

The President
The White House
1600 Pennsylvania Avenue
Washington, DC 20500

July 14, 2014

RE: Fair Treatment for Unaccompanied Central American Children

Dear Mr. President:

We are a group of professors and researchers with experience teaching and practicing in the areas of immigration, human rights, and international law, primarily at U.S. universities, colleges, and law schools. We write to offer our counsel to you and your administration as you respond to the refugee emergency involving unaccompanied children and families with children from Central America and Mexico.

While we recognize the challenges are complex, we focus our comments on two administration responses that raise great concern: first, unspecified calls by the administration for changes to the Trafficking Victims Protection Reauthorization Act of 2008 (“TVPRA”); and second, procedural and operational responses intended to speed up the removal process that weaken legal protections for unaccompanied children and families with children. We also wish to remind you of the powers you have under section 207 of the Immigration and Nationality Act (“INA”) to declare refugee emergencies and to grant protection through that mechanism. It has been the historic policy of the United States to respond to the urgent needs of persons, including children, subject to persecution in their homelands.¹

The Courts, Congress, and the Executive branch have long recognized that children must be treated differently under the immigration laws due to their particular vulnerability and lesser culpability.² We need to maintain these obligations as we face the current challenges.

1. Maintain the Protections under the TVPRA for Unaccompanied Children from Central America and Properly Implement the TVPRA Protections for Unaccompanied Mexican Children

¹ Refugee Act of 1980, S. Rep. No. 590, 96th Cong. 2d Sess. 19 (1980); *see also* Lyndon B. Johnson, Message from the President of the United States Transmitting the Protocol Relating to the Status of Refugees, *reprinted in* 114 Cong. Rec. 27757, 27757-58 (1968) (invoking the United States’ “traditional role of leadership in promoting assistance for refugees” and the symbolism of U.S. accession to the 1967 Protocol “in our ceaseless effort to promote everywhere the freedom and dignity of the individual and of nations; and to secure and preserve peace in the world”).

² *See, e.g., Flores v. Reno* settlement agreement (legacy INS agreed to remove immigrants under the age of 18 from adult detention facilities and instead house them within federal shelters operated by the Office of Refugee Resettlement); INA § 212(a)(2)(A)(I)(ii) (juvenile exception to inadmissibility grounds); *Matter of Ramirez-Rivera*, 18 I&N Dec. 135 (BIA 1981) (holding that juvenile delinquency adjudications are not convictions for immigration purposes); USCIS AOBTC, *Guidelines for Children’s Asylum Claims*, Sept. 1, 2009, <http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Guidelines-for-Childrens-Asylum-Claims-31aug10.pdf>.

Multiple members of the administration have called for “greater flexibility” to be allowed under TVPRA, including Homeland Security Secretary Jeh Johnson and Department of Health and Human Services Secretary Sylvia Mathews Burwell at the Senate Appropriations Committee hearing on July 10. We have seen at least two legislative proposals³ that call for treating Central American children in the same fashion as Mexican children under the TVPRA, and have heard of calls for an accelerated removal process (although those calls may be in essence the same as the call for TVPRA amendment). The recent track record of Customs and Border Protection (“CBP”) in the treatment of Mexican children and expedited removal for adults does not inspire confidence, and further expanding CBP’s authority to apply these statutory tools with Central American children is unwise.

A. Implementation of the TVPRA for Mexican Children Has Fallen Short and Should not be the Model for Treatment of Central American Children

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.⁴

A child capable of making decisions and who does not have such fears can be “permitted to withdraw” their application for admission and be sent home.⁵ The legislation calls for such screening to occur promptly (within 48 hours), but if such screening does not occur within 48 hours they are to be transferred to Health and Human Services.⁶ Safe repatriation of children to Mexico is presumably insured by contiguous country agreements and other procedures.⁷ Even though the rules for contiguous states found at TVPRA § 235(a) are more permissive of quick return than for non-contiguous states, Congress passed the law in order to provide more protection for Mexican children than had been the case up to that point. As we outline below, the devil is in the detail. Safety determinations for Mexican children have often been inadequate and inconsistently applied, and there have been credible reports of pressure on Mexican children who fear returning to withdraw their applications for admission to the U.S.⁸

