On December 13th, the Lawyers Committee submitted the following comments to the INS denouncing the November 13th notice in the Federal Register authorizing expedited removal for Haitian and other migrants who arrive by sea (with the exception of Cubans). The notice will result in an expansion of unfair deportation and detention procedures to Haitian and other sea arrivals.

Comments of the Lawyers Committee for Human Rights
On INS No. 2243-02 Notice of Designation
Expansion of Expedited Removal to Sea Arrivals

On November 13, 2002, the Department of Justice (DOJ) and the Immigration and Naturalization Service (INS) issued a notice in the Federal Register (Order No. 2243-02, 67 Fed. Reg. 68924-26) authorizing expedited removal for Haitian and other migrants who arrive by sea – with the exception of Cubans. The Notice authorizes the INS to place in expedited removal: individuals arriving in the U.S. by sea by boat or other means, who have not been admitted or paroled, and who have not been physically present in the U.S. for a continuous period of two years.

As a result of the Notice, future sea arrivals will face an increased risk of mistaken deportation under the expedited removal process and will also be deprived of the chance to seek release from detention from an immigration judge. Issued one week after President Bush expressed his concern that "Haitians and everybody else ought to be treated the same way," this change will unfortunately ensure unfair treatment for future Haitian asylum seekers.

In the Notice, the DOJ claims that "placing these individuals in expedited removal proceedings and maintaining detention for the duration of all immigration proceedings, with limited exceptions, will ensure prompt immigration determinations and ensure removal from the country of those not granted relief in those cases, *while at the same time protecting the rights of the individuals affected*." 67 Fed. Reg. at 68924 (emphasis added). This is simply not the case. This change – which will subject people to unfair procedures and prolonged detention -- will not protect, but will instead violate, the rights of the affected asylum seekers and other individuals.

The Lawyers Committee urges the Department of Justice and the INS to immediately **reverse this decision**, and not subject any additional categories of individuals to expedited removal. The Lawyers Committee also urges that the INS meet with organizations that work with refugee and immigrants to discuss concerns about this decision as well as issues relating to the implementation of the expanded expedited removal power.

The Lawyers Committee's Expertise on

Expedited Removal and Detention of Asylum Seekers

For more than twenty years, the Lawyers Committee for Human Rights has worked to ensure protection of the rights of refugees, including the right to seek and enjoy asylum. The Lawyers Committee grounds its work on refugee protection in the international standards of the Convention relating to the Status of Refugee and its Protocol and other international human rights instruments, and we advocate adherence to these standards in U.S. law and policy.

The Lawyers Committee operates one of the largest and most successful pro bono asylum representation programs in the country. With the assistance of over 900 volunteer attorneys, the Lawyers Committee provides legal representation, without charge, to hundreds of refugees each year. Our extensive experience dealing directly with refugees seeking protection in the United States is the foundation of our advocacy work, and informs the comments that follow below.

The Lawyers Committee opposed certain provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 – including the expedited removal provisions – because we believed that those provisions would severely impede the right of refugees to seek and enjoy asylum and would result in the denial of protection to victims of torture and persecution. The Lawyers Committee commented extensively on the proposed and interim regulations issued under the 1996 law.[1]

The Lawyers Committee has issued two reports detailing our concerns about expedited removal. The first report, *Slamming the Golden Door: A Year of Expedited Removal*, was released in March 1998 and outlined our concerns about the expedited procedures. The second report, *Is This America? The Denial of Due Process to Asylum Seekers in the United States*, issued in October 2002 (and available on our website at www.lchr.org), extensively documented many of the flaws in the expedited removal process – presenting numerous examples of asylum seekers who were unfairly treated under the procedures.

