

Testimony of Jan C. Ting

Professor of Law, Temple University Beasley School of Law, Philadelphia (Former Assistant Commissioner, Immigration and Naturalization Service, U.S. Department of Justice)

United States House of Representatives

Committee on Oversight and Government Reform

Subcommittees on National Security and Government Operations

March 23, 2016, Rayburn House Office Building 2154, 9 a.m.

“National Security: Threats at Our Borders”

I. Introduction

I thank Chairman DeSantis and Chairman Meadows and all the members of Subcommittees on National Security and Government Operations of the U.S. House of Representatives Committee on Oversight and Government Reform for the invitation and opportunity to testify today on the adequacy and enforcement of our nation’s immigration laws.

I commend the two subcommittees for holding this hearing in light of the December 2015 report of the Government Accountability Office (GAO) finding limited capabilities at both USCIS and EOIR to detect asylum fraud, reliance on a paper-based system for asylum applications at USCIS, and the absence of clear and specific fraud detection responsibilities for USCIS asylum officers.<sup>1</sup> Committee members are aware that in FY 2014 there was an unprecedented surge of unaccompanied alien minors (UAMs) and alien minors accompanied by alien adults claiming to be parents (family units), nearly 137,000 aliens in these two categories, who illegally entered the United States through our southern border.<sup>2</sup> Initial reports suggest that we are headed for an even greater surge of UAMs and family units projected to illegally enter the United States in FY 2016.<sup>3</sup>

---

<sup>1</sup> U.S. Government Accountability Office, GAO-16-50, “ASYLUM: Additional Actions Needed to Assess and Address Fraud Risks” (2015). See also Dan Cadman, “GAO Vets Asylum Vetting and Finds It Lacking”, Center for Immigration Studies, Dec. 9, 2015, <http://cis.org/cadman/gao-vets-asylum-vetting-and-finds-it-lacking> .

<sup>2</sup> U.S. Customs and Border Protection, “Southwest Border Unaccompanied Alien Children FY 2014”, <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2014> .

<sup>3</sup> U.S. Customs and Border Protection, “United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016”, <http://www.cbp.gov/newsroom/stats/southwest->

It seems almost self-evident that bureaucratic weaknesses in our border security combined with high numbers of undocumented aliens attempting to illegally enter the United States present compelling opportunities for foreign terrorists and criminals to gain entry to this country, and an enormous security risk for the American people.

U.S. Customs and Border Protection (CBP) has reportedly apprehended members of known Islamist terror organizations crossing our southern border, including Somali members of al-Shabab and other terrorist groups in Somalia, and members of terrorist organizations in Sri Lanka and Bangladesh. Undocumented aliens from 35 countries in the Middle East and Asia have been arrested in the Rio Grande Valley in recent years.<sup>4</sup> Syrians in possession of stolen European passports intending to gain entry to the U.S. have been reported arrested in Central America,<sup>5</sup> and Syrians have been arrested at our southern border.<sup>6</sup>

So the concern of Congress for border security and how it can be improved is both timely and appreciated.

## II. Expedited Removal

Before 1996, unauthorized aliens arriving in the U.S. could delay their removal by making a claim for asylum, which because of backlogs in processing and a shortage of detention space, often resulted in release on their own recognizance with an order to appear for a removal hearing before an immigration judge at a later date when their asylum claim would be considered. Most such arriving aliens failed to comply with their orders to appear for their scheduled hearing. In a famous report on the television program “60 Minutes” on CBS, Leslie Stahl showed that undocumented aliens were arriving at Kennedy International Airport every single day, and were routinely being released into the population the day of their arrival without any background check or assurance that they would appear for their scheduled hearing.

---

[border-unaccompanied-children/fy-2016](#) . See also Caroline May, “Border Surge Accelerates – On Pace to Exceed 177,000 Migrants By End of Fiscal Year”, January 12, 2016, <http://www.breitbart.com/big-government/2016/01/12/border-surge-accelerates-on-pace-to-exceed-177000-migrants-by-end-of-fiscal-year> .

<sup>4</sup> “Texas Officials Warn of Immigrants with Terrorist Ties Crossing Southern Border”, Washington Post, Feb. 26, 2015, <https://www.washingtonpost.com/blogs/govbeat/wp/2015/02/26/texas-officials-warn-of-immigrants-with-terrorist-ties-crossing-southern-border> .

<sup>5</sup> Alan Gomez, “Report: U.S.-bound Syrians arrested in Honduras with fake passports”, USA TODAY, Nov. 19, 2015, <http://www.usatoday.com/story/news/world/2015/11/18/report-us-bound-syrians-arrested-honduras-fake-passports/76016812/> .

<sup>6</sup> Beth Breeding, “Goodlatte & Grassley Press DHS for Info on Threat of Isis Entering U.S. at SW Border”, Nov. 24, 2015, [http://goodlatte.house.gov/press\\_releases/818](http://goodlatte.house.gov/press_releases/818) .