³ On July 9, 2014 Senator Jeff Flake, along with several other Republican Senators including John McCain, introduced an amendment to S. 2363, the Sportsman's Heritage Act (the bill currently under floor consideration in the U.S. Senate) that calls for treating Central American children in the same fashion as Mexican children under the TVPRA. In addition, this amendment provides the DHS Secretary broad and unchecked discretion to expand this treatment to any child from any country the Secretary deems appropriate. http://www.flake.senate.gov/public/_cache/files/e84629ca-603f-4a9b-b3fb-c413f159f7af/flake-tvpra-reform-amendment.pdf; Senator John Cornyn and U.S. Representative Henry Cuellar are planning on introducing a bill to amend the 2008 TVPRA and treat Central American children in the same fashion as Mexican children. Sureng Min Kim, *Bill Aims to Quicken Border Process*, July 14, 2014, <http://www.politico.com/story/2014/07/immigrants-border-children-bill-108872.html>.

⁴ TVPRA § 235(a)(2)(A).

⁵ TVPRA § 235(a)(2)(B).

⁶ TVPRA § 235(a)(4).

⁷ TVPRA § 235(a)(2)(C) and TVPRA § 235(a)(5).

⁸ See Betsy Cavendish & Maru Cortazar, *Children at the Border: The Screening, Protection and Repatriation of Unaccompanied Mexican Minors*, (2011), <http://appleseednetwork.org/wp-content/uploads/2012/05/Children-At-The-Border1.pdf>.

In contrast under the 2008 trafficking legislation, unaccompanied minors from noncontiguous states are placed in ordinary removal proceedings, a long-standing immigration enforcement mechanism. Simultaneously, these children are transferred to facilities run by the Office of Refugee Resettlement (“ORR”) where they are allowed to meet with social workers and attorneys experienced in working with children. In addition, and pursuant to the TVPRA, HHS appoints independent child advocates for particularly vulnerable unaccompanied children in the Rio Grande Valley and Chicago; their role is to meet with the children, learn their stories, and advocate for their best interests.

Children who have experienced trauma often do not open up immediately. They often need time in an appropriate setting to express their true reasons for coming to the United States, and to be interviewed by the right individuals - those with expertise and training in child welfare and development. This in turn provides a more accurate understanding of their eligibility for relief from deportation than the expedited interviews conducted at the border. This does not mean that all of these children will qualify for relief.⁹

However, speeding the process and sending children back to countries without determining whether a true situation involving persecution, trafficking or abuse/abandonment or neglect exists will lead to much more disastrous results than continuing to allow these children to have a thorough process before an immigration judge.

Secretary Johnson’s request for more discretion, presumably the right to use contiguous state procedures for Central American children, should be withdrawn in light of his agency’s questionable track record in applying those procedures to Mexican children and failure despite repeated complaints, to make changes. In 2011, the Appleseed Foundations of the United States and Mexico issued a 72 page report with 48 pages of addenda. Appleseed concluded:

In the United States, TVPRA screening is not conducted either in a manner or in environments likely to elicit information that would indicate whether the minor is a potential victim of trafficking or abuse, and whether the child can and does voluntarily agree to return to Mexico. This failure predictably follows DHS’s decision to assign TVPRA screening duties to its law enforcement branch, Customs and Border Protection (CBP), a force intended to repel external threats to the United States and, not surprisingly, without any child welfare expertise. The minimal training and tools provided to CBP officers have done little to equip them to satisfy the Congressional mandates of the TVPRA. As a result, the expected post-TVPRA influx of unaccompanied Mexican minors into the U.S. system designed to evaluate their rights to protection has not materialized, leaving many of these children vulnerable to trafficking and other forms of exploitation, including by criminal gangs and drug cartels.¹⁰

⁹ See Olga Byrne & Elise Miller, Vera Institute of Justice, *The Flow of Unaccompanied Children Through the Immigration System* (Mar. 2012), <http://www.vera.org/sites/default/files/resources/downloads/the-flow-of-unaccompanied-children-through-the-immigration-system.pdf>.

¹⁰ Cavendish & Cortazar, *Children at the Border*, *supra* note 8, at 2.

