that discretion has been clearly limited by statute in a way that goes beyond standard terminology. For example, a statute directing that the INS “shall” remove removable aliens would not be construed by itself to limit prosecutorial discretion, but the specific limitation on releasing certain criminal aliens in section 236(c)(2) of the INA evidences a specific congressional intention to limit discretion not to detain certain criminal aliens in removal proceedings that would otherwise exist. Personnel who are unsure whether the INS has discretion to take a particular action should consult their supervisor and legal counsel to the extent necessary.

It is important to recognize not only what prosecutorial discretion is, but also what it is not. The doctrine of prosecutorial discretion applies to law enforcement decisions whether, and to what extent, to exercise the coercive power of the Government over liberty or property, as authorized by law in cases when individuals have violated the law. Prosecutorial discretion does not apply to affirmative acts of approval, or grants of benefits, under a statute or other applicable law that provides requirements for determining when the approval should be given. For example, the INS has prosecutorial discretion not to place a removable alien in proceedings, but it does not have prosecutorial discretion to approve a naturalization application by an alien who is ineligible for that benefit under the INA.

This distinction is not always an easy, bright-line rule to apply. In many cases, INS decisionmaking involves both a prosecutorial decision to take or not to take enforcement action, such as placing an alien in removal proceedings, and a decision whether or not the alien is substantively eligible for a benefit under the INA. In many cases, benefit decisions involve the exercise of significant discretion which in some cases is not judicially reviewable, but which is not prosecutorial discretion.

Prosecutorial discretion can extend only up to the substantive and jurisdictional limits of the law. It can never justify an action that is illegal under the substantive law pertaining to the
conduct, or one that while legal in other contexts, is not within the authority of the agency or officer taking it. Prosecutorial discretion to take an enforcement action does not modify or waive any legal requirements that apply to the action itself. For example, an enforcement decision to focus on certain types of immigration violators for arrest and removal does not mean that the INS may arrest any person without probable cause to do so for an offense within its jurisdiction. Service officers who are in doubt whether a particular action complies with applicable constitutional, statutory, or case law requirements should consult with their supervisor and obtain advice from the district or sector counsel or representative of the Office of General Counsel to the extent necessary.

Finally, exercising prosecutorial discretion does not lessen the INS’ commitment to enforce the immigration laws to the best of our ability. It is not an invitation to violate or ignore the law. Rather, it is a means to use the resources we have in a way that best accomplishes our mission of administering and enforcing the immigration laws of the United States.

**Principles of Prosecutorial Discretion**

Like all law enforcement agencies, the INS has finite resources, and it is not possible to investigate and prosecute all immigration violations. The INS historically has responded to this limitation by setting priorities in order to achieve a variety of goals. These goals include protecting public safety, promoting the integrity of the legal immigration system, and deterring violations of the immigration law.

It is an appropriate exercise of prosecutorial discretion to give priority to investigating, charging, and prosecuting those immigration violations that will have the greatest impact on achieving these goals. The INS has used this principle in the design and execution of its border enforcement strategy, its refocus on criminal smuggling networks, and its concentration on fixing benefit-granting processes to prevent fraud. An agency’s focus on maximizing its impact under appropriate principles, rather than devoting resources to cases that will do less to advance these overall interests, is a crucial element in effective law enforcement management.

The Principles of Federal Prosecution governing the conduct of U.S. Attorneys use the concept of a “substantial Federal interest.” A U.S. Attorney may properly decline a prosecution if “no substantial Federal interest would be served by prosecution.” This principle provides a useful frame of reference for the INS, although applying it presents challenges that differ from those facing a U.S. Attorney. In particular, as immigration is an exclusively Federal responsibility, the option of an adequate alternative remedy under state law is not available. In an immigration case, the interest at stake will always be Federal. Therefore, we must place particular emphasis on the element of substantiality. How important is the Federal interest in the case, as compared to other cases and priorities? That is the overriding question, and answering it requires examining a number of factors that may differ according to the stage of the case.
As a general matter, INS officers may decline to prosecute a legally sufficient immigration case if the Federal immigration enforcement interest that would be served by prosecution is not substantial. Except as may be provided specifically in other policy statements or directives, the responsibility for exercising prosecutorial discretion in this manner rests with the District Director (DD) or Chief Patrol Agent (CPA) based on his or her common sense and sound judgment. The DD or CPA should obtain legal advice from the District or Sector Counsel to the extent that such advice may be necessary and appropriate to ensure the sound and lawful exercise of discretion, particularly with respect to cases pending before the Executive Office for Immigration Review (EOIR). The DD’s or CPA’s authority may be delegated to the extent necessary and proper, except that decisions not to place a removable alien in removal proceedings, or decisions to move to terminate a proceeding which in the opinion of the District or Sector Counsel is legally sufficient, may not be delegated to an officer who is not authorized under 8 C.F.R. § 239.1 to issue an NTA. A DD’s or CPA’s exercise of prosecutorial discretion will not normally be reviewed by Regional or Headquarters authority. However, DDs and CPAs remain subject to their chains of command and may be supervised as necessary in their exercise of prosecutorial discretion.

Investigations

Priorities for deploying investigative resources are discussed in other documents, such as the interior enforcement strategy, and will not be discussed in detail in this memorandum. These previously identified priorities include identifying and removing criminal and terrorist aliens, deterring and dismantling alien smuggling, minimizing benefit fraud and document abuse, responding to community complaints about illegal immigration and building partnerships to solve local problems, and blocking and removing employers’ access to undocumented workers. Even within these broad priority areas, however, the Service must make decisions about how best to expend its resources.

Managers should plan and design operations to maximize the likelihood that serious offenders will be identified. Supervisors should ensure that front-line investigators understand that it is not mandatory to issue an NTA in every case where they have reason to believe that an alien is removable, and agents should be encouraged to bring questionable cases to a supervisor’s attention. Operational planning for investigations should include consideration of appropriate procedures for supervisory and legal review of individual NTA issuing decisions.

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3 In some cases even a substantial immigration enforcement interest in prosecuting a case could be outweighed by other interests, such as the foreign policy of the United States. Decisions that require weighing such other interests should be made at the level of responsibility within the INS or the Department of Justice that is appropriate in light of the circumstances and interests involved.

4 This general reference to DDs and CPAs is not intended to exclude from coverage by this memorandum other INS personnel, such as Service Center directors, who may be called upon to exercise prosecutorial discretion and do not report to DDs or CPAs, or to change any INS chains of command.

5 Exercising prosecutorial discretion with respect to cases pending before EOIR involves procedures set forth at 8 CFR 239.2 and 8 CFR Part 3, such as obtaining the court’s approval of a motion to terminate proceedings.
Careful design of enforcement operations is a key element in the INS’ exercise of prosecutorial discretion. Managers should consider not simply whether a particular effort is legally supportable, but whether it best advances the INS’ goals, compared with other possible uses of those resources. As a general matter, investigations that are specifically focused to identify aliens who represent a high priority for removal should be favored over investigations which, by their nature, will identify a broader variety of removable aliens. Even an operation that is designed based on high-priority criteria, however, may still identify individual aliens who warrant a favorable exercise of prosecutorial discretion.6

*Initiating and Pursuing Proceedings*

Aliens who are subject to removal may come to the Service’s attention in a variety of ways. For example, some aliens are identified as a result of INS investigations, while others are identified when they apply for immigration benefits or seek admission at a port-of-entry. While the context in which the INS encounters an alien may, as a practical matter, affect the Service’s options, it does not change the underlying principle that the INS has discretion and should exercise that discretion appropriately given the circumstances of the case.

Even when an immigration officer has reason to believe that an alien is removable and that there is sufficient evidence to obtain a final order of removal, it may be appropriate to decline to proceed with that case. This is true even when an alien is removable based on his or her criminal history and when the alien—if served with an NTA—would be subject to mandatory detention. The INS may exercise its discretion throughout the enforcement process. Thus, the INS can choose whether to issue an NTA, whether to cancel an NTA prior to filing with the immigration court or move for dismissal in immigration court (under 8 CFR 239.2), whether to detain (for those aliens not subject to mandatory detention), whether to offer an alternative to removal such as voluntary departure or withdrawal of an application for admission, and whether to stay an order of deportation.

The decision to exercise any of these options or other alternatives in a particular case requires an individualized determination, based on the facts and the law. As a general matter, it is better to exercise favorable discretion as early in the process as possible, once the relevant facts have been determined, in order to conserve the Service’s resources and in recognition of the alien’s interest in avoiding unnecessary legal proceedings. However, there is often a conflict

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6 For example, operations in county jails are designed to identify and remove criminal aliens, a high priority for the Service. Nonetheless, an investigator working at a county jail and his or her supervisor should still consider whether the exercise of prosecutorial discretion would be appropriate in individual cases.
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between making decisions as soon as possible, and making them based on evaluating as many relevant, credible facts as possible. Developing an extensive factual record prior to making a charging decision may itself consume INS resources in a way that negates any saving from forgoing a removal proceeding.

Generally, adjudicators may have a better opportunity to develop a credible factual record at an earlier stage than investigative or other enforcement personnel. It is simply not practicable to require officers at the arrest stage to develop a full investigative record on the equities of each case (particularly since the alien file may not yet be available to the charging office), and this memorandum does not require such an analysis. Rather, what is needed is knowledge that the INS is not legally required to institute proceedings in every case, openness to that possibility in appropriate cases, development of facts relevant to the factors discussed below to the extent that it is reasonably possible to do so under the circumstances and in the timeframe that decisions must be made, and implementation of any decision to exercise prosecutorial discretion.

There is no precise formula for identifying which cases warrant a favorable exercise of discretion. Factors that should be taken into account in deciding whether to exercise prosecutorial discretion include, but are not limited to, the following:

- **Immigration status**: Lawful permanent residents generally warrant greater consideration. However, other removable aliens may also warrant the favorable exercise of discretion, depending on all the relevant circumstances.
- **Length of residence in the United States**: The longer an alien has lived in the United States, particularly in legal status, the more this factor may be considered a positive equity.
- **Criminal history**: Officers should take into account the nature and severity of any criminal conduct, as well as the time elapsed since the offense occurred and evidence of rehabilitation. It is appropriate to take into account the actual sentence or fine that was imposed, as an indicator of the seriousness attributed to the conduct by the court. Other factors relevant to assessing criminal history include the alien’s age at the time the crime was committed and whether or not he or she is a repeat offender.
- **Humanitarian concerns**: Relevant humanitarian concerns include, but are not limited to, family ties in the United States; medical conditions affecting the alien or the alien’s family; the fact that an alien entered the United States at a very young age; ties to one’s home country (e.g., whether the alien speaks the language or has relatives in the home country); extreme youth or advanced age; and home country conditions.
- **Immigration history**: Aliens without a past history of violating the immigration laws (particularly violations such as reentering after removal, failing to appear at hearing, or resisting arrest that show heightened disregard for the legal process) warrant favorable consideration to a greater extent than those with such a history. The seriousness of any such violations should also be taken into account.
• **Likelihood of ultimately removing the alien:** Whether a removal proceeding would have a reasonable likelihood of ultimately achieving its intended effect, in light of the case circumstances such as the alien's nationality, is a factor that should be considered.

• **Likelihood of achieving enforcement goal by other means:** In many cases, the alien's departure from the United States may be achieved more expeditiously and economically by means other than removal, such as voluntary return, withdrawal of an application for admission, or voluntary departure.

• **Whether the alien is eligible or is likely to become eligible for other relief:** Although not determinative on its own, it is relevant to consider whether there is a legal avenue for the alien to regularize his or her status if not removed from the United States. The fact that the Service cannot confer complete or permanent relief, however, does not mean that discretion should not be exercised favorably if warranted by other factors.

• **Effect of action on future admissibility:** The effect an action such as removal may have on an alien can vary—for example, a time-limited as opposed to an indefinite bar to future admissibility—and these effects may be considered.

• **Current or past cooperation with law enforcement authorities:** Current or past cooperation with the INS or other law enforcement authorities, such as the U.S. Attorneys, the Department of Labor, or National Labor Relations Board, among others, weighs in favor of discretion.

• **Honorable U.S. military service:** Military service with an honorable discharge should be considered as a favorable factor. See Standard Operating Procedures Part V.D.8 (issuing an NTA against current or former member of armed forces requires advance approval of Regional Director).

• **Community attention:** Expressions of opinion, in favor of or in opposition to removal, may be considered, particularly for relevant facts or perspectives on the case that may not have been known to or considered by the INS. Public opinion or publicity (including media or congressional attention) should not, however, be used to justify a decision that cannot be supported on other grounds. Public and professional responsibility will sometimes require the choice of an unpopular course.

• **Resources available to the INS:** As in planning operations, the resources available to the INS to take enforcement action in the case, compared with other uses of the resources to fulfill national or regional priorities, are an appropriate factor to consider, but it should not be determinative. For example, when prosecutorial discretion should be favorably exercised under these factors in a particular case, that decision should prevail even if there is detention space available.

Obviously, not all of the factors will be applicable to every case, and in any particular case one factor may deserve more weight than it might in another case. There may be other factors, not on the list above, that are appropriate to consider. The decision should be based on the totality of the circumstances, not on any one factor considered in isolation. General guidance such as this cannot provide a “bright line” test that may easily be applied to determine the “right” answer in every case. In many cases, minds reasonably can differ, different factors may point in different directions, and there is no clearly “right” answer. Choosing a course of action in difficult
cases must be an exercise of judgment by the responsible officer based on his or her experience, good sense, and consideration of the relevant factors to the best of his or her ability.

There are factors that may not be considered. Impermisssible factors include:

- An individual’s race, religion, sex, national origin, or political association, activities or beliefs;¹
- The officer’s own personal feelings regarding the individual; or
- The possible effect of the decision on the officer’s own professional or personal circumstances.

In many cases, the procedural posture of the case, and the state of the factual record, will affect the ability of the INS to use prosecutorial discretion. For example, since the INS cannot admit an inadmissible alien to the United States unless a waiver is available, in many cases the INS’ options are more limited in the admission context at a port-of-entry than in the deportation context.

Similarly, the INS may consider the range of options and information likely to be available at a later time. For example, an officer called upon to make a charging decision may reasonably determine that he or she does not have a sufficient, credible factual record upon which to base a favorable exercise of prosecutorial discretion not to put the alien in proceedings, that the record cannot be developed in the timeframe in which the decision must be made, that a more informed prosecutorial decision likely could be made at a later time during the course of proceedings, and that if the alien is not served with an NTA now, it will be difficult or impossible to do so later.

Such decisions must be made, however, with due regard for the principles of these guidelines, and in light of the other factors discussed here. For example, if there is no relief available to the alien in a removal proceeding and the alien is subject to mandatory detention if

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¹This general guidance on factors that should not be relied upon in making a decision whether to enforce the law against an individual is not intended to prohibit their consideration to the extent they are directly relevant to an alien’s status under the immigration laws or eligibility for a benefit. For example, religion and political beliefs are often directly relevant in asylum cases and need to be assessed as part of a prosecutorial determination regarding the strength of the case, but it would be improper for an INS officer to treat aliens differently based on his personal opinion about a religion or belief. Political activities may be relevant to a ground of removal on national security or terrorism grounds. An alien’s nationality often directly affects his or her eligibility for adjustment or other relief, the likelihood that he or she can be removed, or the availability of prosecutorial options such as voluntary return, and may be considered to the extent these concerns are pertinent.
placed in proceedings, that situation suggests that the exercise of prosecutorial discretion, if appropriate, would be more useful to the INS if done sooner rather than later. It would be improper for an officer to assume that someone else at some later time will always be able to make a more informed decision, and therefore never to consider exercising discretion.

Factors relevant to exercising prosecutorial discretion may come to the Service’s attention in various ways. For example, aliens may make requests to the INS to exercise prosecutorial discretion by declining to pursue removal proceedings. Alternatively, there may be cases in which an alien asks to be put in proceedings (for example, to pursue a remedy such as cancellation of removal that may only be available in that forum). In either case, the INS may consider the request, but the fact that it is made should not determine the outcome, and the prosecutorial decision should be based upon the facts and circumstances of the case. Similarly, the fact that an alien has not requested prosecutorial discretion should not influence the analysis of the case. Whether, and to what extent, any request should be considered is also a matter of discretion. Although INS officers should be open to new facts and arguments, attempts to exploit prosecutorial discretion as a delay tactic, as a means merely to revisit matters that have been thoroughly considered and decided, or for other improper tactical reasons should be rejected. There is no legal right to the exercise of prosecutorial discretion, and (as stated at the close of this memorandum) this memorandum creates no right or obligation enforceable at law by any alien or any other party.

Process for Decisions

*Identification of Suitable Cases*

No single process of exercising discretion will fit the multiple contexts in which the need to exercise discretion may arise. Although this guidance is designed to promote consistency in the application of the immigration laws, it is not intended to produce rigid uniformity among INS officers in all areas of the country at the expense of the fair administration of the law. Different offices face different conditions and have different requirements. Service managers and supervisors, including DDs and CPAs, and Regional, District, and Sector Counsel must develop mechanisms appropriate to the various contexts and priorities, keeping in mind that it is better to exercise discretion as early in process as possible once the factual record has been identified. In particular, in cases where it is clear that no statutory relief will be available at the immigration hearing and where detention will be mandatory, it best conserves the Service’s resources to make a decision early.

Enforcement and benefits personnel at all levels should understand that prosecutorial discretion exists and that it is appropriate and expected that the INS will exercise this authority in appropriate cases. DDs, CPAs, and other supervisory officials (such as District and

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8 DDs, CPAs, and other INS personnel should also be open, however, to possible reconsideration of decisions (either for or against the exercise of discretion) based upon further development of the facts.
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Sector Counsels) should encourage their personnel to bring potentially suitable cases for the favorable exercise of discretion to their attention for appropriate resolution. To assist in exercising their authority, DDs and CPAs may wish to convene a group to provide advice on difficult cases that have been identified as potential candidates for prosecutorial discretion.

It is also appropriate for DDs and CPAs to develop a list of "triggers" to help their personnel identify cases at an early stage that may be suitable for the exercise of prosecutorial discretion. These cases should then be reviewed at a supervisory level where a decision can be made as to whether to proceed in the ordinary course of business, to develop additional facts, or to recommend a favorable exercise of discretion. Such triggers could include the following facts (whether proven or alleged):

Lawful permanent residents;
Aliens with a serious health condition;
Juveniles;
Elderly aliens;
Adopted children of U.S. citizens;
U.S. military veterans;
Aliens with lengthy presence in United States (i.e., 10 years or more); or
Aliens present in the United States since childhood.

Since workloads and the type of removable aliens encountered may vary significantly both within and between INS offices, this list of possible trigger factors for supervisory review is intended neither to be comprehensive nor mandatory in all situations. Nor is it intended to suggest that the presence or absence of "trigger" facts should itself determine whether prosecutorial discretion should be exercised, as compared to review of all the relevant factors as discussed elsewhere in these guidelines. Rather, development of trigger criteria is intended solely as a suggested means of facilitating identification of potential cases that may be suitable for prosecutorial review as early as possible in the process.

Documenting Decisions

When a DD or CPA decides to exercise prosecutorial discretion favorably, that decision should be clearly documented in the alien file, including the specific decision taken and its factual and legal basis. DDs and CPAs may also document decisions based on a specific set of facts not to exercise prosecutorial discretion favorably, but this is not required by this guidance.

The alien should also be informed in writing of a decision to exercise prosecutorial discretion favorably, such as not placing him or her in removal proceedings or not pursuing a case. This normally should be done by letter to the alien and/or his or her attorney of record, briefly stating the decision made and its consequences. It is not necessary to recite the facts of the case or the INS' evaluation of the facts in such letters. Although the specifics of the letter
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will vary depending on the circumstances of the case and the action taken, it must make it clear to the alien that exercising prosecutorial discretion does not confer any immigration status, ability to travel to the United States (unless the alien applies for and receives advance parole), immunity from future removal proceedings, or any enforceable right or benefit upon the alien. If, however, there is a potential benefit that is linked to the action (for example, the availability of employment authorization for beneficiaries of deferred action), it is appropriate to identify it.

The obligation to notify an individual is limited to situations in which a specific, identifiable decision to refrain from action is taken in a situation in which the alien normally would expect enforcement action to proceed. For example, it is not necessary to notify aliens that the INS has refrained from focusing investigative resources on them, but a specific decision not to proceed with removal proceedings against an alien who has come into INS custody should be communicated to the alien in writing. This guideline is not intended to replace existing standard procedures or forms for deferred action, voluntary return, voluntary departure, or other currently existing and standardized processes involving prosecutorial discretion.

Future Impact

An issue of particular complexity is the future effect of prosecutorial discretion decisions in later encounters with the alien. Unlike the criminal context, in which statutes of limitation and venue requirements often preclude one U.S. Attorney's office from prosecuting an offense that another office has declined, immigration violations are continuing offenses that, as a general principle of immigration law, continue to make an alien legally removable regardless of a decision not to pursue removal on a previous occasion. An alien may come to the attention of the INS in the future through seeking admission or in other ways. An INS office should abide by a favorable prosecutorial decision taken by another office as a matter of INS policy, absent new facts or changed circumstances. However, if a removal proceeding is transferred from one INS district to another, the district assuming responsibility for the case is not bound by the charging district's decision to proceed with an NTA, if the facts and circumstances at a later stage suggest that a favorable exercise of prosecutorial discretion is appropriate.

Service offices should review alien files for information on previous exercises of prosecutorial discretion at the earliest opportunity that is practicable and reasonable and take any such information into account. In particular, the office encountering the alien must carefully assess to what extent the relevant facts and circumstances are the same or have changed either procedurally or substantively (either with respect to later developments, or more detailed knowledge of past circumstances) from the basis for the original exercise of discretion. A decision by an INS office to take enforcement action against the subject of a previous documented exercise of favorable prosecutorial discretion should be memorialized with a memorandum to the file explaining the basis for the decision, unless the charging documents on their face show a material difference in facts and circumstances (such as a different ground of deportability).
Legal Liability and Enforceability

The question of liability may arise in the implementation of this memorandum. Some INS personnel have expressed concerns that, if they exercise prosecutorial discretion favorably, they may become subject to suit and personal liability for the possible consequences of that decision. We cannot promise INS officers that they will never be sued. However, we can assure our employees that Federal law shields INS employees who act in reasonable reliance upon properly promulgated agency guidance within the agency’s legal authority – such as this memorandum—from personal legal liability for those actions.

