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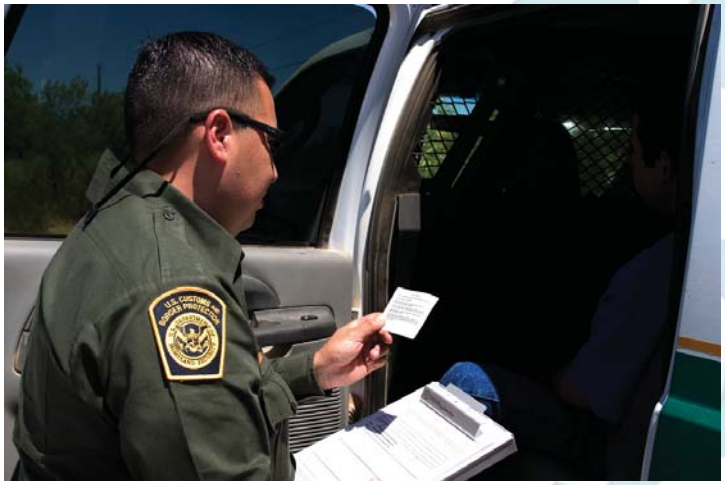
The Erosion of Due Process in the American Immigration System: Expedited Removal

by Adriana C. Zambrano[1]

Despite the symbols and history that form the world's perception of the United States as a welcoming society, a closer look shows a long-standing tradition of rejection and hostility toward immigrants. When Irish Catholics came to the American East Coast escaping poverty and starvation in the mid-1800s, a largely Protestant America greeted them with claims that their religion and economic class rendered them unfit for citizenship. Similarly, Americans received Italians fleeing social and economic disturbances in the late 1800s with prejudice, exploitation and violence. At around the same time, an increase in trade with China and the California Gold Rush produced a large-scale migration of Chinese laborers to the West Coast. The government outright turned them away through the Chinese Exclusion Act of 1882, a pivotal document in the evolution of American immigration law that forced the Chinese already in the country to obtain a residence certificate within a year or be deported. The Act deemed any Chinese person, or person of Chinese descent, to be present in the country illegally unless they could affirmatively prove otherwise.

The Chinese American community promptly challenged the Exclusion Act in *Fong Yue Ting v. United States* (1893) – and lost. Supreme Court Justice Horace Gray reasoned for the majority on the bench that Chinese laborers, "so long as they are permitted by the Government of the United States to remain in the country," were entitled to Constitutional safeguards and to the protection of the laws. "But they continue to be aliens, having taken no steps towards becoming citizens, and incapable of becoming such under the naturalization laws, and therefore remain subject to the power of Congress to expel them or to order them to be removed and deported from the country whenever, in its judgment, their removal is necessary or expedient for the public interest"



(*Fong Yue Ting v. U.S.*, 1893). The modern conversation regarding due process for non-citizens in the United States began with the affirmation of a law that summarily rejected them. It continues to this day with the expansion of policies that seek to eliminate access to legal protections for non-citizens. In the previous administration, these policies were enacted under the guise of bartering enforcement for reform. In the current administration, reform in favor of immigrants is not even on the table.

On June 28, 2008, presidential candidate Senator Barack Obama, speaking at the National Association of Latino Elected and Appointed Officials Annual Conference in Washington D.C., recognized the need for reform in order to get 12 million undocumented people "out of the shadows" and to "assert our values and reconcile our principles as a nation of immigrants and a nation of laws" (NA, 2008: Barack Obama on Immigration). His 2012 re-election, heavily fueled by the Latino vote, was immediately followed by a four-part legislative proposal for comprehensive immigration reform

that prioritized enforcement (Slack, 2013). But all efforts to pass immigration reform through the legislature failed, even though the Congressional Budget Office estimated that the proposed bill would save $158 billion during the first decade of implementation, including the costs of securing the border, and an additional $700 billion in the following ten years (Congressional Budget Office, 2014).

The highlight of Obama's legacy in favor of immigrants is perhaps the creation of the Deferred Action for Childhood Arrivals (DACA) program through executive action, which prompted hundreds of thousands to come out of the proverbial shadows and register their identities with the Federal Government in exchange for access to work, education, and the temporary deferment of their removal. All the information collected through the DACA program is now in the hands of the new administration, which in November 2016 vowed to deport "probably 2 million" and possibly 3 million people who are in the country without proper documentation (Chapell, 2016). This essay explores the dangerous expansion of the expedited removal statute under the new administration and the two ways in which it erodes due process rights for immigrants: 1) the denial of judicial review and 2) the mandatory detention of vulnerable populations (women and children asylum-seekers).

The number of foreign-born noncitizens[2] that can be charged under the expedited removal statute has increased since it was created in 1996. It was purposely designed with the flexibility to reach large proportions of recent arrivals as well as immigrants who have formed ties with the United States. The statute hardly provided any administrative or judicial checks. In 2014, President Obama began to enforce the expedited removal statute to resume and expand the policy of family detention in hopes of detering the immigration of persons, particularly minors, seeking protection from extreme violence in El Salvador, Honduras, and Guatemala. The administration sought funding for up to 6,300 beds in detention facilities (Grassroots Leadership, 2016). Through the unrestrained implementation and expansion of this statute over the past two years, Obama manufactured a deportation machine through which the new administration can carry out its frightening plan to deport millions.

