

Testimony of

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Hearing on Problems with ICE Interrogation, Detention, and Removal Procedures

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Madam Chairman Lofgren, Ranking Member King, and members of the Subcommittee:

Thank you for the opportunity to appear before you today. My name is Rachel Rosenbloom. I am a Human Rights Fellow at the Center for Human Rights and International Justice at Boston College and Supervising Attorney at the Center's Post-Deportation Human Rights Project. I am honored to be here today.

The Center for Human Rights and International Justice at Boston College addresses the increasingly interdisciplinary needs of human rights work. Through multidisciplinary training programs, applied research, and the interaction of scholars with practitioners, the Center aims to nurture a new generation of scholars and practitioners in the United States and abroad who draw upon the strengths of many disciplines and the wisdom of rigorous ethical training in the attainment of human rights and international justice. The Center is built upon the university's deep religious and ethical tradition of service to others and its broad scholarly reach in graduate programs in Arts & Sciences and professional programs in Law, Business, Education, Social Work, and Nursing.

The Center offers a multi-tiered approach to addressing the harsh effects of U.S. deportation laws. Through the Boston College Immigration and Asylum Project (BCIAP), the Center provides "know-your-rights" presentations and legal representation to detained immigrants. Through the Post-Deportation Human Rights Project (PDHRP), the Center represents individuals who have been deported and promotes the rights of deportees, those under threat of deportation, and their family members through human rights advocacy, legal and policy analysis, media outreach, training programs, and participatory action research. The goals of the PDHRP are to introduce legal predictability, proportionality, compassion, and respect for family unity into the deportation laws and policies of this country, and to harmonize U.S. deportation policy with international human rights law.

My testimony today concerns the erroneous removal of United States citizens.

In February of last year, the media reported the removal of Pedro Guzman, an American-born United States citizen. While in the custody of the Los Angeles County Sheriff's Department on a misdemeanor trespassing charge, Mr. Guzman signed a document stating that he was a citizen of Mexico and had no legal status in the United States. Mr. Guzman, twenty-nine years old at the time of his removal, has a cognitive disability. He attended special education classes as a child, cannot read or write, and has difficulty processing information. The Sheriff's Department administrator who obtained Mr. Guzman's signature on the document checked a box indicating that Mr. Guzman had read the statement himself, in Spanish. On the basis of his signature on this document,

Mr. Guzman was transferred to the custody of Immigration and Customs Enforcement, which transported him to Tijuana. No attorney or family members were present at any time during the process that led to his removal.

The first point I wish to make to you today is that the removal of Mr. Guzman is not an isolated incident. The Center for Human Rights and International Justice is aware of at least eight cases in recent years in which United States citizens have been removed. I will describe some of these cases to you – cases that are every bit as troubling as Mr. Guzman's. The Center is currently undertaking an extensive survey of attorneys and community groups because, based on anecdotal evidence, we suspect that there are many more such cases that have not been publicly reported.

My second point is that such mistakes are virtually *inevitable* under our current deportation laws. Cases such as Mr. Guzman's are indicative of systemic problems in the detention and deportation system. These deficiencies raise serious due process concerns under the United States Constitution and contradict U.S. obligations under the International Covenant on Civil and Political Rights, which the United States has ratified.

The English jurist William Blackstone famously stated that it is "Better that ten guilty persons escape than that one innocent suffer."<sup>1</sup> This principle informs many aspects of American criminal law, from the right to counsel to the colloquy that takes place between a judge and a defendant before a guilty plea may be entered.

In the realm of deportation, our current policies seem designed to err in the opposite direction: to ensure that deportation laws are applied as broadly as possible to those who are removable, even at the cost of ensnaring United States citizens and others with the right to remain in this country in a vast net of enforcement. For a person under threat of deportation, there is no right to government-appointed counsel. Indeed, there is no right to the assistance even of paid counsel in certain types of removal proceedings. Moreover, an individual who admits to being removable in the streamlined processes that I will describe is not even entitled to a determination by a judge that such an admission is voluntary, knowing, or intelligent.

