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Cluster Report Submitted by:

**American Civil Liberties Union (ACLU)¹, ACLU Foundation, over 500,000 members,
and 53 affiliates²**

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¹ The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit, nonpartisan organization dedicated to protecting human rights and civil liberties in the United States. The ACLU was founded in 1920, largely in response to the curtailment of liberties that accompanied America’s entry into World War I, including the persecution of political dissidents and the denial of due process rights for non-citizens. In the intervening decades, the ACLU has advocated to hold the U.S. government accountable to the rights protected under the U.S. Constitution and other civil and human rights laws.

² This submission to the is on behalf of a coalition comprised of the American Civil Liberties Union (ACLU), ACLU Foundation, ACLU of Alabama, ACLU of Alaska, ACLU of Arizona, ACLU of Arkansas, ACLU of Northern California, ACLU of Southern California, ACLU of San Diego and Imperial Counties, ACLU of Colorado, ACLU of Connecticut, ACLU of Delaware, ACLU of Florida, ACLU of Georgia, ACLU of Hawaii, ACLU of Idaho, ACLU of Illinois, ACLU of Indiana, ACLU of Iowa, ACLU of Kansas and Western Missouri, ACLU of Kentucky, ACLU of Louisiana, Maine Civil Liberties Union, ACLU of Maryland, ACLU of Massachusetts, ACLU of Michigan, ACLU of Minnesota, ACLU of Mississippi, ACLU of Eastern Missouri, ACLU of Montana, ACLU of the National Capital Area, ACLU of Nebraska, ACLU of Nevada, New Hampshire Civil Liberties Union, ACLU of New Jersey, ACLU of New Mexico, New York Civil Liberties Union, ACLU of North Carolina, ACLU of Ohio, ACLU of Oklahoma, ACLU of Oregon, ACLU of Pennsylvania, ACLU of Puerto Rico, ACLU of Rhode Island, ACLU National Office in Charleston South Carolina, ACLU of South Dakota, ACLU of Tennessee, ACLU of Texas, ACLU of Utah, ACLU of Vermont, ACLU of Virginia, ACLU of Washington, ACLU of West Virginia, ACLU of Wisconsin, and ACLU of Wyoming.

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Access to Justice for Guantánamo Detainees

1. Almost 13 years after it opened, the prison at Guantánamo Bay still holds 149 foreign detainees. Seventy-nine detainees are cleared for transfer from the prison yet remain detained, the vast majority having been cleared by a US government interagency task force in 2010. Another 60 detainees have even less recourse from a continuing US policy of indefinite detention without charge or trial.
2. Due to procedural delays within the executive branch as well as Congressional restrictions, transfer of the detainees who were cleared for transfer in 2010 has been infrequent. Most languish in detention without knowing when if ever they will be released. Only nine detainees in this category have been transferred in the last year. Moreover, the administration bears responsibility for opposing in court the release of detainees against whom the government has presented scant evidence of wrongdoing.
3. For its part, Congress has in the past enacted provisions banning or otherwise unnecessarily restricting the transfer of detainees. Yet even in the intermittent absence or easing of such restrictions, and in spite of calls of foreign heads of state to return their citizens held captive at Guantánamo, the administration has been exceedingly slow in executing transfer orders. Continuing delays could increase the likelihood of new legislative restrictions that will only further restrict or slow transfer efforts.
4. Current language in draft text of the National Defense Authorization Act (NDAA)—a bill that is essentially guaranteed a final vote each year—would ban transfers of even cleared detainees to Yemen. Of the 79 detainees at Guantánamo that are cleared for transfer, 57 are Yemeni. A Yemen transfer ban would punish these Yemeni detainees by subjecting them to on-going detention based solely on their country of origin. The administration must strongly oppose, if not sanction, such discrimination, which would only guarantee indefinite detention for a vast majority of the cleared detainees.
5. The Periodic Review Boards, which began about a year ago after more than two years of delay, are meant to provide an opportunity for indefinitely imprisoned detainees to challenge their continued detention through an administrative hearing. But in their first year, the hearings have largely only aggravated the practice of indefinite detention. They have proven to be painfully slow and inherently unfair for detainees. In their first year, the boards held hearings for only nine detainees out of an eligible 71. At that rate, the last detainee will not complete his first review board hearing until April 2026. Further, the admissibility of secret evidence means that the detainee and his representatives may be unable to meaningfully contest the government's assertion that the detainee represents a continued threat or the reliability of its sources. In such a scenario, the detainee's representatives may be afforded only declassified summaries of the evidence collected by the government.
6. The Periodic Review Board system is not meant to replace detainees' opportunity to petition for the writ of habeas corpus, but even that right has been seriously constrained by recent prison policy and court decisions adopting positions urged by the US

government. As of May 2013, detainees are forced to undergo – as one detainee described them - “humiliating and degrading” groin searches no fewer than four times for each meeting with attorneys. These intrusive searches have led some detainees to refuse attorney meetings, chilling detainees’ efforts to contest the lawfulness of their detention or prepare for a hearing before the PRB. The searches were upheld by the DC Circuit Court in August 2014 month.

7. There are also troubling reports that the Obama administration supports closing the Guantánamo prison by moving detainees to a Department of Defense detention facility in the United States. Indefinite detention in the United States is as unlawful and unacceptable as it is at Guantánamo. Attempts at establishing such a domestic regime could result in efforts by this and future administration to bypass the constitutional and human rights restraints and protections of the criminal justice system in favor of indefinite military detention.