It is critical to highlight that the scheme of family detention disproportionately affects women and children from the Northern Triangle countries. Fathers with children are rarely ever detained. As of November 17, 2016, only mothers with children, and zero men, were held in the three functioning family detention centers in the United States: the South Texas Family Residential Center in Dilley, TX, the Karnes City Residential Center in Karnes City, TX, and the Berks County Residential Center in Leesport, PA (Author's Notes, 2016). Since then, this continues to be the case. Also noteworthy is the fact that family detention drives profits for the private

Photo courtesy of U.S. Immigration and Customs Enforcement (ICE)

prison industry, which has benefitted from robust contracts with the Federal Government. The for-profit private prison company GEO group operates the Karnes facility; Corrections Corporation of America (CCA), also privately run, operates Dilley; whereas Berks is operated by the County of Berks.

The fact that this profit tool was developed by an administration purporting to be sympathetic to the immigrant cause should make us question our identity as a country. If we were truly "a nation of immigrants and a nation of laws," we would not accept the obvious reasons for this shift away from the progress offered by Obama's initial campaign promises. On the contrary and as confirmed by recent events, such as the Executive Orders on immigration issued recently by President Trump, the United States is a nation of a large number of White nationalists who fear losing their American greatness to immigrants of color (Parker, 2014). Over the next few years, we are likely to see the leaders of this constituency use expedited removal, mandatory imprisonment for profit, and whatever other tools at their disposal to exclude and disempower immigrants, no matter how contrary to the constitution, to justice and to humanity.

History of Expedited Removal and Mandatory Detention for Asylum Seekers

The most important instrument that regulates the admission, removal and detention of non-citizens is the Immigration and Nationality Act (INA), first enacted in 1952. Before expedited removal became law, the INA provided arriving noncitizens with a hearing before an Immigration Judge to decide on the person's removal on grounds of inadmissibility and any possible defenses (Siskin & Wasem, 2005). At this hearing, the noncitizen could formally submit an application for asylum as a defense against removal (Siskin &

Wasem, 2005). Under INA Section 101 (a) (42), a person can qualify for asylum if he or she has a reasonable fear of future persecution on the basis of one of five protected grounds (race, religion, nationality, membership in a particular social group, or political opinion).

Each of the elements of this definition is extremely nuanced, outlined by decades of international law, domestic case law and administrative policy. Therefore, regular immigration court proceedings (known as 240 proceedings) were, and continue to be, subject to administrative review by the Board of Immigration Appeals (BIA), and a BIA decision is, in turn, subject to judicial review by the corresponding federal circuit court.

In response to a dramatic increase in arrivals of Cuban and Haitian asylum seekers to the South Florida shores in 1980, the government sought to curb the appeal of immigration to the United States without proper documents and, at the same time, reduce perceived abuses of the asylum process (Siskin & Wasem, 2005). Congress attempted several times over the years to enact legislation providing for the screening of asylum seekers without triggering the existing formal asylum process and its mechanisms for review.The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) articulated the expedited removal statute, or 235(b) proceedings. The statute strips the layers of review that ensure a fair decision on an asylum claim or even the contemplation of any other defense against removal.

Section 302 of IIRIRA revised the entirety of Section 235 of the INA. Its relevant provisions include that any foreign-born noncitizen, regardless of whether he or she arrived at a port of entry or was intercepted in international or United States waters is subject to the statute (INA Sec. 235 (a) (1)). Also, it provides that the Attorney General may decide and modify, *at any time and without review*, which classes of foreign-born noncitizens are subject to the statute, with extremely limited exceptions (INA Sec. 235 (b) (1) (A) (iii)). Further, it adds that an immigration officer may order the foreign-born noncitizen removed *without further hearing or review* unless he or she indicates an intention to apply for asylum or a fear of persecution (INA Sec. 235 (b) (1) (A) (i)). If so, the noncitizen is to be referred to an asylum officer for a "credible fear" interview ("CFI") (INA Sec. 235 (b) (1) (A) (ii). Finally, it directs that persons subject to these provisions be subject to mandatory detention *until a credible fear is established, or until removed* (INA Sec. 235 (b) (1) (B) (iii) (IV)). The unreviewable character of these provisions is emphasized and promoted in Section 11(c) of the January 25, 2017 Executive Order "Border Security and Immigration Enforcement Improvements."

The essence of due process is notice and a meaningful opportunity to be heard before being deprived of life, liberty or property. This becomes impossible when the law applied is vaguely discretionary and contains express provisions against review by a higher authority. This is precisely what the expedited removal statute does. The mandated deprivation of liberty is not only a due process violation in itself, but also an even larger obstacle in any effort to build and present a defense.

