



**WRITTEN STATEMENT SUBMITTED TO THE  
CIVIL SOCIETY CONSULTATION FOR THE  
UNIVERSAL PERIODIC REVIEW OF THE UNITED STATES OF AMERICA**

**Regarding**

**Access to Justice in the U.S. Immigration System**

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Submitted by:

American Civil Liberties Union

**I. Introduction**

Since its inception, the United Nations has recognized the need to protect the rights of noncitizens. Immigrants to the United States, from longtime residents to recent arrivals, continue to face numerous violations of their human rights under international and domestic law. This testimony focuses on one particularly troubling set of violations: those concerning access to justice for immigrants attempting to assert their right to enter or remain in the United States.

Each year, the U.S. federal government deports hundreds of thousands of individuals. At least thousands of them have attempted to assert a right to remain in the United States, whether because of their ties to this country or their fear of returning to their own.

Both international human rights law and the domestic constitutional and statutory law of the United States guarantee certain basic legal protections to these individuals. International human rights law specifically recognizes the right of immigrants to defend

against deportation, to be represented in that proceeding, and to have their expulsion reviewed by a competent authority.<sup>1</sup> In addition, human rights law guarantees that all persons appearing before a judicial proceeding receive “a fair and public hearing by a competent, independent, and impartial tribunal.”<sup>2</sup> U.S. domestic law has historically recognized the importance of fair deportation hearings. In 1903 the Supreme Court recognized that the Due Process Clause of the Fifth Amendment to the U.S. Constitution applied in cases where the government seeks to deport those who have already entered the United States.<sup>3</sup> And the Supreme Court has repeatedly recognized that deportation often carries grave consequences, and therefore implicates the rights to life, liberty, and property, “or of all that makes life worth living.”<sup>4</sup>

Nonetheless, the safeguards applicable when the government seeks to deport immigrants remain woefully inadequate, and if anything have grown weaker in the last two decades, even as the number of deportations has dramatically increased. Most deportees never receive a hearing before an immigration judge. Even those who do typically have no attorney to represent them at that hearing. Our testimony today centers on two areas where basic human rights obligations have been ignored at tremendous cost to

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<sup>1</sup> The International Covenant on Civil and Political Rights (ICCPR) guarantees that “[a]n alien lawful in the territory of a State party” cannot be deported except “in pursuance of a decision reached in accordance with the law and shall, except where compelling reasons of national security require otherwise, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.” ICCPR, adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, ratified by the United States on June 8, 1992, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>, art. 13; *see also* Body of Principles for the Protection of Persons Under Any Form of Detention and Imprisonment, Principle 17(2), G.A. Res. 43/173, Annex, U.N. Doc. A/Res/43/173 (Dec. 9, 1988) (right of all detainees to receive legal assistance if he or she is unable to afford a lawyer), *available at* <http://www.un.org/documents/ga/res/43/a43r173.htm>. According to the UN Human Rights Committee, the requirement of a competent, independent and impartial tribunal “is an absolute right that is not subject to any exception.” Human Rights Committee, General Comment 32, Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007), <http://www1.umn.edu/humanrts/gencomm/hrcom32.html>, para. 19. Similarly, Article 8(1) of the American Convention on Human Rights, signed by the United States in 1977, provides each person with “the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law” in the determination of their rights. American Convention on Human Rights (“Pact of San José, Costa Rica”), adopted November 22, 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992), [http://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights.htm](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm). Interpreting the American Convention on Human Rights, the Inter-American Commission on Human Rights has stated that deportation proceedings require “as broad as possible” an interpretation of due process requirements, and includes the right to a meaningful defense and to be represented by an attorney. Inter American Commission on Human Rights, Report No. 49/99 Case 11.610, Loren Laroye Riebe Star, Jorge Alberto Barón Guttlein and Rodolfo Izal Elorz v. Mexico, April 13, 1999, Section 70-1.

<sup>2</sup> ICCPR, art. 14.

<sup>3</sup> *Yamataya v. Fisher*, 189 U.S. 86, 100-01 (1903).