8. Recommendations

- i. Take all necessary measures to execute without delay the transfer orders for all detainees cleared for transfer and to ensure a timely and meaningful Periodic Review Board process for all detainees held indefinitely.
- ii. Strongly oppose legislation that would further delay efforts to transfer detainees from Guantánamo, especially any that would discriminate on the basis of national origin.
- iii. Take all necessary measures to immediately end the practice of indefinite detention, including opposition to any efforts to broaden the practice of indefinite detention beyond Guantánamo Bay.

Access to Justice for Victims of Torture in the National Security Context

9. Under the George W. Bush administration, many hundreds of people were tortured and abused by the CIA and Department of Defense, primarily in Afghanistan, Guantánamo, and Iraq, but also in other countries after unlawful rendition. Yet, to date, there has been little accountability for abuses including torture, arbitrary detention and enforced disappearances.¹
10. In January 2009, shortly after entering office, President Obama took important steps to dismantle the torture program. Through executive orders, President Obama ordered the CIA to close its secret prisons, banned the CIA from all but short-term transitory detention, and put the CIA under the same interrogation rules that apply to the military.² But in the following years—as the ACLU and other NGOs have documented—the Obama administration undermined that early promise by thwarting accountability for torture and other abuses:
 - i. No survivor of the U.S. torture program has had their day in court. On behalf of torture victims, the ACLU and other human rights organizations challenged the mistreatment in court in a number of lawsuits. The government succeeded in extinguishing those lawsuits based on procedural arguments.
 - ii. For example, the Obama Administration embraced the Bush Administration’s claim that, by invoking “state secrets,” the government can not only restrict discovery but can quash an entire lawsuit—without demonstrating the validity of their claim to a judge.
 - iii. The federal government has also used the judicially-created doctrine of qualified immunity to dismiss civil suits alleging torture; cruel, inhuman, or degrading treatment; forced disappearance; and arbitrary detention without consideration on the merits.³
 - iv. Efforts at criminal accountability have not resulted in criminal charges, except against lower-ranking service members and a single government contractor.
 - v. The U.S. government has fought to keep secret many documents that would allow the public to understand the extent of the abuse.
 - vi. Even as top Bush administration officials were crafting and implementing torture policies, an untold number of U.S. service members and civilian officials risked their careers by objecting to official torture and other cruelty. The efforts of these individuals are not well known and the government has not sufficiently recognized them.
 - vii. With domestic avenues for relief closed, a number of victims of U.S. torture and abuse have filed petitions against the United States with the Inter-American Commission on Human Rights. The US government has yet to respond to any of the petitions, including one filed over six years ago on behalf of Mr. Khaled El Masri.⁴
11. In 2012, the U.S. Senate’s committee on Intelligence adopted a 6,000-page report on the CIA’s use of torture, the most comprehensive to date. With the anticipated release of the Senate Intelligence Committee’s several hundred-page summary of the report, the United States has a critical opportunity to demonstrate its commitment to the rule of law and

provide long-overdue accountability for the Bush administration's illegal torture program.

12. Recommendations

- i. Ensure that all cases of unlawful killing, torture or other ill- treatment, unlawful detention, or enforced disappearance are effectively, independently and impartially investigated. Ensure that perpetrators including, in particular, persons in command positions, are prosecuted and sanctioned if warranted by the evidence and the law.
- ii. Release documents relating to the mistreatment of detainees, including:
 - a. The memorandum issued by President Bush on September 17, 2001 authorizing the CIA to establish secret overseas interrogation facilities.
 - b. Hundreds of CIA cables describing the use of waterboarding and other harsh interrogation techniques.
 - c. Over 2,000 photographs of abuse at detention facilities throughout Iraq and Afghanistan.
- iii. Appoint an independent body to provide compensation and rehabilitation services to those who suffered torture or other cruel, inhuman, or degrading treatment. President Obama should publicly acknowledge and apologize to the victims of U.S. torture policies.
- iv. Congress should permanently ban the CIA from operating any detention facility or holding any person in its custody, and subject the CIA to the same interrogation rules that apply to the military.
- v. President Obama should formally honor the members of the military, the CIA, and other public servants who, when our nation went off course, stayed true to our most fundamental ideals.

Racial Disparities in Sentencing

13. There are significant racial disparities in sentencing decisions in the United States.⁵ Sentences imposed on Black males in the federal system are nearly 20 percent longer than those imposed on White males convicted of similar crimes.⁶ Black and Latino offenders sentenced in state and federal courts face significantly greater odds of incarceration than similarly situated White offenders and receive longer sentences than their White counterparts in some jurisdictions.⁷ Black male federal defendants receive longer sentences than Whites arrested for the same offenses and with comparable criminal histories.⁸
14. The racial disparities also increase with the severity of the sentence imposed. The level of disproportionate representation of Blacks among prisoners who are serving life sentences without the possibility of parole (LWOP) is higher than that among parole-eligible prisoners serving life sentences. In general, studies have found that greater racial disparities exist in sentencing for nonviolent crimes, especially property crimes and drug offenses.⁹ These racial disparities result from disparate treatment of Blacks at every stage of the criminal justice system, including stops and searches, arrests, prosecutions and plea negotiations, trials, and sentencing.¹⁰
15. In its August 2014 Concluding Observations following its review of the United States, the CERD Committee reiterated its concern regarding the persistent racial disparities in the criminal justice system, including the disproportionate number of racial minorities in the prison population and the disproportionate representation of African-Americans at every stage of the criminal justice system.¹¹ In its report submitted to the Committee in June 2013, the U.S. government highlighted the passage of the Fair Sentencing Act of 2010, noting that the law reduced sentencing disparities between powder cocaine and crack cocaine offenses, but failing to note the over 16,700 prisoners still serving sentences under the 100-to-1 regime that resulted in the disproportionate imposition of significantly harsher sentences on Black defendants.¹²