The report made numerous recommendations for improvements in the system, but reportedly little has changed. In June 2014, a number of non-profit groups jointly filed a complaint with the Office for Civil Rights and Civil Liberties and the Inspector General of the Department of Homeland Security on behalf of 116 unaccompanied immigrant children, ages five to seventeen years old, alleging abuse and mistreatment while in the custody of CBP, including U.S. Border Patrol.¹¹

B. It is Unwise to Extend Accelerated Removal Procedures to Unaccompanied Children When the Current System for Adults is Plagued with Problems

Some press accounts have attributed your administration as calling for expedited removal of unaccompanied children.¹² This reference to “expedited removal” may be simply shorthand for amending the TVPRA to process Central American children as if they were Mexican, as discussed above. But because some of the fundamental issues are the same (“do you fear return to your country?”) and because CBP personnel are most usually the gatekeepers for both TVPRA and expedited removal, a look at current expedited removal practice is worthwhile.

As you know, expedited removal vests immigration border officers with the authority to detain and summarily deport an individual at the border who is not in possession of valid immigration documents or presents fraudulent documents. However, Congress recognized the expansive and decisive power of the authority and provided exceptions for certain populations including potential refugees fleeing persecution, as well as people claiming to have been granted such status already, to be legal permanent residents, or to be U.S. citizens.¹³

As with the treatment of Mexican children under TVPRA, irregularities have been raised about how the Border Patrol treats adults seeking to express their fear of return to their own countries. Serious concerns about accountability and transparency at CBP have been raised:

Data obtained by the American Immigration Council shine a light on the lack of accountability and transparency which afflicts the U.S. Border Patrol and its parent agency, U.S. Customs and Border Protection (CBP). The data, which the Immigration Council acquired through a Freedom of Information Act (FOIA) request, covers 809 complaints of alleged abuse lodged against Border Patrol agents between January 2009 and January 2012. These cases run the gamut of physical, sexual, and verbal abuse. Although it is not possible to determine which

¹¹ Complaint to Megan H. Mack, Officer for Civil Rights and Civil Liberties and John Roth, Inspector General Department of Homeland Security, June 11, 2014, from National Immigrant Justice Center, Esperanza Immigrant Rights Project, Americans for Immigrant Justice, Florence Immigrant Rights & Refugee Project, & ACLU Border Litigation Project, RE: Systemic Abuse of Unaccompanied Immigrant Children by U.S. Customs and Border Protection, <http://www.acluaz.org/sites/default/files/documents/DHS%20Complaint%20re%20CBP%20Abuse%20of%20UICs.pdf>.

¹² See, e.g., *Obama seeks power to return immigrant children*, Assoc. Press., June 30, 2014.

¹³ INA § 235(b)(1)(A). In its implementation of the 1996 law, legacy U.S. I.N.S. restricted the use of expedited removal in cases of unaccompanied minors to very limited circumstances. Paul Virtue, U.S. I.N.S. Acting Executive Associate Commissioner, Programs, *Unaccompanied Minors Subject to Expedited Removal*, Aug. 21, 1997, available on AILA InfoNet Doc. No. 97082191 (posted Aug. 21, 1997).

cases had merit and which did not, it is astonishing that, among those cases in which a formal decision was issued, 97 percent resulted in “No Action Taken.” . . . [A]gents of the Border Patrol are known for regularly overstepping the boundaries of their authority by using excessive force, engaging in unlawful searches and seizures, making racially motivated arrests, detaining people under inhumane conditions, and removing people from the United States through the use of coercion and misinformation.¹⁴

That report details the apparent failure of CBP to take effective internal action against alleged abuses by officers acting within 100 miles of the southern border. The Rio Grande Valley Border Patrol sector, the area most affected by the recent influx of unaccompanied children, received the second highest number of complaints in the country. In terms of absolute number of complaints, the Rio Grande Valley Sector was second with 167 of a total 809 (Tucson was first with 279). It was second in terms of complaints per 100,000 apprehensions (114.3 just behind Del Rio’s 116.7). And it was second in terms of numbers of complaints per 1,000 Border Patrol agents (27.5 just behind Tucson’s 30.7).¹⁵

In an individual complaint filed against Border Patrol abuse originating in the Rio Grande Valley Sector in 2013, allegations of suppressing expressions of fear were made:

