

THE EXPEDITED REMOVAL STUDY

EVALUATION OF THE

GENERAL ACCOUNTING OFFICE'S

SECOND REPORT ON EXPEDITED REMOVAL

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Congress enacted expedited removal procedures to summarily return at ports of entry persons who do not have valid travel documents or who attempt entry through fraud or misrepresentation. The new procedures provide that persons indicating a fear of return or intent to apply for asylum are to be referred for a credible fear interview to determine whether their claims are groundless and abusive; if not, they are to be channeled into the normal process for full consideration of their claims to asylum and related protection. In enacting expedited removal, Congress hoped to deter the entry of fraudulent claimants while ensuring that sincere asylum seekers have the opportunity to access the full asylum process, and that legitimate travelers are permitted to enter.

The Expedited Removal Study was initiated in May 1997 to conduct a comprehensive nationwide review of the expedited removal process implemented in April 1997, especially as such procedures apply to asylum seekers. It was originally conceptualized as a two-year study of the implementation of expedited removal, but in light of the many unanswered questions regarding the process, it has been extended through October 2000. The Study released annual reports in May of 1998, 1999 and 2000. This report, an evaluation of the GAO's second congressionally-mandated report on expedited removal, is the Study's final public report.

The Expedited Removal Study was designed to examine all components of the new procedure, and to provide solid statistical and qualitative information to policy makers and the public, in order to determine whether expedited removal, as implemented, meets the dual congressional objectives of preventing abuse of the process, while at the same time identifying and screening-in individuals who fear persecution and admitting other legitimate travelers. Although the Study's intended methodology included on-site observation at selected ports of entry in conjunction with review of Immigration and Naturalization Service (INS) data, the INS did not allow on-site observation of the process or, until recently, access to data. For three and a half years, the Study has collected and analyzed data on expedited removal from domestic non-governmental organizations and private attorneys, as well as reviewed records of proceedings obtained from the Executive Office of Immigration Review. The Study's review of both qualitative and statistical data related to expedited removal places it in a uniquely qualified position to discuss the GAO's report on expedited removal and to evaluate to what extent GAO has answered the specific questions and concerns raised by Congress.

The Expedited Removal Study is a project of the Center for Human Rights and International Justice at the University of California, Hastings College of the Law. It is funded by the Ford Foundation and the Joyce Mertz-Gilmore Foundation. Karen Musalo, the Center's Resident Scholar, is the Study's Director. Lauren Gibson, Research Fellow, is the Coordinating Attorney, and Stephen Knight serves as Research Fellow. J. Edward Taylor, Professor in the Department of Agricultural and Resource Economics at the University of California at Davis, is the Study's Research Consultant. The Study thanks Richard Boswell, Professor at the University of California, Hastings College of the Law and Andrew Schoenholtz, Director of Law and Policy Studies, Institute for the Study of International Migration, Georgetown University, as well as Kate Konschnik for her research assistance.

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**THE EXPEDITED REMOVAL STUDY: EVALUATION OF THE
GENERAL ACCOUNTING OFFICE'S SECOND REPORT ON EXPEDITED REMOVAL**

EXECUTIVE SUMMARY

Introduction

The expedited removal laws were first implemented on April 1, 1997. Under these laws, if an immigration officer at a port of entry determines that a person lacks valid travel documents or is attempting entry through fraud or misrepresentation, the officer has the authority to rule that the person is inadmissible and to issue a removal order. This order is not subject to review and carries a five year bar on return to the United States. The officer has discretion to permit persons to withdraw their applications for admission and avoid this bar on return.

There are two groups of persons who receive additional process: persons who express an intent to apply for asylum or a fear of return to their country, and persons claiming lawful status as U.S. citizens, lawful permanent residents, refugees, or asylees. Persons claiming a fear of return or an intent to apply for asylum are referred to a "credible fear" interview with an asylum officer (AO), in which it is determined if they have a "credible fear" and will be allowed to present their claims through the regular process provided by law. Persons found not to have a credible fear by an AO may ask for review by an immigration judge (IJ). Persons claiming lawful status are also entitled to review of their claims by an IJ. However, no further review is available, and persons subject to expedited removal must be detained, except under very limited circumstances.