16. Recommendations

- i. Abolish the sentence of life without parole for offenses committed by children under 18 years of age. Enable child offenders currently serving life without parole to have their cases reviewed by a court for reassessment and resentencing, to restore parole eligibility and for a possible reduction of sentence.
- ii. Abolish the sentence of life without parole for nonviolent offenses. Congress and state legislatures should eliminate all existing laws that either mandate or allow for a sentence of LWOP for a nonviolent offense. Such laws should be repealed for nonviolent offenses, regardless of whether LWOP operates as a function of a three-strikes law, habitual offender law, or other sentencing enhancement. Make elimination of nonviolent LWOP sentences retroactive and require resentencing for all people currently serving LWOP for nonviolent offenses.

- iii. Crack and powder cocaine are two forms of the same drug, and Congress should eliminate any disparity in the amount of either necessary to prompt mandatory minimum sentences.
- iv. Congress should enact comprehensive federal sentencing reform legislation such as the Smarter Sentencing Act of 2013 or the Justice Safety Valve Act of 2013, which would reduce some mandatory minimum sentences for drug offenses and would retroactively apply the Fair Sentencing Act—which reduced the crack/powder cocaine sentencing disparity—to those currently serving sentences for these offenses.

Racial Profiling

17. Racial profiling in law enforcement is a persistent problem in the United States. Although top U.S. officials have condemned racial profiling, noting that it “can leave a lasting scar on communities and individuals” and is “bad policing,” federal policy fails to protect against it.¹³ In particular, despite repeated calls by civil society, the U.S. Department of Justice has failed to issue a revision to its 2003 Guidance on the Use of Race by Federal Law Enforcement.¹⁴ Although the U.S. government states that the purpose of the Guidance is to ban racial profiling, the current Guidance has the perverse effect of tacitly authorizing the profiling of almost every minority community in the United States.
18. The Guidance exempts from its ban on racial profiling practices that are related to “protecting the integrity of the Nation’s borders” and “investigating or preventing threats to national security or other catastrophic events (including the performance of duties related to air transportation security).” Furthermore, the Guidance does not ban profiling based on religion, national origin, or sexual orientation.
19. Examples of profiling include: Federal Bureau of Investigation (FBI) racial mapping; Transportation Security Administration (TSA) profiling; and immigration enforcement through programs like Secure Communities¹⁵ and Section 287(g) Agreements.¹⁶ The result of these broad exemptions and omissions is that the Guidance sanctions profiling against almost every minority community in the United States. Allowing profiling in “border integrity” investigations disproportionately impacts Latino communities and communities living and working within the 100-mile zone; profiling in national security investigations has led to the inappropriate targeting of Muslims, Sikhs, and people of Arab, Middle Eastern, and South Asian descent.

20. Recommendations

- i. Revise the Department of Justice’s Guidance Regarding the Use of Race to: (1) prohibit profiling based on religion or national origin or sex (including gender identity and expression), or sexual orientation; (2) end exceptions for border integrity and national security; (3) apply the Guidance to state and local law enforcement who work in partnership with the federal government or receive federal funding; (4) explicitly state that the ban on racial profiling applies to data collection, intelligence activities, assessments and predicated investigations; and (5) make the Guidance enforceable. Revise the Department of Homeland Security’s April 2013 memorandum to component heads regarding its commitment to non-discriminatory law enforcement and screening activities, which incorporates the Justice Department’s Guidance by reference, accordingly.
- ii. Declassify and release the full current version of the FBI Domestic Intelligence and Operations Guide (DIOG) and require the FBI to amend it to incorporate prohibitions on the use of race and ethnicity in law enforcement investigations and the amendments to the Justice Department Guidance requested above.

- iii. End the 287(g) program, including all jail partnerships and task force agreements. End the Secure Communities program. Collect and make public data regarding the race, national origin, and religion of individuals stopped, apprehended, or detained pursuant to the 287(g) and Secure Communities programs. Halt the government's use of immigration detainers in their current form; do not issue detainers except upon a judicial finding of probable cause; and restrict detainers to individuals convicted of a serious crime.
- iv. Extend the settlement in the case of *Jose Sanchez et al. v. U.S. Border Patrol et al.* nationwide, applying its Fourth Amendment training and data collection provisions to all checkpoints and roving patrols.¹⁷
- v. Support the passage of the End Racial Profiling Act (ERPA).