Constitutional Provisions, Flores and Castro

The Fifth Amendment provides that "[n]o person shall be … deprived of life, liberty, or property, without due process of law…" (U.S. Const. Amend. V). The Constitution makes no distinction regarding personhood based on immigration status. In *Wong Win v. United States*, the U.S. Supreme Court asserted that "all persons within the territory of the United States are entitled to the protection [of the Fifth Amendment] and … even aliens shall not be … deprived of life, liberty or property without due process of law" (1896). While the question of whether immigrants have Constitutional due process rights seems to have been settled in favor of immigrants by *Wong Win* over a century ago, it is still up to Congress and the administrative agencies to establish whatever process they consider is sufficiently appropriate. In the case of expedited removal, this power has resulted in a narrow mechanism for review that has, therefore, limited protections.

Due process rights for immigrants are at higher risk when the laws and regulations concerning immigrant rights are expressly designed to exclude the possibility of judicial review. The ongoing case *Castro v. Department of Homeland Security* deals with the issue of whether the courts have jurisdiction over expedited removal orders sustained by an improper screening mechanism that violates due process rights (2016). At the time of filing (November, 2015), the 29 adult and 35 children Petitioners had been subject to mandatory detention under the expedited removal statute. They filed petitions for *habeas corpus* relief to have their cases independently reviewed by a federal court. The legal sources for a writ of habeas corpus are found in immigration case law and in Article I, Section 9, Clause 2 of the U.S. Constitution, or the Suspension Clause: "The Privileges of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion of Invasion the public Safety may require it" (U.S. Const.). Typically, habeas corpus relief is sought by prisoners challenging the legality of their detention, but it can be used by anyone who wants a restriction on their body reviewed by a court. The *Castro* petitioners were not seeking review over the validity of their detention at the time of filing. Instead, they sought access to the courts to review the validity of their expedited removal orders. So far, this access has been denied.

Judicial review protects due process guarantees, particularly for more vulnerable populations. For example,

in January 1997, the class-wide lawsuit *Flores v. Meese* reached a settlement agreement, now known as the Flores Agreement. Only some of the stipulations of the agreement were codified, but its provisions still apply to the class of "[a]ll minors who are detained in the legal custody of the INS" (Flores Agreement, 1997, ¶10). The Flores Agreement "sets out nationwide policy for the detention, release, and treatment of minors in the custody of the INS" (Flores Agreement, 1997, ¶9). Immigration authorities must treat "all minors in its custody with dignity, respect and special concern for their particular vulnerability as minors." (Flores Agreement, 1997, ¶11). The Flores Agreement continues to be an essential tool in challenging policies that deny constitutional due process rights to children. But the expedited removal statute has been used to circumvent the Flores protections to children through the scheme of family detention.

The trend is toward recognizing additional protections for those persons who are present within the country without authorization, but have more ties to the country, as opposed to those recently arriving to U.S. borders (Wasem, Lake, Seghetti, Monke, & Vina, 2004). But the statute as written could capture those who have been in the United States for up to two years regardless of the ties they have formed during that time. More troubling, current developments in both the Flores and the Castro cases reveal a callousness on the part of the government, a lack of consideration for the vulnerability of the persons involved, a stubbornness against protecting children from the arbitrariness and harm of prolonged detention, and an eagerness to punish those who dare to challenge the constitutionality of the expedited removal statute.

Due Process Implications of Discretionary Power and Vagueness Under 235 (b)

The courts acknowledge that granting the right of access to lawyers, the ultimate guardians of due process, would dismantle the expedited removal statute. On February 7, 2017, the Ninth Circuit ruled in *U.S. v. Peralta-Sanchez* that persons subject to expedited removal have no constitutional right to legal counsel, warning that the introduction of lawyers risks destroying the expedited nature of 235 (b) proceedings, increasing detention and legal costs to the government. This concession reveals that the statute is specifically designed to deny a meaningful opportunity for defense.

Discussions on the implementation of Section 302 of the IIRIRA, as recorded on the March 6, 1997 Federal Register, elaborate on the intent behind the wide discretion given to the Attorney General in determining who is a foreign-born noncitizen subject to the statute. The Attorney General has delegated this classification authority to the U.S. Customs and Border Protection (CBP) Commissioner through the regulations implementing 235 (b). A major purpose of the provision was to allow a rapid, effective and flexible response "to situations of mass influx or other exigencies." However, there is no concrete definition of a "mass influx" within the statute, its discussions, or anywhere else in codified law. A numerical reference is found in the *Flores* settlement agreement of 1997, which deals with federal custody of immigrant children. It defined an "influx of minors into the United States" as a time when over 130 minors are eligible for placement in federal custody (Aronson, 2015). This is an absurdly low threshold considering that, for example, in March 2016 alone, apprehensions of children with their families at the border reached 4,452, and those of unaccompanied children reached 4,240 (Krogstad, 2016).

The current implementation of the expedited removal statute has been justified by a supposed mass influx of unauthorized Central Americans into the United States, but this rationale fails to take into account the net number of unauthorized persons within the country. According to the Pew Research Center, the overall undocumented population in the United States has remained stable in recent years because the number of new unauthorized immigrants is about the same as the number who are removed, obtain legal immigration documents, leave, or die (Passel, 2016). Further, the Obama administration is known for its record high number of deportations compared to enforcement statistics of previous administrations. It is reported that, as of June 2016, Obama had formally removed around 2.4 million people from the country. As long as the definition of influx is not clear, it could be used as a justification for an expansion of the expedited removal statue at any time, even if the net unauthorized immigration rates are negative or below zero.

