Testimony of Andrew R. Arthur

To the Subcommittee on Immigration and Border Security,
United States House of Representatives
Committee on the Judiciary

For A Hearing Titled:
Restoring Enforcement of our Nation's Immigration Laws

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Mr. Chairman, Ranking Member Lofgren, and Subcommittee Members, it is an honor for me to be here today to contribute to your efforts aimed at improving the enforcement of our Nation's immigration laws.

Before I proceed with my testimony, please allow me to provide you with some background information about myself. I am currently on sabbatical after having retired following more than 24 years of federal government service.

I began my career through the Attorney General's Honors Program as a clerk to Administrative Law Judge Joseph E. McGuire in the Office of the Chief Administrative Hearing Officer at the Executive Office for Immigration Review (EOIR). This office has jurisdiction over employer sanctions, document fraud, and unfair immigration-related employment practices cases, under sections 274A, 274B, and 274C of the Immigration and Nationality Act (INA), respectively. In this position, I assisted Judge McGuire in his issuance of many precedential decisions, which set standards that are still followed to this day.

After my two-year clerkship, I received a second Honors Program appointment as a Trial Attorney in the former Immigration and Naturalization Service's San Francisco District Counsel's Office, and later its Baltimore District Counsel's Office. As a Trial Attorney, I represented the United States in more than a thousand deportation, exclusion, and removal cases before the Immigration Courts. Of particular note, as a Trial Attorney I represented the INS in cases involving convicted spies and suspected terrorists.

In addition, in San Francisco, I also was one of two attorneys who handled, part-time, employer sanctions cases in a district that ran from Kern County, California, to the Oregon border.

In 1999, I was promoted to the INS's General Counsel's Office in Washington DC, first as an Assistant General Counsel, and later as an Associate General Counsel and Acting Chief of the National Security Law Division. In the General Counsel's Office, I supervised attorneys in the field who were handling so-called "special interest" cases, that is, cases involving espionage,

terrorism, and persecutors; and advised the Attorney General, Deputy Attorney General, and INS Commissioner on issues relating to national security.

In July of 2001, I left the INS to become a Counsel on this Committee, performing oversight of immigration issues. After five years at House Judiciary, I was appointed to the immigration bench, serving as an Immigration Judge at the York Immigration Court in York, Pennsylvania.

In my more than eight years as an Immigration Judge, I heard anywhere between 15,000 and 20,000 cases involving credible fear, bond, removability, and relief. I also had the honor of swearing in hundreds of new citizens at naturalization ceremonies.

At the beginning of the 114th Congress, I left the bench and came back to Capitol Hill, where I served as Staff Director of the National Security Subcommittee at House Oversight and Government Reform before taking retirement in September 2016.

My career has provided me with what I believe are valuable insights into immigration generally, immigration policy, and immigration enforcement. I have seen the process from beginning to end: inspections at the ports of entry; arrests at the ports, in the interior, and along the border; the issuance of charging documents, master calendar hearings, removal orders, administrative appeals, and Circuit Court petitions for review; to physical removal of aliens and the naturalization of new citizens.

With respect to immigration enforcement, there are many areas for improvement.

For example, as of July of last year, there were more than 953,000 aliens at large in the United States who were under final orders of removal, that is, who had been accorded their rights to removal proceedings, been ordered removed, and either exhausted their appeals or failed to take appeals.[1] Undoubtedly, that number has risen in the last eight months, because removals have been largely in decline for the last five years, going from 409,849 removals in FY 2012 to 240,255 removals in FY 2016, a 41 percent decrease.[2]

In fact, this decline is worse than it looks, because the numbers are largely bolstered by an increase in removals of individuals apprehended at or near the border or ports of entry, as opposed to in the interior of the United States. In FY 2016, ICE conducted 65,332 removals of individuals apprehended by ICE officers (i.e., interior removals).[3] This is down from 69,478

[1] *Recalcitrant Countries: Denying Visas to Countries that Refuse to Take Back Their Deported Nationals: Hearing Before the House Comm. on Oversight and Gov't Reform*, 114th Cong. (2016), *available at*: https://oversight.house.gov/hearing/recalcitrant-countries-denying-visas-to-countries-that-refuse-to-take-back-their-deported-nationals/

[2] *FY 2016 ICE Immigration Removals*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *available at*: https://www.ice.gov/removal-statistics/2016

[3] *Id.*

interior removals in FY 2015[4], which was down from 102,224 interior removals in FY 2014[5], which was down from 133,551 interior removals in FY 2013[6].

A failure to remove aliens from the interior of the United States, and in particular aliens under final orders of removal, indicates to those who would enter the United States illegally that this country is not serious about its immigration laws. This encourages others to enter the United States illegally, knowing that if they are able to enter illegally, the odds of being removed are low.

ICE does not bear the bear the burden of the failure to remove aliens alone, however. According to the Pew Research Center, there were 11.1 million aliens unlawfully present in the United States in 2014, a number that Pew found has held steady since 2009.[7] There are currently, however, only 6,000 ICE Enforcement and Removal Operations Officers for the entire United States[8], or about 100 officers fewer than the Philadelphia Police Department.[9] This is plainly too few officers to respond effectively to the large number of aliens present unlawfully in our country.

Significant attention has been directed to these issues in the past year, and during the Presidential campaign. One issue that has not received a significant amount of attention, however, and that I want to address is the issue of benefit fraud, and in particular asylum fraud in the credible fear process.