While in the holding cells, Mr. Alberto was called out to speak with a CBP agent. After answering some questions about his family, Mr. Alberto was told he had to sign documents printed in English, which Mr. Alberto does not speak or read. He repeatedly refused to sign the documents and asked what the documents said. The CBP agent ultimately told Mr. Alberto they were for his “deportation.” Mr. Alberto refused to sign the documents, saying he was afraid to go back to his country because he would be killed by a gang. The CBP agent told Mr. Alberto that he would send him to federal prison if he did not sign. Mr. Alberto became upset and began crying, and the CBP agent laughed and mocked him. After he continued to refuse to sign the documents, Mr. Alberto was taken back to the holding cell and again threatened with being sent to federal prison.¹⁶

Another report from May 2014 raises serious concerns about Border Patrol’s willingness to hear and properly process stories of fear from migrants:

[A]dvocates reported that asylum seekers face significant hurdles beginning with their initial encounters with CBP officers and continuing to their merit hearings in immigration court. We heard frequent complaints that CBP officers often dissuade people from seeking asylum, sometimes berating and yelling at them. Some advocates complained that clients were harassed, threatened with separation

¹⁴ Daniel Martinez, et. al., *No Action Taken: Lack of CBP Accountability in Responding to Complaints of Abuse*, American Immigration Council, released May 6, 2014, available at <http://www.americanimmigrationcouncil.org/newsroom/release/no-action-taken-lack-cbp-accountability-responding-complaints-abuse>.

¹⁵ *Id.*

¹⁶ “FTCA Administrative Complaint against the United States,” *Hold CBP Accountable*, Dec. 11, 2013, <http://holdcbpaccountable.org/2013/12/11/administrative-complaints-against-united-states-filed-31213/>.

from their families or long detentions, or told that their fears did not amount to asylum claims. . . . Other attorneys noted that CBP conducted initial interviews too rapidly, without confidentiality, and without properly interpreting interviews or translating documents back to applicants. The resulting discrepancies, such as erroneous birth dates, were later used against applicants in court. Many attorneys stated that they routinely saw identical boilerplate statements in officers' reports and that officers often failed to record asylum seekers' statements even though clients told attorneys they had provided specific information to the officers.¹⁷

These reports echo accounts we have heard from clients in some of our own immigration clinics.

The suggested changes in law and policy are short-sighted for two additional reasons: first, this policy contravenes the Supreme Court's decision in *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993); and second, it runs afoul of our international obligations not to return children to a country where "there are substantial grounds for believing that there is a real risk of irreparable harm to the child."¹⁸

In *Sale*, the Supreme Court upheld President Reagan's interdiction program, which permitted the U.S. Coast Guard to interdict unauthorized migrants attempting to land in the U.S. on the high seas and return them to their country of origin without any advice about their right to seek protection. The Supreme Court found that the program did not violate the U.S.'s obligations under the Refugee Convention of *non-refoulement* – the obligation not to return an individual to a country where he or she may face serious harm – because the interdiction occurred on the high seas and not within U.S. territory. So while the interdiction program survived judicial scrutiny, your administration's proposal to fast track the deportation of unaccompanied minors with little, if any, process squarely violates the Court's *Sale* decision because obligations that do not apply on the high seas, do in fact apply at our borders.

Second, summarily deporting unaccompanied minors does not incorporate the best interest of the child principle required by international law.¹⁹ Upon arrival they are hungry, sleep deprived and scared. In addition they are coming from countries where there is a high degree of mistrust of government officials. Indeed, they may even be fleeing government persecution. Immediately subjecting these young children to a cursory and rushed interview by a law enforcement officer risks children failing to fully articulate why they are afraid or why they cannot return. Swift deportation risks that children will be repatriated to unsafe conditions including continued physical and sexual abuse, gang recruitment and other criminal violence. Sufficient time and the

¹⁷ Sarah Campos & Joan Friedland, *Mexican And Central American Asylum And Credible Fear Claims*, May 2014, http://www.immigrationpolicy.org/sites/default/files/docs/asylum_and_credible_fear_claims_final.pdf

¹⁸ U.N. Comm. on the Rights of the Child, *General Comment No. 6; Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, para. 27 U.N. Doc. CRC/GC/2005/6 (Sept. 1, 2005).