<sup>4</sup> *Ng Fung Ho v. White*, 259 U.S. 276, 284-85 (1922). *See also Padilla v. Kentucky*, 130 S.Ct. 1473, 1481 (2010) (“deportation is a particularly severe penalty”).

immigrants with claims to enter or remain in the United States: (1) access to courts and (2) legal representation for all.

## **II. Access to courts**

The overwhelming majority of people expelled from the United States each year will never see an immigration judge and never have a hearing where they can present a defense or pursue claims to remain in the United States. According to the most recent statistics released by the government, 70 percent of people deported in Fiscal Year 2013 did not have a hearing before an immigration judge.<sup>5</sup>

As a result of changes to U.S. immigration law over the past two decades, hundreds of thousands of people are now expelled from the United States after proceedings in which officers of the Department of Homeland Security (DHS) - who are not necessarily even lawyers, let alone judges - conduct all of the functions normally associated with a judicial process. For these immigrants, Homeland Security officers arrest, detain, charge, prosecute, judge, and deport. The penalties associated with their removal orders include not only expulsion, but also bans on reentering the United States, which in some cases last for the entire lifetime of the individual in question.

Categories of individuals who are ineligible for a hearing under current law include individuals who enter or are found in the United States without valid documents, individuals removed previously or who had old removal orders, and undocumented children from Mexico. However, because U.S. immigration law also includes significant practical and substantive limitations on judicial review, many individuals who do not fall into these categories are nonetheless also expelled without hearings. Their removals are illegal, but effectively unreviewable because the law does not provide access to attorneys and the court process necessary to allow legal challenges to these practices. This regime plainly violates the requirement under international law of an impartial and independent hearing.<sup>6</sup>

The ACLU recently brought a lawsuit challenging the propriety of DHS's practice of expelling Mexicans in the southern border region of California without permitting them to see an immigration judge. We have collected extensive evidence of DHS officers using coercion and misinformation to pressure individuals into waiving their right to a removal hearing.<sup>7</sup> We are also in the process of investigating other types of expulsions that occur without a hearing before an immigration judge. Our initial research indicates that border

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<sup>5</sup> In FY 2013, ICE conducted 101,000 removals of individuals following the issuance of an order of expedited removal, and 159,624 were subject to a reinstated final order. None of these individuals would have had the opportunity to appear before an immigration judge. Department of Homeland Security, FY 2013 ICE Removal Statistics, available at <http://www.ice.gov/removal-statistics/>.

<sup>6</sup> ICCPR, art. 13, 14.

<sup>7</sup> *Lopez-Venegas v. Napolitano*, No. 13-cv-03972JAK (filed June 4, 2013), see <http://www.aclusandiego.org/breaking-news/aclu-class-action-lawsuit-challenges-immigration-enforcement-agencies-practices-of-tearing-families-apart/>.

officials routinely deport people who may have claims for relief in immigration court. Some of these individuals face persecution and other forms of serious danger after their deportation. These deportations appear to occur in the absence of meaningful safeguards. For example, our research thus far shows that border officials almost never ask individuals apprehended whether they have a fear of returning to their country of origin, as required under U.S. law and the Refugee Convention, the 1967 Protocol to which the U.S. is a party.<sup>8</sup> In 2005, the United States Commission on International Religious Freedom (USCIRF) published a study on asylum-seekers being removed at the border where researchers observed first-hand the interviews between border officials and arriving migrants.<sup>9</sup> The study found that in more than 50 percent of the interviews observed, border officials were not informing migrants of their right to seek protection if they feared being returned to their country, and in 72 percent of interviews, asylum seekers signed sworn statements without any opportunity to review the form. Two years later, USCIRF reported that its serious concerns over these interviews had not been addressed.<sup>10</sup>

Over the past several months, the ACLU has confirmed USCIRF's findings, documenting several cases of individuals fleeing persecution or violence who were deported without being asked about their fear of returning to their country of origin and who were subsequently physically attacked, sexually assaulted, and in one case murdered. In some circumstances, even U.S. citizens and individuals with other lawful status (such as asylees and lawful permanent residents) have been deported using these procedures.<sup>11</sup> Similarly, border guards appear to routinely expel unaccompanied children without affording them even those minimal legal protections that existing law provides. In our conversations with 13 unaccompanied minors ranging from ages 11 to 17, all of whom were interviewed shortly after their deportation, only one child said he had been asked if he wanted to see a judge or if he was afraid of returning to his country.<sup>12</sup>