Anti-LGBT Discrimination

21. Despite tremendous advances for the lesbian, gay, bisexual, and transgender (LGBT) community, there are almost no explicit protections for LGBT people in U.S. federal law. In basic areas of everyday life including education, employment and housing, LGBT people remain uniquely vulnerable to discrimination due to the lack of statutory non-discrimination protections that explicitly reference sexual orientation and gender identity. Not surprisingly, being harassed at school, fired from a job or denied housing are realities that far too many LGBT people have experienced personally.
22. In the most recent Universal Periodic Review process, the U.S. government accepted a recommendation that it “take measures to comprehensively address discrimination against individuals on the basis of their sexual orientation or gender.”¹⁸
23. Even in the absence of explicit federal statutory prohibitions on sexual orientation and gender identity discrimination, the U.S. government can still take steps to protect LGBT people from discrimination under existing prohibitions on sex discrimination. To date, numerous federal courts and the U.S. Equal Employment Opportunity Commission (EEOC) have held that federal laws that bar sex discrimination—notably Title VII of the Civil Rights Act of 1964, which bars employment discrimination—extend to discrimination based on gender identity or a failure to conform to stereotypical notions of masculinity or femininity.

24. Recommendations

- i. As broadly as possible, Executive Branch agencies should clarify that existing federal statutory bans on sex discrimination cover discrimination based on gender identity as well as discrimination based on a failure to conform to stereotypical notions of masculinity or femininity.
- ii. Specifically, the EEOC should issue comprehensive guidance on the scope of protections for LGBT people under Title VII of the Civil Rights Act of 1964.
- iii. The U.S. Department of Education should issue comprehensive guidance on the scope of protections for LGBT students under Title IX of the Education Amendments of 1972, which prohibits sex discrimination in any education program or activity receiving Federal financial assistance.

Unaccompanied Immigrant Children and Families

25. An estimated 66,000 unaccompanied children and an additional 66,000 family units have crossed the U.S.-Mexico border since October 2013,¹⁹ in what some observers have termed a refugee crisis and President Obama²⁰ has recognized as a humanitarian situation. In response, the U.S. government is considering actions that could lead to systematic violations of its non-refoulement obligations under international law.²¹ It has also begun to dramatically expand the detention of immigrant families, though international human rights law strongly disfavors the use of administrative immigration detention, and rejects it completely for children.²² Finally, it has failed to protect children from abuse in CBP custody.
26. Three-quarters of the recently arrived unaccompanied children come from Guatemala, El Salvador or Honduras, while most of the rest are Mexican. Many of them have fled violence or persecution in their home countries and seek safety in the United States. These children have potential claims to protection as refugees, under the UN Convention Against Torture, or under U.S. immigration law.
27. These children should be provided access to full and fair immigration proceedings and legal representation. In accordance with UNHCR guidance and international standards, they should be interviewed by individuals with expertise and training in child development. Children have a particular need for such safeguards given their vulnerability and because it is predictable that traumatized children may face difficulties expressing their true reasons for fleeing home immediately upon their arrival and when questioned by a law enforcement officer.²³ Truncated processes that presume unaccompanied children should be returned—rather than assessed for their protection needs—could lead U.S. officials to fail to recognize some children’s legal claims and thereby result in systematic violation of U.S. non-refoulement obligations.
28. Currently U.S. law requires that unaccompanied children from countries other than Mexico and Canada be provided a “full and fair hearing” of their claims, and prevents them from being expelled based on a truncated process.²⁴ However, Congress and the Executive Branch are currently considering proposals that would instead expand an accelerated removal (i.e. deportation) process—one that is already being applied to deport families with unconscionable speed, preventing full and fair presentation of their cases and ensuring that mistakes are made in life-or-death determinations of future safety. Indeed, on August 22, the ACLU and other organizations filed a lawsuit against the U.S. government challenging its policies of denying fair deportation proceedings to refugee women and children detained at a new family detention facility in Artesia, New Mexico.²⁵
29. Some proposals relating to Central American unaccompanied children would treat them the same way as Mexican children, who are currently subject to truncated and wholly inadequate processes, including a presumption of immediate return to their home country without a hearing. Yet the truncated process applied to Mexican children has led to potential violations of U.S. law and non-refoulement obligations. UNHCR has found that

in practice, the abbreviated screening process used for unaccompanied Mexican children²⁶ has sacrificed fairness and protection for expediency.²⁷ Mexican children are interviewed by officers with insufficient training and in a manner that cannot reasonably be expected to elicit information about whether they are past or potential victims of abuse. The overwhelming majority of Mexican children (95.5%) are returned to Mexico without a judicial hearing despite the significant risk of trafficking and other forms of exploitation, including by criminal gangs and drug cartels.²⁸

30. Prior to this summer, the United States had begun to move away from the practices of detained mothers and their children. In 2009, ICE stopped detaining families at the T. Don Hutto facility in Texas following ACLU litigation and other advocacy challenging the deplorable conditions of confinement and treatment of children there; by late 2009, the administration had reduced its detention of immigrant families to 96 beds at one facility. But in July 2014, the U.S. government reversed course and announced plans to expand family detention, creating up to 6,350 beds in the near future.²⁹ Already, the government has opened two new family detention facilities: a 646-bed facility in Artesia³⁰ and a 600-bed facility, run by a private prison company, in Karnes County, Texas.³¹ The government is opening at least one additional facility – with a shocking 2,400 beds – in West Dilly, Texas. It will be run by a private prison company.³² The majority of the mothers and their children detained in these facilities are seeking asylum in the United States. DHS has inappropriately imposed a no-bond policy for these mothers and children, including persons who pass credible fear interviews, without an individualized assessment of the need to detain, and despite individual circumstances that often support supervision in the community rather than jail detention.³³ Remote detention facilities like Artesia and Karnes also make it difficult to impossible for immigration detainees to obtain legal counsel in their deportation proceedings.³⁴ In addition, medical experts and child welfare specialists have reported that many children had lost considerable weight after entering Artesia and several displayed symptoms of depression.³⁵