¹⁹ See generally Bridget A. Carr, *Incorporating a "Best Interests of the Child" Approach into Immigration Law and Procedure*, 12 YALE HUM. RTS & DEV. L.J. 120 (2009); see also International Covenant on Civil and Political Rights art. 24(1), *opened for signature* Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st ("Every child shall have, without any discrimination as to . . . national or social origin . . . the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.").

provision of experts trained in child welfare to assess the best interest of the child are critical to fulfill the U.S. obligations under international human rights and international refugee law.²⁰

2. Level the Legal Playing Field for Unaccompanied Children Before Asylum Officers and Immigration Courts, Rather Than Pre-Judging Claims and Tilting the System Against Such Claims

A. Pre-Judgment About Eligibility for Relief by Senior Administration Officials Risks Prejudicing Protection Claims

“The question is whether or not that case will be approved or whether it meets the standards under the law. We think that's unlikely.” – White House advisor Cecilia Muñoz²¹

“It's our view that it's unlikely that most of these kids will qualify for humanitarian relief. If they don't qualify for humanitarian relief, they will be sent back.” – White House Press Secretary Josh Earnest²²

The United Nations High Commissioner for Refugees (“UNHCR”) in its study of over 400 unaccompanied Mexican and Central American children who have traveled to the U.S. reported that approximately 58% may have some form of international protection concern.²³ But the direct or indirect messages being sent by the administration to its frontline employees is to find ways to speed decisions, speed deportations, and otherwise send a message to other potential claimants by dealing harshly with those now in the process that they will lose their cases and be deported. As we detail below, prior U.S. administrations, both Republican and Democratic, have some dishonorable moments of “message sending” with respect to Haitians, Central Americans, and Chinese persons seeking protection.

B. Administration Procedures Intended to Streamline the Credible Fear and Removal Process Run the Risk of Prejudicing Claims for Protection

Steps the administration has taken or is taking to speed up the removal process have some promise, but raise concerns at the same time. The effort to tighten the screws has not gone unnoticed, and raises concerns as to the administration's commitment to international protection for asylum seekers. The following three points are emblematic not exhaustive illustrations.

²⁰ Lisa Frydman, et. al., *A Treacherous Journey: Child Migrants Navigating the U.S. Immigration System* at 37-55, available at http://www.uchastings.edu/centers/cgrs-docs/treacherous_journey_cgrs_kind_report.pdf

²¹ *Administration Moves to Speed Deportations of Unaccompanied Minors*, NPR, July 9, 2014, <http://www.npr.org/2014/07/09/330038061/administration-moves-to-speed-deportations-of-unaccompanied-minors>.

²² Katie Zezima, *White House: ‘Most’ unaccompanied minors at border will likely be deported*, WASH. POST, July 7, 2014, <http://www.washingtonpost.com/blogs/post-politics/wp/2014/07/07/white-house-most-unaccompanied-minors-at-border-will-likely-be-deported/>.

²³ UN High Commissioner for Refugees, *Children on the Run* 6, March 2014, <http://unhcrwashington.org/children>.

1. Temporary Judges to Be Drawn Solely from the Government Ranks, Including Some Currently Tasked with Seeking Removal of Applicants

We applaud the effort under the July 8, 2014 Emergency Supplemental Request 8 to increase the number of Immigration Judges.²⁴ However, the interim rule²⁵ is to appoint those new judges solely from the ranks of either current or former administrative law judges, or Department of Justice employees with immigration experience.

This is problematic for at least two reasons. First, many current or former administrative law judges have no immigration experience. Second, while many of the DOJ employees have a great deal of immigration experience, particularly attorneys at the Office of Immigration Litigation whose charge is to oppose non-citizen appeals to the federal circuit courts, their experience and backgrounds are primarily in a posture of opposing granting reprieve to non-citizens seeking relief. Thus their perspectives, intentionally or not, may tip the scales overall against persons seeking relief. While administrative efficiency is served by hiring existing or former DOJ employees, this administration must also consider fairness, accountability, and accuracy in decision-making, as well as the appearance of impartiality to give the removal proceedings legitimacy.²⁶

In addition, increasing funding for video conferencing also raises concerns about unaccompanied children being judged by adjudicators they can only see on a screen. Credibility determinations and discretionary factors in forms of relief, such as body language and gesturing, are difficult while a detained child sits hundreds of miles away from the adjudicator and possibly without counsel.²⁷

²⁴ The White House, Office of the Press Secretary, *Fact Sheet: Emergency Supplemental Request to Address the Increase in Child and Adult Migration from Central America in the Rio Grande Valley Areas of the Southwest Border*, July 8, 2014.