Our preliminary research also suggests that the majority of people being deported without access to the immigration court system likely have no idea what their rights are, what rights they are waiving, and what penalties they are accepting. Based upon one survey we recently conducted, few immigrants interviewed after being removed without a hearing were given deportation documents in a language they understood or with the opportunity to read, review, or ask questions about the deportation order they received. This finding is

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<sup>8</sup> Convention relating to the Status of Refugees, 189 U.N.T.S. 150, entered into force April 22, 1954 (implemented in US law through INA Section 208); Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267; 19 U.S.T. 6223.

<sup>9</sup> United States Commission on International Religious Freedom (USCIRF), Report on Asylum Seekers in Expedited Removal (2005), *available at* [http://www.uscirtf.gov/sites/default/files/resources/stories/pdf/asylum\\_seekers/Volume\\_I.pdf](http://www.uscirtf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/Volume_I.pdf)

<sup>10</sup> USCIRF, Expedited Removal Study Report Card: 2 Years Later (2007), *available at* [http://www.uscirtf.gov/sites/default/files/resources/stories/pdf/scorecard\\_final.pdf](http://www.uscirtf.gov/sites/default/files/resources/stories/pdf/scorecard_final.pdf)

<sup>11</sup> See, e.g., Megan Stack, Associated Press, "Mother sues Border Patrol for son's death," June 10, 2000 *available at* [http://amarillo.com/stories/2000/06/10/usn\\_LD0749.shtml](http://amarillo.com/stories/2000/06/10/usn_LD0749.shtml); ACLU interviews for forthcoming report on deportations without hearings (on file with ACLU).

<sup>12</sup> ACLU interviews for forthcoming report on deportations without hearings (on file with ACLU).

particularly troubling given that many of these immigrants had family members who remained in the United States. If migrants attempt to re-join their families after having been deported, U.S. law permits them to be prosecuted for the felony offense of illegal reentry, which typically results in a substantial prison sentence.<sup>13</sup>

Given the severity of these consequences, we urge the United States to cease deporting or otherwise expelling individuals without permitting them to appear before an immigration judge.

### **III. Legal Representation**

Perhaps the most disturbing example of a critical human rights protection recognized in the domestic criminal system but absent from the deportation process is the right to appointed counsel. Although the U.S. Supreme Court has recognized the “drastic deprivation”<sup>14</sup> that deportation may entail for individuals who have lived here for many years or face persecution or torture in their home countries, current U.S. law fails to provide a right to legal representation to all persons facing deportation regardless of their wealth. Instead, only those who can afford counsel can typically access it.

The Supreme Court interpreted the Sixth Amendment to the U.S. Constitution to establish a right to appointed counsel in most criminal cases over fifty years ago in *Gideon v. Wainwright*.<sup>15</sup> Further strengthening this right, the Supreme Court held over forty years ago in *Argersinger v. Hamlin* that the Constitution prohibits a criminal prosecution resulting in *any* jail sentence, even for one day, without appointed counsel.<sup>16</sup> Although government-funded defense services remain imperfect in their delivery, fifty years of U.S. case law have made clear that the right to appointed counsel plays a critical role as we strive to ensure that indigence is not an impediment to justice in our criminal system.

The operation of the federal government’s deportation system stands in stark contrast to the Supreme Court’s pronouncements in cases such as *Gideon*. Every day, immigration courts permanently separate people from their families, deport refugees who fled persecution or torture, and impose other consequences far more dire than a few days in prison. Yet they do so without affording immigrants the basic safeguard of appointed counsel. While DHS always pays for an attorney to represent itself in removal proceedings, hundreds of thousands of immigrants must defend against deportation without legal representation. The gap in legal representation is particularly stark for those

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<sup>13</sup> The federal government chooses to prosecute that crime in thousands of cases each year. Illegal entry and reentry are the most prosecuted federal crimes within the federal criminal justice system. See Transitional Records Access Clearinghouse (TRAC) “At Nearly 100,000, Immigration Prosecutions Reach All-time High in FY 2013” Nov. 25, 2013, available at <http://trac.syr.edu/immigration/reports/336/>.