The principles set forth in this memorandum, and internal office procedures adopted hereto, are intended solely for the guidance of INS personnel in performing their duties. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Training and Implementation

Training on the implementation of this memorandum for DDs, CPAs, and Regional, District, and Sector Counsel will be conducted at the regional level. This training will include discussion of accountability and periodic feedback on implementation issues. In addition, following these regional sessions, separate training on prosecutorial discretion will be conducted at the district level for other staff, to be designated. The regions will report to the Office of Field Operations when this training has been completed.
Appendix B:
ICE Memorandum re: Prosecutorial Discretion, October 24, 2005
MEMORANDUM FOR: All OPLA Chief Counsel

FROM: William J. Howard
Principal Legal Advisor

SUBJECT: Prosecutorial Discretion

As you know, when Congress abolished the Immigration and Naturalization Service and divided its functions among U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (CIS), the Office of the Principal Legal Advisor (OPLA) was given exclusive authority to prosecute all removal proceedings. See Homeland Security Act of 2002, Pub. L. No. 107-296, § 442(c), 116 Stat. 2135, 2194 (2002) (“the legal advisor shall represent the bureau in all exclusion, deportation, and removal proceedings before the Executive Office for Immigration Review”). Complicating matters for OPLA is that our cases come to us from CBP, CIS, and ICE, since all three bureaus are authorized to issue Notices to Appear (NTAs).

OPLA is handling about 300,000 cases in the immigration courts, 42,000 appeals before the Board of Immigration Appeals (BIA or Board), and 12,000 motions to reopen each year. Our circumstances in litigating these cases differ in a major respect from our predecessor, the INS’s Office of General Counsel. Gone are the days when INS district counsels, having chosen an attorney-client model that required client consultation before INS trial attorneys could exercise prosecutorial discretion, could simply walk down the hall to an INS district director, immigration agent, adjudicator, or border patrol officer to obtain the client’s permission to proceed with that exercise. Now NTA-issuing clients or stakeholders might be in different agencies, in different buildings, and in different cities from our own.

Since the NTA-issuing authorities are no longer all under the same roof, adhering to INS OGC’s attorney-client model would minimize our efficiency. This is particularly so since we are litigating our hundreds of thousands of cases per year with only 600 or so attorneys; that our case preparation time is extremely limited, averaging about 20 minutes a case; that our caseload will increase since Congress is now providing more resources for border and interior immigration enforcement; that many of the cases that come to us from NTA-issuers lack supporting evidence like conviction documents; that we must prioritize our cases to allow us to place greatest emphasis on our national security and criminal alien dockets; that we have growing collateral duties such as
All OPLA Chief Counsel

Page 2 of 9

assisting the Department of Justice with federal court litigation; that in many instances we lack sufficient staff to adequately brief Board appeals or oppositions to motions to reopen; and that the opportunities to exercise prosecutorial discretion arise at many different points in the removal process.

To elaborate on this last point, the universe of opportunities to exercise prosecutorial discretion is large. Those opportunities arise in the pre-filing stage, when, for example, we can advise clients who consult us whether or not to file NTAs or what charges and evidence to base them on. They arise in the course of litigating the NTA in immigration court, when we may want, among other things, to move to dismiss a case as legally insufficient, to amend the NTA, to decide not to oppose a grant of relief, to join in a motion to reopen, or to stipulate to the admission of evidence. They arise after the immigration judge has entered an order, when we must decide whether to appeal all or part of the decision. Or they may arise in the context of DRO’s decision to detain aliens, when we must work closely with DRO in connection with defending that decision in the administrative or federal courts. In the 50-plus immigration courtrooms across the United States in which we litigate, OPLA’s trial attorneys continually face these and other prosecutorial discretion questions. Litigating with maximum efficiency requires that we exercise careful yet quick judgment on questions involving prosecutorial discretion. This will require that OPLA’s trial attorneys become very familiar with the principles in this memorandum and how to apply them.

Further giving rise to the need for this guidance is the extraordinary volume of immigration cases that is now reaching the United States Courts of Appeals. Since 2001, federal court immigration cases have tripled. That year, there were 5,435 federal court cases. Four years later, in fiscal year 2004, that number had risen to 14,699 federal court cases. Fiscal year 2005 federal court immigration cases will approximate 15,000. The lion’s share of these cases consists of petitions for review in the United States Courts of Appeal. Those petitions are now overwhelming the Department of Justice’s Office of Immigration Litigation, with the result that the Department of Justice has shifted responsibility to brief as many as 2,000 of these appellate cases to other Departmental components and to the U.S. Attorneys’ Offices. This, as you know, has brought you into greater contact with Assistant U.S. Attorneys who are turning to you for assistance in remanding some of these cases. This memorandum is also intended to lessen the number of such remand requests, since it provides your office with guidance to assist you in eliminating cases that would later merit a remand.

Given the complexity of immigration law, a complexity that federal courts at all levels routinely acknowledge in published decisions, your expert assistance to the U.S. Attorneys is critical. 1 It is all the more important because the decision whether to

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1 As you know, if and when your resources permit it, I encourage you to speak with your respective United States Attorneys’ Offices about having those Offices designate Special Assistant U.S. Attorneys from OPLA’s ranks to handle both civil and criminal federal court immigration litigation. The U.S.
proceed with litigating a case in the federal courts must be gauged for reasonableness, lest, in losing the case, the courts award attorneys' fees against the government pursuant to the Equal Access to Justice Act, 28 U.S.C. 2412. In the overall scheme of litigating the removal of aliens at both the administrative and federal court level, litigation that often takes years to complete, it is important that we all apply sound principles of prosecutorial discretion, uniformly throughout our offices and in all of our cases, to ensure that the cases we litigate on behalf of the United States, whether at the administrative level or in the federal courts, are truly worth litigating.

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With this background in mind, I am directing that all OPLA attorneys apply the following principles of prosecutorial discretion:

1) Prosecutorial Discretion Prior to or In Lieu of NTA Issuance:

In the absence of authority to cancel NTAs, we should engage in client liaison with CBP, CIS (and ICE) via, or in conjunction with, CIS/CBP attorneys on the issuance of NTAs. We should attempt to discourage issuance of NTAs where there are other options available such as administrative removal, crewman removal, expedited removal or reinstatement, clear eligibility for an immigration benefit that can be obtained outside of immigration court, or where the desired result is other than a removal order.

It is not wise or efficient to place an alien into proceedings where the intent is to allow that person to remain unless, where compelling reasons exist, a stayed removal order might yield enhanced law enforcement cooperation. See Attachment A (Memorandum from Wesley Lee, ICE Acting Director, Office of Detention and Removal, Alien Witnesses and Informants Pending Removal (May 18, 2005)); see also Attachment B (Detention and Removal Officer's Field Manual, Subchapters 20.7 and 20.8, for further explanation on the criteria and procedures for stays of removal and deferred action).

Examples:

- **Immediate Relative of Service Person** - If an alien is an immediate relative of a military service member, a favorable exercise of discretion, including not issuing an NTA, should be a prime consideration. Military service includes current or former members of the Armed Forces, including: the United States Army, Air Force, Navy, Marine Corps, Coast Guard, or National Guard, as well as service in the Philippine Scouts. OPLA counsel should analyze possible eligibility for citizenship under

  Attorneys' Offices will benefit greatly from OPLA SAUSAs, especially given the immigration law expertise that resides in each of your Offices, the immigration law's great complexity, and the extent to which the USAOs are now overburdened by federal immigration litigation.
sections 328 and 329. See Attachment C (Memorandum from Marcy M. Forman, Director, Office of Investigations, Issuance of Notices to Appeal, Administrative Orders of Removal, or Reinstatement of a Final Removal Order on Aliens with United States Military Service (June 21, 2004)).

- **Clearly Approvable I-130/I-485** - Where an alien is the potential beneficiary of a clearly approvable I-130/I-485 and there are no serious adverse factors that otherwise justify expulsion, allowing the alien the opportunity to legalize his or her status through a CIS-adjudicated adjustment application can be a cost-efficient option that conserves immigration court time and benefits someone who can be expected to become a lawful permanent resident of the United States. See Attachment D (Memorandum from William J. Howard, OPLA Principal Legal Advisor, Exercising Prosecutorial Discretion to Dismiss Adjustment Cases (October 6, 2005)).

- **Administrative Voluntary Departure** - We may be consulted in a case where administrative voluntary departure is being considered. Where an alien is eligible for voluntary departure and likely to depart, OPLA attorneys are encouraged to facilitate the grant of administrative voluntary departure or voluntary departure under safeguards. This may include continuing detention if that is the likely end result even should the case go to the Immigration Court.

- **NSEERS Failed to Register** - Where an alien subject to NSEERS registration failed to timely register but is otherwise in status and has no criminal record, he should not be placed in proceedings if he has a reasonable excuse for his failure. Reasonably excusable failure to register includes the alien’s hospitalization, admission into a nursing home or extended care facility (where mobility is severely limited); or where the alien is simply unaware of the registration requirements. See Attachment E (Memorandum from Victor Cerda, OPLA Acting Principal Legal Advisor, Changes to the National Security Entry Exit Registration System (NSEERS)(January 8, 2004)).

- **Sympathetic Humanitarian Factors** - Deferred action should be considered when the situation involves sympathetic humanitarian circumstances that rise to such a level as to cry for an exercise of prosecutorial discretion. Examples of this include where the alien has a citizen child with a serious medical condition or disability or where the alien or a close family member is undergoing treatment for a potentially life threatening disease. DHS has the most prosecutorial discretion at this stage of the process.

2) **Prosecutorial Discretion after the Notice to Appear has issued, but before the Notice to Appear has been filed:**

We have an additional opportunity to appropriately resolve a case prior to expending court resources when an NTA has been issued but not yet filed with the immigration court. This would be an appropriate action in any of the situations
identified in #1. Other situations may also arise where the reasonable and rational
decision is not to prosecute the case.

Example:

- U or T visas- Where a “U” or “T” visa application has been submitted, it
  may be appropriate not to file an NTA until a decision is made on such an
  application. In the event that the application is denied then proceedings
  would be appropriate.

3) Prosecutorial Discretion after NTA Issuance and Filing:

The filing of an NTA with the Immigration Court does not foreclose further
prosecutorial discretion by OPLA Counsel to settle a matter. There may be
ample justification to move the court to terminate the case and to thereafter
cancel the NTA as improvidently issued or due to a change in circumstances
such that continuation is no longer in the government interest. We have
regulatory authority to dismiss proceedings. Dismissal is by regulation without
prejudice. See 8 CFR §§ 239.2(c), 1239.2(c). In addition, there are numerous
opportunities that OPLA attorneys have to resolve a case in the immigration
court. These routinely include not opposing relief, waiving appeal or making
agreements that narrow issues, or stipulations to the admissibility of evidence.
There are other situations where such action should also be considered for
purposes of judicial economy, efficiency of process or to promote justice.

Examples:

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2 Unfortunately, DHS’s regulations, at 8 C.F.R. 239.1, do not include OPLA’s attorneys among the 38
categories of persons given authority there to issue NTAs and thus to cancel NTAs. That being said,
when an OPLA attorney encounters an NTA that lacks merit or evidence, he or she should apprise the
issuing entity of the deficiency and ask that the entity cure the deficiency as a condition of OPLA’s
going forward with the case. If the NTA has already been filed with the immigration court, the OPLA
attorney should attempt to correct it by filing a form I-261, or, if that will not correct the problem,
should move to dismiss proceedings without prejudice. We must be sensitive, particularly given our
need to prioritize our national security and criminal alien cases, to whether prosecuting a particular case
has little law enforcement value to the cost and time required. Although we lack the authority to sua
sponte cancel NTAs, we can move to dismiss proceedings for the many reasons outlined in 8 CFR §
239.2(q) and 8 CFR § 1239.2(c). Moreover, since OPLA attorneys do not have independent authority
to grant deferred action status, stays of removal, parole, etc., once we have concluded that an alien
should not be subjected to removal, we must still engage the client entity to “defer” the action, issue the
stay or initiate administrative removal.
• **Relief Otherwise Available**- We should consider moving to dismiss proceedings without prejudice where it appears in the discretion of the OPLA attorney that relief in the form of adjustment of status appears clearly approvable based on an approvable I-130 or I-140 and appropriate for adjudication by CIS. See October 6, 2005 Memorandum from Principal Legal Advisor Bill Howard, supra. Such action may also be appropriate in the special rule cancellation NACARA context. We should also consider remanding a case to permit an alien to pursue naturalization. This allows the alien to pursue the matter with CIS, the DHS entity with the principal responsibility for adjudication of immigration benefits, rather than to take time from the overburdened immigration court dockets that could be expended on removal issues.

• **Appealing Humanitarian Factors**- Some cases involve sympathetic humanitarian circumstances that rise to such a level as to cry for an exercise of prosecutorial discretion. Examples of this, as noted above, include where the alien has a citizen child with a serious medical condition or disability or where the alien or a close family member is undergoing treatment for a potentially life threatening disease. OPLA attorneys should consider these matters to determine whether an alternative disposition is possible and appropriate. Proceedings can be reinstated when the situation changes. Of course, if the situation is expected to be of relatively short duration, the Chief Counsel Office should balance the benefit to the Government to be obtained by terminating the proceedings as opposed to administratively closing proceedings or asking DRO to stay removal after entry of an order.

• **Law Enforcement Assets/CIS**- There are often situations where federal, State or local law enforcement entities desire to have an alien remain in the United States for a period of time to assist with investigation or to testify at trial. Moving to dismiss a case to permit a grant of deferred action may be an appropriate result in these circumstances. Some offices may prefer to administratively close these cases, which gives the alien the benefit of remaining and law enforcement the option of calendaring proceedings at any time. This may result in more control by law enforcement and enhanced cooperation by the alien. A third option is a stay.

4) **Post-Hearing Actions:**

Post-hearing actions often involve a great deal of discretion. This includes a decision to file an appeal, what issues to appeal, how to respond to an alien’s appeal, whether to seek a stay of a decision or whether to join a motion to reopen. OPLA

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3 Once in proceedings, this typically will occur only where the alien has shown prima facie eligibility for naturalization and that his or her case involves exceptionally appealing or humanitarian factors. 8 CFR §1229.1(f). It is improper for an immigration judge to terminate proceedings absent an affirmative communication from DHS that the alien would be eligible for naturalization but for the pendency of the deportation proceeding. Matter of Cruz, 15 I & N Dec. 236 (BIA 1975); see Nolan v. Holmes, 334 F.3d 189 (2d Cir. 2003) (Second Circuit upholds BIA’s reliance on Matter of Cruz when petitioner failed to establish prima facie eligibility.).
attorneys are also responsible for replying to motions to reopen and motions to reconsider. The interests of judicial economy and fairness should guide your actions in handling these matters.

Examples:

- Remanding to an Immigration Judge or Withdrawing Appeals- Where the appeal brief filed on behalf of the alien respondent is persuasive, it may be appropriate for an OPLA attorney to join in that position to the Board, to agree to remand the case back to the immigration court, or to withdraw a government appeal and allow the decision to become final.

- Joining in Untimely Motions to Reopen- Where a motion to reopen for adjustment of status or cancellation of removal is filed on behalf of an alien with substantial equities, no serious criminal or immigration violations, and who is legally eligible to be granted that relief except that the motion is beyond the 90-day limitation contained in 8 C.F.R. § 1003.23, strongly consider exercising prosecutorial discretion and join in this motion to reopen to permit the alien to pursue such relief to the immigration court.

- Federal Court Remands to the BIA- Cases filed in the federal courts present challenging situations. In a habeas case, be very careful to assess the reasonableness of the government’s detention decision and to consult with our clients at DRO. Where there are potential litigation pitfalls or unusually sympathetic fact circumstances and where the BIA has the authority to fashion a remedy, you may want to consider remanding the case to the BIA. Attachments H and I provide broad guidance on these matters. Bring concerns to the attention of the Office of the United States Attorney or the Office of Immigration Litigation, depending upon which entity has responsibility over the litigation. See generally Attachment F (Memorandum from OPLA Appellate Counsel, U.S. Attorney Remand Recommendations (rev. May 10, 2005)); see also Attachment G (Memorandum from Thomas W. Hussey, Director, Office of Immigration Litigation, U.S. Department of Justice, Remand of Immigration Cases (Dec. 8, 2004)).

- In absentia orders. Reviewing courts have been very critical of in absentia orders that, for such things as appearing late for court, deprive aliens of a full hearing and the ability to pursue relief from removal. This is especially true where court is still in session and there does not seem to be any prejudice to either holding or rescheduling the hearing for later that day. These kinds of decisions, while they may be technically correct, undermine respect for the fairness of the removal process and cause courts to find reasons to set them aside. These decisions can create adverse precedent in the federal courts as well as BAJA liability. OPLA counsel should be mindful of this and, if possible, show a measured degree of flexibility, but
only if convinced that the alien or his or her counsel is not abusing the removal court process.

5) Final Orders- Stays and Motions to Reopen/Reconsider:

Attorney discretion doesn’t cease after a final order. We may be consulted on whether a stay of removal should be granted. See Attachment B (Subchapter 20.7). In addition, circumstances may develop whether the proper and just course of action would be to move to reopen the proceeding for purposes of terminating the NTA.

Examples:

- **Ineffective Assistance-** An OPLA attorney is presented with a situation where an alien was deprived of an opportunity to pursue relief, due to incompetent counsel, where a grant of such relief could reasonably be anticipated. It would be appropriate, assuming compliance with Matter of Lozada, to join in or not oppose motions to reconsider to allow the relief applications to be filed.

- **Witnesses Needed, Recommend a Stay-** State law enforcement authorities need an alien as a witness in a major criminal case. The alien has a final order and will be removed from the United States before trial can take place. OPLA counsel may recommend that a stay of removal be granted and this alien be released on an order of supervision.

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Prosecutorial discretion is a very significant tool that sometimes enables you to deal with the difficult, complex and contradictory provisions of the immigration laws and cases involving human suffering and hardship. It is clearly DHS policy that national security violators, human rights abusers, spies, traffickers both in narcotics and people, sexual predators and other criminals are removal priorities. It is wise to remember that cases that do not fall within these categories sometimes require that we balance the cost of an action versus the value of the result. Our reasoned determination in making prosecutorial discretion decisions can be a significant benefit to the efficiency and fairness of the removal process.

**Official Use Disclaimer:**

This memorandum is protected by the Attorney/Client and Attorney Work product privileges and is for Official Use Only. This memorandum is intended solely to provide legal advice to the Office of the Chief Counsels (OCC) and their staffs regarding the appropriate and lawful exercise of prosecutorial discretion, which will lead to the efficient management of resources. It is not intended to, does not, and may not be relied upon to create or confer any right(s) or benefit(s), substantive or procedural, enforceable at law by any individual or other party in
removal proceedings, in litigation with the United States, or in any other form or manner. Discretionary decisions of the OCC regarding the exercise of prosecutorial discretion under this memorandum are final and not subject to legal review or recourse. Finally this internal guidance does not have the force of law, or of a Department of Homeland Security Directive.
Appendix C:
ICE Guidelines for Identifying Humanitarian Concerns among Administrative Arrestees When Conducting Worksite Enforcement Operations
Guidelines for Identifying Humanitarian Concerns among Administrative Arrestees
When Conducting Worksite Enforcement Operations

- Prior to conducting a worksite enforcement operation targeting the arrest of more than 150 persons, ICE should develop a comprehensive plan to identify, at the earliest possible point, any individuals arrested on administrative charges who may be sole care givers or who have other humanitarian concerns, including those with serious medical conditions that require special attention, pregnant women, nursing mothers, parents who are the sole caretakers of minor children or disabled or seriously ill relatives, and parents who are needed to support their spouses in caring for sick or special needs children or relatives. Where practical, at the direction of the Assistant Secretary, ICE will continue to implement these guidelines in all smaller worksite enforcement operations.

- In support of ICE efforts to identify arrestees who should be considered for humanitarian release after processing, ICE should coordinate with the Department of Health and Human Services, Division of Immigration Health Services (DIHS), to provide a sufficient number of personnel to assess the humanitarian needs of arrestees at the ICE processing site.

- DIHS personnel should be given prompt access to all arrestees under safe and humane conditions on the day of the action. To the extent possible, DIHS should be provided access on a rolling basis right after processing of each arrestee. DIHS personnel should be given the time necessary to assess each arrestee's individual circumstances. The purpose of the assessment should be to determine whether the arrestee, the arrestee's children, or other people, including sick or disabled relatives, have been placed at risk as a result of the arrest, based on the illegal activity of the arrestee. To the greatest extent possible, the information provided in the course of such assessments should be used exclusively for humanitarian purposes. DIHS should also inform ICE of any medical issues that might necessitate humanitarian release or additional care. If, during the course of the arrest operation or processing, an emergency medical condition is identified, ICE will ensure that arrestees receive appropriate emergency medical care.

- If DIHS is unable to support an ICE request for a planned worksite enforcement action, ICE should consider coordinating with an appropriate state or local social service agency (SSSA) or utilizing contracted personnel to provide humanitarian screening. If DIHS support for ICE worksite enforcement operations is found not to meet the needs or standards of ICE and such issues cannot be resolved through consultation between ICE and DIHS, then ICE should consider coordinating with an alternative social service agency or utilize contracted personnel.

- In the event DIHS is unable to provide the requested support, ICE should provide advance notice of a planned worksite enforcement operation to the SSSA in the appropriate jurisdiction. In worksite enforcement operations, ICE will consider

This document shall not create or confer any right or benefit on any other person or party, private or public.
whether such coordination is appropriate, without regard to whether DIHS is able to provide the requested support, and will make such coordination whenever possible. While advanced notification to a large number of state social service officials may not be prudent or feasible for every operation, when practicable, ICE should attempt to inform the cabinet-level state official responsible for social services of an impending worksite enforcement action. The notification should be given with sufficient advanced notice to allow the SSSA to identify resources that can support the operation.

- Once the SSSA has been notified, ICE should work with the SSSA to define its role on the day of the enforcement operation, to include proactively screening arrestees for humanitarian concerns. Humanitarian screening should occur at a time and place determined by ICE that minimizes its impact on the law enforcement operation, provided that such screening occur within 12 hours of the enforcement action, or as soon as practical.