²⁵ Exec. Office for Immig. Rev., Dep't of Justice, *Interim Rule: Designation of Temporary Immigration Judges*, EOIR Docket No. 177; AG Order No. 3447-2014, RIN 1125-AA77, <http://www.justice.gov/eoir/press/2014/AGOrder3447-2014.pdf>.

²⁶ American Immigration Council, *Two Systems of Justice*, 7-8, 12 (March 2013), http://www.immigrationpolicy.org/sites/default/files/docs/aic_two_systems_of_justice.pdf.

²⁷ "[V]irtual reality is rarely a substitute for actual presence and that, even in an age of advancing technology, watching an event on the screen remains less than the complete equivalent of actually attending it." *U.S. v. Lawrence*, 248 F.3d 300, 304 (4th Cir. 2001). See also Legal Action Center, *Comments to Administrative Conference of the United States re: Immigration Adjudication Draft Report*, 4 (Feb. 13, 2012), <http://www.legalactioncenter.org/sites/default/files/docs/lac/American%20Immigration%20Council,%20comments%202-13-12.FIN.pdf> ("In light of the concerns flagged by critics, video hearings raise serious due process concerns, and their use may deprive a respondent of a full and fair hearing. At a minimum, respondents or representatives should be able to object and request in-person hearings in cases where video hearings may jeopardize fairness."). The Immigration Court has guidelines for the treatment of unaccompanied children which currently allow for video conferencing in some circumstances, a practice we think should be discouraged. U.S. Dep't of Justice, Office of the Chief Immigration Judge, *Operating Policies and Procedures Memorandum 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children*, May 22, 2007, <http://www.justice.gov/eoir/efoia/ocij/oppm07/07-01.pdf>.

2. Revision of Credible Fear Screening Standards Will Be “Something Our Nation Regrets”

In February 2014, USCIS Asylum Office headquarters issued new guidance on how to conduct credible fear interviews,²⁸ a change greeted with criticism calling it a limitation on the ability of genuine asylum seekers to get access to protection.²⁹ In Professor Hing’s analysis: “[t]he application of the credible fear standard in a harsh manner that does not give the benefit of the doubt to imperfect but reasonable claims will be something that our nation will regret in the not-too-distant future.”³⁰

3. Planned Provision of Representation for Some Children Laudable but Inadequate

Out of a \$3.7 billion emergency request to Congress, only \$17.5 million is requested for Legal Orientation Programs (“LOP”) and direct legal representation for children.³¹ While direct representation is a great step forward, the amount of funding will be inadequate and the manner in which it is being provided could be improved. The program currently being put out for applications will be administered through Americorps, which will rely at its core on volunteer attorneys paid \$24,000 a year (the federal poverty level for a family of four). Such a program will no doubt attract tremendously motivated attorneys, but likely early in their careers. The program also restricts representation by these attorneys to children 15 years old and younger, who are not detained and who have not had their cases consolidated with parents or guardians. It appears that representation might be limited to only four forms of relief (asylum, Special Immigrant Juvenile Status, U visas, and T Visas). Appeals or actions before federal courts are prohibited.³² Many of the immigrant children arriving in the U.S. are aged 16-18, and will be unable to access this assistance. While this program is a good start, it could be much more robust, and these limitations should be reconsidered.

C. Past Humanitarian Lessons Should Caution Against Procedural Shortcuts

This is not the first time that the U.S. response to urgent needs of persons fleeing persecution in their homelands has treated some groups differently from others in an effort to “send a message.” After the Refugee Act of 1980 passed both the U.S. House and Senate with the express goal to

²⁸ USCIS, Refugee, Asylum, and International Operations Directorate, Asylum Division, *Asylum Officer Training Course Lesson Plan: Credible Fear*, Feb. 28, 2014, <http://cmsny.org/wp-content/uploads/credible-fear-of-persecution-and-torture.pdf>.