The deportation system had developed certain due process protections over its hundred year history. However, during the last decade, many of these procedural protections have been eroded by the introduction of new fast-track removal systems. To understand just how few due process protections remain, consider the following procedures, which together account for an increasingly large proportion of removals.

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<sup>1</sup> William Blackstone, 4 Commentaries on the Law of England 358.

## **“Voluntary” Removal**

Some United States citizens, such as Mr. Guzman, concede removability and sign away their right to a hearing before an immigration judge. They may do so through a stipulated order of removal, under § 240 of the Immigration and Nationality Act (INA), or by accepting pre-hearing voluntary departure.

With increasing cooperation between local and state law enforcement agencies and the Department of Homeland Security, the review of an individual’s immigration status is now frequently made by law enforcement officers with minimal training in immigration law. Because deportation is considered to be a civil rather than criminal proceeding, none of the Sixth Amendment protections apply. Individuals such as Mr. Guzman regularly sign away the panoply of rights inherent in citizenship without ever consulting with an attorney, and without any determination by a judge that an admission is knowing, voluntary, and intelligent, or that deportation is justified.

## **Expedited Removal**

The second process that can easily lead to erroneous deportation is expedited removal, which was established by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and is codified at § 235 of the INA. Expedited removal allows Customs and Border Patrol officers to summarily remove foreign nationals who are deemed inadmissible for lack of a valid entry document, fraudulent procurement of an immigration benefit, or a false claim to United States citizenship. Those subject to expedited removal have no right to counsel and no right to a hearing before an immigration judge. Expedited removal grants unprecedented—and largely unreviewable—authority to immigration officers to issue orders of removal.

Expedited removal was originally applied only to those arriving at United States ports of entry. It has since been expanded, however, to cover those encountered in the interior under certain circumstances. Expedited removal accounted for over one third of removal orders issued in Fiscal Year 2005.<sup>2</sup>

The INA creates exceptions to the expedited removal process for those who establish a credible fear of persecution and those with claims to United States citizenship or other legal status. Under either of these circumstances, a case is supposed to be referred to an immigration judge. Numerous commentators have argued that these

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<sup>2</sup> Migration Information Source, Spotlight on Immigration Enforcement in the United States (March 2007), available at <http://www.migrationinformation.org/USfocus/display.cfm?id=590> (last visited Feb. 10, 2008).

supposed safeguards have been grossly inadequate with regard to those fleeing persecution.<sup>3</sup> So, too, has the system failed with regard to citizenship claims.

In 2000, for example, Sharon McKnight, a United States citizen of Jamaican descent, was subjected to expedited removal upon her return to the United States from Jamaica, where she had been visiting her grandfather. Ms. McKnight, age 35 at the time of the removal, is developmentally disabled and has the mental capacity of a young child. Immigration officers took her into custody under suspicion of carrying a fraudulent U.S. passport. Family members who were awaiting her arrival discovered that she was being detained, and secured a copy of her U.S. birth certificate. Nevertheless, Ms. McKnight was left overnight in a room at the airport, handcuffed and shackled to a chair. She was neither fed nor permitted to use the bathroom. In the morning she was deported to Jamaica. Upon her arrival there, baggage porters at the airport donated money to her for bus fare. She was permitted to return to the United States only after the intervention of a Member of Congress. Later describing her ordeal, Ms. McKnight said she had been treated like an animal and suffered from continuing nightmares as a result of the experience.

## **Administrative Removal**

The final fast-track process I would like to bring to your attention is administrative removal, established by Congress in 1994 and codified at INA § 238. Administrative removal applies to those convicted of an “aggravated felony”<sup>4</sup> who are not admitted for permanent residence or are conditional permanent residents who have not yet completed statutory requirements for lifting the conditions on their status. Fifty-five percent of those removed in 2006 on the basis of an aggravated felony conviction were processed through administrative removal.<sup>5</sup>

Individuals who are subject to administrative removal are provided with notice of the charge and the opportunity to be represented by counsel at no cost to the government. In practice, however, this right is largely meaningless given the speed with which the process occurs and the fact that those subject to administrative removal are detained.