The Lawyers Committee has, since the early 1990s, monitored the INS's detention practices relating to asylum seekers. The Lawyers Committee has (1) issued reports on the INS's efforts in the early 1990s to implement parole procedures for asylum seekers,[2] (2) filed a Petition for Rulemaking in 1996 which detailed the deficiencies in the INS's implementation of the asylum parole program and requested that the Department of Justice issue regulations codifying the asylum parole guidelines, (3) published a report in 1999, entitled *Refugees Behind Bars, The Imprisonment of Asylum Seekers in the U.S.*, which documented the unfair detention of asylum seekers in the U.S., and (4) just this

[1] *See* Lawyers Committee for Human Rights, Comments on INS No. 1788-96; AG Order No. 2071-97 (July 7, 1997); Lawyers Committee for Human Rights, Comments on INS No. 17-88; AG Order No. 2065 No. 2065-96 (Feb. 3, 1997) (on file with Lawyers Committee for Human Rights).

[2] Lawyers Committee for Human Rights, *Interim Report on the Pilot Parole Project of the Immigration and Naturalization Service* (New York: 1990) (The Lawyers Committee had facilitated the involvement of legal groups, voluntary agencies and local community groups with the pilot project.); Lawyers Committee for Human Rights, *Detention of Refugees: Problems in Implementation of the Asylum Pre-Screening Officer Program* (New York: 1994).

year, released a comparative survey detailing the procedures of the U.S. and other governments in detaining asylum seekers, including the procedures – if any – that serve as checks on arbitrary detention.

The U.S.'s Obligation to Protect Refugees from Persecution and Arbitrary Detention

The modern refugee protection regime developed in the wake of the World War II refugee crisis.[3] Between 1948 and 1951, the Convention Relating to the Status of Refugees ("1951 Convention") was drafted to establish protections for those who had well-founded fear of being persecuted as a result of events occurring before January 1, 1951.[4] Then in 1967, the Protocol Relating to the Status of Refugees ("1967 Protocol") undertook to ensure that the protections of the 1951 Convention were applied to all refugees, regardless of the 1951 Convention's temporal and geographic limitations.[5]

As a Member State to the 1967 Protocol, the United States is prohibited, under Article 33 of the Convention, from returning a refugee to any country in which the refugee's "life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion." Article 14 of the Universal Declaration of Human Rights guarantees all persons the right to seek and enjoy asylum.

The Refugee Act of 1980 amended the Immigration and Nationality Act (INA) to bring the United States into conformity with the analogous provisions of the 1951 Convention.[6] Indeed, the Refugee Act specifically incorporated the Convention's definition of a refugee.[7]

The United States is also a signatory to the Convention Against Torture. Article 3 of the Convention Against Torture is unqualified in providing:

> "No State Party shall expel, return (refouler) or extradite a person to another State where there are substantial grounds for believing that he [or she] would be in danger of being subjected to torture.

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[3] *See* Robert L. Newmark, *Non-Refoulement Run Afoul: The Questionable Legality of Extraterritorial Repatriation Programs*, 71 WASH. U.L.Q. 833, 863 (1993) (noting that "the aftermath of World War II illustrated the importance of providing some protection for those in flight").

[4] 189 U.N.T.S. 2545.

[5] 19 U.S.T. 6224.

[6] *See Cardoza-Fonseca*, 480 U.S. at 46-37 ("If one thing is clear from the legislative history of [the Refugee Act], it is that one of the Congress' primary purposes was to bring United States refugee law into conformance with the 1967 [Protocol].")

[7] *Id*. at 437 (comparing meaning of refugee under Refugee Act with meaning under the 1951 Convention and holding that Refugee Act adopted the Convention's definition of refugee).

> For the purposes of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights." [8]

Article 3 was incorporated into domestic law when Congress passed and the President signed the Foreign Affairs Reform and Restructuring Act (FARRA) in October 1998:

> It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.[9]

The International Covenant on Civil and Political Rights ("ICCPR"), ratified by the United States in 1992, formally codifies a number of the rights set forth in the Universal Declaration of Human Rights. Article 9(4) of the ICCPR provides that: "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may, decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." ICCPR Art. 9(4), *adopted* Dec. 19, 1966, *entered into force* March 23, 1976, G.A. res. 2200A (XXI), U.N. Doc. A/6316, 999 U.N.T.S. 171.[10] *See also* Universal Declaration of Human Rights,[11] *adopted* Dec. 10, 1948, U.N.G.A. Res. 217A (III), U.N. Doc. A/810, Art. 9 ("everyone has the right to life, liberty and security of person," and "no one shall be arbitrarily arrested, detained, or exiled").