31. An additional concern is the treatment of unaccompanied immigrant children detained by the U.S. agency Customs and Border Protection. The ACLU and other organizations have documented more than 100 cases where unaccompanied immigrant children detained by Customs and Border Protection were subjected to verbal, sexual and physical abuse; prolonged detention in squalid conditions; and a severe lack of essential necessities such as beds, food and water.³⁶

32. Recommendations

- i. Ensure that all individuals, including unaccompanied children, are given sufficient time and access to protection as refugees, under the UN Convention Against Torture or other legal statutes provided by U.S. immigration law.
- ii. Do not subject children to truncated screenings for protection.

- iii. Provide all individuals, including children, who have colorable claims for protection with a full and fair hearing and the right to judicial review.
- iv. Provide legal representation to all immigrants, and particularly children, with deportation cases before an immigration judge.
- v. Reject the detention of families and children, unaccompanied or with their parents, as an immigration enforcement tool. Ensure that the detention of families and children is only used as a last resort, for the shortest period of time possible. Use and expand the use of alternatives to detention.
- vi. Ensure that administrative detention, when absolutely necessary, comply with all human rights obligations to provide humane treatment and care, including medical, legal, and social services.
- vii. Increase oversight of Customs and Border Protection, including through body-worn cameras, create binding and enforceable short-term detention standards for CBP facilities; and ensure adequate training for all CBP officers on appropriate treatment of children.
- viii. Investigate all complaints regarding conditions of confinement or abuse, ensure that officers who abuse immigration detainees are held accountable, and revise training or policy to prevent inappropriate conditions of confinement or officer behavior in the future.

Access to Justice in Immigration Proceedings

33. Each year, the U.S. federal government deports hundreds of thousands of individuals, including children, longtime residents, and persons with disabilities. Both international human rights law and the domestic constitutional and statutory law of the United States guarantee certain basic legal protections to individuals facing deportation. International human rights law specifically recognizes the right to defend against deportation, to be represented in that proceeding, and to have their expulsion reviewed by a competent authority.³⁷ 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.”³⁸
34. However, for many noncitizens facing removal from the United States, a fair hearing and a meaningful opportunity to present claims and defenses is illusory. According to the most recent statistics released by the government, at least 75% of people deported in Fiscal Year 2013 did not have a hearing before an immigration judge to determine whether they could and should be deported.³⁹ For these immigrants, it is not an independent judge but law enforcement officers and agents with the Department of Homeland Security who arrest, detain, charge, prosecute, and deport who also judge their cases in often rapid proceedings. Without immigration judge hearings, immigrants facing removal are never given that brief moment of individuality and impartiality within a deportation system that often ignores both. The penalties associated with these summary removal orders include not only expulsion, but also bans on reentering the United States, which in some cases last a person’s entire lifetime.⁴⁰
35. The ACLU recently settled a lawsuit challenging DHS’s conduct in expelling Mexicans in the southern border region of California through the use of coercion and misinformation to pressure individuals into waiving their right to a removal hearing. In a yearlong investigation (forthcoming) we also found that many people with claims to remain in the United States and strong ties to this country have been unfairly and sometimes illegally deported when they signed forms in a language they didn’t understand or were threatened by DHS officers to accept immediate deportation. Some of these individuals were deported to life-threatening situations and were subject to the very persecution they had sought to escape.
36. Even for individuals who do see a judge, however, the immigration court system lacks essential safeguards to ensure a fair hearing, in compliance with human rights law. For example, 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 detained immigrants, approximately 84% of whom are unrepresented in immigration court.⁴¹ Absent government-funded legal services, large numbers of people—including young children— will inevitably go through immigration proceedings without legal assistance given the high cost of representation and its extremely limited availability in the remote areas where many detention centers are located.⁴² The ACLU is currently litigating the right to counsel for all children in removal proceedings.⁴³ With respect to

unaccompanied children fleeing violence in Central America, the ACLU in August 2014 asked a federal court to immediately block the government from pursuing deportation proceedings against several children unless it ensures those youth have legal representation. The move comes as immigration courts are speeding up deportation hearings against children in an expedited process sometimes referred to as "rocket docket."⁴⁴

37. The ACLU previously filed a lawsuit to ensure legal representation for immigrants with mental disabilities facing removal.⁴⁵ In 2013 the ACLU won rulings from the district court establishing the right to legal representation for several lead plaintiffs in the case.⁴⁶ While the 2013 Senate immigration reform bill did provide for appointed counsel for these two groups, that legislation has stalled and the Obama administration has to date failed to ensure legal representation in the interim.