The expedited removal statute provides limited guidance as to when it should apply. Instead, the law provides three specific instances when it should *not apply*. It should not apply: 1) to those who have been admitted or paroled, 2) those continuously present in the United States for a period of two years or longer preceding the determination of inadmissibility (INA Sec. 235 (b) (1) (A) (iii) (II)), and 3) those who have arrived by aircraft at a port of entry and are native or citizens of a country in the Western Hemisphere without full diplomatic relations (INA Sec. 235 (b) (1) (F)). No such country exists. Since the United States announced the reinstatement of diplomatic relationships with Cuba, and the end of the *wet foot-dry foot* policy, unauthorized arriving Cubans are also subject to expedited removal. This means that 235 (b) could potentially apply to anyone who is deemed inadmissible and cannot show uninterrupted physical presence in the U.S. for two years. The law as written gives the government power to put even the most vulnerable people in these proceedings, mandate their detention and deport them without a fair hearing. It is already applied to women and children asylum seekers without restraint. It could potentially include victims of crimes

in the United States, human trafficking victims, persons with disabilities, persons with other potential immigration relief, such as pending family or employment petitions, or Special Immigrant Juvenile Status under varying state laws.

The development of the regulations is toward the exclusion of broader classes of foreign-born noncitizens. Initially, INS only applied 235(b) to persons who presented at a port of entry, or "arriving aliens" (Siskin & Wasem, 2005). On November 13, 2002, INS announced that certain foreign-born noncitizens arriving by sea, and not just at a port of entry, were to be placed in expedited removal proceedings unless admitted or paroled (Siskin & Wasem, 2005). Then, in August 2004, the Department of Homeland Security announced the expansion of expedited removal to include noncitizens present in the U.S. without authorization who are encountered by an immigration officer within 100 air miles of the U.S. international land border and who cannot prove that they have been physically present in the United States continuously for the 14-day period immediately preceding the date of encounter (Siskin & Wasem, 2005). The purpose of this expansion was to apply the statute to border patrol areas along the southwestern and northern borders (Siskin & Wasem, 2005). This gradual increase in reach of the expedited removal statute is not a change in the law, but a change in policy. The January 25, 2017 Executive Order on border security and enforcement boosts this change of policy by calling for a plain language reading of 235(b), which could get rid of any regulations that impose geographical and temporal limits on its implementation.

The Initial Inspection by an Immigration (CBP) Officer and Claiming Fear

It is relatively easy to become an immigration officer with the capacity to trigger 235 (b) when a person arrives at the border. Besides qualifications related to criminal, financial and employment history, an applicant must have 3 years of "full-time general experience that demonstrates the ability to meet and deal with people and the ability to learn and apply a body of facts" (U.S. Customs and Border Protection, 2014). In the alternative, "4 years of study in any field leading to a bachelor's degree in an accredited college or university is fully qualifying" (U.S. Customs and Border Protection, 2014). No formal legal education, no previous experience in immigration proceedings, and no training in trauma-informed interviewing are required. Yet, so much power is vested upon a CBP officer to make serious legal determinations at the time of inspection that could deny the rights of vulnerable people seeking refuge at the border. If the person manages to properly articulate an intention to apply for asylum or a fear of persecution at the time of inspection, then they are referred to an asylum officer for a credible fear interview (CFI). But the CBP officer still has the power to trigger expedited removal proceedings, like a glue trap that keeps noncitizens detained until a credible fear is established, or until removal, with minimal due process rights.

So far, expedited removal undermines due process guarantees in at least two ways. First, it transfers the power to determine whether a person has a well-founded fear of persecution from the immigration court to a much less qualified officer (CLINIC). Second, unless the person affirmatively avails him or herself by making a satisfactory fear claim, they run the risk of getting excluded from the process completely (CLINIC). Heavily persecuted and traumatized persons, children, persons with disabilities or persons with communication barriers, such as rare language speakers or illiterate persons, are much less likely to understand and trust the process enough to affirmatively avail themselves to it.

The Credible Fear Interview

Under INA Sec. 235 (b) (1) (A) a person who claims a fear of return is subsequently interviewed by an asylum officer who evaluates whether or not that person has a credible fear of persecution or torture. Under the same section, credible fear of persecution means that there is a "significant possibility" that the applicant could establish in a full asylum hearing that their race, religion, nationality, membership in a particular social group or political opinion is at least one central reason for the harm suffered (USCIS, 2006). This legal connection is called nexus. This does not mean, however, that a person must present an asylum case at this time. The Credible Fear Interview is simply a screening as to whether there would be a "significant possibility" of prevailing at an asylum hearing. The "significant possibility" standard is fairly low – lower than the "preponderance of the evidence," or the "more likely than not" standard. The officer is the one charged with eliciting testimony and making a determination based on the correct standard (USCIS, 2006).

If no fear of persecution is established, then the asylum officer will determine whether or not the person has a credible fear of torture. Torture is defined by Article 1 of the UN Convention Against Torture (CAT) as

> …any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating him or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity (UN General Assembly, 1984).