- DIHS representatives and any SSSA representatives who have screened arrestees should make recommendations to ICE about individuals who should be released on humanitarian grounds. ICE should promptly take these recommendations into consideration when making determinations about whether arrestees will be released on their own recognizance or through some other alternative to detention. While ICE should take humanitarian issues raised by DIHS or an SSSA into consideration, these concerns will be weighed against other factors, including the arrestee's criminal record, an existing removal order and other factors that would normally mandate detention. It is also understood that aliens who are ordered detained by ICE can seek relief before an Immigration Judge, who can change ICE's detention decision.

- Detainees should not be transferred out of the general area until the above assessments have been completed.

- In addition to coordination with DIHS and the relevant SSSA, when conducting large worksite enforcement operations ICE should provide notification to key area nongovernmental organizations (NGOs) once an operation is underway. ICE should provide the NGOs with the name and contact information of an ICE representative with knowledge of the operation. This notification should be to request that the NGOs assist ICE with identifying any humanitarian issues that are not brought to the attention of ICE.

- As in all ICE law enforcement operations, ICE should provide arrestees with adequate food and water and allow reasonable restroom access. Arrestees will be restrained when operationally necessary in accordance with ICE policy.

- All ICE law enforcement officers receive training and guidance to ensure that individuals are provided access to legal counsel, consistent with principles of due process and fundamental fairness.

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• As in all ICE law enforcement operations, ICE should ensure that all personnel assigned to the operation receive detailed instructions on what steps to take if they encounter individuals with humanitarian concerns.

• In accordance with existing law and procedure, during processing ICE should provide arrestees with oral notice, and written where practical, in their first language of their right to legal counsel and communication with consular officers, along with a list of pro bono legal services in the area. As soon as practical after processing, ICE should grant arrestees an opportunity to meet or speak by phone with legal counsel and consular officers. ICE should facilitate all such communication, as well as communication with family members, by providing free and reasonable telephone service.

• As in all ICE law enforcement operations, once ICE determines that an arrestee will be removed, ICE should give the arrestee adequate notice and access (by phone at a minimum) to relatives so that s/he may make plans for dependents. If the family requires assistance from an SSSA, ICE should facilitate contact by providing the arrestee with contact information for the SSSA. ICE should provide the arrestee access via telephone and, where possible, direct visits with the agency at the detention facility.

• As appropriate, if ICE is contacted by an SSSA or an NGO and provided with new information regarding a humanitarian condition after an arrestee has been processed and detained, ICE should facilitate contact between the reporting entity and the arrestee. In compelling cases, ICE may consider the possibility of release on humanitarian grounds based on such newly obtained information.

• In furtherance of efforts to ensure that humanitarian issues are raised with ICE, the agency should staff a dedicated toll free hotline so that relatives seeking information about the location of a family member will have reliable up-to-date information. ICE should publicize the hotline information to the community.

This document shall not create or confer any right or benefit on any other person or party, private or public.
Appendix D:
STATEMENT

OF

JAMES C. SPERO
DEPUTY ASSISTANT DIRECTOR
OFFICE OF INVESTIGATIONS

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT
DEPARTMENT OF HOMELAND SECURITY

REGARDING A HEARING ON

"ICE WORKPLACE RAIDS: IMPACT ON US CITIZEN CHILDREN, FAMILIES AND COMMUNITIES"

BEFORE THE

SUBCOMMITTEE ON WORKPLACE PROTECTIONS
May 20, 2008 at 10:00 a.m.
2141 Rayburn House Office Building
Washington, D.C.
INTRODUCTION

Good morning, distinguished Members of the Subcommittee. I am pleased to appear before you today to discuss U.S. Immigration and Customs Enforcement (ICE) law enforcement operations. I want to thank the Subcommittee for its continued support of ICE, which has allowed the dedicated men and women of the agency to accomplish so much.

ICE is first and foremost a federal law enforcement agency with the mandate of protecting national security and public safety by enforcing the nation’s immigration and customs laws. ICE conducts its law enforcement operations lawfully, professionally, and humanely and takes extraordinary steps to identify, document, and act appropriately regarding humanitarian concerns of the individuals encountered during law enforcement operations. In planning enforcement operations, ICE agents specifically plan for the possibility that individuals who are arrested may also be sole caregivers or that their detention may otherwise place an undue hardship on their families.

When planning worksite enforcement operations, ICE strikes a balance between the operational objectives of enforcing the law and any humanitarian issues that may arise as a result of the enforcement operation. ICE has developed worksite enforcement guidelines that field offices use when developing their operation plans to ensure that individuals who have been arrested and have unattended minors or family members with health factors are identified at the earliest point possible. ICE takes this responsibility
very seriously and these humanitarian factors are carefully taken into account when ICE makes custody decisions.

During large worksite enforcement operations, ICE coordinates with Public Health Service (PHS) professionals to provide a sufficient number of personnel to assess the medical and humanitarian needs of arrestees. This assessment is then used by ICE to identify arrestees who may be considered for release from custody due to an urgent humanitarian concern. PHS personnel are given prompt access to all arrestees under safe and humane conditions on the day of the enforcement action. To the extent possible, PHS personnel are provided access on a “rolling basis” immediately after the processing of each arrestee.

In addition to PHS, when operationally possible, ICE coordinates with state and local social service agencies to assist with humanitarian screening. Furthermore, after an operation begins, ICE proactively contacts the local social service agencies and local nongovernmental organizations to advise them of the operation and request their assistance in identifying any humanitarian issues that come to their attention. We provide these groups with contact information for an ICE representative who will immediately address any issues not previously identified.

If ICE is contacted by a social service agency or an NGO and provided with additional information or details regarding a humanitarian concern after an arrestee has been processed and detained, ICE carefully evaluates that new information and if appropriate,
may modify the conditions of release. This may include the possibility of release from
custody or an alternative to detention such as electronic monitoring. During large scale
operations, in an effort to provide reliable and timely information to family and friends
regarding an arrestee’s custody status and detention location, ICE has taken the
unprecedented step of establishing a dedicated 24 hour toll-free information hotline.

When making a custody determination, ICE considers any humanitarian issues raised by
the PHS, a social service agency, or contract support personnel and evaluates those in the
context of other factors, including the arrestee’s criminal record, immigration history, and
other relevant factors. Generally, aliens who are ordered detained by ICE can seek a
bond re-determination hearing before an immigration judge who has authority to review
and modify ICE’s detention decisions. ICE also makes every effort to not transfer
detainees out of the area where they are arrested; however, this is not always possible due
to the limitations of detention locations.

We used a similar humanitarian plan on our most recent large worksite enforcement
operation. On May 12, 2008, ICE agents conducted an operation at
AGRIPROCESSORS INC., a meat processing plant in Postville, IA. Agents executed a
criminal search warrant and a Blackies search warrant at the company. This worksite
enforcement operation resulted in the administrative arrest of 389 undocumented alien
workers, 304 of whom were subsequently arrested for criminal violations.
In this recent operation, as in all ICE law enforcement operations, extraordinary care was taken to determine if any arrestees were sole caregivers or had other humanitarian concerns. This process involved the direct questioning of all arrestees on the day of the enforcement operation and during interviews with PHS representatives. Detainees were questioned no less than three times about humanitarian issues such as child custody concerns. ICE arranged to have PHS professionals at the arrest site to immediately determine the needs and status of any children impacted by the operation. Through this comprehensive effort, 62 of those arrested were conditionally released for humanitarian purposes; most were released from the arrest site while the operation was ongoing.

ICE takes extraordinary efforts to ensure that its law enforcement operations are conducted in a safe, humane, and professional manner, including extensive pre-operative planning and coordination. Worksite enforcement operations are not poorly planned, haphazard incidents, but rather are professional law enforcement operations conducted by a professional law enforcement agency whose primary mission is the enforcement of the laws of the United States and the protection of the American people.

ICE does, and will continue to, take great care with respect to the humanitarian concerns of aliens taken into custody during law enforcement operations and exercise discretion regarding custody when, and if, the exercise of such discretion is appropriate.

CONCLUSION
On behalf of the men and women of ICE who place their lives at risk every day to enforce the laws of this Nation making it a safer place to live and work, I would like to thank you for your continued support. These men and women have a difficult job to do in often dangerous circumstances but they do so as consummate law enforcement professionals. Thank you for your time and I look forward to answering your questions.
Appendix E:
United States Conference of Catholic Bishops Statement on Immigration Enforcement Initiatives,
September 12, 2007
Statement of Most Reverend Gerald R. Barnes
On
Immigration Enforcement Initiatives

September 12, 2007

The recent failure of the United States Senate to pass comprehensive immigration reform legislation has set back, not ended, attempts to comprehensively repair an immigration system that is seriously flawed. It is disturbing our nation has yet to find the will to humanely address this challenging issue confronting our nation.

The immigration reform debate, while provoking informed analysis and thoughtful discussion, also has generated harsh rhetoric against migrants in this country, particularly those without legal status. Fanned by talk radio and by anti-immigrant organizations, this rhetoric has inflamed fears and misunderstanding among some portions of the American public, leading to a polarized and vitriolic atmosphere.

While at the moment the voices of division and fear are loud, with more education the truth about immigration and migrants in this country ultimately will prevail. Migrant workers, including the undocumented, provide great contributions to our nation’s economy by working in vital industries, such as agriculture, construction, and service. Yet, our country has refused to acknowledge these contributions and has instead relegated them to a permanent underclass of workers, without full rights in our society. This is unworthy of a great democracy.

Moreover, the full consequences of federal inaction on immigration reform are becoming more apparent, as migrant workers across the nation have become increasingly subject to enforcement raids and other actions that separate families and lead to exploitation and abuse. We are gravely concerned with enforcement actions that divide families and target schools, churches, hospitals, and social service centers, where migrants receive assistance for basic human needs.

Legislation and administrative enforcement initiatives at the federal level also are cause for concern, particularly a recently announced package of enforcement measures by the Administration. Central to this package is the Department of Homeland Security’s (DHS) plan to use Social Security Administration (SSA) “no-match” letters, which notify employers when an employee’s social security number does not match the SSA database. DHS and SSA should not use wage and tax data to enforce immigration law. We are fearful that, because of the inadequacy of SSA and DHS databases, the use of the SSA “no-match” letters could lead to the termination of bona fide workers. We also are concerned that the issuance of the letters could be used by unscrupulous employers to discriminate against certain workers.
Federal inaction also has emboldened state and local governments to fill the federal void, addressing the issue locally through state legislation and local ordinances. These actions are creating a patchwork of immigration policies across the nation. To compound matters, local jurisdictions have been pitted against each other, with some cities or counties passing anti-immigrant measures. State and local laws that seek to force migrants to leave the country by denying them the means to subsist not only violate human dignity, but undermine the common good.

We reaffirm our view that enforcement-only measures at any jurisdictional level will further drive undocumented migrant workers into a hidden underclass and create more fear and suspicion in immigrant communities. Such measures also will not repair a system that is inadequate to meet the labor needs of our globalized economy.

The U.S. bishops acknowledge the right of our country to secure our borders. As the U.S. bishops have consistently stated, comprehensive immigration reform, which reforms all aspects of our immigration system, is the best way to secure our country and humanely and effectively address the problem of unauthorized migration to our country. We urge Congress to immediately return to consideration of comprehensive immigration reform. We also urge Catholics and all Americans to work together constructively to ensure a positive outcome to this vital national debate.
Raids Protocols

- Immigration and Customs Enforcement (ICE) should not conduct raids or enforcement actions at or near churches, hospitals, community health centers, schools, food-banks, or other community-based organizations that provide charitable social services. This includes the parking lots and streets surrounding such organizations. In any memorandum of understanding or agreement that ICE undertakes with state or local law enforcement entities for the purpose of collaborative immigration enforcement, ICE should require that the same restrictions apply.

- ICE should ensure the public that raids/enforcement actions will not occur in these places. All immigrants, regardless of immigration status, need to feel comfortable attending their place of worship, taking their children to school, and accessing medical services. The missions of social service organizations should not be undermined by the threat of raids. By conducting enforcement actions in such locations, an environment of fear and distrust is fostered that may prevent immigrants and their family members from practicing their faith in community, taking their children to school, or accessing needed medical and social services. Such an atmosphere only serves to weaken and divide our communities.

- The separation of families should be avoided. The family unit is the fundamental building block of our society and must be affirmed. Mixed-immigration-status families should not be separated as a result of enforcement actions. Primary caregivers who are arrested during enforcement actions should be released under appropriate safeguards so that they can continue to care for their children.

- Local ICE offices should set up toll-free phone numbers ("Friends and Family Member Hotlines") when enforcement actions are conducted so that there is an easy way for community members to call ICE to locate their loved ones who have been affected by raids.

- It is critical that ICE allow persons arrested / detained by ICE after an enforcement action access to legal counsel prior to being transferred out of the community/to another jurisdiction. ICE must enable local legal service providers to have prompt access to individuals affected by raids in order to provide legal orientation presentations and conduct screening interviews. Early access by legal service providers can forestall later problems. Examples include identifying sole caregivers who may be reluctant to talk with ICE as well as persons (to be taken into custody) that require prescription medication.

- ICE should make every effort not to transfer represented persons out of the jurisdiction as doing so can deprive low-income persons of access to counsel in removal proceedings. ICE should investigate community-based alternatives to detention for persons encountered in enforcement operations who do not pose a safety or security risk. Among other things, the likelihood that low-income persons will obtain legal representation increases when ICE uses methods other than secure detention to ensure their presence at removal hearings.

- Local ICE offices should develop and implement community outreach and education plans that can be followed when an enforcement action takes place. The plans should establish communications mechanisms and identify community organizations and appropriate Consular officials that ICE can contact to provide information about where enforcement actions are being conducted, where individuals arrested are being detained, and how family members can communicate with them. ICE should contact community organizations while enforcement
actions are in progress. This would enable community organizations to immediately dispel rumors, collaborate effectively with state and local governments in response efforts, and provide accurate information to callers as soon as phone inquiries begin.

- Local ICE offices should be encouraged to meet with community-based organizations, legal service providers, Consulates, and other service organizations that have questions or concerns about ICE enforcement initiatives. Such meetings enable legal service providers/community organizations to better understand ICE enforcement policies and procedures at the local level, which ultimately benefits ICE.
Appendix F:
Letter from Edward M. Kennedy to Michael Chertoff, Secretary of Homeland Security and Michael O. Leavitt, Secretary of Health and Human Services
United States Senate
WASHINGTON, DC 20510-2101

May 16, 2008

Michael Chertoff
Secretary of Homeland Security
U.S. Department of Homeland Security
3801 Nebraska Avenue, NW
Washington, DC 20528

Michael O. Leavitt
Secretary of Health and Human Services
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

Dear Secretary Chertoff and Secretary Leavitt:

I’m writing as Chairman of the Senate Committee on Health, Education, Labor, and Pensions and the Judiciary Subcommittee on Immigration, Refugees and Border Security to request that you adopt an interagency agreement, issue guidelines, and take other appropriate steps to reduce the impact of enforcement actions by Immigration and Customs Enforcement (ICE) on children participating in Head Start and other federally-assisted child development programs.

It has come to my attention that in the past year, as part of its increased immigration enforcement, ICE has targeted programs serving children whose parents are suspected of being illegally in the United States. Numerous incidents have been reported in which ICE or local law enforcement agencies acting in cooperation with ICE have staked out Head Start and other child-oriented service programs to intimidate or apprehend such parents of children participating in such programs. Local law enforcement officials, in cooperation with ICE, have arranged for ICE agents to enter federally-funded early childhood programs armed and in full gear to remove children. In several communities, ICE enforcement activities have blockaded roads leading to such programs, interfering with traffic patterns and hindering access to the programs by children and their families. In other cases, ICE agents have followed school buses and employees of early care and education programs to identify families suspected of being undocumented for apprehension and arrest.

Numerous children have already been affected by these activities and potentially millions more are at risk. Nearly two-thirds of the children affected by such raids are U.S. citizens under the age of ten. It is projected that for every two immigrants who are detained, one child is left behind.
Forcible separation from their parents can have a profoundly negative impact on children’s mental health, schooling, and well-being. In some instances, children removed from early childhood programs as a result of ICE enforcement are placed in child protective services and later subjected to the child welfare and foster care systems. Educational disruption can also have severe consequences, potentially resulting in an increased need for remediation, special education or other educational support services. Carrying out such enforcement actions also places significant burdens on social institutions that care for children, such as schools, early childhood education centers, and child welfare agencies that must meet the needs of children in the aftermath of a raid. In addition, such enforcement actions affect not only the children whose parents are apprehended but also the children’s peers who witness such actions.

I fully appreciate that ICE has the authority to take individuals into custody who are in the United States illegally. However, ICE also has the responsibility to exercise this authority in ways that are effective, humane, and result in the least disruption to children and their families. I was encouraged by ICE’s decision to take an important step toward handling such vulnerable cases with appropriate care and compassion, by issuing humanitarian guidelines to ensure appropriate treatment of care providers and their dependents following its raid on the New Bedford Michael Bianco plant.

In keeping with that sound decision, I urge your agencies to work together to reach an agreement and issue guidelines defining appropriate limitations on enforcement that respect the needs of children participating in early childhood education and care programs. Such action is essential to the developmental needs of these children, and is critical to the sound implementation of federally-assisted early care and education programs.

As we deal with the many immigration challenges facing us, it is essential to develop and implement policies and procedures that respect the dignity and humanity of the communities, families, and children that are most affected. I look forward to your response, and my staff and I stand ready to assist you in this effort in any way that will be helpful.

With respect and appreciation,

Sincerely,

Edward M. Kennedy
Appendix G:
Report of the Special Rapporteur on the Human Rights of Migrants,
Jorge Bustamante, March 5, 2008
HUMAN RIGHTS COUNCIL
Seventh session
Agenda item 3

PROMOTION AND PROTECTION OF ALL HUMAN RIGHTS, CIVIL,
POLITICAL, ECONOMIC, SOCIAL AND CULTURAL RIGHTS,
INCLUDING THE RIGHT TO DEVELOPMENT

Report of the Special Rapporteur on the human rights of migrants,
Jorge Bustamante

Addendum

MISSION TO THE UNITED STATES OF AMERICA* **

* The summary of this document is being circulated in all official languages. The report, which is annexed to the summary, is being circulated in the language of submission only.

** The present document is submitted late to reflect the most recent information.

GE.08-11281 (E) 070308
Summary

The present report is submitted in accordance with resolution 2001/52 of the Commission on Human Rights following the official visit of the Special Rapporteur on the human rights of migrants to the United States of America (the United States) between 30 April and 18 May 2007.

The purpose of the mission was to examine and report on the status of the human rights of migrants living in the United States. For the purposes of this report, “migrants” refers to all non-citizens living in the United States, including, among others, undocumented non-citizens and non-citizens with legal permission to remain in the country, such as legal permanent residents, work visa holders, and persons with refugee status. The Special Rapporteur thanks the Government of the United States for extending an invitation for him to conduct such a mission. The Special Rapporteur was disappointed, however, that his scheduled and approved visits to the Hutto Detention Center in Texas and the Monmouth detention centre in New Jersey were subsequently cancelled without satisfactory explanation.

While noting the Government’s interest in addressing some of the problems related to the human rights of migrants, the Special Rapporteur has serious concerns about the situation of migrants in the country, especially in the context of specific aspects of deportation and detention policies, and with regard to specific groups such as migrant workers in New Orleans and the Gulf Coast in the aftermath of Hurricane Katrina, migrant farm workers, and migrants in detention facilities.

The Special Rapporteur wishes to highlight the fact that cases of indefinite detention - even of migrants fleeing adverse conditions in their home countries - were not uncommon according to testimonies he received. The Special Rapporteur learned from human rights advocates about the lack of due process for non-citizens in United States deportation proceedings and their ability to challenge the legality or length of their detention; as well as about the conditions of detained asylum-seekers, long-term permanent residents and parents of minors who are United States citizens. In some cases immigrant detainees spend days in solitary confinement, with overhead lights kept on 24 hours a day, and often in extreme heat and cold. According to official sources, the United States Government detains over 230,000 people a year - more than three times the number of people it held in detention nine years ago.

The Special Rapporteur notes with dismay that xenophobia and racism towards migrants in the United States has worsened since 9/11. The current xenophobic climate adversely affects many sections of the migrant population, and has a particularly discriminatory and devastating impact on many of the most vulnerable groups in the migrant population, including children, unaccompanied minors, Haitian and other Afro-Caribbean migrants, and migrants who are, or are perceived to be, Muslim or of South Asian or Middle Eastern descent.

The Special Rapporteur notes that the United States lacks a clear, consistent, long-term strategy to improve respect for the human rights of migrants. Although there are national laws prohibiting discrimination, there is no national legislative and policy framework implementing protection for the human rights of migrants against which the federal and local programmes and strategies can be evaluated to assess to what extent the authorities are respecting the human rights of migrants.
In light of numerous issues described in this report, the Special Rapporteur has come to the conclusion that the United States has failed to adhere to its international obligations to make the human rights of the 37.5 million migrants living in the country (according to Government census data from 2006) a national priority, using a comprehensive and coordinated national policy based on clear international obligations. The primary task of such a national policy should be to recognize that, with the exception of certain rights relating to political participation, migrants enjoy nearly all the same human rights protections as citizens, including an emphasis on meeting the needs of the most vulnerable groups.

The Special Rapporteur has provided a list of detailed recommendations and conclusions, stressing the need for an institution at the federal level with a mandate solely devoted to the human rights of migrants, a national body that truly represents the voices and concerns of the migrant population, and which could address underlying causes of migration and the human rights concerns of migrants within the United States.
Annex

REPORT OF THE SPECIAL RAPPORTEUR ON THE HUMAN RIGHTS OF MIGRANTS, JORGE BUSTAMANTE, ON HIS MISSION TO THE UNITED STATES OF AMERICA (30 April-18 May 2007)

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Introduction

1. Pursuant to his mandate the Special Rapporteur on the human rights of migrants visited the United States of America (the United States) from 30 April to 18 May at the invitation of the Government.