<sup>14</sup> *Woodby v. INS*, 385 U.S. 276, 285 (1966).

<sup>15</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>16</sup> *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (“We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial”).

immigrants whom DHS chooses to detain. Approximately 84% of immigration detainees are unrepresented in immigration court,<sup>17</sup> a crisis that the federal government has previously acknowledged.<sup>18</sup> In the absence of government-funded legal services it is inevitable that large numbers of people will go through immigration proceedings without legal assistance given the high cost of legal representation and the extremely limited availability of assistance in the remote areas where many detention centers are located.<sup>19</sup> Immigration detainees are often incarcerated far from their families and from legal service providers who could provide representation at an affordable rate. Because phone services in detention facilities are limited, expensive, and often non-operational, many attorneys decline to represent immigration detainees because they cannot afford the time and expense needed to communicate with their clients.<sup>20</sup>

There should be no dispute that immigrants often suffer significant harm because of this critical gap in available legal representation. A recent study of New York immigration courts showed that immigrants who are compelled to proceed without representation are six times more likely to lose their cases than those who have counsel.<sup>21</sup> For those with

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<sup>17</sup> Vera Institute for Justice, *Improving Efficiency and Promoting Justice in the Immigration System: Lessons from the Legal Orientation Program*, May 2008, at 1, *available at* [http://www.vera.org/sites/default/files/resources/downloads/LOP\\_Evaluation\\_May2008\\_final.pdf](http://www.vera.org/sites/default/files/resources/downloads/LOP_Evaluation_May2008_final.pdf). Texas Appleseed, a non-profit legal services organization, found that 86 percent of immigration detainees in Texas were unrepresented in 2009. Texas Appleseed, *Justice for Immigration's Hidden Population: Protecting the Rights of Persons with Mental Disabilities in the Immigration Court and Detention System*, March 2010, p.13, *available at* [http://www.texasappleseed.net/index.php?option=com\\_docman&task=doc\\_download&gid=313](http://www.texasappleseed.net/index.php?option=com_docman&task=doc_download&gid=313).

<sup>18</sup> Executive Office of Immigration Review Statistical Year Book FY2010 at G1 (calling the large number of individuals representing themselves as “of great concern...”), *available at* <http://www.justice.gov/eoir/statspub/fy10syb.pdf>; DOJ’s Executive Office for Immigration Review has noted the challenges created by non-represented cases for court efficiency, and the National Association of Immigration Judges wrote to members of Congress that “when noncitizens are represented by attorneys, Immigration Judges are able to conduct proceedings more expeditiously and resolves cases more quickly.” Charles H. Kuck, *Legal Assistance for Asylum Seekers in Expedited Removal: A Survey of Alternative Practices*, p. 8, in U.S. Commission on International Religious Freedom, *Asylum Seekers in Expedited Removal* (2005), *available at* [http://www.uscirf.gov/images/stories/pdf/asylum\\_seekers/legalAssist.pdf](http://www.uscirf.gov/images/stories/pdf/asylum_seekers/legalAssist.pdf); Letter from Dana Marks, National Association of Immigration Judges, to Members of Congress, March 22, 2013 (on file with the ACLU); *see also* Jennifer Ludden, “Immigration Crackdown Overwhelms Judges,” National Public Radio, February 9, 2009, transcript, *available at* <http://www.npr.org/templates/transcript/transcript.php?storyId=100420476>.

<sup>19</sup> Human Rights First, *Jails and Jumpsuits*, October 2011, p. 31, *available at* <http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Jails-and-Jumpsuits-report.pdf> (finding that 40 percent of all detention facilities are located more than 60 miles from an urban center).

<sup>20</sup> National Institute for Immigrant Justice, *Isolated in Detention: Limited Access to Legal Counsel in Immigration Detention Facilities Jeopardizes a Fair Day in Court*, September 2010, *available at* <https://www.immigrantjustice.org/isolatedindetention>. The ACLU is currently litigating the issue of access to phone services for detained immigrants. *See* ACLU of Northern California, “ACLU Sues ICE Over Unfair Telephone Policy,” Dec. 19, 2013, <https://www.aclunc.org/news/aclu-sues-ice-over-unfair-telephone-policy>.