The credible fear standard was designed to protect people against removal "under circumstances that would violate Article 3 of the [CAT]" (Federal Register, Vol. 64, No. 8479, 1999). This is critical because this portion of the Convention protects against *refoulement*, or returning a person to a country where they would be at risk of torture, taking into account whether that country presents a pattern of human rights violations (UN General Assembly, 1984).

The 2006 Asylum Officer Basic Training Handbook describes the credible fear process as a net meant to catch "all potential refugees and individuals who would be subject to torture if returned to their country of feared persecution or harm" (USCIS, 2006, p. 11). Quoting from the regulations as articulated on the Federal Register by the Department of Justice, officers are trained to understand the nature of the CFI standard as

> 'a low threshold of proof of potential entitlement to asylum; many aliens who have passed the credible fear standard will not ultimately be granted asylum.' The purpose of the credible fear screening is to ensure access to a full hearing for all individuals who qualify under the standard (USCIS, 2006, p. 11).

A "full hearing" means that the person will be placed in regular removal proceedings before an immigration judge under Section 240 of the INA. This also means that the person is not subject to mandatory detention, has the opportunity to find an attorney to represent them, gather evidence and testimony in support of their claim and prepare their case in a safe, protected setting. In addition, a person in regular 240 proceedings is also able to present other forms of immigration relief.

If the asylum officer does not follow the guidelines for a proper credible fear interview, it can lead to the wrongful *refoulement* of vulnerable families. In current practice, credible fear proceedings are often inconsistent, interviews are not sensitive to trauma or are not culturally informed, and so they fail to elicit relevant testimony.[3] For example, it is common to see cases in which a family is separated at the border or they arrive at different times, and mother and father present identical claims in separate credible fear interviews. The father will be found to have a credible fear, be released and placed in regular 240 removal proceedings, whereas the mother and the child will be found not to have a credible fear, *based on the same facts* (Author's Notes, 2016). In this case, mother and child will be subject to mandatory detention and possibly removed even if the father attaches mother and child to his asylum claim because the *only* way out of an expedited removal order is through a positive credible fear finding. In other cases, the officer will outright ignore information that could establish a fear of persecution or torture. For example, even though domestic violence was recognized by the Board of Immigration Appeals (BIA) as a basis for asylum in its ruling in *Matter of ARCG*, officers often fail to recognize the red flags that hint that a person is minimizing her experience as a result of trauma caused by domestic violence. The following excerpt of a CFI is an example:

> Q: Has anyone, including a member of your family, a romantic partner, a friend, a neighbor, a stranger, any person at all, ever harmed you for any reason?
>
> A: The father of my second daughter; we did have problems because he would drink. He hit me a little but it was mostly with words. He was drunk.
>
> Q: And who threatened you? (Transcript from interview dated Nov. 2, 2016).

The interviewing officer here did not follow up with questions about the family violence that the applicant mentioned, failing to elicit the testimony to establish a significant possibility of success in an asylum claim under *Matter of ARCG*. The applicant in this case was found to have no credible fear.

In other instances, mothers from countries where governments are known to acquiesce to grave human rights violations against indigenous people (constituting torture under Article 1 of CAT) reveal their indigenous background to the interviewing officers, but the officer fails to produce information as to whether or not she is at risk on account of her ethnicity. Further, there is a pervasive language barrier in the

credible fear process. All interviews are conducted in English, regardless of the language ability of the applicant (Author's Notes, 2016). In every case, the applicant is at the mercy of the skills of an interpreter available by phone.

The misnomer of "credible fear" is problematic. Even though the process is called "credible fear interview," credibility is only one of the factors that asylum officers take into account. Most negative credible fear findings are actually the result of a failure to establish a nexus between the harm suffered and one of the five protected grounds for asylum, or the asylum officer applying the wrong standard. In fact, nearly *all* of the negative credible fear interview transcripts reviewed for this report showed the applicant and her testimony to be credible (Author's Notes, 2016). A "negative credible fear finding" is often misinterpreted as the applicant or their testimony found not to be credible. Parties who profit from or otherwise defend the practice of family detention use this attack on the applicant to justify their position, without really understanding the complexities of the credible fear determination process.

The purpose of the credible fear standard is to protect people against removal to a country where they could be tortured, taking into account whether that country presents a pattern that indicates heightened risk of torture. It is a net to catch all potential torture victims even if they are not ultimately eligible for asylum. In this context, the documented violence that women and children face in Northern Triangle countries should be enough to reach a positive credible fear determination. The United Nations High Commissioner for Refugees 2015 report *Women on the Run* concluded that women in El Salvador, Guatemala and Honduras face a staggering degree of violence in the form of extortion, physical and sexual abuse at home and by criminal armed groups, disappearances and murder, in addition to forced recruitment of their children into criminal armed groups (UNHCR, 2015). It also reported that "[t]he increasing reach of criminal armed groups, often amounting to de facto control over territory and people, has surpassed the capacity for governments in the region to respond" (UNHCR, 2015, p. 48). This conclusion fits squarely under the definition of torture under the convention. Applying the correct (low) standard, any woman and child from El Salvador, Guatemala and Honduras should pass a credible fear interview and be afforded an opportunity to have a full asylum hearing, instead of being sent back to their deaths.