2. Inhabiting a large geographic area, the migrant population of the United States is complex. Hence, the Special Rapporteur did not have time to conduct a comprehensive investigation of all the issues related to the various migrant populations residing in the United States. The Special Rapporteur met with a great variety of organizations, State, national and local agencies, officials, and individuals. These included the following: the Indigenous Front of Binational Organizations and California Rural Legal Assistance; religious leaders and representatives; people whose homes were raided by the Department of Homeland Security’s agency for Immigration and Customs Enforcement; the National Immigration Law Centre; members of the Youth Justice Coalition; Homies Unidos (which led tours of Pico Union, MacArthur Park and Koreatown in Los Angeles); the Florence detention centre in Arizona; officials at the U.S. Border Patrol; Nogales, Arizona; Dr. Bruce Parks, Pima County’s Medical Examiner (who provided statistics and information about migrant deaths due to exposure); the Coalición de Derechos Humanos and other non-governmental organizations (NGOs) in the Phoenix area, including the Macehali Day Labor Center and the Florence Immigrant and Refugee Rights Project; members of local Native American groups; advocates for migrant domestic workers in Maryland and elsewhere; the Farmworker Association of Florida in Immokalee; (while in Florida he also discussed detention and deportation procedures with the Haitian community); the US Human Rights Network and several of its member organizations; community members and advocates. Furthermore, numerous migrants provided testimonials about conditions directly experienced by themselves or by their migrant family members.

3. During his visit, the Special Rapporteur toured the United States border with Mexico and watched United States immigration officials at work. He met there with officials from the U.S. Customs and Border Protection (CBP), a division of the Department of Homeland Security (DHS), spending half a day with Border Patrol officers at the San Diego sector. In Los Angeles the Special Rapporteur conducted site visits, listened to presentations and witnessed community testimony on the system of immigration enforcement (including on raids and detention, workers’ rights, deportation procedures, and the criminalization of immigrants).

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1 The San Diego sector consists of more than 7,000 square miles and 66 linear miles of international boundary with Mexico. It encompasses many kinds of terrain from coastal beaches and expansive mesas to coastal and inland mountains, rugged canyons and high desert. Directly to the South of San Diego lie the Mexican cities of Tijuana and Tecate, Baja California with a combined population of more than 2 million. Although it is the smallest Border Patrol sector geographically, more than 40 per cent of national apprehensions have taken place there. For decades, this area was the preferred corridor for immigration due to the highly populated neighbourhoods north and south of the border. This region has gained national attention with the inception of an enforcement strategy called Operation Gatekeeper, launched on 1 October 1994.
4. In Tucson, Arizona, the Special Rapporteur met with advocates and lawyers who informed him of the practice of subjecting immigrants to disproportionate criminal charges in addition to civil charges for violation of the immigration laws of the United States. In particular, the Special Rapporteur learned that immigration authorities and federal prosecutors are now charging some non-citizens with civil violations for being in the country illegally, as well as for the overly-broad charge of "self-smuggling" themselves into the country. This latter criminal charge is defined as a felony and therefore the migrant can be sentenced to prison upon conviction.

5. In Atlanta, Georgia, the Special Rapporteur attended a regional NGO briefing, "Directly Impacted Community Members Briefing and Press Conference", organized by the National Network of Immigrant and Refugee Rights and its member organizations the Georgia Latino Alliance for Human Rights (GLAHR), the Latin American and Caribbean Community Center (LACCC) and the American Civil Liberties Union (ACLU) of both Georgia and New York. He also attended a reception in Atlanta where he was able to meet with Georgia State Representatives and Senators. During the NGO briefings in Atlanta, the Special Rapporteur heard from migrants and migrant human rights advocates from different organizations and who travelled from across the southern United States, including the Mississippi Immigrant Rights Alliance (MIRA), the New Orleans Workers' Center for Racial Justice, the Southern Poverty Law Center (SPLC), Queer Progressive Agenda (QPA), Raksha (South Asian community organization), the Mexican American Legal Defense and Education Fund (MALDEF), the Georgia Department of Education Program, and the Roman Catholic Archdiocese of Atlanta. Migrants and NGO advocates from these and other organization informed the Special Rapporteur of the plight of migrants in the south of the United States, where the migrant population is booming.

6. The Special Rapporteur also attended a public hearing in New York on the rights of migrants organized by the ACLU of New York, regional NGOs and grass-roots organizations. In New York, the Special Rapporteur heard several individuals testify about the post-9/11 backlash, including the experiences of the some 750 migrants arrested and subjected to arbitrary and lengthy detention subsequent to the September 11, 2001 attacks on the United States.

7. The visit concluded with meetings with senior officials of the Department of Homeland Security and the State Department in Washington, D.C. On the last day of his visit, the Special Rapporteur was informed that the cancellation of his visits to the detention facilities in Texas and New Jersey was due to a pending lawsuit filed against both facilities, in which the United States Government was not allowed to interfere. A statement was subsequently published in the press suggesting that the cancellation was because the "Special Rapporteur declined the invitation"; the Special Rapporteur made clear that this latter allegation was false.

8. Migrant rights issues raised in these various meetings included, but were not limited to, the following: indefinite detention; arbitrary detention; mandatory detention; deportation without due process; family separation; anti-immigrant legislation; racial profiling; linguistic, racial, ethnic, gender and sexual-orientation discrimination; State violence; wage theft; forced labour; limited access to health and education; the growing anti-immigrant climate (including the post-9/11 backlash); and significant limitations on due process and judicial oversight. Most of these issues are addressed in this report.
I. INTERNATIONAL LAW AND STANDARDS

9. Since the early stages of the nation State, control over immigration has been understood as an essential power of government. In recent history, governments have allowed limits to be placed on their power regarding immigration policy, recognizing that it may only be exercised in ways that do not violate fundamental human rights. Therefore, while international law recognizes every State’s right to set immigration criteria and procedures, it does not allow unfettered discretion to set policies for detention or deportation of non-citizens without regard to human rights standards.

A. Right to fair deportation procedures

10. The governmental power to deport should be governed by laws tailored to protect legitimate national interests. United States deportation policies violate the right to fair deportation procedures, including in cases in which the lawful presence of the migrant in question is in dispute, as established under article 13 of the International Covenant on Civil and Political Rights (ICCPR). These deportation policies, particularly those applied to migrants lawfully in the United States who have been convicted of crimes, also violate (a) international legal standards on proportionality; (b) the right to a private life, provided for in article 17 of the ICCPR; and (c) article 33 of the Convention relating to the Status of Refugees, which prohibits the return of refugees to places where they fear persecution, with very narrow exceptions.

11. The ICCPR, which the United States ratified in 1992, states in article 13 (to which the United States has entered no reservations, understandings or declarations): “An alien lawfully in the territory of a State Party to the present covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.”

12. The Human Rights Committee, which monitors State compliance with the ICCPR, has interpreted the phrase “lawfully in the territory” to include non-citizens who wish to challenge the validity of the deportation order against them. In addition, the Committee has made this clarifying statement: “...if the legality of an alien’s entry or stay is in dispute, any decision on this point leading to his expulsion or deportation ought to be taken in accordance with article 13,” and further: “An alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one.”

13. Similarly, article 8, paragraph 1 of the American Convention on Human Rights, which the United States signed in 1977, states that “Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law ... for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.”

2 Human Rights Committee general comment No. 15 (1986) on the position of aliens under the Covenant, paras. 9 and 10.
14. Applying this standard, the Inter-American Commission on Human Rights has stated that detention and deportation proceedings require “as broad as possible” an interpretation of due process requirements and include the right to a meaningful defence and to be represented by an attorney.

15. Because United States immigration laws impose mandatory deportation without a discretionary hearing where family and community ties can be considered, these laws fail to protect the right to private life, in violation of the applicable human rights standards.

16. Article 16, paragraph 3, of the Universal Declaration of Human Rights and article 23, paragraph 1, of the ICCPR state that “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” Furthermore, article 23, paragraph 3 states that the right of men and women to marry and found a family shall be recognized. This right includes the right to live together. Article 17, paragraph 1 of the International Covenant on Civil and Political Rights states that “No one shall be subjected to arbitrary or unlawful interference with his privacy, family or correspondence …”.

17. As the international body entrusted with the power to interpret the ICCPR and decide cases brought under its Optional Protocol, the Human Rights Committee has explicitly stated that family unity imposes limits on the power of States to deport.

18. The American Declaration of the Rights and Duties of Man features several provisions relevant to the question of deportation of non-citizens with strong family ties. Article V states that “Every person has the right to the protection of the law against abusive attacks upon … his private and family life.” Under article VI, “Every person has the right to establish a family, the basic element of society, and to receive protection therefor.” The American Convention on Human Rights, to which the United States is a signatory, contains analogous provisions. The case of Wayne Smith and Hugo Armendáriz v. United States of America, which came before the Inter-American Commission on Human Rights in 2006 relies on several of these provisions to challenge the United States policy of deporting non-citizens with criminal convictions without regard to family unity. In light of these international standards, the United States has fallen far behind the practice of providing protection for family unity in deportation proceedings.

19. Moreover, the rights of children to live together with their parents are violated by the lack of deportation procedures in which the State’s interest in deportation is balanced against the rights of the children. United States mandatory deportation laws harm the human rights of children of non-citizen parents.

20. United States restrictions on relief for refugees convicted of crimes violate the Convention and the Protocol relating to the Status of Refugees. The United States provides two forms of relief for refugees fleeing persecution - withholding of removal, which provides bare protection against refoulement, and more robust asylum relief, which provides a pathway to permanent

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3 Although petitioners’ cases do not involve claims for refugee protection, a discussion of the effect of United States immigration laws on non-citizens with criminal convictions would be incomplete without an exploration of the effect of the laws on non-citizen refugees.
residence. Even the weaker form of relief - withholding of removal - is per se unavailable to non-citizens with aggravated felonies sentenced to an aggregate term of at least five years' imprisonment and to those whom the Attorney General determines have been convicted of a particularly serious crime. United States law denies these refugees even a hearing for their refugee claims, instead denying relief on a categorical basis. United States laws therefore contravene the due process and substantive protections of the Declaration of the Rights and Duties of Man and the Convention and the Protocol relating to the Status of Refugees, which allow for exceptions to non-refoulement in only a narrow set of cases and after individualized hearings.

B. Right to liberty of person

21. Pursuant to the Immigration and Nationality Act, U.S. Immigration and Customs Enforcement (ICE) may detain non-citizens under final orders of removal only for the period necessary to bring about actual deportation. Additionally, two United States Supreme Court decisions, Zadvydas v. Davis, and Clark v. Martinez, placed further limits on the allowable duration of detention. As a result of those decisions, ICE may not detain an individual for longer than six months after the issuance of a final removal order if there is no significant likelihood of actual deportation (for example, because the home country refuses repatriation) in the reasonably foreseeable future.

22. Although these two court decisions limit the ability of ICE to detain non-citizens indefinitely, in practice, United States policy is a long way out of step with international obligations. Immigration enforcement authorities have failed to develop an appropriate appeals procedure, and for all practical purposes have absolute discretion to determine whether a non-citizen may be released from detention. Furthermore, those released from detention as a result of a post-order custody review are released under conditions of supervision, which in turn are monitored by ICE deportation officers. Again, ICE officers have absolute authority to determine whether an individual must return to custody. Given that these discretionary decisions are not subject to judicial review, current United States practices violate international law.

4 See US Code, Title 8, Chapter 12, Subchapter II, Part I, § 1158 (asylum) and Part IV, § 1231 (b) (3) (Restriction on removal to a country where alien’s life or freedom would be threatened).

5 Ibid.


23. The Special Rapporteur wishes to stress that international conventions require that the decision to detain someone should be made on a case-by-case basis after an assessment of the functional need to detain a particular individual. He notes that the individual assessment of cases does not appear to be sufficient and that detention policies in the United States constitute serious violations of international due process standards. Based on individual testimonies, the Government's own admissions and reports he received, the Special Rapporteur notes that the violations include:

- Failing to promptly inform detainees of the charges against them
- Failing to promptly bring detainees before a judicial authority
- Denying broad categories of detainees release on bond without individualized assessments
- Subjecting detainees to investigative detention without judicial oversight
- Denying detainees access to legal counsel

24. In sum, in the current context the United States detention and deportation system for migrants lacks the kinds of safeguards that prevent certain deportation decisions and the detention of certain immigrants from being arbitrary within the meaning of the International Covenant on Civil and Political Rights (ICCPR), which the United States has signed and ratified.

C. Labour rights

25. The labour rights of migrants affected by conditions in certain portions of the labour market, including the tomato workers in Florida and migrants in regions of the country devastated by Hurricane Katrina, are also included in the Universal Declaration of Human Rights and ICCPR. The United States Government has committed itself to protecting these rights.

III. UNITED STATES OF AMERICA IMMIGRATION POLICY AND PRACTICE

A. Legal and political background

26. With regard to deportation policy, under current United States immigration law, individuals arriving in the United States without the necessary visas or other legal permission to enter, including asylum-seekers and refugees, are subject to mandatory detention. In addition, persons subject to deportation procedures after being lawfully present in the United States, including legal permanent residents who have been convicted of crimes, are subject to detention. All of these persons are detained in immigration detention centres, county jails or private prisons under contract with immigration enforcement agencies for months, and sometimes years. According to testimonies heard by the Special Rapporteur, United States citizens erroneously
identified as non-citizens, long-time lawful permanent residents, non-citizen veterans, and vulnerable populations with a regular legal status have also been detained for months without sufficient due process protections, including fair individualized assessments of the reasons for their detention.

27. In 2006, the Department of Homeland Security arrested over 1.6 million migrants, including both undocumented migrants and legal permanent residents, of which over 230,000 were subsequently held in detention.

28. On average, there are over 25,000 migrants detained by immigration officials on any given day. The conditions and terms of their detention are often prison-like: freedom of movement is restricted and detainees wear prison uniforms and are kept in a punitive setting. Many detainees are held in jails instead of detention centres, since the United States uses a combination of facilities owned and operated by ICE, prison facilities owned and operated by private prison contractors and over 300 local and county jails from which ICE rents beds on a reimbursable basis. As a result, the majority of non-criminal immigrants are held in jails where they are mixed in with the prison’s criminal population. This is the case despite the fact that under United States law an immigration violation is a civil offence, not a crime. The mixture of criminal and immigrant detainees in these jails can result in the immigrants being treated in a manner that is inappropriate to their status as administrative, as opposed to criminal, pretrial or post-conviction inmates.

29. In 1996, the Immigration and Naturalization Service had a daily detention capacity of 8,279 beds. By 2006, that had increased to 27,500 with plans for future expansion. At an average cost of US$ 95 per person per day, immigration detention costs the United States Government US$ 1.2 billion per year.

30. ICE reported an average stay of 38 days for all migrant detainees in 2003. Asylum-seekers granted refugee status, spend an average of 10 months in detention, with the longest period in one case being three and a half years. There are instances of individuals with final orders of removal who languish in detention indefinitely, such as those from countries with whom the United States does not have diplomatic relations or that refuse to accept the return of their own nationals. Under United States law, migrant detainees about whom the United States has certain national security concerns are subject to the possibility of indefinite detention, in contravention of international standards.

31. Migrants in detention include asylum-seekers, torture survivors, victims of human trafficking, long-term permanent residents facing deportation for criminal convictions based on a long list of crimes (including minor ones), the sick, the elderly, pregnant women, transgender migrants detained according to their birth sex rather than their gender identity or expression, parents of children who are United States citizens, and families. Detention is emotionally and financially devastating, particularly when it divides families and leaves spouses and children to fend for themselves in the absence of the family’s main financial provider.

32. Immigrants are also often transferred to remote detention facilities, which interferes substantially with access to counsel and to family members and often causes great financial and emotional hardship for family members who are not detained. Thousands of those held in immigration detention are individuals who, by law, could be released.
33. Detention has not always been the primary enforcement strategy relied upon by the United States immigration authorities, as it appears to be today. In 1954, the Immigration and Naturalization Service announced that it was abandoning the policy of detention except in rare cases when an individual was considered likely to be a security threat or flight risk. This reluctance to impose needless confinement was based on the concepts of individual liberty and due process, long recognized and protected in the American legal system, and also enshrined in international human rights standards.

34. Sweeping changes in immigration laws in 1996 drastically increased the number of people subject to mandatory, prolonged and indefinite detention. The increasing reliance of the United States authorities on detention as an enforcement strategy has meant that many individuals have been unnecessarily detained for prolonged periods without any finding that they are either a danger to society or a flight risk. These practices have continued despite attempts by the United States Supreme Court to limit the Government’s discretion to indefinitely detain individuals.

35. Certain provisions of the Immigration and Nationality Act, as amended by two laws passed in 1996 (the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)) require mandatory detention, pending removal proceedings, of virtually any non-citizen who is placed in proceedings on criminal grounds, as well as of persons who arrive at the country’s borders in order to seek asylum from persecution without documentation providing for their legal entry into the country. These two laws have significantly increased the number of migrants subject to mandatory detention on a daily basis, since AEDPA requires the mandatory detention of non-citizens convicted of a wide range of offences, and IIRIRA has further expanded the list of offences for which mandatory detention is required.

36. As a result of these legislative changes, minor drug offences - such as possession of paraphernalia - as well as minor theft or other property-related offences, can result in mandatory detention and in the past decade the use of detention as an immigration enforcement mechanism has become more the norm than the exception in United States immigration enforcement policy.

37. The policy of mandatory detention also strips immigration judges of the authority to determine during a full and fair hearing whether or not an individual presents a danger or a flight risk. Instead, certain previous convictions (and in some cases, merely the admission of having committed an offence) automatically trigger mandatory detention without affording non-citizens an opportunity to be heard as to whether or not they merit release from custody.

38. This policy also deprives immigration judges - and even the Department of Homeland Security - of the authority to order the release of an individual, even when it is clear that he or she poses no danger or flight risk that would warrant such detention.
39. In its landmark decision, Zadvydas v. Davis, the Supreme Court held that indefinite immigration detention of non-citizens who have been ordered deported but whose removal is not reasonably foreseeable would raise serious constitutional problems.

40. Prior to Zadvydas, the Government had a policy of detaining individuals even when there was virtually no chance they would actually be removed (this has been especially common with migrants from countries such as Cuba, Iraq, the Islamic Republic of Iran, the Lao People’s Democratic Republic, the former Soviet Union and Viet Nam). The Government often referred to these individuals as “lifers”, in recognition of the fact that their detention was indefinite and potentially permanent. In the aftermath of Zadvydas, new regulations were promulgated in order to comply with the Supreme Court’s decision. Under these regulations, if the Department of Homeland Security cannot remove a migrant within the 90-day removal period, the Government is required to provide a post-order custody review to determine if the individual can be released. If the individual remains in detention six months after the removal order has become final, another custody review is to be conducted. Once it is determined that removal is not reasonably foreseeable, the regulations require the individual to be released under conditions of supervision.

41. Unfortunately, many problems plague the post-order custody review process. For example, some detainees never receive notice of their 90-day or 6-month custody reviews, and therefore do not have the opportunity to submit documentation in support of their release. Others never receive timely custody reviews at either the 90-day or 6-month mark. In addition, decisions to continue detention are often based on faulty reasoning and erroneous facts, ignore the law outlined by the Supreme Court in Zadvydas, or are essentially rubber-stamp decisions that fail to cite any specific evidence in support of their conclusion.

42. Frequently, these decisions ignore documentation (including letters from the detained individual’s consulate) that proves that there is no significant likelihood of removal in the reasonably foreseeable future. In other cases, the Department of Homeland Security has failed to present evidence of the likelihood of removal and instead blames detainees for failing to facilitate their own removal.

43. The Special Rapporteur notes that according to the law, individuals can be released on parole regardless of their immigration status. In practice, however, because migrants are not entitled to a review of their custody by an immigration judge, or are subjected to rubber-stamp administrative custody review decisions, their detention is essentially mandatory.

44. The Special Rapporteur acknowledges that the mission for the Department of Homeland Security is to “lead the unified national effort to secure America” through its Immigration and Customs Enforcement agency (ICE). ICE is the largest investigative branch of the Department of Homeland Security; and seeks to protect the United States against terrorist attacks by targeting undocumented immigrants, whom the agency considers to be “the people, money and materials that support terrorism and other criminal activities”.

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9 See footnote 7 above.
45. In that context, the ICE has recently shifted its approach to enforcement by bringing criminal charges against employers of irregular migrant workers, seizing their assets and charging them with money laundering violations.

B. Deportation policy

46. With regard to deportation policy, following changes to United States immigration law in 1996, non-citizens in the United States have been subjected to a policy of mandatory deportation upon conviction of a crime, including very minor ones. These persons are not afforded a hearing in which their ties to the United States, including family relationships, are weighed against the Government's interest in deportation. According to Government sources, hundreds of thousands of persons have been deported since these laws went into effect in 1996.

47. One case that has been brought to the attention of the Special Rapporteur is that of a male migrant, originally from Haiti, who enlisted in the United States military in 1970. A lawful permanent resident, or green card holder, this individual served his adopted country for four years. Now a 52-year-old veteran with four United States citizen sons, two of whom are in the military themselves, he faces mandatory deportation because he was convicted of the possession and sale of small amounts of crack cocaine in the mid-1990s, for which he spent 16 months in prison.

48. Some 672,593 immigrants in the United States - many of whom, like the Haitian migrant described above, were legal residents - have been deported from the country under the 1996 legislation that requires mandatory deportation of non-citizens convicted of a crime after they have served their sentence. It does not matter whether the non-citizen has lived in the United States legally for decades, built a home and family, run a business, or paid taxes. And these laws do not apply only to serious crimes, but also to minor offences.

49. The 1996 laws added new crimes to the aggravated felony ground of deportation. First, Congress added 17 additional types of crimes to the category when it passed AEDPA in April 1996. IIRIRA added four more types of crimes to the aggravated felony definition and lowered certain threshold requirements. Before IIRIRA, for example, theft offences and crimes of violence were treated as aggravated felonies only if the term of imprisonment was five years or more; IIRIRA reduced the term of imprisonment provision to a one-year threshold.

50. Estimates based on the United States census find that 1.6 million adults and children, including United States citizens, have been separated from their spouses and parents because of the 1996 legislation and the expansion of the aggravated felony definition. Families have been torn apart because of a single, even minor misdemeanour, such as shoplifting or drug possession.