Use of Flawed Expedited Removal Process Should Not be Expanded

Expedited removal is an unfair process that lacks sufficient safeguards to ensure that genuine refugees are not mistakenly returned to face persecution. Under the procedure, immigration officers are given the power to order the deportation of individuals who arrive in the U.S. without proper documents (as is the case with many genuine refugees) – a power that had previously been entrusted only to trained immigration judges. There is no independent review of this deportation order and the GAO's study revealed that

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[8] Article 3, Convention Against Torture, adopted Dec. 10, 1984, opened for signature Feb. 4, 1985, G.A. Res. A/Res/39/46 (1984), reprinted at S. Treaty Doc. 100-20 (1990).)

[9] *See* FARRA, Sec. 2242(a), Pub.L. No. 105-277, Div. G, Oct. 21, 1998.

[10] The ICCPR, which has been ratified by 148 countries (*see Status of Ratifications of the Principle International Human Rights Treaties* (Jul. 10, 2002), *available at* www.unchr.ch/html/menu3/b/a_ccpr.htm), formally codifies a number of the rights set forth in the Universal Declaration of Human Rights.

[11] The Universal Declaration of Human Rights, though not a treaty, is a well-recognized and respected articulation of human rights that can be valuable in statutory construction. *See Filartiga v. Pena-Irala*, 630 F.2d 876, 883 (2d Cir. 1980) (Universal Declaration an "authoritative statement of the international community"); *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981). *See also* Restatement (Third) of Foreign Relations Law § 701 ("It is increasingly accepted that [parties] to the [United Nations] Charter are legally obligated to respect some of the rights recognized in the Universal Declaration.").

some immigration supervisors don't even properly review these deportation orders before the individuals were deported.[12]

As a result of the expedited removal procedures, numerous individuals have been deported even though they have expressed a fear of return. In nearly 6% of the expedited removal files reviewed by the GAO at JFK Airport (which reported receiving nearly one-forth of all credible fear cases), individuals who indicated a fear of return were not referred for credible fear interviews.[13] Human rights groups and the press have documented individual cases of asylum seekers being mistakenly deported to their countries of persecution under expedited removal – including an Albanian rape survivor and a Colombian asylum seeker who were returned to countries where their lives were in danger.[14]

The flaws in expedited removal, and the resulting mistreatment and mistaken deportation of asylum seekers, have been extensively documented by the Lawyers Committee,[15] by The Expedited Removal Study, an academic study that released a series of comprehensive reports on expedited removal,[16] by immigration experts[17] and by the press.[18] Among the many voices calling for repeal of expedited removal are two major bodies established by Congress and by the president: the bipartisan Commission on Immigration Reform and the Advisory Committee on Religious Freedom Abroad to the Secretary of State and to the President of the United States. The Commission on Immigration Reform, referring to expedited removal, urged "immediate correction of certain provisions [in the 1996 law] that can harm bona fide asylum seekers and undermine the efficiency of the asylum system." The Advisory Committee on Religious Freedom, created after the implementation of expedited removal, called for its repeal in its final report to the secretary of state in May 1999. [19]

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[12] U.S. GAO, Illegal Aliens: Opportunities Exist to Improve the Expedited Removal Process, at 40-42, 46, 103 (September 2000); The Expedited Removal Study, Evaluation of the GAO's Second Report on Expedited Removal, October 2002 at 30 (see note 16 below).

[13] *Id.*

[14] *See Is This America* at 57-58; Eric Schmidt, *When Asylum Requests are Overlooked*, N.Y TIMES, Aug. 15, 2001. Articles relating to the Albanian rape survivor appeared *The New York Times* on Sept. 20, 1997 and Jan. 14, 1998.

[15] Lawyers Committee for Human Rights, *Is This America? The Denial of Due Process to Asylum Seekers in the United States*, Oct. 2002.

[16] The Expedited Removal Study is a project of the Center for Human Rights and International Justice at the University of California, Hastings College of Law. The Study released comprehensive reports in 1998, 1999, and 2000, and a second report in October 2002 which evaluated the GAO's report. The reports are available at www.uchastings.edu/ers.