There are many different immigration benefits that an alien who is seeking to enter and remain in the United States may pursue. Family-based visas are available to those with qualifying relatives, and employment-based visas may be pursued by those with needed skills. If an alien has neither an employer nor a family member to file a petition, the alien could pursue a diversity visa through the visa lottery.

For many seeking to enter the United States without a visa, however, an asylum application is the vehicle they choose.

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[4] FY 2015 ICE Immigration Removals, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *available at*: https://www.ice.gov/removal-statistics/2015

[5] *DHS releases end of year statistics*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Dec. 18, 2014), *available at*: https://www.ice.gov/news/releases/dhs-releases-end-year-statistics

[6] *ERO Annual Report, FY 2013 ICE Immigration Removals*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *available at*: https://www.ice.gov/doclib/about/offices/ero/pdf/2013-ice-immigration-removals.pdf

[7] Jeffrey S. Passel and D'Vera Cohn, *Overall Number of U.S. Unauthorized Immigrants Holds Steady Since 2009*, PEW RESEARCH CENTER (Sep. 20, 2016), *available at*: http://www.pewhispanic.org/2016/09/20/overall-number-of-u-s-unauthorized-immigrants-holds-steady-since-2009/

[8] *Criminal Aliens Released by the Department of Homeland Security: Hearing Before the House Comm. on Oversight and Government Reform*, 114th Cong. (2016) (statement of ICE Director Sarah Saldaña), *available at*: https://www.dhs.gov/news/2016/04/28/written-testimony-ice-director-house-committee-oversight-and-government-reform

[9] *About the Department*, PHILADELPHIA POLICE DEPARTMENT, *available at*: http://www.phillypolice.com/about/

An applicant for asylum has the burden to demonstrate that he or she is eligible for that protection.[10] To satisfy that burden, the applicant must prove that he or she is a refugee.[11] A "refugee" is a person outside of his or her country of nationality or habitual residence who is "unable or unwilling" to return to that country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[12]

There are generally two different processes by which an alien may file for asylum: the affirmative asylum process and the defensive asylum process.[13] To obtain asylum through the affirmative asylum process, an alien must be physically present in the United States, and may apply for asylum status regardless of how the alien arrived in the United States or the alien's current immigration status.[14] Those applications are filed with U.S. Citizenship and Immigration Services (USCIS), followed by a non-adversarial interview (that is, without confrontation by a government attorney) by an Asylum Officer; if that application is denied, the alien can renew the application in removal proceedings before an Immigration Judge.[15]

A defensive application for asylum is filed when an alien is seeking asylum as a defense against removal from the United States.[16] For asylum processing to be defensive, the alien must be in removal proceedings in Immigration Court.[17] Before an alien can file such an application, the Immigration Judge must have found that the alien is removable, because the alien entered without inspection or on some other ground.[18] Those proceedings are adversarial, with the United States represented by an attorney from ICE.[19]

As the Government Accountability Office (GAO) has noted:

> Asylum decisions can have serious consequences. Granting asylum to an applicant with a genuine claim protects the asylee from being returned to a country where he or she has been or could in the future be persecuted. On the other hand, granting asylum to an individual with a fraudulent claim jeopardizes the integrity of the asylum system by enabling the individual to remain in the United States, apply for certain federal benefits, and pursue a path to citizenship.[20]

In addition, fraudulent asylum applications delay the consideration of other, more meritorious applications, delaying the granting of benefits to aliens who are in legitimate need of protection.

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[10] 8 C.F.R. § 1208.13(a).
[11] *See* section 208(b) of the Immigration and Nationality Act (INA).
[12] Section 101(a)(42) of the INA.
[13] *See Obtaining Asylum in the United States*, U.S. CITIZENSHIP AND IMMIG. SERVS., *available at*: https://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Asylum: Additional Actions Needed to Assess and Address Fraud Risk*, GOV'T ACCOUNTABILITY OFFICE, GAO-16-50, at 1 (Dec. 2015), *available at:* http://www.gao.gov/assets/680/673941.pdf

Due to the nature of fraud, it is impossible to assess the extent of the problem itself. As Denise N. Slavin, then-Vice President of the National Association of Immigration Judges, told the New York Times in 2011, however: "Fraud in immigration asylum is a huge issue and a major problem."[21] In perhaps one of the more substantive examinations of asylum fraud, USCIS's Fraud Detection and National Security Directorate (FDNS) partially completed an asylum-based Benefits Fraud and Compliance Assessment (BFCA), which was described in testimony before this Subcommittee in February 2014 by Louis D. Crocetti, Jr., former Associate Director of FDNS.[22] The asylum-based BFCA Program was designed "[t]o determine the scope and types of fraud, and the application and utility of existing fraud detection methods" and "[t]o identify weaknesses and vulnerabilities, and propose/undertake corrective action."