51. Certain immigrants, for example those convicted of selling drugs and given a five-year sentence, are subject to deportation without consideration of the fact that they would be returned to persecution. This is the case under United States law, despite the fact that under the Convention relating to the Status of Refugees (a treaty binding on the United States), only refugees who have been convicted of a "particularly serious crime" and who "constitute a danger to the community" of the United States may be returned to places where they fear persecution.
52. The 1996 legislation prevents judges from considering whether there are compelling reasons for immigrants to remain in the United States even though they have broken the law. It prevents judges from striking a balance between the reasons for deportation - i.e. the seriousness of the crime - and the length and breadth of an immigrant’s ties to the United States.

53. Out of the 1.6 million family members left behind by criminal deportees, it is estimated that 540,000 are United States citizens by birth or naturalization.

54. Despite the fact that the relevant laws were passed 10 years ago, data on the underlying convictions for deportations were released for the first time by ICE at the end of 2006 for fiscal year 2005. These data show that 64.6 per cent of immigrants were deported for non-violent offences, including non-violent theft offences; 20.9 per cent were deported for offences involving violence against people; and 14.7 per cent were deported for unspecified other crimes.

55. Applying these percentages from 2005 to the aggregate number of persons deported reveals that some 434,495, or nearly a half million people, were non-violent offenders deported from the United States in the 10 years since the 1996 laws went into effect. In addition, some 140,572 people were deported during that same decade for violent offences.

56. Human rights law recognizes that the privilege of living in any country as a non-citizen may be conditional upon obeying that country’s laws. However, no country should withdraw that privilege without protecting the human rights of the immigrants it previously allowed to enter. Human rights law requires a fair hearing in which family ties and other connections to an immigrant’s host country are weighed against that country’s interest in deporting him or her.

C. Local enforcement operations

57. While migration is a federal matter, ICE is actively seeking the assistance of State and local law enforcement in enforcing immigration law. Under a recent federal law, ICE has been permitted to enter into agreements with state and local law enforcement agencies through voluntary programmes which allow designated officers to carry out immigration law enforcement functions. These state and local law enforcement agencies enter into a memorandum of understanding (MOU) or a memorandum of agreement (MOA) that outlines the scope and limitation of their authority. According to ICE, over 21,485 officers nationwide are participating in this programme, and more than 40 municipal, county, and state agencies have applied. In 2006, this programme resulted in 6,043 arrests and so far in 2007, another 3,327.

58. Local law enforcement agencies that have signed MOUs so far are:

- Florida Department of Law Enforcement (the first to enter into the agreement)
- Alabama Department of Public Safety
- Arizona Department of Corrections
- Los Angeles, County Sheriff’s Department
- San Bernardino County Sheriff-Coroner Department
D. Detention and removal system

59. On 2 November 2005 the Department of Homeland Security announced to the public a multi-year plan called the Secure Border Initiative (SBI) to increase enforcement along the United States borders and to reduce illegal migration. The SBI is divided into two phases.

60. The first phase includes a restructuring of the detention and removal system through the expansion of expedited removal and the creation of the “catch and return” initiative, in addition to greatly strengthening border security through additional personnel and technology.

61. The second phase, the interior enforcement strategy, was unveiled to the public on 20 April 2006. It is through this initiative that U.S. Immigration and Customs Enforcement (ICE) has expanded operations that target undocumented workers and individuals who are in violation of immigration law. The operations also target all non-citizens, including refugees, legal permanent residents, and others with permission to reside in the United States, who have any of a long list of criminal offences on their records, including minor offences, which result in the mandatory detention and deportation of these individuals in accordance with the immigration laws passed in 1996.\(^\text{10}\)

62. The primary goal of the IES is to “Identify and remove criminal aliens, immigration fugitives and other immigration violators.” According to the Office of Detention and Removal Operations:

- A criminal alien is a non-citizen who has been convicted of a crime while residing in the United States, either legally or illegally. This includes charges ranging from shoplifting to work document fraud and murder. After having served their sentence, these individuals face a separate administrative procedure to determine whether they should be removed from the United States.

- An immigration fugitive is someone who has been ordered deported by an immigration judge but has not complied with the order. In actuality, a number of these deportation orders were issued in absentia and often mailed to incorrect mailing addresses.

- Other immigration violators or non-fugitive violators are people who are in some way in violation of current immigration law, but have not been issued a final order of deportation. This includes people who are undocumented, have overstayed their visas, or are in violation of an immigration law that might not have existed at the time of their original entry.

63. Increasing workplace and household raids by ICE agents have terrorized immigrant communities. Besides their frequent disregard of due process, these raids have left an indelible mark by forcibly separating many families.

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\(^{10}\) Immigration and Nationality Act, section 287 (g).
64. In practically every state in the country, ICE raids have separated children from their parents. Testimonies from children and parents, as well as from social service providers, faith leaders, and elected officials, speak of the widespread social devastation caused by ICE raids.

65. The Special Rapporteur is particularly concerned about the stepped up strategy of arresting deportable immigrants through early morning actions at their homes. In many cases, ICE enters a home with a warrant to arrest one or several immigrants and then proceeds to sweep the entire building, knocking on other doors and demanding to see immigration papers from all the inhabitants. In one case three young boys, aged three, four and seven were awakened at six in the morning to find that their parents were being taken away by immigration officers. ICE carries out these raids in a forceful fashion and uses them not only as an enforcement mechanism but to deter others from being in the United States. These raids are carried out as coordinated efforts with a massive law enforcement presence and have considerable impact on affected families and communities.

66. The Special Rapporteur heard accounts from victims that ICE officials entered their homes without a warrant, denied them access to lawyers or a phone to call family members and coerced them to sign “voluntary departure “agreements.

67. Many who are subject to these raids and subsequent mandatory detention are long-time permanent residents who know far more about the country from which they are facing removal - the United States - than the country to which they may be removed. Although lawful permanent status is not terminated with detention, but only when a final order of removal is entered against an individual, lawful residents can be detained until there is a final resolution in their case.

E. Mandatory detention

68. Detention impairs an individual’s ability to obtain counsel and present cases in removal proceedings. In 2005, 65 per cent of immigrants appeared at their deportation hearings without benefit of legal counsel. Despite the adversarial and legally complex nature of removal proceedings and the severe consequences at stake, detainees are not afforded appointed counsel.

69. Moreover, detention impacts an individual’s ability to earn income, thereby also impeding the ability to retain counsel. To make matters worse, the Department of Homeland Security often transfers detainees hundreds or thousands of miles away from their home cities without any notice to their attorneys or family members, which violates the agency’s own administrative regulations on detention and transfer of detainees. Non-citizens are often detained in particularly remote locations. Many private attorneys are put off from taking cases where clients are detained in such locations. Onerous distances, inflexible visitation schedules and advance notice scheduling requirements by facilities are all obstacles that impede the ability of detainees to secure and retain legal assistance.

70. Detention severely impairs the right of a respondent in removal proceedings to present evidence in her or his own defence. Extensive documentation is often required, including family ties, employment history, property or business ties, rehabilitation or good moral character. Obtaining admissible supporting documents from family members, administrative agencies,
school and hospitals, can be burdensome for anyone, but often practically impossible for
detainees. Access to mail and property is often limited and can also create significant obstacles
for detainees.

71. Faced with the prospect of mandatory and prolonged detention, detainees often abandon
claims to legal relief from removal, contrary to international standards that require non-citizens
to be able to submit reasons against their deportation to the competent authorities. Mandatory
detention operates as a coercive mechanism, pressuring those detained to abandon meritorious
claims for relief in order to avoid continued or prolonged detention and the onerous conditions
and consequences it imposes.

72. United States immigration law allows for detention of migrants that is often neither brief
nor determinate, and adjudication of defenses against removal can be complicated and lengthy.
An appeal to the Board of Immigration Appeals by either party extends the period of mandatory
detention for many additional months. A petition for review to the Court of Appeals also extends
mandatory detention, often for a period of years. A non-citizen is subject to mandatory detention
even after being granted relief by the immigration judge, simply upon the filing of a notice of
intent to appeal by Government counsel. In fact, it is often the most meritorious cases that take
the longest to adjudicate, and in which migrants spend the longest amount of time in detention.
Often the cases subject to continuing appeals are cases where individuals may have the strongest
ties to the United States and risk the severest consequences if removed.

73. Mandatory detention also extends to United States citizens who have not yet officially
proven their citizenship status or whose status is pending approval. That is because, for those
who are not born in the United States, proving citizenship can be a legally and factually intensive
process, requiring documentation of their own and their family’s history over many years.
United States citizenship may be acquired or may exist in derivative form and therefore legally
complex determinations must be made in order for citizenship to be established. Mandatory
detention policies often prevent a citizen’s ability to gather proof of citizenship at all, or in an
expedited manner. Even in cases where individuals were born in the United States, verification
of citizenship can be burdensome and take months or more, and individuals may remain detained
in the process.

74. In addition to the devastating effect that mandatory detention has on detained individuals,
the policy has an overwhelmingly negative impact on the families of detainees, many of whom
are citizens of the United States.

75. Those who will eventually be removed are prevented from resolving their affairs and
making preparations with their families for departure, to the detriment of the wider community.

76. Mandatory detention and mandatory deportation prevent migrants from fulfilling
responsibilities they have to family members, to employers, and to the wider communities that
may rely on them for various reasons. Children can suffer trauma and severe loss from the
sudden, prolonged, and sometimes permanent absence of that parent. The absence of a family
member can result in irreparable economic and other injury to an entire family structure.
Additionally, health conditions and medical situations specific to certain families are not
considered when individuals are subjected to mandatory detention.
77. Mandatory detention and deportation policy, therefore, has significant effects on United States citizens and the children of permanent residents, and other family members. Families consistently bear many of the psychological, geographic, economic, and emotional costs of detention and deportation.

78. Immigration laws are known for being particularly complex. It may take a non-citizen subject to mandatory detention months and sometimes years to ultimately prove that he or she was not deportable.

79. In one case a lawful permanent resident of the United States was detained for approximately three and a half years, subject to mandatory detention, for offences that the Court of Appeals for the Ninth Circuit ultimately found not to constitute deportable offences. Three and a half years after being placed in the custody of the Department of Homeland Security and charged as having been convicted of an aggravated felony, this person was released by the Department, as it was clear that nothing in his case made him removable and that removal proceedings would therefore be terminated.

80. The Security Through Regularized Immigration and a Vibrant Economy Act of 2007 (the STRIVE Act), introduced by Congress on 22 March 2007, is an example of recently proposed legislation that would further expand mandatory detention and indefinite immigration detention, and was an attempt to create comprehensive immigration reform through policy. It required that the Department of Homeland Security significantly increase the number of facilities for the detention of non-citizens, adding a minimum of 20 detention facilities with the capacity to detain an additional 20,000 non-citizens.

81. The STRIVE Act would have essentially overruled the limitations on indefinite detention outlined by the United States Supreme Court in Zadvydas v. Davis by specifically authorizing the Department of Homeland Security to indefinitely detain certain non-citizens who have been ordered removed, even when their removal is not reasonably foreseeable. The STRIVE Act would also have increased the number of people subject to mandatory detention by further expanding the kinds of crimes that constitute an aggravated felony and providing the basis for such detention. During the Special Rapporteur’s mission to the United States the bill died in the Congressional Subcommittee on 5 May 2007 as it did not come to a vote.

82. Despite efforts by activists, community members, lawyers, and other advocates to repair the significant damage resulting from the legislation introduced in 1996, the legislation and its effects have not been reversed nor mitigated. Moreover, at both state and federal levels, the anti-immigrant climate has resulted in legislation that leads to increased mandatory detention of non-citizens even before they are in Department of Homeland Security custody.

83. For example, in November 2006, Arizona voters approved Proposition 100, which became effective on 7 December 2006 upon its codification in Arizona Revised Statutes §13-3961. That

\[^{11}\text{H.R. 1645.}\]

\[^{12}\text{See paragraph 40 above.}\]
section now provides that a person who is in criminal custody shall be denied bail “if the proof is
evident or presumption great” that the person is guilty of a serious felony offence and the person
“has entered or remained in the United States illegally”. In addition to the serious due process
and equal protection issues this provision raises, by mandating different treatment for
non-citizens and citizens in criminal proceedings and requiring state officials with little
understanding of the complexity of immigration laws to enforce those laws, it also virtually
ensures the eventual transfer of these individuals to Department of Homeland Security custody
(even if they are never convicted), further increasing the number of people potentially subject to
mandatory, prolonged, and indefinite detention.

84. Immigrants indefinitely detained are left uncertain of their status, their rights and their
futures. Indefinite detention subjects the families of detained immigrants to the agony of not
knowing when their loved one will be released or removed. It exacerbates existing mental health
problems and retraumatizes individuals who have been subjected to torture or other forms of
persecution in their home countries.

report revealed that ICE is non-compliant with regulations governing the review of post-order
cases following the two Supreme Court rulings on indefinite detention.

86. The OIG study further found that ICE failed to provide detainees with prior notice of
custody reviews, information about how they can cooperate in removal efforts or decisions that
clearly explain why supervised release has been denied. OIG attributed many of these failures to
inadequate staffing both at local ICE field offices and headquarters, leading to insufficient
oversight of local custody decisions.

87. Without the ability to comply uniformly with the current regulations there can be no
reasonable expectation that ICE has the capacity to handle its large caseload resulting in part
from the efforts of the Department of Homeland Security to secure the border.

III. THE PLIGHT OF MIGRANT WORKERS:
THE CASE OF HURRICANE KATRINA

A. Background

88. In the aftermath of Hurricane Katrina, which devastated New Orleans and other areas of
the United States Gulf Coast in 2005, several hundred thousand workers, mostly
African Americans, lost their jobs and their homes, and many became internally displaced
persons (IDPs). Since the storm, these IDPs have faced tremendous structural barriers to
returning home and to finding the employment necessary to rebuild their lives. Without housing,
you cannot work; without work, you cannot afford housing. Since Hurricane Katrina, tens of
thousands of migrant workers, most of them undocumented, have arrived in the Gulf Coast
region to work in the reconstruction zones. They have made up much of the labour to rebuild the
area, to keep businesses running and to boost tax revenue. To support their families, migrant
workers often work longer hours for less pay than other labourers. For some migrant workers,
wages continue to decrease. Jobs are becoming scarcer because the most urgent work, gutting
homes and removing debris, is mostly finished.
89. These migrant workers, like their original local counterparts, are finding barriers to safe employment, fair pay, and affordable housing, and in some cases, experience discrimination and exploitation amounting to inhuman and degrading treatment. In fact, many workers are homeless or living in crowded, unsafe and unsanitary conditions, harassed and intimidated by law enforcement, landlords and employers alike.

90. Migrant workers on the Gulf Coast are experiencing an unprecedented level of exploitation. They often live and work amid substandard conditions, homelessness, poverty, environmental toxicity, and the constant threat of police and immigration raids, without any guarantee of a fair day’s pay. They also face structural barriers that make it impossible to hold public or private institutions accountable for their mistreatment; most have no political voice.

91. The dramatically increased presence of migrant workers in the region has fuelled local tensions over language barriers, education and health-care needs in a public services system strained by Katrina. The low-wage workers rebuilding New Orleans and the Mississippi Gulf Coast are almost entirely people of African, Asian and Hispanic and/or indigenous descent, many of whom are recent migrants from Latin America and Asia and many of whom are not proficient in English. African American residents are often pitted against migrant workers new to the area, with racial and ethnic tensions between marginalized minority groups in the region escalating. Moreover, as some internally displaced persons return to the region, concern is rising that migrant labourers have diminished job prospects for pre-Katrina residents. Day labourers shared stories with the Special Rapporteur about how they are paid less than promised, or not at all. They note that they are trying to rebuild a city that welcomed them when the most dangerous work needed to be done; only to rebuff them as the pace of rebuilding diminishes.

92. The stories of workers across the New Orleans metro area and the Gulf Coast after Katrina are not simply tales of personal plight. They are also stories about institutional responsibility. In the days following the hurricane, certain agencies of the federal government came under fierce criticism for being slow to act. Yet, in actuality, other parts of the federal government sprang into action quite quickly with a range of policy initiatives that were breathtaking in their scope and impact on workers.

93. The treatment of workers in New Orleans constitutes a national human rights crisis. Because these workers are typically migrant, displaced, undocumented, or have temporary work authorization, they have little chance to hold officials and private industry accountable (e.g., many cannot vote, while displaced New Orleanians continue to experience barriers to voting). New Orleans is being rebuilt on the backs of underpaid and unpaid workers perpetuating cycles of poverty that existed pre-Katrina. Hurricane Katrina helped create a situation where there is no government or private accountability for the creation and maintenance of these inequities. Internally displaced voters have no voice back home, and reconstruction workers are either non-residents or non-citizens. As a result, contractors have free reign to exploit workers, and the government has felt little pressure to ensure that migrant workers are protected and able to access what is needed to meet basic human needs.

94. As noted above, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families establish workers’ rights to (a) a safe and
healthful workplace, (b) compensation for workplace injuries and illnesses, (c) freedom of association and the right to form trade unions and bargain collectively, and (d) equality of conditions and rights for immigrant workers.

95. Immigrant workers, including those who migrated to work in the regions affected by Katrina, often experience violations of these rights. Lack of familiarity with United States law and language difficulties often prevent them from being aware of their rights as well as specific hazards in their work. Immigrant workers who are undocumented, as many are, risk deportation if they seek to organize to improve conditions. Fear of drawing attention to their immigration status also prevents them from seeking protection from Government authorities for their rights as workers. In 2002, the Supreme Court stripped undocumented workers of any remedies if they are illegally fired for union organizing activity. Under international law, however, undocumented workers are entitled to the same labour rights, including wages owed, protection from discrimination, protection for health and safety on the job and back pay, as are citizens and those working lawfully in a country.

96. Furthermore, pre- and post-Katrina policies and practices of local, state and federal government agencies have had a grossly disproportionate impact on migrants of colour, in violation of the United States Government’s obligations under the Convention on the Elimination of All Forms of Racial Discrimination (CERD) and other human rights norms that the United States has ratified.

B. Institutional responsibility

97. Personal stories recounted to the Special Rapporteur illuminate the commonality of the struggles faced by migrant workers but also the institutional responsibility, and how both policies and practices perpetuate structural and institutional racism and xenophobia. Across the city of New Orleans, workers - both returning internally displaced persons and new migrant workers - list calamities that have become routine: homelessness, wage theft, toxic working conditions, joblessness, police brutality, and layers of bureaucracy. These shared experiences with structural racism unite low-wage workers across racial, ethnic, and industry lines. Thousands of workers now live in the same conditions: they sleep in the homes they are gutting or in abandoned cars that survivors were forced to leave behind; they are packed in motels, sometimes 10 to a room; and they live on the streets. Most migrant workers were promised housing by their employers but quickly found upon arrival that no housing accommodation had been made available. Instead, they were left homeless.

98. By all accounts, state and local governments have turned a blind eye to this dismal housing situation. Although the city depends on migrant workers to act as a flexible, temporary workforce, it also made no arrangements to provide them with temporary housing. As a result, the workers who are rebuilding New Orleans often have nowhere to sleep.

99. The federal Government has sent mixed messages. On the one hand, it relaxed the immigration law requirements relating to hiring practices, thereby sending a message to contractors that hiring undocumented workers was permissible if not condoned. On the other hand, federal authorities failed to assure these workers and their family members that they would not be turned over to immigration authorities.
100. New migrant workers on the Gulf Coast have experienced a range of problems relating to wage theft which include:

- Non-payment of wages for work performed, including overtime
- Payment of wages with cheques that bounce due to insufficient funds
- Inability to identify the employer or contractor in order to pursue claims for unpaid wages
- Subcontractors - often migrants themselves - who want to but cannot pay wages because they have not been paid by the primary contractor (often a more financially stable white contractor)

101. These conditions are particularly salient for migrant workers, especially if they are undocumented as they are more easily exploitable. They may be hired for their hard manual labour and then robbed of their legally owed wages. The situation is exacerbated by the complexity of local employment structures. Because there are multiple tiers of subcontractors, often flowing from a handful of primary contractors with federal Government contracts, workers often do not know the identities of their employers. This is typical of the growing contingent of low-wage workers throughout the country. In New Orleans, workers explained that without knowing the identity of their employer, they cannot pursue wage claims against them.

102. Numerous workers have witnessed immigration raids by ICE and local law enforcement across the city of New Orleans, at large hotels downtown, the bus station, hiring sites across the city, the Superdome, on work sites, in the parking lots of home improvement stores, and even inside homes that workers are gutting or rebuilding. Workers report frequent immigration raids; retaliatory calls to immigration authorities, or threats of such calls, by employers; and collaboration between local law enforcement agents and ICE to the benefit of employers.

103. The lack of labour and human rights enforcement in the Gulf Coast stands in stark contrast to the aggressive tactics employed by local police and ICE, who readily respond to tips from unscrupulous employers who report workers that voice employment-related grievances. As a result, ICE raids on day labourer and other work sites have increased substantially in the wake of Hurricane Katrina. Both ICE and the Department of Labor have expressed their commitment to developing a process whereby ICE will determine, before deporting any worker detained on the Gulf Coast, whether the worker has any unpaid wage claims. Although ICE and the Department are reportedly engaged in ongoing consultations on this subject, no agreement appears to be in place. Workers live in fear of these tactics every day and most cannot or will not complain for fear of more severe repercussions.

IV. CONCLUSIONS

104. Contrary to popular belief, United States immigration policy did not become more severe after the terrorist attacks on September 11. Drastic changes made in 1996 have been at work for more than a decade, affecting communities across the nation and recent policy changes simply
exacerbate what was put in motion then. Also, contrary to popular belief, these policies do not target only undocumented migrants - they apply to citizens born in the United States of undocumented parents and long-term lawful permanent residents (or green card holders) as well.

105. Not only have immigration laws become more punitive - increasing the types of crimes that can permanently sever a migrant’s ties to the United States - but there are fewer ways for migrants to appeal for leniency. Hearings that used to happen in which a judge would consider a migrant’s ties to the United States, particularly their family relationships, were stopped in 1996. There are no exceptions available, no matter how long an individual has lived in the United States and no matter how much his spouse and children depend on him for their livelihood and emotional support.