²⁹ See, e.g., Bill Ong Hing, Memorandum to John Lafferty, Chief, USCIS Asylum Division Concerning Lesson Plan, *Credible Fear of Persecution and Torture Determinations*, April 21, 2014, <http://static.squarespace.com/static/50b1609de4b054abacd5ab6c/t/53558353e4b02071f74ee3c4/1398113107754/Response%20to%20USCIS%20Credible%20Fear%20Memo.%20Bill%20Hing.%2004.21.2014.pdf><http://static.squarespace.com/static/50b1609de4b054abacd5ab6c/t/53558353e4b02071f74ee3c4/1398113107754/Response%20to%20USCIS%20Credible%20Fear%20Memo.%20Bill%20Hing.%2004.21.2014.pdf>

³⁰ *Id.*

³¹ The White House, Office of the Press Secretary, *Fact Sheet*, *supra* note 24.

³² justice AmeriCorps, Corporation for National and Community Service, CNCS-GRANTS-06232014, June 23, 2014, <http://www.grants.gov/web/grants/view-opportunity.html?oppId=258377>.

create a nondiscriminatory definition of refugee and to make the U.S. conform to the UN Convention,³³ mass influxes of people seeking asylum arrived in the United States.³⁴

Mere weeks after the Refugee Act passed, over 120,000 Cubans fled to Florida and then a steady stream of more than 20,000 Haitians arrived.³⁵ Disparate treatment arose with almost universal denial of asylum to the Haitians, while the Cubans successfully presented asylum claims based on political opinion. *HRC v. Civiletti*, 503 F. Supp. 442, 450-51 (S.D. Fla. 1980).

Then from 1981 to 1990, an estimated one million Salvadorans and Guatemalans fled their repressive governments to seek refuge in the United States.³⁶ These refugees were systematically denied asylum protections with approval rates for claims at around 3%.³⁷ These low grant rates stand in stark contrast to the asylum grant rates for Iranians (60%); Afghans fleeing Soviet invasion (40%); and Poles (32%).³⁸ Under the Reagan administration, INS and DOJ officials detained asylum seekers and pressured them to agree to return to El Salvador and Guatemala.³⁹

Other groups of refugees had the opportunity to present claims to show a fear of persecution without being detained at the border and without being pressured to give up their rights to make a claim before disinterested adjudicators. The discriminatory treatment faced by Salvadoran and Guatemalan asylum applicants was raised by lawyers, non-profits and civil society organizations, and bar associations, and was eventually settled in the 1990s in the *American Baptist Church* case.⁴⁰ If the past is any guide, implementation of procedures prior to passage of legislation was meant primarily to “send a message” rather than live up to international norms and humanitarian obligations will invite future litigation, court orders, and injunctions.

Professor Deborah Anker and Michael Posner wrote prophetically in the wake of the Refugee Act passing that “the problems raised by mass influx of asylum seekers will not be solved by overly simplistic changes in the law. While there have been and will continue to be emergency measures proposed and perhaps adopted to address this issue, the phenomenon cannot be prevented in the future. People with a fear of persecution will continue to come to this country, in search of freedom and a better life.”⁴¹ It is up to your administration to heed the lessons from history in taking an approach that treats similarly-situated people--those risking everything to leave their persecutory situations--without bias or discrimination due to country of origin.

Moreover, in 1993, the *Golden Venture* ship with almost 300 Chinese migrants smuggled on board ran into a sandbar in Queens.⁴² Other ships with refugees were interdicted in the Pacific

³³ See S. Rep. No. 590 at 19, 96th Cong., 2d Sess. 1 (1980).

³⁴ Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 60, 65 (1981).

³⁵ *Id.* at 64.

³⁶ Susan Gzesh, *Central Americans and Asylum Policy in the Reagan Era*, Migration Policy Institute, Apr. 1, 2006.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991).

⁴¹ 19 SAN DIEGO L. REV. at 65.

⁴² *The Golden Venture, Plus 100,000* (opinion), NY TIMES, June 9, 1993.

Ocean around the same time. Many of the refugees on board sought asylum based on coercive family practices in China, repressed religion, and participation in pro-democracy movements. The asylum-seekers were detained for several years in a remote county jail in York, Pennsylvania. Attempts to bring individual habeas corpus petitions were certified as a class on grounds that the Clinton administration unduly exerted political interference in their asylum claims.⁴³ Partial summary judgment for bond eligibility was granted, but it was denied on the political interference ground.⁴⁴ The Third Circuit affirmed, and eventually reversed the grant of partial summary judgment.⁴⁵