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<sup>3</sup> According to one estimate, since 1996 expedited removal has been used wrongly to deny entry into the United States to approximately twenty thousand genuine asylum seekers. See Michele R. Pistone and John J. Hoeffner, No Admissions: Bureaucratic Denial and the Expansion of Expedited Removal, 11-14 *Bender's Immig. Bull.* 3 (2006).

<sup>4</sup> The definition of “aggravated felony,” a term of art under the INA, encompasses many minor convictions classed as misdemeanors under state law. See Nancy Morawetz, Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms, 113 *Harv. L. Rev.* 1936 (2000). The precise contours of the aggravated felony definition are still in flux. In recent years the government has lost two Supreme Court cases (one of them decided unanimously, the other an 8-1 decision) on the reach of the term. *Lopez v. Gonzales*, 549 U.S. \_\_\_, 127 S.Ct. 625, 166 L.Ed. 2d 462 (2006) (drug possession conviction that does not qualify as a felony under federal law is not an aggravated felony); *Leocal v. Ashcroft*, 543 U.S. 1, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004) (DUI conviction is not an aggravated felony).

<sup>5</sup> Transactional Records Access Clearinghouse (TRAC), Syracuse University, New Data on the Processing of Aggravated Felons (2007), available at <http://trac.syr.edu/immigration/reports/175/> (last visited Feb. 10, 2008).

Although the statute as originally drafted in 1994 provided the right to an interpreter in such a proceeding, Congress eliminated this right in 1996. Administrative removal cases are adjudicated by an immigration officer rather than an immigration judge. As in the case of expedited removal, a claim to United States citizenship is supposed to trigger review by an immigration judge, but this ostensible safeguard can easily fail.

Deolinda Smith-Willmore, a partially blind, seventy-one-year-old United States citizen with schizophrenia, was processed through administrative removal in 2001. For reasons that appear to have been related to her mental illness, Ms. Smith-Willmore identified herself as Dominican while serving time in prison for assaulting a neighbor. In fact, she was born in Ossining, New York in 1931, the daughter of an African-American father and a mother who emigrated from the Dominican Republic in 1923. Ms. Smith-Willmore was placed in administrative removal and deported to the Dominican Republic. According to Ms. Smith-Willmore, she informed immigration officers of her United States citizenship while detained, but no attempt was made to verify her claim, and she was not referred to an immigration judge. Upon her arrival in the Dominican Republic, the Dominican government housed her in a nursing home and obtained a United States attorney for her who easily obtained a copy of her birth certificate. Even after the government admitted its mistake in deporting her, it refused to issue her documents that would permit her to return to the United States under her real name until the media took interest in the case.

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I have endeavored here to demonstrate how stipulated orders of removal, expedited removal, and administrative removal greatly increase the potential for United States citizens to be deported. There are a number of additional factors that also contribute to errors within the deportation system, including mandatory detention, lack of access to counsel, and lack of accommodations for individuals with disabilities.

### **Lack of Access to Counsel**

Over sixty percent of all respondents in removal proceedings before an immigration judge are *pro se*. Among detained respondents, ninety percent are unrepresented.<sup>6</sup> The lack of counsel in removal proceedings is particularly troubling in light of the fact that administrative and judicial review of removal determinations has been severely curtailed. Moreover, the Board of Immigration Appeals is struggling under heavy caseloads with a reduced number of judges.

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<sup>6</sup> See Christopher Nugent, Towards Balancing a New Immigration and Nationality Act: Enhanced Immigration Enforcement and Fair, Humane and Cost-Effective Treatment of Aliens, 5 U. Md. L. J. Race, Religion, Gender & Class 243, n.43 and accompanying text (Fall 2005).