106. Throughout the history of the United States, many different kinds of non-citizens have been made subject to mandatory detention. People with lawful permanent resident status (or green card holders), including those who have lived lawfully in the United States for decades, are subject to deportation. So are other legal immigrants - refugees, students, business people, and those who have permission to remain because their country of nationality is in the midst of war or a humanitarian disaster. Undocumented non-citizens are also subject to mandatory detention and deportation regardless of whether they have committed a crime.

107. A primary principle of United States immigration law is that United States citizens can never be denied entry into the country; neither can they ever be forcibly deported from the United States. By contrast, non-citizens, even those who have lived in the country legally for decades, are always vulnerable to mandatory detention and deportation.

108. In the wake of Hurricane Katrina, migrant workers from across the United States travelled to New Orleans. Ultimately, the voices of workers in post-Katrina New Orleans demonstrate that the actions and inactions of federal, state, and local governments and the actions of the private reconstruction industry have created deplorable working and living conditions for people striving to rebuild and return to the city. Because these workers are migrant, undocumented, and displaced they have little chance to hold officials and private industry accountable (e.g., many cannot vote, and displaced workers in New Orleans continue to experience barriers to voting) except through organized, collective action.

V. RECOMMENDATIONS

109. The Special Rapporteur would like to make the following recommendations to the Government.

On general detention matters

110. Mandatory detention should be eliminated; the Department of Homeland Security should be required to make individualized determinations of whether or not a non-citizen presents a danger to society or a flight risk sufficient to justify their detention.

111. The Department of Homeland Security must comply with the Supreme Court’s decision in Zadvydas v. Davis and Clark v. Martinez. Individuals who cannot be returned to their home countries within the foreseeable future should be released as soon as that
determination is made, and certainly no longer than six months after the issuance of a final order. Upon release, such individuals should be released with employment authorization, so that they can immediately obtain employment.

112. The overuse of immigration detention in the United States violates the spirit of international laws and conventions and, in many cases, also violates the actual letter of those instruments. The availability of effective alternatives renders the increasing reliance on detention as an immigration enforcement mechanism unnecessary. Through these alternative programmes, there are many less restrictive forms of detention and many alternatives to detention that would serve the country’s protection and enforcement needs more economically, while still complying with international human rights law and ensuring just and humane treatment of migrants.

Create detention standards and guidelines

113. At the eighty-seventh session of the Human Rights Committee in July 2006, the United States Government cited the issuance of the National Detention Standards in 2000 as evidence of compliance with international principles on the treatment of immigration detainees. While this is indeed a positive step, it is not sufficient. The United States Government should create legally binding human rights standards governing the treatment of immigration detainees in all facilities, regardless of whether they are operated by the federal Government, private companies, or county agencies.

114. Immigration detainees in the custody of the Department of Homeland Security and placed in removal proceedings, should have the right to appointed counsel. The right to counsel is a due process right that is fundamental to ensuring fairness and justice in proceedings. To ensure compliance with domestic and international law, court-appointed counsel should be available to detained immigrants.

115. Given that the difficulties in representing detained non-citizens are exacerbated when these individuals are held in remote and/or rural locations, U.S. Immigration and Customs Enforcement (ICE) should ensure that the facilities where non-citizens in removal proceedings are held, are located within easy reach of the detainees’ counsel or near urban areas where the detainee will have access to legal service providers and pro bono counsel.

Deportation issues impacting due process and important human rights

116. United States immigration laws should be amended to ensure that all non-citizens have access to a hearing before an impartial adjudicator, who will weigh the non-citizen’s interest in remaining in the United States (including their rights to found a family and to a private life) against the Government’s interest in deporting him or her.

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13 CCPR/C/USA/3, paras. 190-192.
Detention/deportation issues impacting unaccompanied children


118. Children should be removed from jail-like detention centres and placed in home-like facilities. Due care should be given to rights delineated for children in custody in the American Bar Association “Standards for the Custody, Placement, and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States”.14

119. Temporary Protected Status (TPS) should be amended for unaccompanied children whose parents have TPS, so they can derive status through their parents.

Situation of migrant women detained in the United States

120. In collaboration with legal service providers and non-governmental organizations that work with detained migrant women, ICE should develop gender-specific detention standards that address the medical and mental health concerns of migrant women who have survived mental, physical, emotional or sexual violence.

121. Whenever possible, migrant women who are suffering the effects of persecution or abuse, or who are pregnant or nursing infants, should not be detained. If these vulnerable women cannot be released from ICE custody, the Department of Homeland Security should develop alternative programmes such as intense supervision or electronic monitoring, typically via ankle bracelets. These alternatives have proven effective during pilot programmes. They are not only more humane for migrants who are particularly vulnerable in the detention setting or who have family members who require their presence, but they also cost, on average, less than half the price of detention.

Judicial review

122. The United States should ensure that the decision to detain a non-citizen is promptly assessed by an independent court.

123. The Department of Homeland Security and the Department of Justice should work together to ensure that immigration detainees are given the chance to have their custody reviewed in a hearing before an immigration judge. Both departments should revise regulations to make clear that asylum-seekers can request these custody determinations from immigration judges.

124. Congress should enact legislation to ensure that immigration judges are independent of the Department of Justice, and instead part of a truly independent court system.

125. Families with children should not be held in prison-like facilities. All efforts should be made to release families with children from detention and place them in alternative accommodation suitable for families with children.

On migrant workers

126. The Government should ensure that state and federal labour policies are monitored, and their impact on migrant workers analysed. Policymakers and the public should be continually educated on the human needs and human rights of workers, including migrant workers. In this context, the Special Rapporteur strongly recommends that the United States consider ratifying the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

127. A human services infrastructure should be built in disaster-affected communities to comprehensively meet the needs of workers facing substandard housing and homelessness, wage theft, unsafe working conditions and health issues.

128. Effective oversight of the enforcement of applicable labour laws by state and federal agencies should be ensured.

129. Existing health and safety laws should be assiduously enforced in order to curb exploitative hiring and employment practices by contractors.

130. Improved health and safety conditions should be ensured in places that are known to employ migrant workers, compensation for workers and health care for injured migrant workers should be provided, and the significant incidences of wage theft combated.

131. Local law enforcement and federal immigration authorities must cease harassing and racially profiling migrant workers. Law enforcement should instead focus on helping to promote the rights of workers, including the rights of migrant workers.
Appendix H:
Statement of Dr. Erik Camayd-Freixas
before the House Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law,
July 24, 2008
STATEMENT

OF

DR. ERIK CAMAYD-FREIXAS
FEDERALLY CERTIFIED INTERPRETER

AT THE

U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA

REGARDING A HEARING ON

"THE ARREST, PROSECUTION, AND CONVICTION
OF 297 UNDOCUMENTED WORKERS
IN POSTVILLE, IOWA,
FROM MAY 12 TO 22, 2008"

BEFORE THE

SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP,
REFUGEES, BORDER SECURITY AND INTERNATIONAL LAW
July 24, 2008 at 11:00am
1310 Longworth House Office Building
PREPARED STATEMENT OF DR. ERIK CAMAYD-FREIXAS

Introduction

Good morning, Chairwoman Lofgren, and distinguished members of the Subcommittee. My name is Dr. Erik Camayd-Freixas. I was one of 26 interpreters who started the court hearings at Waterloo on May 13, 2008, and one of approximately 16 interpreters who stayed the whole two weeks, until May 22.

The role of the Interpreter is defined in Rule 604 of the Federal Criminal Code and Rules (1989) as both an Officer of the Court and the Court’s Expert Witness. In that impartial capacity, I wrote my essay, Interpreting after the Largest ICE Raid in US History, which I respectfully submit for the congressional record. I finished the essay on June 13, with the intention of sending it to an educational trade journal for translators and interpreters.

I first sent my essay to the court and to the group of interpreters with whom I worked in Waterloo. After proper consultation and several requests, I granted permission to forward the essay to family and friends. Immediately, I began to receive, on a daily basis, scores of e-mails of support from attorneys, academics, other interpreters, and people in all walks of life around the country. Distributed by people over the Internet, in two weeks my essay had been read by thousands, had made it to Congress, and later to the media.

The essay can be found at the end of this statement.

In my capacity as the court’s expert witness I observed that the arrest, prosecution, and conviction of 297 undocumented workers from Postville was a process marred by irregularities at every step of the way, which combined to produce very lamentable results.

It is important to note that the initial appearances, plea hearings, and sentencing hearings were presided by different magistrates and judges, and that the interpreters were the only officers of the court who were present at every step of this fast-tracking operation, including the individual interviews in jail, which were not accessible to judges or prosecutors.

This unprecedented operation was a learning experience for all concerned. It was also a pilot operative to be replicated at a similar or smaller scale throughout the country. In this context, it is the duty of the interpreter, as the court’s expert, to ensure that the court is
not misled, and to bring to the court’s attention any misunderstandings and impediments to due process.

While on location, I was only able to give the court a sketchy oral report. Only after careful research, analysis, and reconstruction of the events was I able to make a detailed written report in the form of the abovementioned essay. Moreover, I had to do this after the cases were already closed, so as not to influence their outcome, which is the rationale for the confidentiality clause in the interpreter’s code of ethics.

It is also important to note that I maintained an impartial position throughout the proceedings and I remain impartial today. All my judgments were arrived at from such impartial perspective, in the same way that judges or juries can emit impartial judgments and conclusions of fact.

I had occasion to observe and document the following problems in the judicial process:

1) The compound and quarters where the detainees were kept were not certified by the DOJ or the Bureau of Prisons.
2) The court failed to maintain a physical separation and operational independence from the ICE prosecution.
3) There was inadequate access to legal counsel.
4) The court failed to provide a level playing field for the (centralized) prosecution and the (fragmented) defense.
5) At initial appearance there was no meaningful presumption of innocence.
6) Many defendants did not appear to understand their rights, particularly the meaning and consequences of waiving their right to be indicted by a grand jury.
7) There was no bail hearing, as bail was automatically denied pursuant to an immigration detainer.
8) The heavier charge of aggravated identity theft, used to leverage the Plea Agreement, was lacking in foundation and never underwent the judicial test of probable cause.
9) Many defendants did not appear to understand their charges or rights, insisting that they were in jail for being in the country illegally (and not for document fraud or identity theft), and insisting that they had no rights.
10) Many defendants did not know what a Social Security Number is or what purpose it serves. Because “intent” was an element of each of the charges, many were probably not guilty, but had no choice but to plead out.
11) The denial of bail, the inflated charge, and the leveraged Plea Agreement combined to create, for the many sole providers whose families were put in
jeopardy, a situation of duress under which the pleas were obtained. Under these circumstances, the pleas, in many cases, may have been coerced.

12) At sentencing, the judges had no discretion to administer justice, as they were presented with a binding and coerced Plea Agreement.

13) It was a foreseeable effect that, for the many sole providers whose families were put in jeopardy, the recommended prison sentence would in fact result in a cruel and unusual psychological punishment.

In order to accurately interpret the meaning and spirit of the message, the interpreter has to identify with and “become” each speaker. Seeing from within the perspective of the other is a common procedure in legal interpreting. When I assumed the perspective of most defendants, I found the charges and rights to be incomprehensible; I felt that a great injustice was being done; and I found their imprisonment, with their families in jeopardy, to be an intolerable burden.

I will now concentrate briefly on the defendants’ inability to understand their charges and rights. This was due to the interplay of four factors:

1) It was unclear to what extent the numerous ethnic Mayans understood Spanish as a second language.

2) There are vast cultural differences between Mexican and Guatemalan rural cultures, on the one hand, and American legal culture on the other.

3) It is my expert opinion as an educator that, due to their lack of schooling and low rate of literacy, most of the defendants had a level of conceptual and abstract understanding equivalent to that of a third grader or less. They needed much more time and individualized legal counsel than could be remotely provided by this fast-tracking process under the average ratio of 17 clients per attorney.

4) The court was put in a position of interdependence with the prosecution, which resulted in the court sending very mixed messages. For example, telling defendants in chains, without right of bail, and who are being fast-tracked without regard for individual circumstance, that they have the presumption innocence.

In general, the defendants were not able to understand the far-fetched, abstract, and derivative concept of “identity theft,” because they felt they had not literally stolen from anybody, but had in fact purchased the documents necessary to obtain work, paying up to $300 for them.

Similarly, many had trouble understanding the charge of Social Security fraud because they felt they had not done anyone any harm. They simply understood that both were
arbitrary charges brought by the government for the sole reason that they were in the country illegally and that, therefore, they had no rights.

They further understood that, because they were in the country illegally, they had no chance of ever winning at trial, and that its outcome was predetermined. They had lost all confidence in our justice system. Some even distrusted their own court appointed lawyers, who had come to deliver a forcible Plea Agreement that offered them no viable option. If they pleaded not guilty, they could end up waiting longer in jail, without bail, for a trial they felt they could never win.

Whatever rights they were told they had made absolutely no difference, so they kept insisting that they had no rights because they were here illegally. With their rights being meaningless or denied, and without understanding the nature of the charges against them, they were unable to aid in their own defense.

Their decision, both to waive grand jury indictment or other rights and to plead guilty, was solely based on which was the fastest way to get back home and look after their families. Nothing else had any real meaning.

Interpreting after the Largest ICE Raid in US History:

A Personal Account

Erik Camayd-Freixas, Ph.D.
Florida International University

June 13, 2008

On Monday, May 12, 2008, at 10:00 a.m., in an operation involving some 900 agents, Immigration and Customs Enforcement (ICE) executed a raid of Agriprocessors Inc, the nation’s largest kosher slaughterhouse and meat packing plant located in the town of Postville, Iowa. The raid—officials boasted—was “the largest single-site operation of its kind in American history.” At that same hour, 26 federally certified interpreters from all over the country were en route to the small neighboring city of Waterloo, Iowa, having no idea what their mission was about. The investigation had started more than a year earlier. Raid preparations had begun in December. The Clerk’s Office of the U.S. District Court had contracted the interpreters a month ahead, but was not at liberty to tell us the whole truth, lest the impending raid be compromised. The operation was led by ICE, which belongs to the executive branch, whereas the U.S. District Court, belonging to the judicial branch, had to formulate its own official reason for participating. Accordingly, the Court had to move for two weeks to a remote location as part of a “Continuity of Operation Exercise” in case they were ever disrupted by an emergency, which in Iowa is
likely to be a tornado or flood. That is what we were told, but, frankly, I was not prepared for a disaster of such a different kind, one which was entirely man-made.

I arrived late that Monday night and missed the 8pm interpreters briefing. I was instructed by phone to meet at 7am in the hotel lobby and carpool to the National Cattle Congress (NCC) where we would begin our work. We arrived at the heavily guarded compound, went through security, and gathered inside the retro “Electric Park Ballroom” where a makeshift court had been set up. The Clerk of Court, who coordinated the interpreters, said: “Have you seen the news? There was an immigration raid yesterday at 10am. They have some 400 detainees here. We’ll be working late conducting initial appearances for the next few days.” He then gave us a cursory tour of the compound. The NCC is a 60-acre cattle fairground that had been transformed into a sort of concentration camp or detention center. Fenced in behind the ballroom / courtroom were 23 trailers from federal authorities, including two set up as sentencing courts; various Homeland Security buses and an “incident response” truck; scores of ICE agents and U.S. Marshals; and in the background two large buildings: a pavilion where agents and prosecutors had established a command center; and a gymnasium filled with tight rows of cots where some 300 male detainees were kept, the women being housed in county jails. Later the NCC board complained to the local newspaper that they had been “misled” by the government when they leased the grounds purportedly for Homeland Security training.

Echoing what I think was the general feeling, one of my fellow interpreters would later exclaim: “When I saw what it was really about, my heart sank…” Then began the saddest procession I have ever witnessed, which the public would never see, because cameras were not allowed past the perimeter of the compound (only a few journalists came to court the following days, notepad in hand). Driven single-file in groups of 10, shackled at the wrists, waist and ankles, chains dragging as they shuffled through, the slaughterhouse workers were brought in for arraignment, sat and listened through headsets to the interpreted initial appearance, before marching out again to be bused to different county jails, only to make room for the next row of 10. They appeared to be uniformly no more than 5 ft. tall, mostly illiterate Guatemalan peasants with Mayan last names, some being relatives (various Tajtaj, Xicay, Sajché, Sologüi...), some in tears; others with faces of worry, fear, and embarrassment. They all spoke Spanish, a few rather laboriously. It dawned on me that, aside from their Guatemalan or Mexican nationality, which was imposed on their people after Independence, they too were Native Americans, in shackles. They stood out in stark racial contrast with the rest of us as they started their slow penguin march across the makeshift court. “Sad spectacle” I heard a colleague say, reading my mind. They had all waived their right to be indicted by a grand jury and accepted instead an information or simple charging document by the U.S. Attorney, hoping to be quickly deported since they had families to support back home. But it was not to be. They were criminally charged with “aggravated identity theft” and
“Social Security fraud” — charges they did not understand… and, frankly, neither could I. Everyone wondered how it would all play out.

We got off to a slow start that first day, because ICE’s barcode booking system malfunctioned, and the documents had to be manually sorted and processed with the help of the U.S. Attorney’s Office. Consequently, less than a third of the detainees were ready for arraignment that Tuesday. There were more than enough interpreters at that point, so we rotated in shifts of three interpreters per hearing. Court adjourned shortly after 4pm. However, the prosecution worked overnight, planning on a 7am to midnight court marathon the next day.

I was eager to get back to my hotel room to find out more about the case, since the day’s repetitive hearings afforded little information, and everyone there was mostly refraining from comment. There was frequent but sketchy news on local TV. A colleague had suggested The Des Moines Register. So I went to DesMoinesRegister.com and started reading all the 20+ articles, as they appeared each day, and the 57-page ICE Search Warrant Application. These were the vital statistics. Of Agriprocessors’ 968 current employees, about 75% were illegal immigrants. There were 697 arrest warrants, but late-shift workers had not arrived, so “only” 390 were arrested: 314 men and 76 women; 290 Guatemalans, 93 Mexicans, four Ukrainians, and three Israelis who were not seen in court. Some were released on humanitarian grounds: 56 mostly mothers with unattended children, a few with medical reasons, and 12 juveniles were temporarily released with ankle monitors or directly turned over for deportation. In all, 306 were held for prosecution. Only five of the 390 originally arrested had any kind of prior criminal record. There remained 307 outstanding warrants.

This was the immediate collateral damage. Postville, Iowa (pop. 2,273), where nearly half the people worked at Agriprocessors, had lost 1/3 of its population by Tuesday morning. Businesses were empty, amid looming concerns that if the plant closed it would become a ghost town. Beside those arrested, many had fled the town in fear. Several families had taken refuge at St. Bridget’s Catholic Church, terrified, sleeping on pews and refusing to leave for days. Volunteers from the community served food and organized activities for the children. At the local high school, only three of the 15 Latino students came back on Tuesday, while at the elementary and middle school, 120 of the 363 children were absent. In the following days the principal went around town on the school bus and gathered 70 students after convincing the parents to let them come back to school; 50 remained unaccounted for. Some American parents complained that their children were traumatized by the sudden disappearance of so many of their school friends. The principal reported the same reaction in the classrooms, saying that for the children it was as if ten of their classmates had suddenly died. Counselors were brought in. American children were having nightmares that their parents too were being taken away. The superintendent said the school district’s future was unclear: “This literally
blew our town away.” In some cases both parents were picked up and small children were left behind for up to 72 hours. Typically, the mother would be released “on humanitarian grounds” with an ankle GPS monitor, pending prosecution and deportation, while the husband took first turn in serving his prison sentence. Meanwhile the mother would have no income and could not work to provide for her children. Some of the children were born in the U.S. and are American citizens. Sometimes one parent was a deportable alien while the other was not. “Hundreds of families were torn apart by this raid,” said a Catholic nun. “The humanitarian impact of this raid is obvious to anyone in Postville. The economic impact will soon be evident.”

But this was only the surface damage. Alongside the many courageous actions and expressions of humanitarian concern in the true American spirit, the news blogs were filled with snide remarks of racial prejudice and bigotry, poorly disguised beneath an empty rhetoric of misguided patriotism, not to mention the insults to anyone who publicly showed compassion, safely hurled from behind a cowardly online nickname. One could feel the moral fabric of society coming apart beneath it all.

The more I found out, the more I felt blindsided into an assignment of which I wanted no part. Even though I understood the rationale for all the secrecy, I also knew that a contract interpreter has the right to refuse a job which conflicts with his moral intuitions. But I had been deprived of that opportunity. Now I was already there, far from home, and holding a half-spent $1,800 plane ticket. So I faced a frustrating dilemma. I seriously considered withdrawing from the assignment for the first time in my 23 years as a federally certified interpreter, citing conflict of interest. In fact, I have both an ethical and contractual obligation to withdraw if a conflict of interest exists which compromises my neutrality. Appended to my contract are the Standards for Performance and Professional Responsibility for Contract Court Interpreters in the Federal Courts, where it states: “Interpreters shall disclose any real or perceived conflict of interest... and shall not serve in any matter in which they have a conflict of interest.” The question was did I have one. Well, at that point there was not enough evidence to make that determination. After all, these are illegal aliens and should be deported — no argument there, and hence no conflict. But should they be criminalized and imprisoned? Well, if they committed a crime and were fairly adjudicated... But all that remained to be seen. In any case, none of it would shake my impartiality or prevent me from faithfully discharging my duties. In all my years as a court interpreter, I have taken front row seat in countless criminal cases ranging from rape, capital murder and mayhem, to terrorism, narcotics and human trafficking. I am not the impressionable kind. Moreover, as a professor of interpreting, I have confronted my students with every possible conflict scenario, or so I thought. The truth is that nothing could have prepared me for the prospect of helping our government put hundreds of innocent people in jail. In my ignorance and disbelief, I reluctantly decided to stay the course and see what happened next.
Wednesday, May 14, our second day in court, was to be a long one. The interpreters were divided into two shifts, 8am to 3pm and 3pm to 10pm. I chose the latter. Through the day, the procession continued, ten by ten, hour after hour, the same charges, the same recitation from the magistrates, the same faces, chains and shackles, on the defendants. There was little to remind us that they were actually 306 individuals, except that occasionally, as though to break the monotony, one would dare to speak for the others and beg to be deported quickly so that they could feed their families back home. One who turned out to be a minor was bound over for deportation. The rest would be prosecuted. Later in the day three groups of women were brought, shackled in the same manner. One of them, whose husband was also arrested, was released to care for her children, ages two and five, uncertain of their whereabouts. Several men and women were weeping, but two women were particularly grief stricken. One of them was sobbing and would repeatedly struggle to bring a sleeve to her nose, but her wrists shackled around her waist simply would not reach; so she just dripped until she was taken away with the rest. The other one, a Ukrainian woman, was held and arraigned separately when a Russian telephonic interpreter came on. She spoke softly into a cellular phone, while the interpreter told her story in English over the speakerphone. Her young daughter, gravely ill, had lost her hair and was too weak to walk. She had taken her to Moscow and Kiev but to no avail. She was told her child needed an operation or would soon die. She had come to America to work and raise the money to save her daughter back in Ukraine. In every instance, detainees who cried did so for their children, never for themselves.