Background to Congressionally Mandated Studies of Expedited Removal

The expedited removal laws constitute one of the most fundamental changes in immigration law and policy because they give unprecedented authority to INS inspectors, who now have the unreviewable authority to issue orders of removal which were previously issued by immigration judges and subject to review by the Board of Immigration Appeals and federal courts. As a result of controversy over its enactment, which has continued to the present, Congress has twice requested that the General Accounting Office (GAO) conduct a study of expedited removal.

In light of the unreviewable nature of expedited removal decisions, there has been considerable interest in an evaluation of the quality and accuracy of legal decisions made during the process. When Congress directed GAO to carry out its first study, Congress specifically included the issue of legal accuracy as a subject for the GAO to study. The GAO, however, has said that it does not possess the legal expertise to make this kind of an evaluation, and it declined to do so in its first report, which was released in March 1998. It also declined to engage in a substantial amount of on-site observation which would have allowed it to assess qualitative aspects of the expedited removal process, as well as INS compliance with controlling laws and

policies. In its March 1998 report, the GAO principally examined INS management controls over the expedited removal process, reported on a range of INS expedited removal statistics, and compared the expedited removal process to previously existing exclusion procedures. It also reported on discussions with UNHCR and NGOs regarding concerns about the implementation of expedited removal.

Due to continuing concerns and debate over the impact of expedited removal on asylum seekers, Congress requested that GAO carry out a second study. The request for a second study was included in the International Religious Freedom Act of 1998 (IRFA). IRFA directed the GAO to submit its findings by September 1, 2000 to the Senate and House Committees on the Judiciary, the Senate Committee on Foreign Relations, and the House Committee on International Relations.

In IRFA, Congress asked the GAO to answer the following four questions regarding expedited removal:

- whether INS officers improperly encourage asylum seekers to withdraw applications for admission;
- whether INS officers fail to refer asylum seekers to credible fear interviews;
- whether INS officers incorrectly remove asylum seekers to countries where they may be persecuted; and
- whether INS officers improperly detain asylum seekers or detain such persons under inappropriate conditions.

The GAO's Second Study of Expedited Removal: Scope, Objectives and Methodology

The four questions posed in IRFA indicate congressional interest and concern regarding all phases of the expedited removal process. Questions one and two focus on the implementation of expedited removal at the ports of entry where immigration officers make decisions whether to refer asylum seekers to credible fear interviews, and, as question one itself reflects, where the opportunity exists for the officers to pressure asylum seekers to withdraw their requests for admission, rather than to pursue their claims. Question three – in asking about incorrect removal of asylum seekers – constitutes an inquiry into all phases of the expedited removal process, from ports of entry, through asylum officer and immigration judge decision-making on credible fear. It is a broad-ranging question which generally asks whether the process is likely to render incorrect decisions which could result in the return of asylum seekers to persecution. Question four focuses specifically on detention issues, and asks two distinct and separate questions. First, by inquiring whether INS officers “improperly detain” asylum seekers, Congress sought information as to whether asylum seekers who qualify for release nonetheless remain in detention. Second, by asking if INS officers detain persons under “inappropriate conditions” Congress focused on the character and nature of the detention facilities which house asylum seekers.

The questions asked by Congress in IRFA demonstrate concern about possible INS misconduct (improperly encouraging withdrawal, failing to refer, improperly detaining, etc.) as well as about the potential for erroneous legal decisions, which could result in the return of an asylum seeker to persecution, or the continued detention of an individual who meets the controlling legal criteria for release. As detailed in this evaluation of the GAO's report, to adequately answer the four IRFA questions requires a methodology which incorporates a substantial component of on-site observation coupled with a qualitative evaluation of the process, including an assessment of the accuracy of legal decision-making, neither of which the GAO undertook.