The Program consisted of a "random sampling of [239 out of 8,555] pending and completed (approved/referred) [affirmative asylum applications filed] with USCIS between May 1 and October 31, 2005."[23] Of those 239 cases, 29 (or 12 percent) were determined to be fraudulent; 12 of those 29 cases had already been granted.[24] While 72 (or 30 percent) of the cases did not contain any fraud indicators, 138 (or 58 percent) "exhibited possible indicators of fraud."[25]

Anecdotally, in recent years, a number of immigration practitioners have been charged in high-profile cases in connection with the filing of fraudulent asylum applications:

- In May 2016, for example, an immigration lawyer in suburban Chicago "was convicted by a federal jury of falsifying paperwork in a bid to help clients win asylum in the United States on bogus claims of torture and religious persecution."[26]

- In April 2014, two lawyers and an office worker in New York were found guilty of conspiracy to commit immigration fraud.[27] The three were arrested in a December 2012 FBI sweep that targeted lawyers and staffers suspected of coaching Chinese immigrants on how to lie about their past to be eligible for asylum.[28]

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[21] Sam Dolnick, *Immigrants May Be Fed False Stories to Bolster Asylum Pleas*, NEW YORK TIMES (Jul. 11, 2001), *available at*: http://www.nytimes.com/2011/07/12/nyregion/immigrants-may-be-fed-false-stories-to-bolster-asylum-pleas.html?pagewanted=all

[22] *Asylum Fraud: Abusing America's Compassion?: Hearing Before the House Judiciary Committee Subcommittee on Immigration and Border Security*, 113th Cong. (2014)(statement of Louis D. Crocetti, Jr.)

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] Jason Meisner, *Local immigration lawyer convicted of fraud in winning asylum for Iraqis*, CHICAGO TRIBUNE (May 9, 2016), *available at*: http://www.chicagotribune.com/news/local/breaking/ct-immigration-lawyer-phony-asylum-guilty-met-20160509-story.html

[27] Albert Samaha, *Thirty People Have Been Convicted for Participating in Asylum Fraud Ring*, VILLAGE VOICE (Apr. 16, 2014), *available at*: http://www.villagevoice.com/news/thirty-people-have-been-convicted-for-participating-in-asylum-fraud-ring-6689299

[28] *Id.*

- In a December 2015 report, the GAO noted that: "As of March 2014, a joint fraud investigation led by the U.S. Attorney's Office for the Southern District of New York, the Federal Bureau of Investigation (FBI), the New York City Police Department, and USCIS, known as Operation Fiction Writer, resulted in charges against 30 defendants, including 8 attorneys, for their alleged participation in immigration fraud schemes in New York City. According to discussions with USCIS officials and a FBI press release, allegations regarding these defendants generally involved the preparation of fraudulent asylum applications that often followed one of three fact patterns: (1) forced abortions performed pursuant to China's family planning policy; (2) persecution based on the applicant's belief in Christianity; or (3) political or ideological persecution, typically for membership in China's Democratic Party or followers of Falun Gong. Attorneys and preparers charged in Operation Fiction Writer filed 5,773 affirmative asylum applications with USCIS, and USCIS granted asylum to 829 of those affirmative asylum applicants. According to EOIR data, 3,709 individuals who were connected to attorneys and preparers convicted in Operation Fiction Writer were granted asylum in immigration court; this includes both affirmative asylum claims referred from USCIS as well as defensive asylum claims."[29]

- In June 2010, three California lawyers and two office workers were convicted "of charges related to a scheme to defraud [USCIS] by filing hundreds of false asylum claims between 2000 and 2004."[30]

- Most significantly, in April 2005, "the leader of [a] Fairfax-based immigration fraud ring . . . pleaded guilty to falsifying documents for more than 1,900 Indonesians who are in the United States illegally."[31] According to press reports, the case involved hundreds of aliens who "were coached to tell asylum officers or immigration judges false stories of beatings or rapes they endured in Indonesia at the hands of Muslims because they were either ethnic Chinese or Christians."[32]

The fraud referenced in these cases involved both affirmative and defensive asylum applications.

A credible fear application is a hybrid of both forms of asylum applications, and is filed by an alien in expedited removal proceedings under section 235(b) of the Immigration and Nationality Act (INA). That section of the INA allows immigration officers—rather than judges—to order the deportation of aliens who have failed to establish that they have been in the United States continuously for two years and who have been charged with inadmissibility under section 212(a)(6)(c) (fraud or misrepresentation) and/or section 212(a)(7) (no documentation) of

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[29] *Asylum: Additional Actions Needed to Assess and Address Fraud Risk*, GOV'T ACCOUNTABILITY OFFICE, GAO-16-50, at 1 (Dec. 2015), *available at:* http://www.gao.gov/assets/680/673941.pdf

[30] *Discovery Bay attorney sentenced for false asylum fraud*, MERCURY NEWS (Sept. 24, 2010), *available at*: http://www.mercurynews.com/2010/09/24/discovery-bay-attorney-sentenced-for-false-asylum-fraud/

[31] *ICE mulls fraud case*, WASHINGTON TIMES (Apr. 28, 2005), *available at*: http://www.washingtontimes.com/news/2005/apr/28/20050428-105546-3247r/

[32] *Id.*

the INA. The Department of Homeland Security (DHS) has expanded its use of expedited removal over the years.

The most common instance in which DHS uses expedited removal is when it apprehends an alien seeking admission without a proper entry document at a port of entry or an alien who is attempting to enter or has entered illegally along the border. If the alien asserts a fear of persecution, the arresting officer will refer the alien to an Asylum Officer for a "credible fear interview."[33] If the Asylum Officer determines that the alien has a credible fear, the alien is placed in removal proceedings before an Immigration Judge, where the alien can file his or her application for asylum.

Under section 235(b)(1)(B)(v) of the INA, the term "'credible fear of persecution' means that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 208."

This process is vulnerable to fraud for a number of reasons, the main one of which is resources. There are 328 ports of entry in the United States,[34] and the U.S.-Mexican border spans 1,954 miles.[35] There are, however, only about 360 Asylum Officers stationed at eight Asylum Offices in the United States: in Arlington, Virginia; Chicago, Illinois; Houston, Texas; Miami, Florida; Newark, New Jersey; New York, New York; Los Angeles, California; and San Francisco, California.[36] The low number of Asylum Officers limits the amount of time that any given Asylum Officer can spend on any given credible fear claim, a problem exacerbated by a recent increase in credible fear claims, discussed below.