Photo courtesy of U.S. Immigration and Customs Enforcement (ICE)

The limited opportunity for review of these procedural failures amounts to due process violations. Even though the statute provides for review of a negative credible fear determination, including "an opportunity for the alien to be heard and questioned" by an Immigration Judge (IJ) within 7 days (INA Sec. 235 (b) (1) (B) (iii) (III)), and the regulation provides that the standard of review must be *de novo*, this is not always the case. Too often the applicant and the attorney have a limited opportunity to participate (speak) during the hearing, or the children are not even allowed to enter the courtroom (Author's Notes, 2016). After the IJ review, the statute provides no additional layer of review. On the contrary, INA Sec. 235 (b) (1) (B) (iii) (I) states that upon a negative credible fear finding, the asylum officer shall order removal *without further hearing or review*, and Sec. 235 (b) (1) (C) states that an expedited removal order is not subject to administrative appeal. These inadequacies in the credible fear evaluation process are at the heart of *Castro v DHS*.

Castro: High Stakes for Due Process

In November 2015, 54 Petitioners filed petitions before the U.S. District Court in Eastern Pennsylvania for habeas relief arguing that the failures of the credible fear process as applied to their cases resulted in erroneous negative determinations, and so their expedited removal orders should be held invalid. INA Sec. 242 (1) (e) (5) provides that judicial review of expedited removal orders is available in habeas corpus proceedings only to determine whether the petitioner is an alien, whether he or she was in fact ordered removed under 235 (b), and whether the petitioner can prove that he or she is admitted as a lawful permanent resident, refugee or was granted asylum. Based on a strict reading of this portion of the Act, the Government argued, and the Court agreed, that it lacked jurisdiction to review Petitioners' claim (*Castro v. United States Dep't of Homeland Sec.*, 2016).

Even though the U.S. District Court Judge Paul S. Diamond opinion conceded that "absent judicial review, the chance of mistake and unfairness increases," the petition was nonetheless denied on grounds that the statute is unambiguous in precluding such kind of review (*Castro v. United States Dep't of Homeland Sec.*, 2016, p. 167). The Court relied strongly on the distinction between exclusion and removal cases, highlighting that the statute (the purpose of which is to exclude) was triggered within minutes to hours of the Petitioners arriving to the United States. Petitioners appealed, but the Third Circuit upheld the lower court's

ruling on August 29, 2016, issuing a sweeping opinion that categorized the Petitioners as "recent surreptitious entrants" perpetually unable to invoke the Suspension Clause of the Constitution, despite having been physically present and detained in the United States for a year on average. Because this opinion encompassed not only the Petitioners, but also those similarly situated (persons subject to expedited removal proceedings), the ruling could potentially affect thousands, if not millions of people, considering the potential wide reach of the expedited removal statute.

To put this ruling in context, the habeas right that the District and the Third Circuit Courts denied these 54 asylum-seeking women and children is a right that has previously been extended to slaves and to people detained as enemy combatants. In 1839, a group of African Mende men who were purchased as slaves by Spanish merchants in Cuba staged a mutiny aboard the *Amistad* ship, and then led it to U.S shores by accident in an effort to return home (Federal Judicial Center). They were placed under the custody of U.S. authorities pending criminal and property claims (Federal Judicial Center). Through a writ of habeas corpus, the Mende challenged their detention in District Court, urging a determination on the legitimacy of the property claims as slaves of the Spanish merchants (Federal Judicial Center). The case reached the Supreme Court, where the Mende prevailed and secured their freedom (Federal Judicial Center).

More recently, in *Boumediene v. Bush*, the Supreme Court held that noncitizens detained at Guantanamo as enemy combatants have a constitutional right to habeas corpus review by federal civil courts (2008). The Supreme Court relied on established precedent that the habeas corpus statute made no distinction between Americans and noncitizens held in federal custody, and that the detainee's citizenship was not a factor to determine its geographical coverage (*Boumediene v. Bush*, 2008). On the contrary, in *Castro*, the Court is telling refugee families that they have no rights because they were caught by immigration officials before they could accrue those rights,

Photo courtesy of U.S. Immigration and Customs Enforcement (ICE)

despite them now having been present on United States soil for over a year. About half of the *Castro* Petitioners remain detained at Berks County Residential Center in Leesport, PA. The youngest Petitioner turned 3 years of age in December of 2016, having spent 14 months in immigration custody (Author's Notes, 2016).

The *Castro* litigation is an emergency brake on the statute and policies that threaten the livelihoods of countless immigrants who are now targets of institutionalized racism and bigotry under the new administration. Because the Third Circuit's ruling dangerously renders every person who could be subject to the expedited removal statute stripped of constitutional rights, the Petitioners sought certiorari by the Supreme Court on December 27, 2016.