The GAO is not on record as stating that on-site observation in conjunction with a qualitative evaluation of the process and of the legal decision-making are requisites for answering the four IRFA questions. It has stated, however, that it did not attempt to directly answer the congressional questions because it did not have the legal expertise, feasible methodology or resources to do so.¹

Prior to embarking on its study, GAO apprised the relevant congressional committees that, for the reasons noted above, it would not attempt to directly answer the questions set forth by Congress in IRFA. In an effort to be what GAO has characterized as "reasonably responsive" to the questions, GAO proposed to the congressional committees an approach which focused primarily on INS management controls over the expedited removal process. The GAO's proposal also included an analysis of certain statistics on expedited removal and detention, as well as an evaluation of specified aspects of detention. GAO specifically committed itself to reviewing:

- INS management and internal controls which "are in place to help ensure that inspectors and asylum officers comply with proper expedited removal and credible fear procedures";
- statistical data related to the credible fear process; specifically data correlating factors such as region of nationality, gender, or port of entry to credible fear outcomes (negative credible fear decisions, or decisions by asylum seekers to give up, or "dissolve," their claims); and
- numbers of detained and released asylum seekers, numbers related to the appearance rate of released asylum seekers in immigration court, and conditions of detention facilities.

¹ In recent conversations with the Study, the GAO stated that it did not attempt to directly answer the four IRFA questions because: (1) it lacked the technical expertise to evaluate legal decision making and did not think it was an appropriate role for it to adjudicate or reevaluate legal decisions; (2) it could not identify a feasible methodology to adequately answer aspects of the questions; and (3) it thought a direct answer to the questions would require an inordinate amount of resources. On the basis of these recent, as well as prior discussions with the GAO, the Study understood the second and third points as being directly related to the difficulty and cost of designing an on-site observation component which could capture a sufficiently large random sample of expedited removal cases. Telephone interviews with James Blume, Assistant Director, General Accounting Office (Oct. 23 & Oct. 30, 2000) ("Blume Interviews").

As is evident from this outlined approach, the GAO's proposed study was narrow in scope.² It included a review of INS procedures and management controls, but did not incorporate any analysis of qualitative aspects of the process, such as the sensitivity of immigration officers to verbal and non-verbal indications of fear, or the availability and competency of interpreters upon whom non-English speaking asylum seekers may have to depend in expressing their fear of persecution. GAO looked at statistical data regarding outcomes in the credible fear process, but did not include an evaluation of the manner in which the credible fear standard is applied, or any review of the quality of decision-making by immigration and asylum officers. Further, it did not examine the role of legal representation and the impact it may have upon credible fear outcomes. On the issue of detention, GAO reviewed statistics, but did not evaluate parole decisions by district directors in order to ascertain if they properly applied the legal criteria for release. In assessing the actual conditions of detention, the GAO adopted a self-imposed limit that it would not evaluate any detention condition which required a "value judgement." This resulted in the exclusion of critical issues of concern such as the physical abuse of detainees, which have been the subject of federal investigations in at least two facilities in the last year, and limited the GAO's ability to inform Congress on the issue of "inappropriate conditions."

In addition to having a narrow scope, GAO chose a limited methodology to carry out its study. The GAO's methodology relied almost exclusively on information provided by the INS itself – a reliance which raises issues about the reliability of the information reported.³ For example, it evaluated agency compliance with procedural requirements by examining whether INS inspectors and asylum officers checked boxes on a form indicating compliance, and did not engage in on-site observation of the process, or investigate allegations by persons who had alleged INS misconduct or non-compliance. It reported on district director policies regarding the release from detention of asylum seekers by asking the district directors what their policies were, but did not examine files to determine if the district directors actually made release decisions consistent with what they reported. It assessed conditions of detention by making announced tours of detention facilities, and interviewing INS and facility personnel, but it did not interview detainees, their lawyers, or NGOs to balance the perspective on this information.

Although the GAO did not attempt to answer the specific questions posed in IRFA, it did state that it was attempting to be "reasonably responsive" to these questions, and it did, in fact, issue a number of findings which will be seen as relevant to the congressional concerns expressed through the IRFA questions. For example, Congress expressed concern about the failure to properly refer asylum seekers to credible fear interviews which could arise from INS

² The Study recognizes that GAO's decision to limit its scope and its methodology was informed by the factors identified in note 1, *supra*.