The Asylum Officers are assisted by officers from the Fraud Detection and National Security Directorate (FDNS) in identifying fraud. USCIS created FDNS in 2004 "to help ensure immigration benefits are not granted to individuals who pose a threat to national security or public safety or who seek to defraud the immigration system."[37] According to GAO, as of FY 2015, USCIS had deployed 35 FDNS immigration officers and four supervisory immigration officers to work across all eight asylum offices.[38] Those FDNS officers in Asylum Offices "are tasked with conducting background checks to resolve national security 'hits' and fraud concerns, which arise when asylum officers conduct required background checks of asylum applicants; addressing fraud-related leads provided by asylum officers and other sources; and liaising with law enforcement entities, such as [ICE Homeland Security Investigations], to provide logistical support in law enforcement and national security matters."[39]

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[33] *See* section 235(b)(1)(A)(ii) of the INA.
[34] *At Ports of Entry*, U.S. CUSTOMS AND BORDER PROTECTION, *available at*: https://www.cbp.gov/border-security/ports-entry
[35] *U.S.-Mexico Border, Fences and deaths*, NATIONAL GEOGRAPHIC, *available at*: http://www.nationalgeographic.org/media/tijuana-border-fence/
[36] *Asylum: Additional Actions Needed to Assess and Address Fraud Risk*, GOV'T ACCOUNTABILITY OFFICE, GAO-16-50, at 1 (Dec. 2015), available at: http://www.gao.gov/assets/680/673941.pdf
[37] *Id*. at 29.
[38] *Id*.
[39] *Id*.

In a December 2015 report, GAO reviewed the status of the asylum system.[40] The difficulty of the task facing those FDNS officers (and their EOIR counterparts) is best summarized by that report, in which GAO concluded:

> USCIS and [EOIR] have limited capabilities to detect asylum fraud. First, while both USCIS and EOIR have mechanisms to investigate fraud in individual applications, neither agency has assessed fraud risks across the asylum process, in accordance with leading practices for managing fraud risks. . . . Without regular assessments of fraud risks, USCIS and EOIR lack reasonable assurance that they have implemented controls to mitigate those risks. Second, USCIS's capability to identify patterns of fraud across asylum applications is hindered because USCIS relies on a paper-based system for asylum applications and does not electronically capture some key information that could be used to detect fraud, such as the applicant's written statement. Asylum officers and [FDNS] immigration officers told GAO that they can identify potential fraud by analyzing trends across asylum applications; however, they must rely on labor-intensive methods to do so. Identifying and implementing additional fraud detection tools could enable USCIS to detect fraud more effectively while using resources more efficiently. Third, FDNS has not established clear fraud detection responsibilities for its immigration officers in asylum offices; FDNS officers we spoke with at all eight asylum offices told GAO they have limited guidance with respect to fraud. FDNS standard operating procedures for fraud detection are intended to apply across USCIS, and therefore do not reflect the unique features of the asylum system. Developing asylum-specific guidance for fraud detection, in accordance with federal internal control standards, would better position FDNS officers to understand their roles and responsibilities in the asylum process.[41]

The difficulty of the task facing both USCIS and the Immigration Court in identifying fraud is compounded by the significant increase in the number of expedited removal cases, and credible fear claims, over the past eight years.[42] Specifically, in FY 2009, USCIS completed 5,523 credible fear cases.[43] In FY 2016, USCIS received 94,048 credible fear cases, and

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[40] *See Asylum: Additional Actions Needed to Assess and Address Fraud Risk*, GOV'T ACCOUNTABILITY OFFICE, GAO-16-50, at 1 (Dec. 2015), available at: http://www.gao.gov/assets/680/673941.pdf

[41] *Id.*

[42] The reasons for this increase are unclear and to some degree, in dispute. In one of the most comprehensive assessments of the issue, however, Scott Rempell, Associate Professor of Law at South Texas College of Law/Houston, evaluated the various explanations for this "surge." Scott Rempell, Credible Fears, Unaccompanied Minors, and the Causes of the Southwestern Border Surge, 18 Chapman L. Rev. 337 (2015). Professor Rempell "concludes that the word of mouth effect and, to a lesser extent, changes in country conditions in the Northern Triangle [of El Salvador, Honduras, and Guatemala], have primarily caused the surge in crossings by credible fear claimants and" unaccompanied alien children. *Id.* at 376. In describing the "word of mouth effect," Professor Rempell states: "Individuals learn about actual or allegedly successful ways to enter the United States and mimic the pattern that has been successful." An article that he referenced provides several anecdotes to support the "word of mouth effect." *See id.*; Julia Preston, *Migrants Flow in South Texas, as Do Rumors*, N.Y. TIMES (Jun. 17, 2014) ("At the church, some women said the talk about the entry permit, which has intensified in the last two months, had prompted them to set out on the risk-filled journey across Mexico.").

[43] *FACT SHEET: Asylum in the United States*, AMERICAN IMMIGRATION COUNCIL, *available at*: https://www.americanimmigrationcouncil.org/research/asylum-united-states

conducted 82,660 credible fear interviews.[44] All told, in the fourth quarter of FY 2016, there were 194,986 asylum applications pending at USCIS.[45] While 360 Asylum Officers and 35 FDNS officers may seem like a significant number in the abstract, the difficulty that they face in identifying, let alone addressing, fraud in credible fear cases is clear from the sheer volume of cases that those officers have to handle.