[17] *See* M. R. Pistone and P. G. Schrag, *The New Asylum Rule: Improved but Still Unfair*, 16 GEO. IMMIGR. L.J. 49, Fall 2001.

[18] *See e.g.*, Eric Schmidt, note 14 above; Rick Tulsky, *Power Granted INS inspectors to deny entry sparks concern*," SAN JOSE MERCURY NEWS, Dec. 10, 2000; Susan Sachs, *INS Inspectors are Judge, Jury and Deporter Report Says*, N.Y. TIMES, Oct. 6, 2002.

[19] U.S. Commission on Immigration Reform, *U.S. Refugee Policy: Taking Leadership*, June 1997, at 38; *Final Report of the Advisory Committee on Religious Freedom Abroad to the Secretary of State and to the President of the United States*, May 17, 1999, at 45.

At the time the expedited removal provisions were initially implemented, the Department of Justice wisely decided not to apply the flawed expedited removal process to people who were already within the U.S. and had not been formally admitted or paroled. This was the correct decision. The Lawyers Committee urges that the DOJ and INS now reverse their November 2002 decision to expand the use of expedited removal to sea arrivals.

Deprivation of Immigration Judge Review of Detention

By applying expedited removal to future asylum seekers who were not previously subject to the process, the INS will also be denying them the chance to challenge their detention before an immigration judge, a right that some – like the Haitians who arrived in Florida in late October 2002 – would otherwise have because, as non-citizens who have not been admitted or paroled, they are eligible for a bond re-determination hearing before an immigration judge. Indeed, the Department of Justice makes clear, in the Federal Register Notice, that the effect of this change will be to deprive affected asylum seekers of a bond re-determination hearing before an immigration judge. *See* 67 Fed. Reg. at 68925.

Under international law, an asylum seeker is entitled to an individualized determination of the necessity of his or her detention and a review of the detention decision by an independent administrative or judicial authority.[20] The U.S.'s detention procedures for asylum seekers who are subject to expedited removal are out of step with international standards that prohibit arbitrary detention. Asylum seekers who have been subject to expedited removal are not permitted to challenge their detention before a judge and there are no limits on the length of their detention. In fact, asylum seekers are sometimes detained for years in the U.S. as they pursue their asylum claims. Human rights groups, the press, practitioners, and commentators have repeatedly documented the unfairness and injustices that plague the U.S.'s detention practices for asylum seekers.[21]

This change, which has the effect of depriving asylum seekers of even a limited semi-independent review of their detention, is in direct violation of international law.

Discriminatory Detention Directed at Haitians Violates the Law

[20] *See* ICCPR, Article 9(4)("Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may, decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."); *A. Australia*, UN Human Rights Commission, Communication No. 560/1988, Apr. 2, 1990; United Nations High Commissioner for Refugees, Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers, Feb. 1999.

[21] *See* Frederick N. Tulsky, Uncertain *Refuge: Asylum Seekers Face Tougher U.S. Laws, Attitudes*, SAN JOSE MERCURY NEWS, Dec.10, 2000; Mirta Ohito, *Inconsistency at INS*, N.Y.TIMES, June 22, 1998; Toby Beach & Peter Yost, *INS Jailing Many Asylum Seekers*, BOSTON GLOBE, Nov. 17, 1998, at A27; *see also* Human Rights Watch, *Locked Away: Immigration Detainees in Jails in the United States* (September 1998); Lawyers Committee for Human Rights, *Refugees Behind Bars* (New York: 1999); Women's Commission for Refugee Women and Children, *Forgotten Prisoners: A Follow-Up Report on Refugee Women Incarcerated in York County*, Pennsylvania (July 1998).

The U.S. government has failed to renounce its discriminatory detention practices directed at Haitian asylum seekers. The INS will no doubt continue to detain Haitian asylum seekers in a discriminatory manner.

While the INS may contend that all asylum seekers -- other than Cubans -- will be treated the same as a result of this change, it is clear that this change is aimed directly at Haitians. This change will simply give the INS even greater power to discriminatorily and arbitrarily detain future Haitian asylum seekers – in circumstances in which there will be no chance that an immigration judge might order the asylum seekers released on bond.