³ The reliability of information derived from self-reporting is always brought into question when the reporting entity has some incentive to misreport. Such an incentive to misreport exists in the current situation, where the INS is providing information regarding its performance to the GAO in response to a congressional request to evaluate the agency.

misconduct or error. In an apparent effort to be responsive to this concern, GAO reported that INS personnel generally complied with required procedures. Congress inquired about improper and inappropriate detention; GAO reported that most (78%) of the asylum seekers in the credible fear process were released from detention, and did not identify any serious concerns regarding the conditions in detention facilities. In relation to detention, GAO also analyzed statistical information provided by the INS and the Executive Office for Immigration Review (EOIR), to determine whether asylum seekers who were released pursued their claims. The GAO reported that a high percentage did not, and on the basis of that finding, it concluded that “many aliens may be using the credible fear process to illegally remain in the United States.”⁴

If they were found to be reliable, the GAO’s findings would be significant to policymakers. These findings would seem to indicate that INS personnel are properly implementing expedited removal, that there is minimal reason for concern regarding the duration and conditions of detention, and – if anything – the concern should be regarding the release of individuals from detention who fail to pursue their claims and who exploit the process in order to reside unlawfully in the United States. Furthermore, to the degree that the GAO study is considered to answer IRFA’s questions, it will be seen as obviating the need for any further studies of the expedited removal process.

As is summarized below, and detailed in this report, notwithstanding the GAO’s intention to be “reasonably responsive” to the IRFA questions, its report leaves all four questions largely unanswered. The scope and methodology of the GAO’s study was simply inadequate to answer the questions posed by Congress – and as the GAO itself concedes, it did not attempt to directly answer these questions due to issues of expertise, feasibility and resource constraints. Of more serious concern is the fact that the GAO reported information to Congress which is of questionable reliability. The reliability issues arise from the GAO’s heavy dependence on INS self-reporting as a methodology, and its reliance on INS data which GAO itself acknowledged was not reliable.⁵ The problem of reliability was compounded by several decisions made by GAO regarding its analytical approach and presentation of data which created an appearance of bias. As discussed below, GAO adopted an approach to calculating the rates of failure to appear and failure to file asylum applications which resulted in the highest possible figures. GAO relied on these findings to conclude that many undocumented persons use the credible fear process to remain unlawfully in the United States.

The following provides a summary of the Expedited Removal Study’s evaluation of GAO’s methodology and findings within the framework of each of the IRFA questions.

⁴ GENERAL ACCOUNTING OFFICE, *ILLEGAL ALIENS: OPPORTUNITIES EXIST TO IMPROVE THE EXPEDITED REMOVAL PROCESS* (GAO/GGD-00-176), at 67 (Sept. 2000) (“GAO Report”)

⁵ GAO acknowledged that in certain areas INS data was unreliable and that there were instances of conflict between INS district data and INS Headquarters data, as well as between INS and EOIR data.

Failure to Refer Asylum Seekers to a Credible Fear Interview

The question of whether INS officers incorrectly fail to refer asylum seekers subject to expedited removal remains largely unanswered. For reasons noted above, GAO’s methodology relied almost exclusively on INS self-reporting, and did not include substantial on-site observation of the process, or other research techniques which would have increased the reliability of the information provided and permitted an evaluation of qualitative aspects of the process. To the degree that some of its findings are to be accorded reliability,⁶ they raise concerns regarding the process.

GAO’s Scope, Methodology and Findings

In relation to Congress’ question whether INS officers fail to refer asylum seekers, GAO principally reviewed a sample of files of persons removed pursuant to expedited removal. GAO examined these files for documentation indicating whether INS officers were, as required, asking questions designed to elicit an asylum seeker’s fear, obtaining supervisory review, and obtaining the signature of the individual on the sworn statement which is filled out at secondary inspection and records the individual’s responses to INS officer questions. GAO also reviewed the training of INS personnel who conduct expedited removal proceedings and examined INS’s internal monitoring of the process, by the Expedited Removal Working Group (ERWG) and the Office of Internal Audit (OIA).

GAO reported that the files it reviewed indicated that INS generally complied with required procedures, and that inspectors were satisfied with training provided on expedited removal. GAO also reported that INS’s internal monitoring efforts had revealed expedited removal problems, including incomplete or incorrect sworn statements, supervisory review by persons other than required, and failures to update databases.