38. Recommendations

- i. Provide appointed, government-paid counsel to all individuals facing removal from the United States, in particular vulnerable groups such as children and persons with disabilities.
- ii. Use alternatives to detention so that immigrants have more opportunities to find legal representation and to assist in the preparation of their immigration cases.
- iii. Limit the use of summary removal orders deportations that bypass immigration judge hearings and provide immigration hearings for people facing removal, particularly in cases where individuals are longtime U.S. residents, have U.S. family and other community ties in the United States, are children, may be eligible for humanitarian protection, or may be eligible for prosecutorial discretion or other immigration relief.

¹ See ACLU, *A Call To Courage: Reclaiming Our Civil Liberties Ten Years After 9/11* (September 2011), available at <https://www.aclu.org/files/assets/acalltocourage.pdf>.

² See Executive Order No. 13,491, 74 Fed. Reg. 4891 (Jan. 22, 2009) (Ensuring Lawful Interrogations), http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations/.

³ See, e.g. *Rasul v. Myers*, 563 F.3d 527, 528 (D.C. Cir. 2009) (no reasonable government official would know that Guantanamo detainees had due process rights or a right to be free from "cruel and unusual punishment" as provided by the Fifth and Eighth Amendments to the U.S. Constitution); *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. N.Y. 2009) (government argued qualified immunity, but court did not rule on it); *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d 85 (D.D.C. 2007).

⁴ *El-Masri v. United States*, Petition No. 419-08, Inter-Am. Comm'n H.R. (Apr. 9, 2008), available at www.aclu.org/files/pdfs/safefree/elmasri.iachr.20080409.pdf.

⁵ See, e.g., Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Charging and its Sentencing Consequences*, U of Michigan Law & Econ, Empirical Legal Studies Center Paper No. 12-002 (2012); Marc Mauer, *Addressing Racial Disparities in Incarceration*, 91 Prison J. (2011); The Sentencing Project, *Racial Disparity in Sentencing: A Review of the Literature* (2005), available at http://www.sentencingproject.org/doc/publications/rd_sentencing_review.pdf.

⁶ U.S. Sentencing Comm'n, *Report on the Continuing Impact of United States v. Booker on Federal Sentencing* (Jan. 30, 2013), available at <http://www.ussc.gov/news/congressional-testimony-and-reports/booker-reports/report-continuing-impact-united-states-v-booker-federal-sentencing>.

⁷ Cassia C. Spohn, *Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process*, 3 Crim. Justice 427 (2000), available at <http://www.justicestudies.com/pubs/livelink3-1.pdf>.

⁸ Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Charging and its Sentencing Consequences*, U of Mich. Law & Econ., Empirical Legal Studies Center Paper No. 12-002 (2012).

⁹ The Sentencing Project, *Racial Disparity in Sentencing: a Review of the Literature* (2005), available at http://www.sentencingproject.org/doc/publications/rd_sentencing_review.pdf.

¹⁰ See, e.g., Marc Mauer, *Addressing Racial Disparities in Incarceration*, 91 Prison J. (2011); JOSHUA ROVNER, **THE SENTENCING PROJECT, DISPROPORTIONATE MINORITY CONTACT IN THE JUVENILE JUSTICE SYSTEM** (2014), available at http://sentencingproject.org/doc/publications/jj_Disproportionate%20Minority%20Contact.pdf.

¹¹ U.N. Comm. on the Elimination of Racial Discrimination, *Concluding Observations on the Combined Seventh to Ninth Periodic Reports of United States of America*, U.N. Doc. CERD/C/USA/CO/7-9 (Aug. 29, 2014).

¹² United States Department of State, *Periodic Report of the United States of America to the United Nations Committee on the Elimination of Racial Discrimination* ¶ 66 (June 12, 2013), available at <http://www.state.gov/documents/organization/210817.pdf>.

¹³ See Eric Holder, Att’y Gen., Speech at the American-Arab Anti-Discrimination Committee’s 30th Anniversary National Convention, <http://www.justice.gov/ag/speeches/2010/ag-speech-100604.html> (June 5, 2010).

¹⁴ Civ. Rights Div., Dep’t of Justice, *Guidance Regarding the Use of Race by Federal Law Enforcement Agencies* (June 2003), available at http://www.justice.gov/crt/about/spl/documents/guidance_on_race.pdf.

¹⁵ Secure Communities is a program under which everyone arrested and booked into a local jail has their fingerprints checked against Immigration and Customs Enforcement’s immigration database. Under this program, some police engage in unjustified stops and arrests for low-level offenses in order to put people through the screening process, actions for which the federal government has failed to develop sufficient oversight mechanisms.¹⁵ Secure Communities has been shown to foster racial profiling, undermine community policing, and harm public safety.

¹⁶ Section 287(g) of federal immigration law allows state and local law enforcement agencies to enter into an agreement with the federal Immigration and Customs Enforcement to enforce immigration law within their jurisdictions. In effect, it turns state and local law enforcement officers into immigration agents, many of whom are not adequately trained, and some of whom improperly rely on race or ethnicity as a proxy for status as an undocumented immigrant. The predictable result is that any person who looks or sounds “foreign” is more likely¹⁶ to be stopped by police and more likely to be arrested (rather than warned, cited, or simply let go) when stopped.

¹⁷ *Sanchez et al. v. United States Office of Border Patrol et al.*, No. 3:10-cv-05378 (W.D. Wash. filed Apr. 26, 2012).