The principle of non-discrimination is central to both the Refugee Convention and the ICCPR. Article 3 of the Refugee Convention requires signatory nations to "apply the provisions of [the] Convention to refugees without discrimination as to race, religion or country of origin." As the UNHCR has noted:

> The drafters of the 1951 Convention adopted as one of the central principles of international refugee protection the principle of non-discrimination. It is embodied in Article 3 of the Convention as one of the non-derogable articles.

UNHCR, *Note on International Protection* 7. *See also* UNHCR Detention Guidelines ¶ 3 (Refugee Convention prohibits states from discriminating against refugees on the bases of their race, religion, or *country of origin*). In accordance with this central tenet, the UNHCR Detention Guidelines recommend that any decision to detain an asylum seeker should "only be imposed in a non-discriminatory manner." UNHCR Detention Guidelines ¶ 3. A group of international experts, which was convened by UNHCR in November 2001 to examine issues relating to Article 31 of the Refugee Convention, agreed, and specifically concluded that "[r]efugees and asylum seekers should not be detained on the grounds of their national, ethnic, racial or religious origins . . . "). Summary Conclusions of November 2001 Roundtable, ¶ 11(c), *available at* www.unhcr.ch.

Consistent with the Refugee Convention, the ICCPR obliges all contracting states to ensure to "all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant without distinction of any kind . . ." ICCPR, Art. 2(2). The ICCPR also specifies that this principle of non-discrimination includes national or social origin, birth or other status:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or

> other opinion, national or social origin, property, birth or other status.

ICCPR, Art. 26. Signatory states are thus required to prohibit racial and national origin discrimination in all areas subject to their jurisdiction, including in their detention policies.

This change, which advances the INS's discriminatory policy of detaining Haitians en masse, is contrary to the terms of these international instruments and therefore inconsistent with international law.

National Security

The Department of Justice's claim that a "surge" in illegal migration by sea somehow "threatens national security" by diverting Coast Guard resources is both disingenuous and troubling. As detailed in the comments filed by the Florida Immigrant Advocacy Center, U.S. government interdiction statistics do not indicate any mass migration. This Order was a disproportionate response to the arrival of two boats – one in 2001 and one nearly a year later in late October 2002. The arrival of these two boats, nearly a year apart, can hardly be characterized as a threat to our nation's security -- a point confirmed by the White House's pronouncement that the Coast Guard determined that the most recent vessel did not present a threat to U.S. security. (Comments of White House Press Secretary, October 30, 2002.) At a time when there have been true threats to national security, the attempt to use the phrase "national security" to justify measures that are being taken for political reasons – and that will have the effect of depriving innocent asylum seekers of their rights – is truly disturbing.

Use of Detention to Deter Asylum Seekers is Impermissible Under International Law

The INS has stated that this change is intended to "assist in deterring surges in illegal migration by sea"; but international standards make clear that detaining asylum seekers for reasons of deterrence is not acceptable.

A policy bottomed on deterrence by definition precludes the fair and individualized review of the necessity for detention called for by, *inter alia*, the Refugee Convention and ICCPR, and, as various authorities reviewing the issue have agreed, is inconsistent with international law.

In its formal detention guidelines, and in other pronouncements, the UNHCR has repeatedly emphasized that detention of asylum seekers for the purpose of deterrence is contrary to the norms of international refugee law. The UNHCR Detention Guidelines, as revised in February 1999, specifically state that:

> Detention of asylum seekers which is applied … as part of a policy to deter future asylum seekers is contrary to the principles of international protection. Under no

> circumstances should detention be used as a punitive or disciplinary measure for failure to comply with administrative requirements or breach of reception center, or refugee camp or other institutional restrictions.

UNHCR Detention Guidelines ¶ 3. *See also* UNHCR Executive Committee, *Note on International Protection*, A/AC.96/643, ¶ 29 (Aug. 9, 1984) (while detention may be justified both with regard to individual asylum seekers or a large-scale influx, this is not the case where asylum seekers are detained with the sole object of deterring further arrivals).