Evaluation of GAO’s Methodology and Findings

- GAO’s methodology leaves unanswered Congress’ question whether INS officers have incorrectly failed to refer asylum seekers. GAO made findings regarding INS compliance with required procedures. Compliance with required procedures would establish correct referral only if the required procedures are assumed adequate to ensure correct referral. GAO did not explore qualitative aspects of the process, such as INS officer sensitivity to verbal and non-verbal expressions of fear, and the availability and quality of interpretation, both of which could significantly impact correct referral of asylum seekers.
- GAO’s findings on compliance with required procedures are based entirely on self-reporting by the INS. Reliance on self-reporting raises questions regarding the reliability

⁶ As discussed in more detail *infra*, findings of non-compliance may be accorded more reliability than findings of compliance because of the absence of an incentive to misreport non-compliance.

of GAO's findings. GAO did not go beyond self-reporting in evaluating INS compliance, and failed to include other research techniques such as on-site observation, substantive file review, and investigations of complaints by domestic NGOs regarding officer misconduct.⁷ These alternative techniques could have provided more balance in analyzing INS compliance, in addition to providing information on qualitative aspects of the process which could impact referral, as noted above.

Problems Indicated by GAO's Findings

To the degree that they are considered to be reliable, the GAO's findings in relation to this question raise concerns:

- GAO's review of a random sample of fiscal year 1999 expedited removal files indicated that in 2% of cases, a fear was expressed but there was no referral to a credible fear interview. If this random sample is representative, as many as 900 persons in fiscal year 1999 may not have been referred despite expressing a fear. A breakdown by port indicates a failure to refer rate at JFK which could be as high as 6%.
- INS's two internal monitoring groups, the ERWG and the OIA found non-compliance with two of the three internal controls identified by GAO as ensuring compliance with required procedures (incomplete or incorrect sworn statements and incomplete supervisory review). GAO reviewed 36 of 168 files which ERWG had requested as part of its monitoring, and found problems in more than half. OIA reported problems in eight of the eleven districts which it reviewed. ERWG has reduced its efforts and left the monitoring which it previously carried out to the INS districts.

Improperly Encouraging Asylum Seekers to Withdraw

The question of whether INS officers improperly encourage asylum seekers to withdraw remain largely unanswered. GAO's methodology was mostly limited to an examination of files for INS officers' documentation of compliance with required procedures. However, an INS officer would be unlikely to document improper encouragement in file documents. For reasons noted above, GAO did not include substantial on-site observation or other research techniques, which might have increased the reliability of the data, and addressed Congress' question more directly.

⁷ GAO has explained that it did not report on allegations of misconduct because: "To fairly depict these episodes we would need to also obtain the views of the participating INS officials. Obtaining reliable information from all involved parties on episodes that occurred some time ago would be extremely difficult, if not impossible." Letter from Richard M. Stana, GAO, Director, Justice Issues, to Karen Musalo, Director, Expedited Removal Study (November 2, 2000) ("Stana Letter") (on file with Expedited Removal Study).

GAO's Scope, Methodology and Findings

In relation to the question of encouragement of withdrawal, GAO principally reviewed INS statistics and a sample of withdrawal files in order to examine whether, as required, questions designed to elicit an asylum seeker's fear were asked and whether supervisory review was obtained. GAO did not review withdrawal files at San Ysidro, California, the largest port for expedited removals in the United States, because, although it is required, INS officials there rarely created such files.

GAO reported that documentation in the expedited removal files it reviewed indicated a level of compliance with required procedures ranging from 74-95%, and that there was significant variation in compliance among ports of entry. Based on a review of INS statistics, GAO reported that there were also wide variances by port and region of nationality in the percentages of persons allowed to withdraw, in lieu of being subject to expedited removal, among the nation's airports (58% at Houston vs. 13% at JFK, 8% of individuals from the Caribbean vs. 49% of Central Americans).

Evaluation of GAO's Methodology and Findings

- GAO's methodology leaves the question of improper encouragement to withdraw largely unanswered because it relied extensively on INS self-reporting, and it is highly unlikely that an INS officer would document his "improper encouragement" of withdrawal in file documents.
- GAO excluded other methodologies, particularly on-site observation, which would have increased the reliability of its findings and permitted a qualitative review of the process.