Studies have shown marked disparities in immigration court outcomes for those who are represented by counsel versus those who are *pro se*.<sup>7</sup> Having access to competent legal counsel can be critical in citizenship cases. A recent study reported that seven percent of United States citizens – and twelve percent of citizens earning less than \$25,000 per year – do not have ready access to proof of their citizenship, such as a United States passport, naturalization papers, or a United States birth certificate.<sup>8</sup> As the cases of Mr. Guzman, Ms. McKnight, and Ms. Smith-Willmore show, even those with U.S. birth certificates on file can end up being removed. For those who have obtained citizenship upon the naturalization of a parent, or have acquired citizenship at birth abroad from a United States citizen parent (as well as for those born in the United States who lack a birth certificate because they were not born in a hospital), the chance of error in a removal proceeding is infinitely higher. The laws relating to acquired citizenship are complex and have changed numerous times over the past decades. Some such claims depend on the domestic relations laws of foreign nations. Determining whether someone not born in the U.S. acquired citizenship from a parent can thus require both substantial factual investigation and sophisticated legal analysis.

Immigration judges, who have extensive training in immigration law and are mandated to inform *pro se* respondents of all available forms of relief, are undoubtedly better positioned than immigration officers to spot a potential citizenship claim for a *pro se* respondent. However, because of the complexity of such claims, it can be difficult to prove – or even to identify – a citizenship claim even within immigration court proceedings.

## **Mandatory Detention**

The mandatory detention provisions of the 1996 amendments to the INA greatly increased the number of detained immigrants. Detainees are often transferred across the country, far from friends or family who might be able to assist them in gathering the facts necessary for their case or in obtaining legal representation. Many are detained in remote areas far from free or low-cost legal services that could make a crucial difference in an indigent respondent's ability to prove a citizenship claim or otherwise defend against removal. Moreover, detention deprives respondents of the ability to earn money that could be used to hire an attorney.

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<sup>7</sup> A study of 2003 statistics found that represented detainees obtained relief from removal in 24 percent of cases, versus 15 percent of cases for unrepresented detainees. Donald Kerwin, Revisiting the Need for Appointed Counsel, MPI Insight (April 2005), available at [http://www.migrationpolicy.org/insight/Insight\\_Kerwin.pdf](http://www.migrationpolicy.org/insight/Insight_Kerwin.pdf) (last visited Feb. 10, 2008).

<sup>8</sup> Brennan Center for Justice, Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification (November 2006), available at [http://www.brennancenter.org/page/-/d/download\\_file\\_39242.pdf](http://www.brennancenter.org/page/-/d/download_file_39242.pdf) (last visited 2/10/08).

## **Lack of Accommodations for Individuals with Disabilities**

Researchers have noted the propensity of those with cognitive disabilities to say whatever their questioners want to hear.<sup>9</sup> It is not uncommon for someone who is mentally ill and suffering from delusions to state that he or she was born abroad.

Under the Americans with Disabilities Act, law enforcement agencies are required to make reasonable accommodations for people with disabilities. As the cases I have cited illustrate, our current deportation system lacks even the most basic safeguards for someone who is delusional, has difficulty communicating or processing information, or is otherwise unable to effectively state a citizenship claim or other defense to removal.

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Although my principal focus today is the deportation of United States citizens, the systemic problems I have noted play out in a much wider arena.

Many United States citizens who ultimately prevail in removal proceedings languish in detention for weeks, months, or even years before their citizenship claims are recognized. The following are just two examples of the scores of such cases that have been documented.<sup>10</sup> One native-born U.S. citizen, accused of making a false claim to U.S. citizenship upon arriving on a flight from Mexico, was threatened with twenty years imprisonment, left to sleep on the floor in a detention area at the airport, and then imprisoned for over six weeks before his claim to citizenship was validated by an immigration judge.<sup>11</sup> Another United States citizen, a refugee of the Ethiopian civil war whose parents' naturalized before his eighteenth birthday, was detained for a year and a half before an immigration judge recognized his citizenship. The delay was due to ICE's transposition of two numbers in its translation of his birth certificate, an error that made it appear that he was over eighteen at the time his parents had naturalized.