Other factors complicate this task even further. It is important to note that aliens in expedited removal are subject to mandatory detention until they are found to have a credible fear.[46] Because of the large number of cases and the lack of detention space along the border, many aliens subject to expedited removal are sent to detention facilities throughout the country, including to the York County, Pennsylvania County Jail, where my courtroom was located. Due to the distance between this facility and the Newark Asylum Office (which has jurisdiction over York), most of the credible fear interviews occur by telephone. Most of the aliens in these proceedings do not speak English, and so the Asylum Officers need to use interpreters, many of whom also appear telephonically. From experience, it is difficult enough to identify deception when hearing testimony in a courtroom through an interpreter; this task becomes all the more difficult when the finder of fact cannot assess demeanor.

As the number of cases of aliens seeking credible fear has increased, so has the number of aliens found to have a credible fear. As Temple Law School Professor Jan Ting told the House Oversight Committee last March: "The percentage of all referred cases where credible fear was found by asylum officers has fluctuated from year to year but the trend has been generally upwards from 64.15% in FY 2008 to 77.72% in the first quarter of FY 2016."[47] In FY 2016, USCIS issued 92,990 decisions in credible fear cases; in 73,078 of those cases, or 78.59 percent, credible fear was established.

The number of countries of origin of aliens claiming credible fear has also increased. When I first became an Immigration Judge in November 2006, I heard a handful of referred credible fear cases per year. By the time that I left the court in January 2015, a significant portion of my docket consisted of such cases. The few credible fear claims that I heard when I first became a judge almost exclusively involved aliens from Central America and Mexico, but by the time I stepped down from the bench, a number involved aliens from Africa and Asia. This is apparently similar to the experience of my former colleagues: While the bulk of the credible fear claims nationally between October 2014 and September 2015 were made by aliens

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[44] *Credible Fear Workload Report Summary, FY 2016 Total Caseload*, U.S. CITIZENSHIP AND IMMIG. SERVS., *available at*: https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_CredibleFearReasonableFearStatisticsNationalityReport.pdf

[45] *Number of Service-wide Forms by Fiscal Year To-Date, Quarter, and Form Status 2016*, U.S. CITIZENSHIP AND IMMIG. SERVS. (Dec. 23, 2016), *available at*: https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/all_forms_performancedata_fy2016_qtr4.pdf

[46] Section 235(b)(1)(B)(iii)(IV) of the INA.

[47] *Testimony of Testimony of Jan C. Ting, Professor of Law, Temple University Beasley School of Law, Before the United States House of Representatives Committee on Oversight and Government Reform, Subcommittees on National Security and Government Operations* (Mar. 23, 2016), *available at*: https://oversight.house.gov/wp-content/uploads/2016/03/2016-03-23-Ting-Testimony-Temple.pdf

from Central America and Mexico, 80 were made by Syrian nationals, 191 were made by Pakistani nationals, and 776 were made by Somali nationals.[48]

When questioned about their travel to the United States, most aliens in expedited removal in my court who had come from outside the Western Hemisphere told a similar story: they had flown to Ecuador or Brazil, and made their way with a smuggler by foot, car, or bus through Colombia, Central America, and Mexico before crossing the U.S. border. Many claimed to have been arrested along the way before being released by local authorities with a 10- to 30-day "permission" to leave the country and continue along their route. Notably, many of the countries that they had transited (including Mexico[49]) provide for the granting of asylum and refugee status, but none of the aliens who appeared before me had requested such protection before arriving in the United States.[50]

I would note that, generally, asylum cases in which aliens are unable to provide documentary support for their claims present a particular challenge for the court, because the judge is largely dependent on credible testimony in determining whether to grant or deny relief, making credibility a key issue. Congress provided the Immigration Courts with significant assistance in making credibility determinations in the REAL ID Act of 2005, Pub. L. 109-13 (2005), of which the Subcommittee Chairman, Rep. Sensenbrenner, was the primary sponsor.

Section 101(a)(3) of the REAL ID Act added a subparagraph (B) to section 208(b)(1) of the INA, which states:

> BURDEN OF PROOF-
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> (i) IN GENERAL- The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 101(a)(42)(A). To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.
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> (ii) SUSTAINING BURDEN- The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the

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[48] William La Jeunesse, *Immigrants from terror hubs claiming 'credible fear' to seek US asylum*, FOX NEWS (Mar. 22, 2016), *available at*: http://www.foxnews.com/politics/2016/03/22/gaming-system-immigrants-from-terror-hubs-claiming-credible-fear-to-seek-us-asylum.html

[49] *See Country Reports on Human Rights Practices for 2016, Mexico*, U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR ("The government cooperated with the Office of the UN High Commissioner for Refugees (UNHCR) and other humanitarian organizations in providing protection and assistance to internally displaced persons, refugees, returning refugees, asylum seekers, stateless persons, or other persons of concern."), *available at*: https://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper

[50] I would often ask individuals who had followed this route, particularly aliens who appeared vulnerable to trafficking, whether they had been coerced or forced into making this trip; none asserted that he or she had. Further, none of the ICE attorneys who appeared in these matters were aware of any DHS investigations into the smuggling organizations that had assisted these individuals on their journeys.

applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.