Most recently, in its April 15, 2002 advisory opinion on the INS's detention of asylum seekers in South Florida -- issued in response to inquiries regarding the propriety of Respondents' post-November 2001 Haitian parole policy -- the UNHCR emphasized that "[t]he detention of asylum seekers in furtherance of a policy to deter future arrivals does not fall within any of the exceptional grounds for detention and is contrary to the principle underlying the international refugee protection regime" and that "detention for the purpose of discouraging further arrivals cannot be justified."

Refugee law experts have also concluded that detention for deterrent purposes is inconsistent with international law.[22] In fact, a group of international law experts, which was convened by UNHCR in November 2001 to examine issues relating to Article 31 of the Refugee Convention, specifically determined that "[r]efugees and asylum seekers should not be detained . . . for the purposes of deterrence." See Summary Conclusions on November 2001 Roundtable on Article 31, ¶ 11 (c), *available at* www.unhcr.ch.

Concerns About the Implementation of the Order

The Lawyers Committee urges the INS to meet with non-profit organizations that work with refugees and other non-citizens who might be subjected to the expanded expedited removal authority. A meeting would be essential in order to discuss the many issues that will arise in connection with the implementation of this Order. Organizations that work with refugees and other non-citizens will be able to assist the Service in ensuring that it has a full understanding of all of the potential issues that could arise under the Order.

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[22] *See* Guy S. Goodwin-Gill, *International Law and the Detention of Refugees and Asylum Seekers*, INT'L MIGRATION REV., Vol. 20, No. 2 (1986) ("The detention of refugees and asylum seekers is never an appropriate solution to their plight. The power to detain must be related to a recognized object or purpose, and there must be a reasonable relationship of proportionality between the end and the means. Detention as part of a program of "human deterrence" is unlikely ever to be either legitimate or humane."); Arthur C. Helton, *The Legality of Detaining Refugees in the United States*, 14 N.Y.U. REV. LAW & SOC. CHANGE 353, 372-80 (1986); Arthur C. Helton, *Detention of Refugees and Asylum Seekers: A Misguided Threat to Refugee Protection*, in Gil Loescher, *Refugees and International Relations* (Oxford Univ. Press, Oxford: 1989) ("Detention for purposes of deterrence . . . is legally questionable under Articles 31 and 33 of the United Nations Convention and Protocols Relating to the Status of Refugees, which prohibit the imposition of penalties and restrictions on movements, as well as refoulement.").

Prior to the initial effective date of expedited removal in April 1997, the Service met on several occasions with NGOs in order to discuss the numerous issues relating to implementation. The meetings were constructive and helpful for both the Service and for organizations that work with asylum seekers and refugees.

While it is impossible to fully comment on the many issues that could arise in the implementation of this Order, we will outline a few concerns and suggestions preliminarily.

Scope of Order

The Order is clear in that it only applies to individuals who arrive by sea. The term "by sea" should not be interpreted inappropriately broadly, and should absolutely not be applied to individuals who arrive by crossing other bodies of water.

Burden of Proof

The Order places the burden of proof on non-citizens with respect to only one issue – the issue of continuous two-year presence.

In all other respects, the burden of proof falls squarely on the Service to prove that the individual is subject to the Order. For instance, the burden falls on the Service to prove that the individual in fact (1) arrived "by sea," (2) has not been "admitted or paroled," (3) is not an alien crewmen or stowaway, (4) is not a Cuban citizen or national, and (5) is otherwise subject to the Order. The burden on the Service should be that of "clear and convincing evidence" given the very serious consequences of applying expedited removal. For instance, before this extraordinary power can be invoked, the Service must have clear and convincing evidence establishing that the particular individual was on a particular boat.

On the issue of two-year residence, the one issue where the Order does indicate that the burden falls on the individual non-citizen, we urge that this language be changed so as to instead place the burden on the Service. To the extent the burden remains on the individual, the burden should be met by the individual's statement that they arrived in a manner other than by sea. Any more complicated or higher standard would not be workable. The inquiry on two-year residence should only be conducted once is has been established that the other criteria subjecting the individual to the Order have been met.