Moreover, many of the same problems that lead to the removal of United States citizens can also lead to the erroneous removal of lawful permanent residents. The Center is aware of a large number of cases in which longtime legal residents have been removed on the basis of criminal convictions that do not actually trigger removal, or convictions that do not bar discretionary relief. Faced with the prospect of lengthy

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<sup>9</sup> See generally, Robert Perske, *Unequal Justice: What Can Happen When Persons with Retardation or Other Developmental Disabilities Encounter the Criminal Justice System* (Abingdon Press, 1991).

<sup>10</sup> See Marisa Taylor, *Zeal to Deport Sometimes Catches U.S. Citizens in its Net*, *News & Observer* (Raleigh, NC), Jan. 25, 2008 at A3 (citing unpublished 2006 study by Vera Institute for Justice documenting 125 such cases in twelve detention sites).

<sup>11</sup> *The Expedited Removal Study: Report on the First Three Years of Implementation of Expedited Removal*, 15 *Notre Dame J.L. Ethics & Pub. Pol'y* 1, 83-84 (2001).

detention and lacking the financial ability to hire an attorney, many simply concede removability, or let stand a Board of Immigration Appeals decision that could – for a significant legal fee – have been presented to a federal appeals court for judicial review. Without the benefit of counsel, many *pro se* respondents have no idea that their case even raises a reviewable legal question.

One such person is Martin Rosillo, who was deported to Mexico in 2003 on the basis of a 1999 simple assault conviction. Mr. Rosillo, a lawful permanent resident, left behind his U.S.-born wife Chiara and their two U.S.-born children, Martin Jr .and Alejandra. Prior to his removal, Mr. Rosillo was steadily employed as a landscaper and laborer and was in the process of training to be a heavy equipment operator. Mr. and Mrs. Rosillo have been married for fourteen years. Mrs. Rosillo has serious medical problems and has suffered greatly since her husband’s removal. Because of the financial strain wrought by her husband’s deportation, she has been unable to undergo necessary medical treatment.

Mr. Rosillo’s conviction should not have triggered removal. Moreover, even if Mr. Rosillo had been subject to removal, he would have been eligible for relief. Yet Mr. Rosillo, overwhelmed by the thought of long-term detention and unable to afford an attorney, conceded removability.

Once outside the country, it can be nearly impossible to reopen a proceeding in which a legal error has occurred. Agency regulations bar reopening of a proceeding subsequent to departure. One federal appeals court has found the so-called “post-departure bar” invalid, and others are currently considering this question, but for the time being many individuals who have been erroneously removed have no legal recourse. Even if they are able to get around the jurisdictional bar to post-departure review imposed by the regulations, they still face strict time limits of 30 days for motions to reconsider and 90 days for motions to reopen. Those removed through administrative or expedited removal have no such post-removal review mechanisms available. In effect, if mistakes are made in their cases, they are simply without legal recourse.

### **The Costs of This System**

As Supreme Court Justice Stephen Field commented in *Fong Yue Ting v. United States* in 1892, “As to its cruelty, nothing can exceed a forcible deportation from a country of one’s residence, and the breaking up of all the relations of friendship, family, and business...” Many legal commentators have argued that the classification of deportation as a civil rather than a criminal matter is a legal fiction that ignores the grave

consequences of removal, consequences that often far outweigh those of many criminal convictions.<sup>12</sup>

For Martin Rosillo, removal has meant a potentially lifelong separation from his wife and children. For Pedro Guzman, removal meant 89 days eating out of garbage cans and bathing in canals while seeking to return to the United States. Mr. Guzman told his family that he had tried to reenter the United States at San Ysidro but had been repeatedly turned away. He then walked 100 miles east to reach the border crossing at Mexicali. Mr. Guzman returned to the United States fearful, stuttering, and no longer able to communicate in English.

The costs of this system are borne not only by those deported, but by their loved ones who are left behind, including U.S. citizen children senselessly deprived of the presence and support of a parent.

Finally, there is a great cost to all of us, and to our legal system itself, when the rule of law is undermined by a system that permits such egregious errors regularly to occur.

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<sup>12</sup> See generally, Daniel Kanstroom, *Deportation Nation: Outsiders in American History* (Harvard University Press 2007)