Mandatory Detention

Section 235 (b) mandates detention until a credible fear is established, or until removal (INA Sec. 235 (b) (1) (B) (iii) (IV)). But ICE maintains some discretion to parole persons subject to expedited removal when parole is "required to meet a medical emergency or is necessary for a legitimate law enforcement objective" (INA Sec. 235.3 (b) (4) (ii)). As of early December, 2016, family detention centers in the U.S. housed over 2000 asylum-seeking mothers and children subject to the expedited removal statute (Author's Notes, 2016).

The Karnes, Dilley and Berks family detention centers employed by ICE to house asylum-seeking mothers and children pretend to operate as childcare facilities. State governments have called into question the propriety of using childcare licenses for indefinite immigration detention of adults and children. On December 3, 2016, Texas Judge Karin Krump invalidated the regulation that allowed for the licensure of Karnes and Dilley because it did not comply with state minimum standards for childcare facilities, including one that prohibits children from sharing bedrooms with unrelated adults (NA, 2016a; Grassroots Leadership). Earlier, on January 27, 2016, the Pennsylvania Department of Human Services announced its decision not to renew and to revoke the Berks County Residential Center license (NA, 2016c; Reading Eagle). All three facilities continue to operate pending an appeal on the loss of their licenses, to the detriment of thousands of mothers, children and babies. At $343 per person per day, the dubious and unlawful operation of family detention centers is also extremely costly to the taxpayer (NA, 2015; Human Rights First).

ICE retains discretion to release *all* of the *Castro* Petitioners who have been subject to prolonged detention at Berks, especially considering the harm that prolonged detention (one year to seventeen months as of January, 2017) has inflicted on the families detained. Mothers detained at Berks report in their children symptoms of depression

and anxiety, such as loss of appetite and weight, behavioral regression and suicidal ideations (NA, 2015; Human Rights First). Widespread unattended medical and psychological issues in both mothers and children include diabetes, ovarian cysts, chronic urinary tract infections, breast lumps, liver disease, chronic diarrhea, shigellosis, post traumatic stress disorder, selective mutism, night terrors, sleepwalking and severe dental deterioration (Author's Notes, 2016).

Because the families detained are almost always survivors of extreme violence back home, detention results in re-traumatization and exacerbation of mental health problems. The detainees consider both physical and mental health care (provided by the facility through a phone interpreter) as inadequate, untrustworthy and ineffective (Author's Notes, 2016). Besides, incarceration at Berks comes with its own risks. In January 2015, a staff member was arrested and charged with seven counts of sexual assault of a 19-year-old mother detained there (NA, 2015; Human Rights First). In April 2016, the staff member pleaded guilty to institutional sexual assault and served 6 months in prison – less time than his victim (Author's Notes, 2016). Other reports of questionable conduct at Berks include medical requests being answered with an invitation to request deportation, staff members openly making racist remarks against Latina women, staff members confronting teenagers about their sexual orientation and physically taking children from their beds at night to help ICE coerce mothers into accepting wrongful deportations (Author's Notes, 2016).

Perhaps the most disconcerting part of the plight of these families is that the detention of their children, besides unnecessary, is against the law. The families should be released to enforce the law set forth by the Flores Agreement, which does not exclude children in expedited removal. According to Flores, a class member (child in immigration custody) has four options, in order of preference: (1) release from DHS custody (Paragraph 14); (2) temporary placement in a licensed program (Paragraph 19); (3) secure placement (Paragraph 21); or, (4) brief placement in an INS detention center when immediate release or placement is not possible (Paragraph 12) (Flores Agreement, 1997). Release of the child is the primary objective under Flores. "Where the INS determines that the detention of the minor is not required either to secure his or her timely appearance before the INS or the immigration court, or to ensure the minor's safety or that of others, the INS shall release a minor from its custody without unnecessary delay" (Flores Agreement, 1997; ¶ 14). In related litigation, the Court determined that in order to effectuate the release of a class member, a parent detained with the child should also be released (Flores v. Lynch, 2015).

The second preference is for temporary placement in a "licensed program until such time as release can be

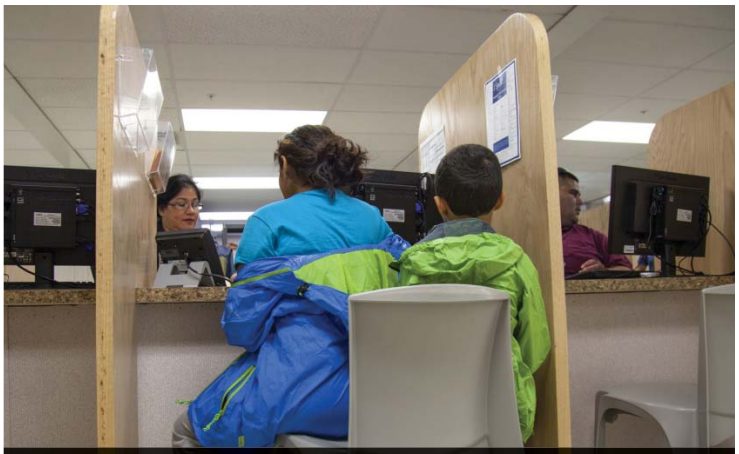


Photo courtesy of U.S. Immigration and Customs Enforcement (ICE)