(iii) CREDIBILITY DETERMINATION- Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

As the House Conference Report stated with respect to this latter provision:

Proposed new clause 208(b)(1)(B)(iii) of the INA codifies factors identified in case law on which an adjudicator may make a credibility determination, including demeanor, candor, responsiveness, inherent plausibility of the account, consistency between the written and oral statements (regardless of when it was made and whether it was under oath, and considering the circumstances under which the statements were made), internal consistency of a statement, consistency of statements with the country conditions in the country from which the applicant claims asylum, and any inaccuracies or falsehoods in such statements. This section reiterates the rule that an asylum adjudicator is entitled to consider credible testimony along with other evidence.

* * * *

This clause will allow Immigration Judges and the BIA to follow commonsense standards in assessing the credibility of asylum applicants better allowing them to identify and reject fraudulent claims.

These amendments have provided significant assistance to Immigration Judges by setting clear standards for credibility determinations.

Even with this guidance, however, I often had little on which to base my decisions in asylum cases, aside from the word of the applicant, due to the fact that many applicants presented no documentary evidence and submitted only cursory applications, and the fact that the government attorneys who appeared before me had a heavy workload and only limited ability to otherwise offer direct, pertinent evidence.

Most of the aliens in credible fear cases that I heard from Central and South America possessed identity documents (such as a voter card or a national identification card), and were able to supply at least some documentary evidence (such as affidavits or police reports) in support of their claims. Many aliens who had been in expedited removal from outside the Western Hemisphere, however, had few, if any, verifiable identity documents. Many of these individuals also struggled to explain how they had obtained the funds to pay for their trips to the United States. In addition, many of these aliens had been living outside of their home countries in what are termed "third countries" before coming to the United States, including a number who had been living for years in refugee camps abroad before attempting to enter the United States illegally.

I note that the ICE attorneys who appeared before me were diligent, and would usually insert background evidence on country conditions into the record, including articles supporting the aliens' claims. Given the sheer volume of the docket, however, their efforts in this regard were necessarily limited.[51]

Further, while Immigration Judges have the authority to submit background evidence for the record, such submissions can subject the judge to complaints about the impartiality of the court. If a judge has questions about the validity of a claim, the judge can also request comments from the State Department.[52] This is a complicated and time-consuming process, however, and for that reason is not often used.

A lack of resources also limited my ability to assess inconsistencies between applicants' statements and other evidence of record. In many cases, there were discrepancies among and between the initial statements made by aliens in expedited removal proceedings, the statements that those aliens had made to Asylum Officers, the aliens' statements in the asylum applications themselves, and/or the alien's testimony in court. One conclusion that could be drawn from such discrepancies is that the claim had become "inflated" or "bolstered" over time, calling the applicant's credibility into question. The time and distance between the preparations of those various statements would often minimize my ability to rely on such inconsistencies, however, particularly when the applicant denied making a given statement. It should be noted that unlike Immigration Judges, Asylum Officers' and Border Patrol Agents' interviews are not recorded electronically.

Often, however, I would face the opposite issue, that is, a voluminous record filled with background evidence, much of which had little or no bearing on the case at hand. All of these documents required review, however, in order to assure that the alien's claim received a full and fair hearing. This brings up the next issue—that is, a lack of resources for the court.

As of February 2017, there were 542,411 cases pending before 302 Immigration Judges, or just less than 1,800 cases per judge.[53] Each judge, however, has just about six hours per week

[51] Further, I have since been informed anecdotally that micromanagement at upper levels of ICE limited the ability of those attorneys to call country-conditions experts in individual cases.
[52] 8 C.F.R. § 1208.11.
[53] *Immigration Court Backlog Tool, Pending Cases and Length of Wait in Immigration Courts*, TRAC IMMIGRATION (Feb. 2017), *available at*: http://trac.syr.edu/phptools/immigration/court_backlog/

to prepare for the week's docket; the rest of the time is spent on the bench hearing cases. Given the fact that each judge could be assigned eight or more asylum cases (any one of which could have hundreds of pages of background evidence) each week, the ability for any given judge to have full familiarity with any given case is limited. This problem is compounded by the fact that many claims, particularly claims from the same country, can have similar facts.

One of the best ways to reduce fraud in the asylum process is to ensure that the judges are familiar with the record in each case, in order to identify discrepancies and inconsistencies in the record when they arise. The best way to ensure that the judges hearing asylum claims are familiar with the record in each case is to hire more judges, thereby giving the judges more time to review the record and to hear each individual case.[54]

It should be noted, as GAO did in its report, that EOIR does have an antifraud officer, which was established in September 2007 by the Department of Justice through regulation.[55] That regulation states that the antifraud officer is to: (1) serve as a point of contact relating to concerns about fraud, particularly with respect to fraudulent applications or documents affecting multiple removal proceedings, applications for relief from removal, appeals, or other proceedings before EOIR; (2) coordinate with DHS and Department of Justice investigative authorities with respect to the identification of and response to fraud; and (3) notify EOIR's Disciplinary Counsel and other appropriate authorities as to instances of fraud, misrepresentation, or abuse related to an attorney or accredited representative.[56] This office does not, however, provide assistance in identifying fraud in individual cases.