<sup>21</sup> Study Group on Immigration Representation, *New York Immigrant Representation Study Report: Part II, Accessing Justice II: A Model for Providing Counsel to New York Immigrants in Removal Proceedings*, 2012, p. 1., *available at* [http://www.cardozolawreview.com/content/denovo/NYIRS\\_ReportII.pdf](http://www.cardozolawreview.com/content/denovo/NYIRS_ReportII.pdf); *see also*



even a cursory knowledge of immigration law, this statistic is hardly surprising. One federal appellate court compared the immigration code to King Mynos' labyrinth in ancient Crete, while another deemed it second only to the federal tax code in its complexity.<sup>22</sup> It should surprise no one that a legal system that asks immigrants with no legal training to defend themselves in such a complex proceeding will fail to protect human rights.

In the midst of this bleak situation, there are small signs of improvement. Last year a federal court in California ordered the government to provide legal representation for people with serious mental disabilities facing deportation. The court recognized the unique legal protections available to individuals with severe disabilities under domestic anti-discrimination law.<sup>23</sup> Rather than appealing the court's decision, the U.S. government has promised to implement it nationwide,<sup>24</sup> and in the last several months has begun appointing attorneys for such individuals in several immigration courts in the western United States under the court's ruling.

While the recent creation of legal representation rights for people in detention with serious mental disabilities constitutes a significant positive development, the federal government has so far resisted calls to extend that protection to the hundreds of thousands of others—including children, detained asylum seekers, and numerous other vulnerable groups—who remain without legal representation in deportation proceedings. Encouragingly, the Senate immigration reform bill introduced last year does provide for the appointment of counsel for children, persons with serious mental disabilities, and

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Ramji-Nogales et al., "Refugee Roulette: Disparities in Asylum Adjudication," 60 Stanford Law Review 295, 340 (2007) (showing represented asylum-seekers are three to six times more likely to win asylum).

<sup>22</sup> See *Lok v. INS*, 548 F.2d 37, 38 (2d Cir. 1977); *Castro O'Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1987).

<sup>23</sup> See *Franco-Gonzales v. Holder*, CV 10-2211 DMG, Dkt. 598 (C.D. Cal. 2013). As the ACLU documented in 2010, the failure to provide legal representation for people with serious mental disabilities violates international law on civil and political rights as well as the rights of people with disabilities under the Convention on the Rights of Persons with Disabilities (CRPD). American Civil Liberties Union/Human Rights Watch, *Deportation by Default: Mental Disability, Unfair Hearings, and Indefinite Detention in the US Immigration System* (July 2010), available at [https://www.aclu.org/files/assets/usdeportation0710\\_0.pdf](https://www.aclu.org/files/assets/usdeportation0710_0.pdf).

<sup>24</sup> See Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, to Thomas D. Homan, Acting Executive Associate Director, Enforcement and Removal Operations, Peter S. Vincent, Principal Legal Advisor, and Kevin Landy, Assistant Director, Office of Detention Policy and Planning, "Civil Immigration Detention: Guidance for New Identification and Information-Sharing Procedures Related to Unrepresented Detainees with Serious Mental Disorders or Conditions" (Apr. 22, 2013), available at [http://www.ice.gov/doclib/detention-reform/pdf/11063.1\\_current\\_id\\_and\\_infosharing\\_detainees\\_mental\\_disorders.pdf](http://www.ice.gov/doclib/detention-reform/pdf/11063.1_current_id_and_infosharing_detainees_mental_disorders.pdf); Memorandum from Brian M. O'Leary, Chief Immigration Judge, Executive Office for Immigration Review, to All Immigration Judges, "Nationwide Policy to Provide Enhanced Procedural Protections to Unrepresented Detained Aliens with Serious Mental Disorders or Conditions" (Apr. 22, 2103), available at <http://nwirp.org/Documents/ImpactLitigation/EOIRDirective04-22-2013.pdf>.

other vulnerable groups. We urge the U.S. government to fulfill this promise by extending legal representation to all immigrants facing deportation from the United States.