effected in accordance with Paragraph 14 or until the minor's immigration proceedings are concluded, whichever occurs earlier" (Flores Agreement, 1997). Specifically, the licensed program must "comply with all applicable state child welfare laws and regulations and all state and local building, fire, health and safety codes" and "be licensed by an appropriate State agency to provide residential, group, or foster care services for dependent children" (Flores Agreement, 1997; ¶ 19). The licensed program must be at a "home or facility that is non-secure" (Flores Agreement, 1997; ¶ 19). The third custody preference is authorized only where there has been a determination that the minor is charged with or is delinquent because of a violent or serious crime, credible threat, disruptive conduct, is an escape-risk, or for his own safety (Flores Agreement, 1997; ¶ 21). This placement should be in a "State or county juvenile detention facility or a secure INS detention facility, or INS-contracted facility[,]" but still must be in the least restrictive environment (Flores Agreement, 1997; ¶ 21). The fourth custody option is permitted only when release under Paragraph 14 is not immediately possible or placement under Paragraph 19 is not immediately available. (Flores Agreement, 1997; ¶ 12). It permits placement for no more than 3 days in most instances and 5 days in almost any other event, in an INS-detention facility or INS-contracted detention facility.

It is hard to tell where mandatory detention of children in family residential centers fits within these options. In the case of the *Castro* children who have been detained at Berks for a year or longer, it is evident that the government is not making continuous efforts for their release and placement. DHS could easily release the child, enroll the mother in an alternative to the detention program, and secure the best possible placement - with the families in the United States who are waiting for them, willing and able to sponsor and support their legal process. Family detention, even when not prolonged, does not fit the second preference either, as none of the facilities is currently licensed. The third option presupposes

that the child is charged with or is delinquent because of a violent or serious crime, credible threat, disruptive conduct, is an escape-risk, or a risk to his own safety. Even if the government successfully argued that newly arrived asylum-seeking children fit into any of those categories, detention should still take place in the least restrictive environment. Residential facilities where children are subject to supervision 24 hours a day, and where they lack adequate access to medical, psychological, education and religious services, food and clothing choices, and sometimes even crayons, cannot be considered the least restrictive. The fourth option does not apply because release under Paragraph 14 is immediately possible.

Despite the cost, harm and illegality of prolonged detention for children, DHS continues to hold the *Castro* petitioners at Berks for an indefinite period of time.

Conclusion and Recommendations

As it stands today, the expedited removal statute with its mandatory detention requirement as applied to asylum-seeking families is a dangerous tool used to deny protection under international law, domestic asylum law and constitutional due process rights to some of the most vulnerable people in the hemisphere. On July 24, 2015, ICE, under the authority of the U.S. Department of Homeland Security, put together a committee of 14 members, including experts on education, detention management, detention reform, immigration law, family and youth services, trauma-informed services and health to develop recommendations for best practices at family residential centers. This Advisory Committee on Family Residential Centers, or ACFRC, conducted research and held several meetings over the course of a year and, on October 7, 2016, met at the U.S. Immigrations and Customs Enforcement Headquarters to vote on and finalize draft recommendations. The basic conclusion and primary recommendation by the ACFRC is for DHS to stop placing families in expedited removal proceedings, and to avoid detaining them "except for rare cases when necessary following an individualized assessment of the need to detain because of danger or flight risk that cannot be mitigated by conditions of release[,]" and to make every effort to place families in supportive "community based case-management programs . . . so that families may live together within a community" (ACFRC, 2016, pp. 1-2). The Government Accountability Office, the United Nations High Commissioner for Refugees, the American Bar Association, the Inter-American Commission on Human Rights and other advocacy organizations, such as Human Rights First and the American Civil Liberties Union have been critical of family detention under expedited removal since its inception (ACFRC, 2016). Likewise, the United Nations Working Group on Arbitrary Detention conducted a visit at Dilley in late 2016, and later met with one of the mothers who had been detained for 8 months at Berks who survived a wrongful removal attempt and was later released. The conclusion of their visit and meeting was in agreement with the organizations above and with the U.S. Commission on Civil Rights, the U.S. Commission on Religious Freedom and others, that family detention should be abolished and that families should be allowed an opportunity to apply for asylum (UNWGAD, 2017).

No part of the law requires DHS to place asylum-seeking mothers and children in arbitrary, costly, harmful and unconstitutional expedited removal proceedings. Most importantly, for the sake of upholding the values that actually make America great, we must ensure that no such law is applied to the most vulnerable humans on this side of the world – Central American mothers, children and babies seeking refuge from unrestrained violence. Even if we cannot save them all, the very least we owe them is the core guarantee of due process: a meaningful opportunity to be heard.

Endnotes

[1]Adriana C. Zambrano is a law student in the College of Law, Michigan State University, where she is specializing in immigration law. She is also a legal advocate for families in immigration detention.

[2]Due to the derogatory implications of the word "alien" when describing foreign-born non-citizens, I will only use such term when directly quoting from the source. Otherwise, "foreign-born noncitizen" or simply, "persons" or "people" is the terminology of choice.

[3]These examples are drawn from the review of dozens of credible fear interview transcripts through the author's legal work in family detention cases from June through July 2015, and from June through December 2016.

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