¹⁸ U.S. DEP’T OF STATE, REPORT OF THE UNITED STATES OF AMERICA SUBMITTED TO THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS IN CONJUNCTION WITH THE UNIVERSAL PERIODIC REVIEW: RESPONSE TO THE U.N. HUMAN RIGHTS COUNCIL WORKING GROUP REPORT para. 112 (March 10, 2011), available at <http://www.state.gov/j/drl/upr/157986.htm>.

¹⁹ See Customs and Border Protection, “Southwest Border Unaccompanied Alien Children (0-17 yr old) Apprehensions,” available at <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children> (accessed Sept. 15, 2014).

²⁰ Memorandum for the Heads of Executive Departments and Agencies, *Response to the Influx of Unaccompanied Alien Children Across the Southwest Border* (June 2, 2014) (on file with the ACLU).

²¹ United Nations General Assembly, *Convention Relating to the Status of Refugees* (Jul. 28, 1951), available at <http://www.unhcr.org/3b66c2aa10.html>.

²² The United Nations Working Group on Arbitrary Detention has stated that immigration detention should be abolished and until then only used as a last resort (UN Commission on Human Rights, Report of the Working Group on Arbitrary Detention, A/HRC/13/30, January 18, 2010, para. 58 and 59, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/102/94/PDF/G1010294.pdf?OpenElement>). The Convention on the Rights of the Child, to which the United States is a signatory, requires that the detention of a child be used only as a last resort. (Convention on the Rights of the Child, article 37(b).) The UN Committee on the Rights of the Child clarifies further that “States should expeditiously and completely cease the detention of children on the basis of their immigration status” (Committee on the Rights of the Child, *The Rights of All Children in the Context of International Migration* (2012), para. 78, available at <http://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2012/DGD2012ReportAndRecommendations.pdf>). The UNHCR Executive Committee has stated that “States should refrain from detaining children, and do so only as a measure of last resort and for the shortest appropriate period of time, while considering the best interests of the child” (UN High Commissioner for Refugees (UNHCR), *Conclusion on Children at Risk*, 5 October 2007, No. 107 (LVIII) - 2007, available at: <http://www.refworld.org/docid/471897232.html>).

²³ See UNHCR, *Guidelines on Formal Determination of the Best Interests of the Child* (May 2006), 26, available at <http://www.unicef.org/violencestudy/pdf/BID%20Guidelines%20-%20provisional%20release%20May%2006.pdf>; see also *Children on the Run* at 20-21.

²⁴ See 8 U.S.C. § 1229a.

²⁵ Specifically, the lawsuit charges that the government has enacted policies that have categorically prejudged asylum cases due to its “detain and deport” policy, drastically limited detainee access to telephones to communicate with attorneys, provided virtually no notice to detainees of credible fear interview times, and led to the intimidation and coercion of women and children by immigration officers. Press Release, *Groups Sue U.S. Government over Life-Threatening Deportation Process against Mothers and Children Escaping Extreme Violence in Central America*, ACLU, Aug. 22, 2014, available at <https://www.aclu.org/immigrants-rights/groups-sue-us-government-over-life-threatening-deportation-process-against-mothers>.

²⁶ The special rules for children originating from contiguous states (Mexico and Canada) include a presumption of immediate return to their home country with no hearing before an immigration judge, unless the child is identified as a victim of severe trafficking, demonstrates a credible fear of persecution, or is unable to make independent decisions about their options. Homeland Security Act (HSA) of 2002, (Pub.L. 107–296, 116 Stat. 2135, enacted November 25, 2002); Trafficking Victims Protection Act of 2000 (TVPA), 22 U.S.C. § 7102. § 235(a)(2)(A).

²⁷ UNHCR, Confidential Report, Findings and Recommendations Relating to the 2012–2013 Missions to Monitor The Protection Screenings of Mexican Unaccompanied Children Along the U.S.–Mexico Border (“UNHCR Confidential Report”), June 2014 at 16, *available at*

http://americanimmigrationcouncil.org/sites/default/files/UNHCR_UAC_Monitoring_Report_Final_June_2014.pdf.

²⁸ See UNHCR Confidential Report, June 2014; *see also* Betsy Cavendish & Maru Cortazar, Children at the Border: The Screening, Protection and Repatriation of Unaccompanied Mexican Minors (2011), *available at* <http://appleseednetwork.org/wp-content/uploads/2012/05/Children-At-The-Border1.pdf>; Center for Public Policy Priorities, A Child Alone and Without Papers: A report on the return and repatriation of unaccompanied undocumented children by the United States, at 40, (2008) (“CPPP Report”), *available at* http://forabettertexas.org/images/A_Child_Alone_and_Without_Papers.pdf; Refugees International, Mexico’s Unseen Victims, at 3–4 (July 2, 2014), *available at*

<http://refugeesinternational.org/sites/default/files/070214%20Mexico%20Unseen%20Victims%20English%20letterhead.pdf>. Erin Siegal McIntyre, Fusion, “Not All Kids Are Equal: Central American Kids Get Court Dates, Mexicans Get the Boot,” July 11, 2014, *available at* <http://fusion.net/justice/story/kids-equal-central-american-kids-court-date-mexicans-845375>; Sarah Mehta, ACLU, “The Kids Aren’t Alright: America Fails to Protect Youth in Crisis,” July 11, 2014, *available at*

<https://www.aclu.org/blog/immigrants-rights-human-rights-racial-justice/kids-arent-alright-america-fails-protect-youth>.