While Congress attempted to overturn the Board of Immigration Appeals precedent in *Matter of Chang*, which denied asylum to those fleeing forced abortion and sterilization, their asylum claims were systematically denied in immigration courts. After two years of being detained, while the cases were on appeal to the Board and federal courts, three female asylum seekers from the *Golden Venture* testified in Congress pursuant to subpoenas (DOJ refused to transport them without subpoenas) about their forced abortion and sterilizations for violating China's one-child policy. Several Congresspersons reprimanded the Clinton administration's response to detain and deny these legitimate applicants.⁴⁶

3. A Possible Solution with Historic Antecedents

Another option at the President's disposal - a much more humanitarian one - is to use his existing powers under section 207 of the Immigration and Nationality Act. Congress created this provision, which allows the executive branch, without additional congressional approval, to permit a limited number of individuals to enter the U.S. as refugees during an emergency situation that is justified by "grave humanitarian concerns or is otherwise in the national interest." INA § 207(b). Versions of this option have precedent. In World War II's Operation Pied Piper, millions of people, most of them children, were shipped to rural areas in Britain as well as overseas to Canada, South Africa, Australia, New Zealand, and the United States. In the early 1960s Operation Pedro Pan provided over 14,000 Cuban youths safe sanctuary in the United States.⁴⁷

Senators Jeff Flake and John McCain have included a provision in their proposal for addressing the crisis that sets aside five thousand refugee visas each for El Salvador, Honduras, and Ecuador.⁴⁸ While we do not support all elements of their proposal (particularly in country

⁴³ *Yang v. Reno*, 157 F.R.D. 624 (M.D. Pa. 1994).

⁴⁴ See *Chung v. Reno*, 886 F. Supp. 1172 (M.D. Pa. 1995) & *Yang v. Reno*, 852 F. Supp. 316 (M.D. Pa. 1994).

⁴⁵ *Yi v. Maugans*, 24 F.3d 500 (3rd Cir. 1994) & *Yang v. Maugans*, 68 F.3d 1540 (3rd Cir. 1995).

⁴⁶ *Coercive Population Control in China: Hearings Before the H. Subcommittee on International Operations and Human Rights* at 56-62, 43-50, 104th Cong (1995).

⁴⁷ See generally Dan Kowalski, *The Refugee Option Obama Will Ignore*, HUFFINGTON POST, July 5, 2014, available at www.huffingtonpost.com/dankowalski/the-refugee-option-obama-immigration_b_5559991.html.

⁴⁸ *Flake and McCain Introduce Legislation to Address Humanitarian Crisis at U.S.-Mexico Border*, July 10, 2014, <http://www.flake.senate.gov/public/index.cfm/press-releases?ID=5f00ffb7-7c6e-461e-b6b7-08b8db009395> ("Increase the number of refugee visas by 5,000 for each of El Salvador, Honduras, and Ecuador. This will encourage people to apply for status in their home country and avoid the long and dangerous journey through Mexico").

processing due to problems with it during the Haitian crisis in the 1990s⁴⁹), the idea of processing refugee claims in third countries is one worth exploring. The numbers per country should be increased, as Guatemala should be included. The bottom line is that this should be seen a fundamentally a refugee crisis.

We recognize the challenges and pressures you face as you contend work for a just solution. We hope that you will exercise your good judgment in adjusting policies to serve these children and their families, as well as the interests of the United States.

cc: The Honorable Jeh Johnson, Secretary of the Department of Homeland Security
The Honorable Eric Holder, Attorney General
The Honorable Sylvia Mathews Burwell, Secretary of the Department of Health and Human Services

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⁴⁹ Bill Frelick, *In-Country Refugee Processing of Haitians: The Case Against*, REFUGE, Dec. 2003, <http://pi.library.yorku.ca/ojs/index.php/refuge/article/viewFile/21310/19981> (“[I]n-country processing in Haiti in the early 1990s was a failure, and arguably was used as a justification for returning to persecution far more people than it saved. The very existence of a small aperture through which relatively few selected individuals will be able to pass for legal admission to the United States is likely to erode the rights of many more Haitian asylum seekers seeking to leave spontaneously and, in particular, to serve to rationalize migration control measures that seriously compromise the fundamental principles of refugee law”); Bill Frelick, *Haitian Boat Interdiction and Return: First Asylum and First Principles of Refugee Protection*, 26 CORNELL INT’L LJ. 675 (1993).

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