Problems Indicated by GAO's Findings

The GAO reported that 2-21% of withdrawal files indicated that INS officers failed to ask mandatory questions designed to elicit fear from asylum seekers. This finding indicates the possibility that hundreds of persons may withdraw, and return to their home countries without being asked any questions regarding fear of persecution.

Incorrect Removal of Asylum Seekers

GAO's study leaves largely unanswered the question of whether INS officers incorrectly remove asylum seekers to countries where they may be persecuted. GAO relied on INS self-reporting regarding compliance with required procedures. GAO also carried out an analysis correlating credible fear outcomes with specified determinants; however this analysis did not provide information responsive to the question. GAO did not examine the legal accuracy of decisions made during the credible fear process, or incorporate other

methodologies, such as on-site observation, which may have assisted in answering this question.

GAO's Scope, Methodology and Findings

In relation to the question whether asylum seekers are incorrectly removed, GAO examined and reported on INS management controls which are applicable to the credible fear process. It also carried out a statistical analysis focusing on cases of those who were found not to have a credible fear, or who did not pursue their claims after having been found to have a credible fear (referred to as "giving up" or "dissolving" their claims).

Based on its file review, GAO reported that asylum officers conducting credible fear interviews generally documented that they had complied with the required procedures of reading mandatory paragraphs to the persons being interviewed (regarding the purpose of the interview, IJ review of an adverse determination, and relief in cases where torture is claimed) and obtaining supervisory review. GAO further reported that in cases where an individual gave up a claim to fear, INS generally documented compliance with the requirement of obtaining the applicant's written request or a signed statement indicating the action was voluntary. GAO also reported that in 44 of the 45 cases in which asylum officers made adverse credible fear determinations the basis for the denial was failure to establish nexus.

Based on its analysis of statistics, GAO concluded that gender, region of citizenship of the asylum seeker, and asylum office had some impact on the likelihood that a person would be found not to have a credible fear or would give up one's claim of fear. Further, it reported that most persons who gave up their claims of fear were ordered removed, in lieu of being permitted to withdraw their applications for admission without immigration consequence. GAO also examined rates of relief for persons who were found to have a credible fear, reporting that 30% had been granted, while 61% had been denied.

Evaluation of GAO's Methodology and Findings

- The GAO's study leaves the answer of incorrect removal unanswered; a meaningful examination of incorrect removal requires an examination of the quality and accuracy of credible fear determinations. GAO did not evaluate legal decision-making or look at any other qualitative issues which might impact credible fear outcome.
- GAO correlated specific variables to the likelihood of credible fear denials and dissolution of claims (multivariate analysis). Although such a correlation is not a substitute for an evaluation of the accuracy of legal decisions, it could provide useful information from which one could make informed inferences regarding the process (i.e., questions would be raised if persons from countries with extreme human rights violations had a significantly higher likelihood of receiving a negative credible fear determination than persons from countries with few human rights violations). However, the usefulness

of the GAO's findings is limited by the fact that it reported on the basis of *regions* of citizenship rather than *countries* of citizenship.⁸ Its usefulness was further limited by the fact that GAO did not investigate the possible explanations for the differences in outcomes which it did identify, including the higher likelihood of a negative credible fear determination (at Arlington and Newark) or giving up of a claim (Arlington, Newark and New York) at some asylum offices than at others. Further, GAO did not include as variables in its analysis other potentially significant factors such as the adequacy of interpretation, education level, and the nature of the claim.

- GAO's reliance on self-reporting to evaluate asylum officer compliance with procedural requirements is subject to the same reliability concerns noted in relation to self-reporting by immigration officers.
- GAO's calculation of a 61% rate of denial of relief in regular removal proceedings for persons who were found to have a credible fear is misleading to the degree that it is interpreted as a measure of the strength of these claims. GAO calculated the rate of denial by combining cases denied on the merits with those denied due to a failure to appear; only the former would have direct relevance to an assessment of the strength of these claims.