The limited number of judges also means that there are significant backlogs between the time that applications are filed and the time that hearings are held on those applications. Mine was a detained court, meaning that all of the cases I heard involved detained aliens. ICE has only limited detention space, however, and aliens would often be released before I could hear their claims. In a non-detained court, years can pass before an asylum application is heard.[57]

Throughout the Presidential campaign and since the inauguration, much attention has been directed to the issue of refugees from countries of concern, and the potential danger that such individuals may pose. There is legitimacy in those concerns. As Director of National Intelligence James Clapper said at a security industry conference in September 2015: "I don't, obviously, put it past the likes of ISIL to infiltrate operatives among these refugees, so that's a

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[54] More judges alone, however, are not the answer. As a judge, I shared one law clerk with another judge, and that clerk's primary responsibilities involved drafting proposed orders, reviewing motions, and researching the effects of various criminal convictions from various states on different grounds of removability, largely freeing me and my fellow judge to review applications for relief and the supporting evidence for those applications. I was also supported by a legal technician who kept the courtroom running, and a front office staff that ensured submissions were docketed and filed. Ideally, for each additional judge hired, there would also be an additional law clerk and technician, as well as support staff.

[55] *Asylum: Additional Actions Needed to Assess and Address Fraud Risk*, GOV'T ACCOUNTABILITY OFFICE, GAO-16-50, at 30 (Dec. 2015), available at: http://www.gao.gov/assets/680/673941.pdf

[56] 8 C.F.R. § 1003.0(e)(2).

[57] Julia Preston, *Deluged Immigration Courts, Where Cases Stall for Years, Begin to Buckle*, NEW YORK TIMES (Dec. 1, 2016), *available at*: https://www.nytimes.com/2016/12/01/us/deluged-immigration-courts-where-cases-stall-for-years-begin-to-buckle.html

huge concern of ours."[58] Further, as FBI Director James Comey noted, although the refugee screening process has since "improved dramatically" since "a number of people who were of serious concern" slipped through the screening of Iraq War refugees, refugees from Syria will be even harder to check because, unlike the situation in Iraq, the United States government has not been collecting information on the local population in that country.[59] "If we don't know much about somebody, there won't be anything in our data," Comey stated, adding: "I can't sit here and offer anybody an absolute assurance that there's no risk associated with this."[60]

Stated succinctly, the vetting process for any given refugee will only be as good as the background information against which that refugee's claim can be compared. For example, if an applicant claimed to have been born in Somalia during that country's decades-long civil war when there was no functioning government[61], the applicant would likely have no birth certificate and few if any documents to establish identity. If a Syrian applicant offered a document issued in an area of that country currently occupied by ISIS[62], the validity of the document could not be independently verified.

That said, at least there is a fairly robust screening process in place for refugees, and a potential refugee could be denied travel documents to come to the United States. In the credible fear process, however, there is no screening before an alien enters the United States, and only limited screening after the alien enters this country.[63] Mr. Crocetti, in his testimony, discussed many of the shortcomings of the USCIS vetting process in his February 2014 testimony, and I would urge you to refer to his conclusions therein.[64] A finding of credible fear can be made without any corroborating evidence, or even identity documents, and once that finding is made, the alien can file an asylum application with an Immigration Court and seek release from custody. Even if release is initially denied, the alien may still be released to free up limited detention space.

This system presents a vulnerability to exploitation by an individual or group seeking to do harm to the United States, by traffickers seeking to bring victims to the United States, and by economic migrants seeking employment opportunities.

With respect to the first group, as the 9/11 Terrorist Travel monograph makes clear: "A number of terrorists [have] . . . abused the asylum system."[65] For example, Ramzi Yousef and

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[58] Jerry Markon, *Senior Obama officials have warned of challenges in screening refugees from Syria*, WASHINGTON POST (Nov. 17, 2015), *available at*: https://www.washingtonpost.com/news/federal-eye/wp/2015/11/17/senior-obama-officials-have-warned-of-challenges-in-screening-refugees-from-syria/?utm_term=.fec4eea68cdd

[59] *Id.*

[60] *Id.*

[61] *See* The World Factbook: Somalia, CENTRAL INTELLIGENCE AGENCY, *available at*: https://www.cia.gov/library/publications/the-world-factbook/geos/so.html

[62] *See Islamic State and the crisis in Iraq and Syria in maps*, BBC (Jan. 20, 2017), *available at*: http://www.bbc.com/news/world-middle-east-27838034

[63] As noted above, there have been cases in which aliens in refugee camps have effectively bypassed the refugee screening system by entering or attempting to enter the United States illegally and claiming credible fear.

[64] *See Asylum Fraud: Abusing America's Compassion?: Hearing Before the House Judiciary Committee Subcommittee on Immigration and Border Security*, 113th Cong. (2014)(statement of Louis D. Crocetti, Jr.)

[65] *9/11 and Terrorist Travel, A Staff Report of the National Commission on Terrorist Attacks upon the United States*, at 106 (2004).

Ahmad Ajaj, plotters of the first World Trade Center bombing, "concocted bogus political asylum stories when they arrived'" to remain in the United States in 1992.[66] Similarly, the "Blind Sheikh," Sheikh Abdul Rahman, "avoided being removed from the United States by filing an application for asylum and withholding of deportation to Egypt in . . . 1992."[67]

Information disclosed to Congress indicates that 299 aliens to whom the terrorism bar to asylum eligibility may apply[68] were found to have a credible fear in the first four months of FY 2015, and that 399 aliens to whom the terrorism bar to asylum eligibility may apply were found to have a credible fear in FY 2014.[69] While the nature and circumstances of those terrorism allegations are not clear, these facts raise the concern that individuals who have connections to terrorist activity have attempted to seek asylum through the credible-fear process.