²⁹ Statement of Jeh Johnson, Secretary of the U.S. Department of Homeland Security before the Senate Committee on Appropriations, July 11, 2014, *available at*

<http://www.appropriations.senate.gov/sites/default/files/hearings/SAC%20Hearing%20S1%20Testimony%207-10-14.pdf>.

³⁰ Dara Lind, *Inside the remote, secretive detention center for migrant families*, Vox (Jul. 24, 2014), *available at*

<http://www.vox.com/2014/7/24/5932023/inside-the-remote-secretive-detention-center-for-migrant-families#interview>.

³¹ Julia Preston, *As U.S. Speeds the Path to Deportation, Distress Fills New Family Detention Centers*, The New York Times, (Aug 5. 2014), *available at* http://www.nytimes.com/2014/08/06/us/seeking-to-stop-migrants-from-risking-trip-us-speeds-the-path-to-deportation-for-families.html?smid=tw-share&_r=0; Susan Carroll, *Feds will house immigrant families at detention center near San Antonio*, Houston Chronicle (Jul. 18, 2014), *available at* <http://www.chron.com/news/article/Feds-will-house-immigrant-families-at-detention-5630925.php>.

³² Forrest Wilder, *Feds Planning Massive Family Detention Center in South Texas*, Texas Observer (Sept. 5, 2014), *available at* <http://www.texasobserver.org/exclusive-feds-planning-massive-family-detention-center-south-texas/>.

³³ John Stanton, “Government Declares Undocumented Immigrant Child, Mother A ‘National Security Threat.’” BuzzFeed (Aug. 5, 2014), *available at* <http://www.buzzfeed.com/johnstanton/government-declares-undocumented-immigrant-child-mother-a-na>, and Julia Preston, “In Remote Detention Center, a Battle on Fast Deportations,” New York Times (Sept. 5, 2014), *available at* <http://nyti.ms/1u89sRf>.

³⁴ Laura W. Murphy, Family detention: A shame and a waste, The Hill (Aug 1, 2014), *available at*

<http://thehill.com/blogs/congress-blog/civil-rights/214001-family-detention-a-shame-and-a-waste>; Eleanor Acer, *Immigrant Families Not Treated Properly*, Albuquerque Journal, (Aug. 3, 2014), *available at*

<http://www.abqjournal.com/439865/opinion/immigrant-families-not-treated-properly.html>.

³⁵ See generally, Press Release, Advocates Call For Moratorium On Deportation Of Refugee Women And Children At Artesia Detention Center Until Basic Due Process Needs Addressed, National Immigrant Justice Center

(Jul.24, 2014), *available at* http://www.immigrantjustice.org/press_releases/advocates-call-moratorium-deportation-refugee-women-and-children-artesia-detention-ce; American Civil Liberties Union, Letter, ACLU Views on S. 2648, the Emergency Supplemental Appropriations Act, 2014 (July 29, 2014), *available at*

https://www.aclu.org/sites/default/files/assets/14_7_29_aclu_letter_to_senate_re_views_on_s_2648_the_emergency_supplemental_appropriations_act_2014.pdf; Dara Lind, *Inside the remote, secretive detention center for migrant families*, Vox News (July 24, 2014), *available at* <http://www.vox.com/2014/7/24/5932023/inside-the-remote-secretive-detention-center-for-migrant-families>.

³⁶ ACLU, Unaccompanied Immigrant Children Report Serious Abuse by U.S. Officials During Detention, June 11, 2014, *available at* <https://www.aclu.org/immigrants-rights/unaccompanied-immigrant-children-report-serious-abuse-us-officials-during>.

³⁷ 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 unable to afford a lawyer), *available at*

<http://www.un.org/documents/ga/res/43/a43r173.htm>; Human Rights Committee, General Comment 32, Right to equality before courts and tribunals and to a fair trial, para. 19, U.N.Doc CCPR/C/GC/32 (2007), <http://www1.umn.edu/humanrts/gencomm/hrcom32.html>, (the requirement of a competent, independent and impartial tribunal “is an absolute right that is not subject to any exception.”); American Convention on Human Rights (“Pact of San José, Costa Rica”), art. 8(1) 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 (providing 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 right); 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 (stating 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).

³⁸ ICCPR, art. 14.

³⁹ Department of Homeland Security, FY 2013 ICE Removal Statistics, *available at* <http://www.ice.gov/removal-statistics/>.

³³ See *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/>.

⁴¹ 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. 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.

⁴² 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).

⁴³ *J.E.F.M. v. Holder*, Case 2:14-cv-01026 (W.D.Wa. July 9, 2014), *available at* https://www.aclu.org/sites/default/files/assets/filed_complaint_0.pdf.

⁴⁴ ACLU, *Groups Ask Federal Court to Block Deportation Hearings for Children without Legal Representation* (Aug. 1, 2014), *available at* <https://www.aclu.org/immigrants-rights/groups-ask-federal-court-block-deportation-hearings-children-without-legal>.

⁴⁵ 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.

⁴⁶ ACLU of Southern California, *Franco v. Holder Case Developments* (last updated Apr. 23, 2013), *available at* <https://www.aclusocal.org/franco/>.