Problems Indicated by GAO's Findings

- GAO reported that a failure to establish nexus was the basis for denial in 44 of the 45 cases it examined in which there was an adverse credible fear determination. Nexus determinations can involve highly complicated factual and legal issues, and the credible fear interview, which is not intended to be a full asylum hearing, may not be an inappropriate venue for making such complex decisions.
- GAO reported that there is a higher likelihood of a negative credible fear determination or giving up a claim at some asylum offices than at others. These findings raise a question as to whether adjudication standards are applied uniformly, and whether the treatment of asylum seekers varies widely from office to office.
- Although for many files it reviewed, GAO could not identify the reasons that asylum seekers decided to dissolve their claims, a number of files indicated reasons such as the inability to tolerate detention or separation from family members. GAO also found that almost all persons who gave up their claims of fear were ordered removed, rather than being permitted to withdraw their applications. These findings raise humanitarian

⁸ GAO reported that because of the limited number of cases by country of citizenship, with the exception of Mexico, it grouped 172 countries of the world by region. GAO did carry out country specific analysis for 16 countries where there was a sufficient number of cases. See *infra* Part III(B)(2); GAO Report, *supra* note 4, at 89 n.2.

concerns in that persons who were found to have a credible fear of persecution but who could not tolerate aspects of the process have been subject to the penalty of a five year, or possibly lifetime, bar on return to the United States.

Improper Detention of Asylum Seekers

The question whether asylum seekers subject to expedited removal are improperly detained remains largely unanswered. GAO relied on self-reporting by district directors, as well as on INS data of questionable reliability. It examined the appearance and asylum application rates of persons who had been released, but did not review the cases of persons who remained detained, in order to determine if their continued detention was consistent with INS policy and parole criteria. Furthermore, in reporting on the rates of failure to appear and failure to file asylum applications, the GAO adopted an approach which resulted in the highest possible rates; it then relied upon these rates to imply that asylum seekers abuse the credible fear process. However, an alternative and equally legitimate approach to calculating these figures would have resulted in substantially lower failure to appear and failure to file rates.

GAO's Scope, Methodology and Findings:

Based on a review of relevant law and policy guidance, analysis of INS data, and the distribution of a survey to INS district detention and deportation branches, GAO reported on: (1) INS detention policy; (2) the criteria used by INS in making detention decisions; (3) the number of asylum seekers in expedited removal who were released after receiving positive credible fear decisions between fiscal years 1997 and 1999; and (4) the rates at which persons found to have a credible fear filed asylum applications and appeared for hearings in regular removal proceedings between fiscal years 1997 and 1999. In addressing the issue of appearance rates in regular removal proceedings, the GAO also reviewed the conclusions of the Vera Institute of Justice's Appearance Assistance Program (AAP).⁹

Based on this analysis, GAO reported:

- **Parole Policy and Rates:** Although INS policy favors parole of individuals who pass credible fear if they are likely to appear for removal hearings, and will not pose a danger to the community, INS districts responding to a GAO questionnaire indicated wide variances in parole policies and rates. While some district officials indicated that they generally release persons who pass credible fear, others indicated that, based on their interpretation of INS Headquarters directives, they detain these persons. In response to GAO's questionnaire, INS districts also reported release numbers which GAO calculated as showing a 78% release rate among persons passing credible fear in fiscal year 1999.

⁹ The AAP is a program commissioned by INS to increase appearance rates in removal proceedings through the supervision of persons who met certain criteria and were paroled by INS.

- **Appearance Rates:** 42% of the persons who passed credible fear, were released, and had decisions by IJs, failed to appear for their hearings and were ordered removed “in absentia,” of whom 44% were Sri Lankan, 16% were Chinese, and 12% were Haitian. In its discussion, GAO noted that EOIR had informed it that the 42% finding was artificially high, because the majority of in absentia orders are entered at early stages of proceedings, while many cases in which an individual appears and has a full hearing are scheduled on average a year after the initial court appearance and thus remained pending at the time GAO did its analysis. EOIR noted that the rate had dropped from 42% to 34% as of August 10, 2000, and predicted it could drop as low as 25% when all the pending cases had been decided.
- **Filing of Asylum Applications:** 43% of persons passing credible fear who had not filed for asylum failed to do so within one year of arrival in the U.S., as required by law.

Based on these appearance and asylum application rates, GAO concluded that many persons may be using the credible fear process to remain in the U.S. illegally.