In 1996 Congress responded to that situation by enacting “expedited removal” for arriving aliens who either lacked proper documentation or engaged in misrepresentation in attempting to enter the U.S., a reform which had long been requested by U.S. immigration enforcement authorities. The new provision nominally provided for the removal of such aliens without a formal removal hearing and without the order of an immigration judge.

But in one of the classic bi-partisan compromises for which Congress is alternately praised and condemned, Congress combined tough, mandatory removal with an enormous loophole. The statute enacted by Congress provided that, “If an immigration officer determines that an alien... who is arriving in the United States or is described in clause (iii) is inadmissible under section 212(a)(6)(C) (misrepresentation) or 212(a)(7) (without documents), the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum... or a fear of persecution.”<sup>7</sup> Clause (iii) of the new statute permitted the Attorney General to designate other, non-arriving aliens for expedited removal if they could not prove 2 years of physical presence in the United States.

Clause (iii) was invoked in 2002 to extend expedited removal to aliens who arrived by sea but don’t have 2 years of physical presence.<sup>8</sup> Expedited removal was expanded again in 2004 to aliens who entered without inspection, within 100 miles of a land border, and who can’t prove continuous presence for more than 14 days.<sup>9</sup> That rule was further extended to within 100 miles of a maritime border in 2006.<sup>10</sup>

So expedited removal now clearly applies to recent alien arrivals near our land and maritime borders. The problem is the loophole for any alien who “indicates either an intention to apply for asylum... or a fear of persecution.”

The statute provides that aliens subject to expedited removal but who indicate an intention to apply for asylum or a fear of persecution shall be referred to an asylum officer for an interview. The asylum officer shall conduct interviews of referred aliens either at a port of entry “or at such place designated by the Attorney General.” If the asylum officer determines an alien has “a credible fear of persecution” then “the alien shall be detained for further consideration of the application for asylum.” If the asylum officer determines an alien does not have a credible

---

<sup>7</sup> INA Section 235(b)(1)(A). 8 USC Section 1225(b)(1)(A).

<sup>8</sup> 67 Fed. Reg. 68924 (2002).

<sup>9</sup> 69 Fed. Reg. 48877 (2004).

<sup>10</sup> “DHS Announces Expedited Removal Along Northern Border and All Coastal Areas”, 83 Interpreter Releases 253 (2006).

fear of persecution, “the officer shall order the alien removed from the United States without further hearing or review.”<sup>11</sup>

That sounds tough until a second loophole kicks in which provides that even these aliens determined by an asylum officer to lack a credible fear of persecution, “upon the alien’s request” shall receive a “prompt review by an immigration judge” of the lack of credible fear determination by the asylum officer.<sup>12</sup> So immigration judges are taken out of the expedited removal process at the beginning, only to be brought back in at the end before expedited removal can actually be executed.

### III. Credible Fear

The number of “credible fear” referrals has increased from less than 5,000 in FY 2008 to over 36,000 in FY 2013, to over 51,000 in the peak year of the border surge in FY 2014. While the number of referrals dipped to just over 48,000 in FY 2015, the 21,492 referrals received in the first quarter of FY 2016 alone suggest that we may be headed for a new record this year.<sup>13</sup> 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.<sup>14</sup> So credible fear has not been very effective at reducing the numbers of unauthorized aliens waiting in line for immigration judge hearings.

The concept of “credible fear” was instituted by the former Immigration and Naturalization Service as an informal device for screening the large number of Haitians interdicted on boats on the high seas headed for the United States after the Haitian coup of 1991. The idea was that people interdicted on boats who could not even articulate a credible fear that might qualify them for asylum would be repatriated to Haiti without further deliberation, and that Haitians who were able to articulate a credible fear of persecution would receive full asylum interviews either at the Guantanamo Naval Base in Cuba or elsewhere.

As it turned out, this informal screening out device had a short life, quickly superseded by events. Because the increasingly large number of Haitian migrants on boats became unmanageable, President Bush in 1992 issued an executive order that all migrants interdicted on the high seas should be repatriated directly without any refugee processing at all. The executive

---

<sup>11</sup> INA Section 235(b)(1)(A), (B). 8 USC Section 1225(b)(1)(A), (B).

<sup>12</sup> INA Section 235(b)(1)(B)(iii)(III). 8 USC Section 1225(b)(1)(B)(iii)(III).

<sup>13</sup> Data provided by U.S. Citizenship and Immigration Services (USCIS) on March 10, 2016. See also Cindy Chang and Kate Linthicum, “U.S. seeing a surge in Central American asylum seekers”, Los Angeles Times, Dec. 15, 2003, <http://articles.latimes.com/2013/dec/15/local/la-me-ff-asylum-20131215> .