The next day we started early, at 6:45am. We were told that we had to finish the hearings by 10am. Thus far the work had oddly resembled a judicial assembly line where the meat packers were mass processed. But things were about to get a lot more personal as we prepared to interpret for individual attorney-client conferences. In those first three days, interpreters had been pairing up with defense attorneys to help interview their clients. Each of the 18 court appointed attorneys represented 17 defendants on average. By now, the clients had been sent to several state and county prisons throughout eastern Iowa, so we had to interview them in jail. The attorney with whom I was working had clients in Des Moines and wanted to be there first thing in the morning. So a colleague and I drove the 2.5 hours that evening and stayed overnight in a hotel outside the city. We met the attorney in jail Friday morning, but the clients had not been accepted there and had been sent instead to a state penitentiary in Newton, another 45-minute drive. While we waited to be admitted, the attorney pointed out the reason why the prosecution wanted to finish arraignments by 10am Thursday: according to the writ of habeas corpus they had 72 hours from Monday’s raid to charge the prisoners or release them for deportation (only a handful would be so lucky). The right of habeas corpus, but of course! It dawned on me that we were paid overtime, adding hours to the day, in a mad rush to abridge habeas corpus, only to help put more workers in jail. Now I really felt bad. But it would soon get worse. I was about to bear the brunt of my conflict of interest.
It came with my first jail interview. The purpose was for the attorney to explain the uniform Plea Agreement that the government was offering. The explanation, which we repeated over and over to each client, went like this. There are three possibilities. If you plead guilty to the charge of “knowingly using a false Social Security number,” the government will withdraw the heavier charge of “aggravated identity theft,” and you will serve 5 months in jail, be deported without a hearing, and placed on supervised release for 3 years. If you plead not guilty, you could wait in jail 6 to 8 months for a trial (without right of bail since you are on an immigration detainer). Even if you win at trial, you will still be deported, and could end up waiting longer in jail than if you just pled guilty. You would also risk losing at trial and receiving a 2-year minimum sentence, before being deported. Some clients understood their “options” better than others.

That first interview, though, took three hours. The client, a Guatemalan peasant afraid for his family, spent most of that time weeping at our table, in a corner of the crowded jailhouse visiting room. How did he come here from Guatemala? “I walked.” What? “I walked for a month and ten days until I crossed the river.” We understood immediately how desperate his family’s situation was. He crossed alone, met other immigrants, and hitched a truck ride to Dallas, then Postville, where he heard there was sure work. He slept in an apartment hallway with other immigrants until employed. He had scarcely been working a couple of months when he was arrested. Maybe he was lucky: another man who began that Monday had only been working for 20 minutes. “I just wanted to work a year or two, save, and then go back to my family, but it was not to be.” His case and that of a million others could simply be solved by a temporary work permit as part of our much overdue immigration reform. “The Good Lord knows I was just working and not doing anyone any harm.” This man, like many others, was in fact not guilty. “Knowingly” and “intent” are necessary elements of the charges, but most of the clients we interviewed did not even know what a Social Security number was or what purpose it served. This worker simply had the papers filled out for him at the plant, since he could not read or write Spanish, let alone English. But the lawyer still had to advise him that pleading guilty was in his best interest. He was unable to make a decision. “You all do and undo,” he said. “So you can do whatever you want with me.” To him we were part of the system keeping him from being deported back to his country, where his children, wife, mother, and sister depended on him. He was their sole support and did not know how they were going to make it with him in jail for 5 months. None of the “options” really mattered to him. Caught between despair and hopelessness, he just wept. He had failed his family, and was devastated. I went for some napkins, but he refused them. I offered him a cup of soda, which he superstitiously declined, saying it could be “poisoned.” His Native American spirit was broken and he could no longer think. He stared for a while at the signature page pretending to read it, although I knew he was actually praying for guidance and protection. Before he signed with a scribble, he said: “God knows you are just doing your job to support your families, and that job is to keep
me from supporting mine." There was my conflict of interest, well put by a weeping, illiterate man.

We worked that day for as long as our emotional fortitude allowed, and we had to come back to a full day on Sunday to interview the rest of the clients. Many of the Guatemalans had the same predicament. One of them, a 19-year-old, worried that his parents were too old to work, and that he was the only support for his family back home. We will never know how many of the 290 Guatemalans had legitimate asylum claims for fear of persecution, back in a country stigmatized by the worst human rights situation in the hemisphere, a by-product of the US-backed Contra wars in Central America under the old domino theory of the 1980s. For three decades, anti-insurgent government death squads have ravaged the countryside, killing tens of thousands and displacing almost two million peasants. Even as we proceeded with the hearings during those two weeks in May, news coming out of Guatemala reported farm workers being assassinated for complaining publicly about their working conditions. Not only have we ignored the many root causes of illegal immigration, we also will never know which of these deportations will turn out to be a death sentence, or how many of these displaced workers are last survivors with no family or village to return to.

Another client, a young Mexican, had an altogether different case. He had worked at the plant for ten years and had two American born daughters, a 2-year-old and a newborn. He had a good case with Immigration for an adjustment of status which would allow him to stay. But if he took the Plea Agreement, he would lose that chance and face deportation as a felon convicted of a crime of "moral turpitude." On the other hand, if he pled "not guilty" he had to wait several months in jail for trial, and risk getting a 2-year sentence. After an agonizing decision, he concluded that he had to take the 5-month deal and deportation, because as he put it, "I cannot be away from my children for so long." His case was complicated; it needed research in immigration law, a change in the Plea Agreement, and, above all, more time. There were other similar cases in court that week. I remember reading that immigration lawyers were alarmed that the detainees were being rushed into a plea without adequate consultation on the immigration consequences. Even the criminal defense attorneys had limited opportunity to meet with clients: in jail there were limited visiting hours and days; at the compound there was little time before and after hearings, and little privacy due to the constant presence of agents. There were 17 cases for each attorney, and the Plea offer was only good for 7 days. In addition, criminal attorneys are not familiar with immigration work and vice versa, but had to make do since immigration lawyers were denied access to these "criminal" proceedings.

In addition, the prosecutors would not accept any changes to the Plea Agreement. In fact, some lawyers, seeing that many of their clients were not guilty, requested an Alford plea, whereby defendants can plead guilty in order to accept the prosecution's offer, but without having to lie under oath and admit to something they did not do. That
would not change the 5-month sentence, but at least it preserves the person's integrity and dignity. The proposal was rejected. Of course, if they allowed Alford pleas to go on public record, the incongruence of the charges would be exposed and find its way into the media. Officially, the ICE prosecutors said the Plea Agreement was directed from the Department of Justice in Washington, D.C., that they were not authorized to change it locally, and that the DOJ would not make any case by case exceptions when a large number of defendants are being “fast-tracked.” Presumably if you gave different terms to one individual, the others will want the same. This position, however, laid bare one of the critical problems with this new practice of “fast-tracking.” Even real criminals have the right of severance: when co-defendants have different degrees of responsibility, there is an inherent conflict of interest, and they can ask to be prosecuted separately as different cases, each with a different attorney. In fast-tracking, however, the right of severance is circumvented because each defendant already has a different case number on paper, only that they are processed together, 10 cases at a time. At this point, it is worth remembering also that even real criminals have an 8th Amendment right to reasonable bail, but not illegal workers, because their immigration detainer makes bail a moot issue. We had already circumvented habeas corpus by doubling the court’s business hours. What about the 6th Amendment right to a “speedy trial”? In many states “speedy” means 90 days, but in federal law it is vaguely defined, potentially exceeding the recommended sentence, given the backlog of real cases. This served as another loophole to force a guilty plea. Many of these workers were sole earners begging to be deported, desperate to feed their families, for whom every day counted. “If you want to see your children or don’t want your family to starve, sign here” –that is what their deal amounted to. Their Plea Agreement was coerced.

We began week two Monday, May 19th. Those interpreters who left after the first week were spared the sentencing hearings that went on through Thursday. Those who came in fresh the second week were spared the jail visits over the weekend. Those of us who stayed both weeks came back from the different jails burdened by a close personal contact that judges and prosecutors do not get to experience: each individual tragedy multiplied by 306 cases. One of my colleagues began the day by saying “I feel a tremendous solidarity with these people.” Had we lost our impartiality? Not at all: that was our impartial and probably unanimous judgment. We had seen attorneys hold back tears and weep alongside their clients. We would see judges, prosecutors, clerks, and marshals do their duty, sometimes with a heavy heart, sometimes at least with mixed feelings, but always with a particular solemnity not accorded to the common criminals we all are used to encountering in the judicial system. Everyone was extremely professional and outwardly appreciative of the interpreters. We developed among ourselves and with the clerks, with whom we worked closely, a camaraderie and good humor that kept us going. Still, that Monday morning I felt downtrodden by the sheer magnitude of the events. Unexpectedly, a sentencing hearing lifted my spirits.
I decided to do sentences on Trailer 2 with a judge I knew from real criminal trials in Iowa. The defendants were brought in 5 at a time, because there was not enough room for 10. The judge verified that they still wanted to plead guilty, and asked counsel to confirm their Plea Agreement. The defense attorney said that he had expected a much lower sentence, but that he was forced to accept the agreement in the best interest of his clients. For us who knew the background of the matter, that vague objection, which was all that the attorney could put on record, spoke volumes. After accepting the Plea Agreement and before imposing sentence, the judge gave the defendants the right of allocution. Most of them chose not to say anything, but one who was the more articulate said humbly: “Your honor, you know that we are here because of the need of our families. I beg that you find it in your heart to send us home before too long, because we have a responsibility to our children, to give them an education, clothing, shelter, and food.” The good judge explained that unfortunately he was not free to depart from the sentence provided for by their Plea Agreement. Technically, what he meant was that this was a binding 11(C)(1)(e) Plea Agreement: he had to accept it or reject it as a whole. But if he rejected it, he would be exposing the defendants to a trial against their will. His hands were tied, but in closing he said onto them very deliberately: “I appreciate the fact that you are very hard working people, who have come here to do no harm. And I thank you for coming to this country to work hard. Unfortunately, you broke a law in the process, and now I have the obligation to give you this sentence. But I hope that the U.S. government has at least treated you kindly and with respect, and that this time goes by quickly for you, so that soon you may be reunited with your family and friends.” The defendants thanked him, and I saw their faces change from shame to admiration, their dignity restored. I think we were all vindicated at that moment.

Before the judge left that afternoon, I had occasion to talk to him and bring to his attention my concern over what I had learned in the jail interviews. At that point I realized how precious the interpreter’s impartiality truly is, and what a privileged perspective it affords. In our common law adversarial system, only the judge, the jury, and the interpreter are presumed impartial. But the judge is immersed in the framework of the legal system, whereas the interpreter is a layperson, an outsider, a true representative of the common citizen, much like “a jury of his peers.” Yet, contrary to the jury, who only knows the evidence on record and is generally unfamiliar with the workings of the law, the interpreter is an informed layperson. Moreover, the interpreter is the only one who gets to see both sides of the coin up close, precisely because he is the only participant who is not a decision maker, and is even precluded, by his oath of impartiality and neutrality, from ever influencing the decisions of others. That is why judges in particular appreciate the interpreter’s perspective as an impartial and informed layperson, for it provides a rare glimpse at how the innards of the legal system look from the outside. I was no longer sorry to have participated in my capacity as an interpreter. I realized that I had been privileged to bear witness to historic events from such a unique
vantage point and that because of its uniqueness I now had a civic duty to make it known. Such is the spirit that inspired this essay.

That is also what prompted my brief conversation with the judge: “Your honor, I am concerned from my attorney-client interviews that many of these people are clearly not guilty, and yet they have no choice but to plead out.” He understood immediately and, not surprisingly, the seasoned U.S. District Court Judge spoke as someone who had already wrestled with all the angles. He said: “You know, I don’t agree with any of this or with the way it is being done. In fact, I ruled in a previous case that to charge somebody with identity theft, the person had to at least know of the real owner of the Social Security number. But I was reversed in another district and yet upheld in a third.” I understood that the issue was a matter of judicial contention. The charge of identity theft seemed from the beginning incongruous to me as an informed, impartial layperson, but now a U.S. District Court Judge agreed. As we bid each other farewell, I kept thinking of what he said. I soon realized that he had indeed hit the nail on the head; he had given me, as it were, the last piece of the puzzle.

It works like this. By handing down the inflated charge of “aggravated identity theft,” which carries a mandatory minimum sentence of 2 years in prison, the government forced the defendants into pleading guilty to the lesser charge and accepting 5 months in jail. Clearly, without the inflated charge, the government had no bargaining leverage, because the lesser charge by itself, using a false Social Security number, carries only a discretionary sentence of 0-6 months. The judges would be free to impose sentence within those guidelines, depending on the circumstances of each case and any prior record. Virtually all the defendants would have received only probation and been immediately deported. In fact, the government’s offer at the higher end of the guidelines (one month shy of the maximum sentence) was indeed no bargain. What is worse, the inflated charge, via the binding 11(C)(1)(c) Plea Agreement, reduced the judges to mere bureaucrats, pronouncing the same litany over and over for the record in order to legalize the proceedings, but having absolutely no discretion or decision-making power. As a citizen, I want our judges to administer justice, not a federal agency. When the executive branch forces the hand of the judiciary, the result is abuse of power and arbitrariness, unworthy of a democracy founded upon the constitutional principle of checks and balances.

To an impartial and informed layperson, the process resembled a lottery of justice: if the Social Security number belonged to someone else, you were charged with identity theft and went to jail; if by luck it was a vacant number, you would get only Social Security fraud and were released for deportation. In this manner, out of 297 who were charged on time, 270 went to jail. Bothered by the arbitrariness of that heavier charge, I went back to the ICE Search Warrant Application (pp. 35-36), and what I found was astonishing. On February 20, 2008, ICE agents received social security “no match”
information for 737 employees, including 147 using numbers confirmed by the SSA as invalid (never issued to a person) and 590 using valid SSNs, “however the numbers did not match the name of the employee reported by Agriprocessors...” “This analysis would not account for the possibility that a person may have falsely used the identity of an actual person’s name and SSN.” “In my training and expertise, I know it is not uncommon for aliens to purchase identity documents which include SSNs that match the name assigned to the number.” Yet, ICE agents checked Accurint, the powerful identity database used by law enforcement, and found that 983 employees that year had non-matching SSNs. Then they conducted a search of the FTC Consumer Sentinel Network for reporting incidents of identity theft. “The search revealed that a person who was assigned one of the social security numbers used by an employee of Agriprocessors has reported his/her identity being stolen.” That is, out of 983 only 1 number (0.1%) happened to coincide by chance with a reported identity theft. The charge was clearly unfounded; and the raid, a fishing expedition. “On April 16, 2008, the US filed criminal complaints against 697 employees, charging them with unlawfully using SSNs in violation of Title 42 USC §408(a)(7)(B); aggravated identity theft in violation of 18 USC §1028A(a)(1); and/or possession or use of false identity documents for purposes of employment in violation of 18 USC §1546.”

Created by Congress in an Act of 1998, the new federal offense of identity theft, as described by the DOJ (http://www.usdoj.gov/criminal/fraud/websites/idtheft.html), bears no relation to the Postville cases. It specifically states: “knowingly uses a means of identification of another person with the intent to commit any unlawful activity or felony” [18 USC §1028(a)]. The offense clearly refers to harmful, felonious acts, such as obtaining credit under another person’s identity. Obtaining work, however, is not an “unlawful activity.” No way would a grand jury find probable cause of identity theft here. But with the promise of faster deportation, their ignorance of the legal system, and the limited opportunity to consult with counsel before arraignment, all the workers, without exception, were led to waive their 5th Amendment right to grand jury indictment on felony charges. Waiting for a grand jury meant months in jail on an immigration detainee, without the possibility of bail. So the attorneys could not recommend it as a defense strategy. Similarly, defendants have the right to a status hearing before a judge, to determine probable cause, within ten days of arraignment, but their Plea Agreement offer from the government was only good for... seven days. Passing it up, meant risking 2 years in jail. As a result, the frivolous charge of identity theft was assured never to undergo the judicial test of probable cause. Not only were defendants and judges bound to accept the Plea Agreement, there was also absolutely no defense strategy available to counsel. Once the inflated charge was handed down, all the pieces fell into place like a row of dominoes. Even the court was banking on it when it agreed to participate, because if a good number of defendants asked for a grand jury or trial, the system would be overwhelmed. In short, “fast-tracking” had worked like a dream.
It is no secret that the Postville ICE raid was a pilot operation, to be replicated elsewhere, with kinks ironed out after lessons learned. Next time, “fast-tracking” will be even more relentless. Never before has illegal immigration been criminalized in this fashion. It is no longer enough to deport them: we first have to put them in chains. At first sight it may seem absurd to take productive workers and keep them in jail at taxpayers’ expense. But the economics and politics of the matter are quite different from such rational assumptions. A quick look at the *ICE Fiscal Year 2007 Annual Report* (www.ice.gov) shows an agency that has grown to 16,500 employees and a $5 billion annual budget, since it was formed under Homeland Security in March 2003, “as a law enforcement agency for the post-9/11 era, to integrate enforcement authorities against criminal and terrorist activities, including the fights against human trafficking and smuggling, violent transnational gangs and sexual predators who prey on children” (17). No doubt, ICE fulfills an extremely important and noble duty. The question is why tarnish its stellar reputation by targeting harmless illegal workers. The answer is economics and politics. After 9/11 we had to create a massive force with readiness “to prevent, prepare for and respond to a wide range of catastrophic incidents, including terrorist attacks, natural disasters, pandemics and other such significant events that require large-scale government and law enforcement response” (23). The problem is that disasters, criminality, and terrorism do not provide enough daily business to maintain the readiness and muscle tone of this expensive force. For example, “In FY07, ICE human trafficking investigations resulted in 164 arrests and 91 convictions” (17). Terrorism related arrests were not any more substantial. The real numbers are in immigration: “In FY07, ICE removed 276,912 illegal aliens” (4). ICE is under enormous pressure to turn out statistical figures that might justify a fair utilization of its capabilities, resources, and ballooning budget. For example, the *Report* boasts 102,777 cases “eliminated” from the fugitive alien population in FY07, “quadrupling” the previous year’s number, only to admit a page later that 73,284 were “resolved” by simply “taking those cases off the books” after determining that they “no longer met the definition of an ICE fugitive” (4-5).

De facto, the rationale is: we have the excess capability; we are already paying for it; ergo, use it we must. And using it we are: since FY06 “ICE has introduced an aggressive and effective campaign to enforce immigration law within the nation’s interior, with a top-level focus on criminal aliens, fugitive aliens and those who pose a threat to the safety of the American public and the stability of American communities” (6). Yet, as of October 1, 2007, the “case backlog consisted of 594,756 ICE fugitive aliens” (5). So again, why focus on illegal workers who pose no threat? Elementary: they are easy pickings. True criminal and fugitive aliens have to be picked up one at a time, whereas raiding a slaughterhouse is like hitting a small jackpot: it beefs up the numbers. “In FY07, ICE enacted a multi-year strategy: ...worksite enforcement initiatives that target employers who defy immigration law and the “jobs magnet” that draws illegal
workers across the border” (iii). Yet, as the saying goes, corporations don’t go to jail. Very few individuals on the employer side have ever been prosecuted. In the case of Agriprocessors, the Search Warrant Application cites only vague allegations by alien informers against plant supervisors (middle and upper management are insulated). Moreover, these allegations pertain mostly to petty state crimes and labor infringements. Union and congressional leaders contend that the federal raid actually interfered with an ongoing state investigation of child labor and wage violations, designed to improve conditions. Meanwhile, the underlying charge of “knowingly possessing or using false employment documents with intent to deceive” places the blame on the workers and holds corporate individuals harmless. It is clear from the scope of the warrant that the thrust of the case against the employer is strictly monetary: to redress part of the cost of the multimillion dollar raid. This objective is fully in keeping with the target stated in the Annual Report: “In FY07, ICE dramatically increased penalties against employers whose hiring processes violated the law, securing fines and judgments of more than $30 million” (iv).