Factors outside of the credible fear process may further hinder discovery of the terrorist ties of an alien who is applying for asylum through the credible fear process. The most significant of these factors is the regulation governing the confidentiality of asylum information, found at 8 C.F.R. § 1208.6. That regulation states:

> Disclosure to third parties.
>
> (a) Information contained in or pertaining to any asylum application, **records pertaining to any credible fear determination** conducted pursuant to § 1208.30, and records pertaining to any reasonable fear determination conducted pursuant to § 1208.31, **shall not be disclosed** without the written consent of the applicant, except as permitted by this section or at the discretion of the Attorney General.
>
> (b) The confidentiality of other records kept by the Service and the Executive Office for Immigration Review **that indicate that a specific alien** has applied for asylum, **received a credible fear or reasonable fear interview, or received a credible fear or reasonable fear review shall also be protected from disclosure**. The Service will coordinate with the Department of State to ensure that the confidentiality of those records is maintained if they are transmitted to Department of State offices in other countries.
>
> (c) This section shall not apply to any disclosure to:
>
> (1) Any United States Government official or contractor having a need to examine information in connection with:

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[66] *Id*. at 50.
[67] *Id*. at 55.
[68] *See* section 208(b)(2)(A)(v) of the INA (asylum may not be granted to "an alien if the Attorney General determines that - the alien is described in subclause (I), (II), (III), (IV), or (VI) of section 212(a)(3)(B)(i) or section 237(a)(4)(B) (relating to terrorist activity), unless, in the case only of an alien described in subclause (IV) of section 212(a)(3)(B)(i) , the Attorney General determines, in the Attorney General's discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States.").
[69] Letter from Chaffetz, Goodlatte, DeSantis, and Gowdy to Johnson of 5/20/15, at 1, *available at*: https://oversight.house.gov/wp-content/uploads/2015/05/2015-05-20-JC-DeSantis-Goodlatte-Gowdy-to-Johnson-DHS-Credible-Fear-due-6-3.pdf

(i) The adjudication of asylum applications;

(ii) The consideration of a request for a credible fear or reasonable fear interview, or a credible fear or reasonable fear review;

(iii) The defense of any legal action arising from the adjudication of, or failure to adjudicate, the asylum application, or from a credible fear determination or reasonable fear determination under § 1208.30 or § 1208.31;

(iv) The defense of any legal action of which the asylum application, credible fear determination, or reasonable fear determination is a part; or

(v) Any United States Government investigation concerning any criminal or civil matter; or

(2) Any Federal, State, or local court in the United States considering any legal action:

(i) Arising from the adjudication of, or failure to adjudicate, the asylum application, or from a credible fear or reasonable fear determination under § 1208.30 or § 1208.31; or

(ii) Arising from the proceedings of which the asylum application, credible fear determination, or reasonable fear determination is a part.

(emphasis added).

Thus, information "pertaining to any credible fear determination . . . and records pertaining to any reasonable fear determination conducted" cannot "be disclosed without the written consent of the applicant, except as permitted by this section or at the discretion of the Attorney General." It has been my experience, having handled or supervised scores of special interest cases, that discretion to disclose asylum information is rarely given. When it is, such disclosure risks a claim by the applicant that even if there was no fear of persecution before the disclosure, there is now, because the alien's home country knows that the alien, in applying for asylum, is placing that country in a bad light.

This regulation hinders any attempt by ICE or other government agency to verify with the alien's home government information provided during the credible fear process, or to use that information to determine whether the alien poses a terrorism risk.

One final note about expedited removal and credible fear. Expedited removal was added to the INA by section 302 of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).[70] While the apparent purpose of that provision was to facilitate the removal of aliens from the United States, by its terms it allows an alien to appear at a land port of entry, such as the

[70] Section 302 of Pub. L. 104-208 (1996).

Bridge of the Americas Port of Entry in El Paso, and request asylum.[71] By statute, such aliens are referred to an Asylum Officer and begin the credible fear process, without having to establish that he or she sought and was denied asylum elsewhere.[72]

In summary, as recent events have shown, it is reasonable for the United States government to screen individuals who are seeking to enter the United States closely for terrorist ties or other foreign affiliations that suggest they could pose a danger to the United States. Refugees are not the only class of alien seeking to enter the United States who could pose such a danger, however.

Aliens who are seeking to enter the United States through the credible fear process have not been screened before arriving in the United States. Many of these aliens come to the United States without documents, and arrive from countries in which there is significant terrorist activity. Appropriate resources must be directed to the review of the asylum applications filed by those individuals, to ensure that they are not able, through fraud, to enter the United States and do harm to the America people. Again, I would respectfully encourage this Subcommittee to consider the recommendations made by Mr. Crocetti for the vetting of asylum applications in his February 2014 testimony[73], and I would urge FDNS and EOIR to review the conclusions of the GAO in its December 2015 report[74], both of which are referenced above.

In addition, the United States government, in connection with its global partners, must disrupt the smuggling organizations that are preying on aliens who are seeking to come to the United States.

This concludes my testimony, and I again thank Chairman Goodlatte and all the Members of the committee for the invitation and opportunity to testify today.

[71] Section 235(b)(1)(A)(i) of the INA.
[72] *See* section 235(b)(1)(A)(ii) of the INA.
[73] *Asylum Fraud: Abusing America's Compassion?: Hearing Before the House Judiciary Committee Subcommittee on Immigration and Border Security*, 113th Cong. (2014)(statement of Louis D. Crocetti, Jr.)
[74] *Asylum: Additional Actions Needed to Assess and Address Fraud Risk*, GOV'T ACCOUNTABILITY OFFICE, GAO-16-50, at 1 (Dec. 2015), *available at:* http://www.gao.gov/assets/680/673941.pdf