<sup>14</sup> Ibid.

order was challenged in court as a violation of both U.S. and international refugee law. The district court upheld the executive order against the challenge. The U.S. Court of Appeals for the Second Circuit reversed the district court. And the U.S. Supreme Court by an 8 to 1 majority vote reversed the Second Circuit and upheld the executive order, concluding that neither U.S. nor international refugee law limits the President’s power to repatriate undocumented aliens intercepted on the high seas.<sup>15</sup>

So when Congress enacted “expedited removal” in 1996, I was surprised to see that Congress had incorporated the concept of “credible fear” into the statute, possibly in the hope that it might again serve as a screening-out device to reduce the number of arriving and recently arrived undocumented aliens allowed to join the line waiting to make asylum claims in removal proceedings before immigration judges. Congress for the first time provided a statutory definition of “credible fear” as “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”.<sup>16</sup>

Congress also as part of the enactment of “expedited removal” for the first time included a definition of “asylum officer” in the statute as meaning “an immigration officer who—(i) has had professional training in country conditions, asylum law, and interview techniques comparable to that provided to full-time adjudicators of application under section 208 (asylum), and (ii) is supervised by an officer who meets the condition described in clause (i) and has had substantial experience adjudicating asylum applications.”<sup>17</sup>

#### IV. Recommendations. What should be done?

- A. All Border Patrol and other Customs and Border Protection officers should receive training in country conditions, asylum law, and interview techniques as part of their basic training. All current Border Patrol and other CBP officers should be offered such training if they did not receive it in basic training. Such trained and qualified officers should be authorized by statute to make asylum adjudications as part of the expedited removal process.
- B. All references to “credible fear”, and involvement of immigration judges in expedited removal should be removed from the statute. INA Section 235(b)(1)(B)(iii)(I) could then be amended to read: “If an asylum-trained officer determines that an alien subject to INA Section 235(b)(1) is not a refugee as defined in INA Section 101(a)(42), the officer shall

---

<sup>15</sup> Sale v. Haitian Centers Council, 509 U.S. 155 (1993).

<sup>16</sup> INA Section 235(b)(1)(B)(v). 8 USC Section 1225(b)(1)(B)(v).

<sup>17</sup> INA Section 235(b)(1)(E). 8 USC Section 1225(b)(1)(E).

order the alien removed from the United States without any further hearing or review.” Such trained officers should also be able to recommend asylum grants in appropriate expedited removal cases subject to supervision from an officer who “has had substantial experience adjudicating asylum applications” and who can exercise the statutory requirement of discretion in granting asylum on behalf of the Secretary of Homeland Security.

- C. Mandatory detention should be explicitly required by statute for all aliens in the U.S. subject to expedited removal until they are either removed or granted legal status. Increased reliance should also be placed on INA Sec. 235(b)(2)(C) which authorizes the return of arriving aliens to contiguous territory from which they arrived pending immigration proceedings. The statute should be clarified to specify that, “In the case of any alien who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Secretary of Homeland Security may return the alien to that territory pending any proceeding to determine the alien’s immigration status.”
- D. Just as the credible fear device may have been quickly devalued as alien smugglers gamed the system to spread the stories that “work” in demonstrating credible fear, so the asylum statute itself, INA Section 208, perhaps a useful addition to our immigration law when enacted in 1980, may also have lost value as the stories have spread that “work” in convincing an adjudicator to grant asylum. Two years ago in testimony to another committee of the U.S. House of Representatives on February 11, 2014, I suggested that making asylum claims has become commonplace as a path to an immigrant green card for aliens without other alternatives, and that false asylum claims have become common and often deceive U.S. asylum adjudicators into granting asylum.<sup>18</sup> The perception that false asylum claims often work and at least delay removal of illegal aliens from the U.S., sometimes for long periods, adds to the benefit side of the cost/benefit analysis attracting illegal immigration to the U.S., and adds to the administrative and processing costs of immigration law enforcement and the U.S. taxpayers.

How did the U.S. meet its international law obligations under the Convention and Protocol on the Status of Refugees before 1980? The answer is through withholding of deportation, now called withholding of removal, INA Section 241(b)(3), 8 USC Section 1231(b)(3). That statute prevents the removal of an alien to any country if, “the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.”

---

<sup>18</sup> <http://judiciary.house.gov/cache/files/ce51425e-3e89-4007-a98d-7153ac6f2b4c/jan-c-ting-asylum-fraud-testimony-final.pdf>.

I would like to see Congress consider enhancing Section 241(b)(3) by adding to it some of the benefits of asylum like work authorization and adjustment of status to legal permanent resident, and the following to join of a spouse and minor children, with the goal of replacing the asylum statute with a single enhanced withholding of removal state for the protection of refugees. That statute has and will have a higher burden of proof than the asylum statute,<sup>19</sup> and should therefore be less susceptible to fraud.

That concludes my testimony. I'll close by again thanking Chairman DeSantis, Chairman Meadows, and all the members of the two subcommittees for the invitation and opportunity to testify today.

---

<sup>19</sup> See *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987).