For instance, the application of the "clear and convincing" evidence standard, in the context of proving compliance with the filing deadline, has resulted in many asylum seekers who have in fact complied with the filing deadline being referred for failure to prove that they did comply. In the filing deadline context moreover, asylum seekers have a chance to submit evidence (both before and sometimes after their asylum office interviews, to be represented by counsel, and will be referred only to regular removal proceedings, rather than expedited removal, if the standard is not met. This situation is entirely different. There may be no real opportunity to submit evidence, and the

consequences of a finding that two-year residence has not been proved will result in an extraordinarily serious consequence: expedited removal and detention.

Officers Entrusted with this Power

The power to deport someone under expedited removal is, as discussed above, an extraordinary power – one that has already resulted in mistaken deportations and other improper results. This extraordinary power should not be entrusted to individual enforcement officers. Only high level supervisory officers should be permitted to exercise this power, and as noted below, only with the advance approval of the officer's supervisor and by officials at INS headquarters who are charged with oversight of expedited removal.

Counsel and Family Involvement

Individuals should be given the chance to consult with attorneys, with families or other persons of their choosing, prior to the interview at which it will be determined if they should be deported under expedited removal. Individuals should have the right to have legal counsel and/or a person of their choosing present at this interview.

The Interviews

The interviews, at which it is determined if someone is subject to expedited removal, must take place in an appropriate place and manner. They must take place in INS offices, in a private and confidential interview space, and with appropriate safeguards. In our numerous reports and prior comments, we have detailed our recommendations for the appropriate conduct of these interviews.

Oversight and Training

Despite the training conducted for immigration inspectors, mistakes and abuses (discussed above) have plagued the use of expedited removal. While the lack of due process safeguards will always lead to mistakes, training is still critical and absolutely necessary. Officers who are entrusted with this power must receive extensive initial – and continuing – training on the used of expedited removal.

Before an individual can be subject to expedited removal, the supervisory officer should be required to obtain approval from his or her supervisor, from the district director, and from the expedited removal working group at INS headquarters. This approval must be obtained before the deportation is ordered. .

Translation

In our prior comments, and in our reports on expedited removal, we have detailed the many problems that have resulted from the use of deficient translation. Many mistakes have been caused by the lack of competent translation. We urge that every effort be

made to have live interpreters of the highest quality – rather than telephonic interpretation.

Application at the Asylum Office

When individuals affirmatively identify themselves to the INS by seeking asylum, they **should not** be subjected to the provisions of this Order. Asylum seekers who affirmatively identify themselves to the INS by filing an asylum application should not be subject to expedited removal or to mandatory detention. While this approach is consistent with the Order, the Commissioner should issue further clarification to make this clear if necessary.

Sea arrivals should be given the opportunity to apply for, and be granted, asylum by the INS. The examination of issues such as "admissibility" is not triggered until after it has been determined that an asylum seeker is not eligible for asylum. Asylum seekers could be treated akin to parolees, who can be denied or granted asylum by the Asylum Office. *See* 8 CFR 208.14(c) 3. Sea arrivals who are not granted asylum by the Asylum Office should not be subjected to expedited removal, but should instead be either simply denied asylum, or referred to regular removal proceedings. This approach would be simpler, and less of a burden on the system. Also, given that this population voluntarily brought themselves to the attention of the INS, there is no reason to subject them to summary procedures and detention.

A contrary result would undermine the effectiveness of the U.S. asylum system. If it became known that individuals who apply for asylum by affirmatively bringing themselves to the attention of U.S. authorities were being detained in some cases, many genuine refugees might be too scared to apply for asylum. Instead, asylum seekers would in effect be encouraged to remain in an undocumented and illegal status. The technical legal distinctions – that only "sea arrivals" were being detained – would certainly be missed. Also, as noted above, there is generally no need to detain individuals who have affirmatively identified themselves to the authorities, and the Service always retains the power to detain in individual cases anyway.

Conclusion

We urge, in conclusion, that the Order be reversed. Expedited removal should not be applied to any additional categories of non-citizens.