Much of the case against Agriprocessors, in the Search Warrant Application, is based upon “No-Match” letters sent by the Social Security Administration to the employer. In August 2007, DHS issued a Final Rule declaring “No-Match” letters sufficient notice of possible alien harboring. But current litigation (AFL-CIO v. Chertoff) secured a federal injunction against the Rule, arguing that such error-prone method would unduly hurt both legal workers and employers. As a result the “No-Match” letters may not be considered sufficient evidence of harboring. The lawsuit also charges that DHS overstepped its authority and assumed the role of Congress in an attempt to turn the SSA into an immigration law enforcement agency. Significantly, in referring to the Final Rule, the Annual Report states that ICE “enacted” a strategy to target employers (iii); thereby using a word (“enacted”) that implies lawmaking authority. The effort was part of ICE’s “Document and Benefit Fraud Task Forces,” an initiative targeting employees, not employers, and implying that illegal workers may use false SSNs to access benefits that belong to legal residents. This false contention serves to obscure an opposite and long-ignored statistics: the value of Social Security and Medicare contributions by illegal workers. People often wonder where those funds go, but have no idea how much they amount to. Well, they go into the SSA’s “Earnings Suspense File,” which tracks payroll tax deductions from payers with mismatched SSNs. By October 2006, the Earnings Suspense File had accumulated $586 billion, up from just $8 billion in 1991. The money itself, which currently surpasses $600 billion, is credited to, and comingled with, the general SSA Trust Fund. SSA actuaries now calculate that illegal workers are currently subsidizing the retirement of legal residents at a rate of $8.9 billion per year, for which the illegal (no-match) workers will never receive benefits.
Again, the big numbers are not on the employers’ side. The best way to stack the stats is to go after the high concentrations of illegal workers: food processing plants, factory sweatshops, construction sites, janitorial services—the easy pickings. September 1, 2006, ICE raid crippled a rural Georgia town: 120 arrested. Dec. 12, 2006, ICE agents executed warrants at Swift & Co. meat processing facilities in six states: 1,297 arrested, 274 “charged with identity theft and other crimes” (8). March 6, 2007 — *The Boston Globe* reports— 300 ICE agents raided a sweatshop in New Bedford: 361 mostly Guatemalan workers arrested, many flown to Texas for deportation, dozens of children stranded. As the *Annual Report* graph shows, worksite raids escalated after FY06, signaling the arrival of “a New Era in immigration enforcement” (1). Since 2002, administrative arrests increased tenfold, while criminal arrests skyrocketed thirty-fivefold, from 25 to 863. Still, in FY07, only 17% of detainees were criminally arrested, whereas in Postville it was 100% — a “success” made possible by “fast-tracking” — with felony charges rendering workers indistinguishable on paper from real “criminal aliens.” Simply put, the criminalization of illegal workers is just a cheap way of boosting ICE “criminal alien” arrest statistics. But after Postville, it is no longer a matter of clever paperwork and creative accounting; this time around 130 man-years of prison time were handed down pursuant to a bogus charge. The double whammy consists in beefing up an additional and meatier statistics showcased in the Report: “These incarcerated aliens have been involved in dangerous criminal activity such as murder, predatory sexual offenses, narcotics trafficking, alien smuggling and a host of other crimes” (6). Never mind the character assassination: next year when we read the FY08 report, we can all revel in the splendid job the agency is doing, keeping us safe, and blindly beef up its budget another billion. After all, they have already arrested 1,755 of these “criminals” in this May’s raids alone.

The agency is now poised to deliver on the New Era. In FY07, ICE grew by 10 percent, hiring 1,600 employees, including over 450 new deportation officers, 700
immigration enforcement agents, and 180 new attorneys. At least 85% of the new hires are directly allocated to immigration enforcement. "These additional personnel move ICE closer to target staffing levels" (35). Moreover, the agency is now diverting to this offensive resources earmarked for other purposes such as disaster relief. Wondering where the 23 trailers came from that were used in the Iowa "fast-tracking" operation? "In FY07, one of ICE's key accomplishments was the Mobile Continuity of Operations Emergency Response Pilot Project, which entails the deployment of a fleet of trailers outfitted with emergency supplies, pre-positioned at ICE locations nationwide for ready deployment in the event of a nearby emergency situation" (23). Too late for New Orleans, but there was always Postville... Hopefully the next time my fellow interpreters hear the buzzwords "Continuity of Operations" they will at least know what they are getting into.

This massive buildup for the New Era is the outward manifestation of an internal shift in the operational imperatives of the Long War, away from the "war on terror" (which has yielded lean statistics) and onto another front where we can claim success: the escalating undeclared war on illegal immigration. "Had this effort been in place prior to 9/11, all of the hijackers who failed to maintain status would have been investigated months before the attack" (9). According to its new paradigm, the agency fancies that it can conflate the diverse aspects of its operations and pretend that immigration enforcement is really part and parcel of the "war on terror." This way, statistics in the former translate as evidence of success in the latter. Thus, the Postville charges—document fraud and identity theft—treat every illegal alien as a potential terrorist, and with the same rigor. At sentencing, as I interpreted, there was one condition of probation that was entirely new to me: "You shall not be in possession of an explosive artifact.” The Guatemalan peasants in shackles looked at each other, perplexed.

When the executive responded to post-9/11 criticism by integrating law enforcement operations and security intelligence, ICE was created as "the largest investigative arm of the Department of Homeland Security (DHS)" with "broad law enforcement powers and authorities for enforcing more than 400 federal statutes" (1). A foreseeable effect of such breadth and integration was the concentration of authority in the executive branch, to the detriment of the constitutional separation of powers. Nowhere is this more evident than in Postville, where the expansive agency's authority can be seen to impinge upon the judicial and legislative powers. "ICE's team of attorneys constitutes the largest legal program in DHS, with more than 750 attorneys to support the ICE mission in the administrative and federal courts. ICE attorneys have also participated in temporary assignments to the Department of Justice as Special Assistant U.S. Attorneys spearheading criminal prosecutions of individuals. These assignments bring much needed support to taxed U.S. Attorneys' offices" (33). English translation: under the guise of interagency cooperation, ICE prosecutors have infiltrated the judicial branch.
Now we know who the architects were that spearheaded such a well crafted “fast-tracking” scheme, bogus charge and all, which had us all, down to the very judges, fall in line behind the shackled penguin march. Furthermore, by virtue of its magnitude and methods, ICE’s New War is unabashedly the aggressive deployment of its own brand of immigration reform, without congressional approval. “In FY07, as the debate over comprehensive immigration reform moved to the forefront of the national stage, ICE expanded upon the ongoing effort to re-invent immigration enforcement for the 21st century” (3). In recent years, DHS has repeatedly been accused of overstepping its authority. The reply is always the same: if we limit what DHS/ICE can do, we have to accept a greater risk of terrorism. Thus, by painting the war on immigration as inseparable from the war on terror, the same expediency would supposedly apply to both. Yet, only for ICE are these agendas codependent: the war on immigration depends politically on the war on terror, which, as we saw earlier, depends economically on the war on immigration. This type of no-exit circular thinking is commonly known as a “doctrine.” In this case, it is an undemocratic doctrine of expediency, at the core of a police agency, whose power hinges on its ability to capitalize on public fear. Opportunistically raised by DHS, the sad specter of 9/11 has come back to haunt illegal workers and their local communities across the USA.

A line was crossed at Postville. The day after in Des Moines, there was a citizens’ protest featured in the evening news. With quiet anguish, a mature all-American woman, a mother, said something striking, as only the plain truth can be. “This is not humane,” she said. “There has to be a better way.”
Appendix I:
Statement of Lutheran Immigration and Refugee Service and Bishop Steven Ullestad, Northeastern Iowa Synod of the Evangelical Lutheran Church in America, submitted to the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, July 24, 2008
Statement of Lutheran Immigration and Refugee Service and Bishop Steven Ullstad, Northeastern Iowa Synod of the Evangelical Lutheran Church in America

Submitted to the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law Hearing on “Immigration Raids: Postville and Beyond”

July 24, 2008

As the national Lutheran agency serving immigrants and refugees, and the synodical bishop of the Evangelical Lutheran Church in America (ELCA) in Northeastern Iowa, we are deeply concerned about the impact of the May 12, 2008 Immigration and Customs Enforcement (ICE) raid in Postville, Iowa. In a town of a few thousand people, ICE apprehended 389 immigrant employees, making it the largest single-site raid in U.S. history. In the aftermath, the local economy, businesses and local institutions and hundreds of children and families have been directly harmed. Indeed, the entire town has been left wondering how it will recover.

The Lutheran church has responded by sending volunteers to offer services to the immigrants and families affected by the raid and donating money to provide food, rent and utilities assistance to immigrant families in crisis. Lutheran leaders and church members have taken extraordinary steps to voice their concerns and take public action, including passing a church synod resolution and issuing a domestic disaster announcement.

Given the devastation caused by this single event, we ask that Congress call for a moratorium on raids until clear protocols and protections are in place to ensure that ICE does not traumatize immigrant families and that local communities are not harmed by such future actions. We further urge Congress to declare raids of places of worship, social service sites, and schools as off-limits.

Postville, Iowa Declared a Domestic Disaster by the ELCA
Within days after the Postville raid, the ELCA designated the town a domestic disaster in response to the emotional trauma experienced by the community and the sheer magnitude of humanitarian need. As a Lutheran denomination comprised of more than five million Lutherans nationwide, the ELCA made the decision based on its assessment that the size and nature of the impact and the humanitarian consequences were comparable to a major natural disaster (see attached, “Lutherans Responding to People Affected by Iowa Immigration Raid”). This is the first time that the ELCA designated a government-caused immigration action a domestic disaster.

On June 28, the Northeastern Iowa Synod of the ELCA passed a resolution which declared that the immigration raid has caused a humanitarian crisis and called for Congress and the President to pass just and fair immigration laws so that such harsh, punitive enforcement measures do not happen again (see attached, “A RESOLUTION ON IMMIGRATION REFORM”). The synod has also created a web site to update its constituents about the raid, volunteer opportunities and upcoming events.
Many of the immigrants and their families who have been affected by the raid have sought help through the Hispanic Ministry program at St. Bridget's Catholic Church in Postville, and they continue to convene there in search of support and services. Volunteers from the local St. Paul Lutheran Church and nearby Luther College and Wartburg College have donated money to support these families and continue to visit St. Bridget's church to serve food, provide child care, bring immigrants to their immigration appointments and offer them spiritual support. One Lutheran went as far as donating her unused food stamps to provide food to the pantry.

In the critical hours following the raid, Lutheran Immigration and Refugee Service (LIRS) helped to facilitate legal services for immigrant families and develop communication protocols between legal service and social service providers. LIRS also helped to secure outside funding from Lutheran donors to support legal services for those affected by the immigration raid.

**Harm to Families and Children**
The impact on those arrested, their children and families, and the whole community was devastating, and more than two months later, the town continues to experience the fallout. In the days following the raid, an estimated 65 percent of Latino high school students and 90 percent of Latino students overall were absent from class. Some elementary classes shrank from 25 children to less than ten. Children of U.S. citizen parents were also traumatized by the action. These children reported having nightmares about their own parents being taken away and some drew pictures including the words, “Don’t take my friends away.”

Over 10 percent of Postville’s population has been detained. Those who were arrested were valued members of the community whose absence has hurt Postville. Businesses lost customers, landlords and realtors saw renters and homebuyers disappear, and schools saw their classrooms emptied of students. People in Postville continue to ask if the U.S. government gave any consideration to the impact on this small town before they took this action. School officials wonder how many children will enroll in school next fall and how many teachers they will need to hire.

Most of the people picked up in the raid were charged related to using false identification to work and will be detained for five months before the deportation process begins. We do not condone people breaking laws, but we question whether the raid was the appropriate and proportionate response for such violations. Instead of arresting hundreds of people, putting children at risk, tearing families apart, and disabling Postville’s economy, Congress and the President need to create viable means to meet our nation’s need for both skilled and unskilled workers. Our immigration system must provide a way for workers to come to the United States legally and for those who have already been working in this country for years to obtain legal status through a fair, earned legalization process.

The Postville raid underscores the need for an overhaul of our immigration laws to protect children and unite families, safeguard human rights and worker rights, enable marginalized undocumented people to come out of the shadows and to live without fear, and provide a path to permanence for those who have put down roots. In Postville, children were put at risk and families divided. There are charges that the employer committed workplace abuse. People with deep roots here, many with U.S. citizen children, are being detained and deported instead of being given an opportunity to earn their legal status. We need to put families first and fix the broken system.

**Protection of Children and Families Must Be Primary in Any Enforcement Actions**
Meanwhile, urge Congress to exercise rigorous oversight of immigration raids and enforcement actions. Specifically, we call for a moratorium on raids and similar actions until protocols are in place to prevent severe social and economic harms and trauma to local communities. Such protocols should at least require
that ICE do the following: 1) coordinate with community social service and pastoral care workers to mitigate the traumatic impact of any ICE enforcement action on children and families; 2) facilitate access to legal counsel for all immigrants taken into ICE custody and detention; 3) prioritize the importance of keeping people picked up in raids or other enforcement actions detained locally; 4) provide communication mechanisms that allow family members and lawyers to locate those in detention; and 5) work with appropriate federal, state and local government agencies to provide support and assistance to the community based on the projected impact the raid would have on the community.

Thank you for holding this important hearing and for the opportunity to submit this testimony. If you have questions or comments, please direct them to Gregory Chen, director for legislative affairs at Lutheran Immigration and Refugee Service at 202-626-7933 or via email at gchen@lirs.org.

Yours truly,

The Rev. Dr. Steven Ullestad
Bishop of the Northeastern Iowa Synod
Evangelical Lutheran Church of America

Lutheran Immigration and Refugee Service
ELCA NEWS SERVICE

May 15, 2008

Lutherans Responding to People Affected by Iowa Immigration Raid
08-064-JB

CHICAGO (ELCA) -- Members of St. Paul Lutheran Church, Postville, Iowa, are responding to the needs of people who have been affected by a May 12 federal immigration raid at a Postville meat processing plant. Hundreds of family members of those arrested have taken refuge inside St. Bridget's Catholic Church, Postville, said the Rev. Stephen P. Brackett, St. Paul Lutheran Church.

On May 12 U.S. Immigration and Customs Enforcement (ICE) agents arrested 390 people, and are seeking an additional 300 people who were not at the kosher meatpacking plant, Agriprocessors Inc. The purpose of the raid was to secure evidence of possible identity theft, stolen Social Security numbers and illegal immigration, said Tim Counts, an ICE spokesperson. Federal officials said the raid was the largest operation of its kind in U.S. history.

Most of the people arrested were believed to be from Guatemala and Mexico, and some were from Israel and Ukraine, the Associated Press reported. They were taken to Waterloo, Iowa, where most remain. More than 50 people were released on humanitarian grounds to care for children, and a few others were released because of medical conditions. Some who were released were fitted with ankle bracelets, Brackett said.

Church members and others in the community have stepped in to help family members who were not arrested but affected, Brackett said. Those who are at St. Bridget's include newborns, children, teens, adults, mothers, fathers and grandparents, he said. Brackett estimated that as many as 30 members of St. Paul are helping out at St. Bridget's by providing and serving food, providing clothing, helping with sleeping arrangements, tutoring students and reading to younger children. Also helping out at St. Bridget's are several students from Luther College, Decorah, Iowa, one of 28 ELCA colleges and universities, he said.

"We're almost overwhelmed with the food and clothing donations that have come in," Brackett said. "We're trying to bring in resources as they are needed."

For those arrested a significant need will be securing legal help, Brackett said. The cost of meeting with a lawyer is at least $150 per person, he said.

No one is staying at St. Paul because most people affected are Roman Catholic and afraid to leave the church building for fear of arrest, Brackett explained. Some children have been able to return to school during the day, he said. A nearby Presbyterian church is housing a few people.

Calling the situation "very traumatic" for those affected, Brackett said some family circumstances are "excessively complicated" because some children are U.S. citizens and their parents may not be U.S. citizens. Families could be broken up if members are deported, he said.

"This could go on for a while," Brackett said. "We may have people here for a long, long time."

"Families and friends are suffering tremendous loss and grief," said the Rev. Steven L. Ullstad, bishop, ELCA Northeastern Iowa Synod, Waverly, in a message to the synod. "The long-term implications for these families, as well as the impact on the schools and businesses of Postville, are significant."

The synod is working with the local Catholic diocese to assist at St. Bridget's, Ullstad said. The synod's greatest concerns are keeping families together, providing for their needs and making sure children are safe, he said.

The synod is developing a list of pastors who speak English and Spanish to assist families, Ullstad
said. He asked Lutherans to pray for the people of Postville, and the bishop invited congregations to talk about immigration concerns.

"The ICE raid in Postville is yet another example of the harsh environment of fear that immigrants -- documented and undocumented -- now face, especially since the collapse of comprehensive immigration reform last summer," said Ralston H. Deffenbaugh, president, Lutheran Immigration and Refugee Service, Baltimore. "Our immigration law is badly broken and desperately needs reform."

"Most of those taken into custody are honest, hard-working people just trying to make a living," Deffenbaugh said. "As a result of the raid, families have been torn apart, children have been traumatized, and a diverse community that was once thriving is now in complete upheaval," he said.

The Rev. Kevin A. Massey, acting director, ELCA Domestic Disaster Response, said financial gifts to assist families in Postville may be given to ELCA Domestic Disaster Response.

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NOTE: Financial gifts may be sent directly to ELCA Domestic Disaster Response, 8765 W. Higgins Rd., Chicago, IL 60631-4101. Designate gifts for Postville.
Credit card gift line: 1-800-638-3522
Credit card gifts via Internet: http://www.ELCA.org/disaster

For information contact:
John Brooks, Director (773) 380-2958 or news@elca.org
http://www.elca.org/news
A RESOLUTION ON IMMIGRATION REFORM

WHEREAS, Agents of the Immigration and Customs Enforcement (ICE), an agency of the Department of Homeland Security, have conducted a raid at Agriprocessors at Postville, Iowa on May 12, 2008; and,

WHEREAS, Over 390 people were apprehended in this raid by ICE, making it the largest raid of its kind on a single facility; and,

WHEREAS, The arrest and detention of these hundreds of workers have created such a humanitarian crisis of turmoil, distress, and fear among the families, neighbors, and community that the ELCA has designated Postville, Iowa a domestic disaster site; and,

WHEREAS, Families have been torn apart, children have been traumatized, businesses have been adversely affected, and whole neighborhoods have been emptied of inhabitants; and,

WHEREAS, The people and churches of Postville, particularly Sister Mary McCauley, Paul Rael, Father Paul Ouderkirk, Father Richard Gaul, and Pastor Stephen Brackett; Pastor David Vasquez of Luther College; Bishop Steven Ullestad of the Northeastern Iowa Synod of the ELCA; Archbishop Jerome Hanus of the Archdiocese of Dubuque; and many others have been tireless in their support, encouragement, and advocacy of those affected by this raid; and,

WHEREAS, The illegal status of working immigrants opens them to discrimination, victimization, extortion, and abuse by employers and others who seek to profit from their illegal status; and,

WHEREAS, These events in Postville are but a small example of the results of greed and exploitation of the poor by nations and corporations; and of the failure of the Congress and President of the United States to establish and enforce a just and fair immigration policy; and,

WHEREAS, Our Lutheran tradition calls on us to uphold the Biblical mandate to welcome the stranger: “When a stranger sojourns with you in the land, you shall not do him wrong. The stranger who sojourns with you shall be to you as the native among you, and you shall love him as yourself; for you were strangers in the land of Egypt: I am the Lord” (Leviticus 19:33-34) “Welcome one another, therefore, as Christ has welcomed you, for the glory of God” (Romans 15:7); and,

WHEREAS, The Rev. Mark Hanson, Presiding Bishop of the ELCA, and Ralston H. Deffenbaugh, Jr., President of the Lutheran Immigration and Refugee Service, have issued a statement calling for fair and just immigration reform which would:
  - Oppose the criminalization of the church, its ministers and its members who provide humanitarian aid to undocumented immigrants;
  - Oppose provisions which criminalize undocumented presence;
  - Provide a path to permanence for individuals currently residing and working in the United States as well as their families;
• Ensure basic constitutional due-process rights in the enforcement of our laws; and
• Include in the legislation the bipartisan “Agricultural Job Opportunities Act” for farm workers, a measure negotiated by growers, agricultural employers and farm workers to create an “earned adjustment” program enabling some undocumented farm workers and H-2A guest workers to obtain temporary immigration status with the possibility of permanence and that revises the existing H-2A worker program;

Therefore, be it

RESOLVED, That the members and congregations of the Northeastern Iowa Synod be encouraged to lift up in prayer:
1) the workers who have been detained in the May 12 raid on Agriprocessors at Postville and their families, friends, and neighbors, as they face this humanitarian crisis;
2) the owners and operators of Agriprocessors at Postville, that they will immediately begin employment and hiring practices that are lawful and provide a living wage;
3) those called to law-enforcement, that they will be able to safely discharge their duties in a manner that is both humane and respectful; and be it further,

RESOLVED, That the Northeastern Iowa Synod commend Bishop Steven Ullestad, Pastor Stephen Brackett, the people of St. Paul Lutheran, Postville, Pastor David Vasquez and the many volunteers from Luther College, the Lutheran Immigration and Refugee Service, and the ELCA Domestic Disaster Response for their witness, service and advocacy on behalf of all those affected by the recent immigration enforcement raid in Postville; and be it further,

RESOLVED, That the members and congregations of the Northeastern Iowa Synod be encouraged to petition the U.S. Congress and the President to quickly pass comprehensive immigration legislation which provides for the current labor needs of businesses, while at the same time rigorously fines businesses that hire undocumented workers; and be it further,

RESOLVED, That the members and congregations of the Northeastern Iowa Synod be encouraged to petition the U.S. Congress and the President, the State of Iowa, and the Global Mission division of the ELCA to develop strategies to help the people of Mexico and Guatemala build schools, hospitals, and infrastructure that provides respectable living conditions for their citizens; and be it further,

RESOLVED, That the Northeastern Iowa Synod endorse the call issued by Presiding Bishop Mark Hanson and LIRS President Ralston H. Deffenbaugh, Jr. for a Fair and Just Immigration Reform; and be it further,

RESOLVED, That the congregations of the Northeastern Iowa Synod be encouraged to read, reflect, and study this statement; and be it further,

RESOLVED, That the Board of Ministry in Mission of the Northeastern Iowa Synod be directed to be in conversation with the Western Iowa Synod and the Southeastern Iowa
Synod in promoting a full and public debate on the issues surrounding immigration reform in the state of Iowa and throughout the nation.

SUBMITTED BY: Pastor Jim Klosterboer, Pastor Kris Snyder, Pastor Stephen Brackett, Pastor Dave Lenth, Pastor Ron Yarnell, Pastor Marshall Hahn, Pastor Chris Staley, Pastor Jason Cooper, Pastor Lin Reichstadter, Pastor Ian Wolfe, Pastor Harold McMillin, Jr., St. Paul Lutheran Church Council of Postville, Bethany Lutheran Church Council of Elkader, Zion Lutheran Church of Castalia, Norway Lutheran Church Council of St. Olaf, Marion Lutheran Church Council of Elgin (Gunder), St. Paul Lutheran Church Council of Guttenberg, St. John’s Lutheran Church Council of Guttenberg, St. Peter Lutheran Church Council of Garnavillo

ACTION OF THE RESOLUTIONS COMMITTEE:
Background: The Resolutions Committee believes that the editorial change clarifies our relationship with the other synods.
Recommendation: Adoption
Status: Upon presentation by the Resolutions Committee, this resolution will be considered by the assembly for action.
Vote Required for Adoption: Majority