Evaluation of GAO’s Methodology and Findings

- GAO’s study leaves Congress’ question regarding the improper detention of asylum seekers largely unanswered. The thrust of GAO’s research was to arrive at a conclusion as to whether individuals paroled after passing credible fear were improperly released, rather than a conclusion as to whether persons not released from detention were improperly detained. This latter assessment would have required a substantive review of a random sample of files of asylum seekers who remained detained to evaluate whether their continued detention was consistent with INS Headquarters policy and controlling parole criteria.
- GAO reported a 78% parole release rate, based on the district directors reporting that they released 3,432 out of 4,391 persons with positive credible fear determinations in fiscal year 1999. However, the 78% release rate is brought into question by the fact that INS Headquarters reported a total of 6,515 credible fear cases. The release of 3,432 out of 6,515 does not constitute a 78% release rate.
- GAO analyzed the rates of failure to appear and failure to file asylum applications for asylum seekers who had been released from detention. GAO adopted an approach which resulted in rates at the high end of a possible range.
 - **Appearance Rates:** Between April 1, 1997, and September 30, 1999, INS paroled 5,320 of 7,947 persons who had been found to have a credible fear. As of February 22, 2000, 1,000 of the 5,320 (19%) had failed to appear and were ordered removed in absentia. GAO reported a 42% failure to appear rate because it looked at failure to appear cases as a percentage of those cases which had come to a final decision by an IJ (2,351) rather than as a percentage of all cases in which

persons found to have a credible fear were paroled (5,320). EOIR informed GAO that the 42% was artificially inflated, and that when all pending cases had come to conclusion the failure to appear rate would most likely be around 25%.

- **Asylum Filing Within One Year Deadline:** Of the 7,947 persons who passed credible fear, 1,338 had failed to file for asylum within a year of their arrival in the U.S., as required by law. Although this would represent a 17% missed deadline rate (1,338 out of 7,947), GAO reported a 43% failure rate by comparing the number of persons who failed to file within one year to the smaller pool of persons who had not yet filed for asylum (3,140), rather than to the larger pool of persons who had passed credible fear.
- **Use of Credible Fear Process to Remain Illegally:** On the basis of the questionably high failure to appear and failure to file rates which it reported, GAO concluded that many persons may be using the credible fear process to remain in the U.S. illegally. There is no independent data which supports this conclusion, and the GAO failed to explore evidence which tends to support a contrary proposition; namely that some significant percentage of the persons who fail to appear may have been bound for Canada when they were placed in expedited removal, and rather than remaining in the U.S. illegally, continued to Canada upon being paroled. There is anecdotal evidence indicating that this is generally the case with Sri Lankans, who constitute 44% of the pool of persons reported by the GAO as failing to appear at their IJ hearings.

Problems Indicated by GAO's Findings

GAO's findings indicate that district directors may not be consistently applying INS policy and parole criteria, which may result in non-uniform parole decisions in the cases of asylum seekers.

Detaining Asylum Seekers Under Inappropriate Conditions

The GAO's report leaves Congress' question regarding inappropriate conditions of detention largely unanswered because GAO did not analyze conditions that would require "value judgements," limited its investigation to data provided by facility tours and discussions with facility officials, did not attempt to gather additional information through interviews with detainees or their attorneys, and failed to describe the standards relevant to conditions it investigated in any detail, or to discuss compliance with these standards.

GAO's Scope, Methodology and Findings

In order to evaluate detention conditions, GAO visited 12 facilities used to detain asylum seekers subject to expedited removal, including two INS Service Processing Centers (SPCs),

three contract facilities and seven jails. GAO discussed detention policies and procedures with officials and toured the facilities. In its evaluation, GAO focused on those aspects of detention conditions which did not require a “value judgement.” Beyond that threshold criteria, it principally determined what conditions to observe by reviewing INS standards, American Correctional Association (ACA) standards, UNHCR guidelines, and NGO reports and discussion.

Based on its examination, GAO found that detention conditions varied, and that INS-controlled facilities generally provided services in a more uniform manner and to a greater extent than did local jails.

Evaluation of GAO’s Methodology and Findings

- GAO’s methodology excluded analysis of conditions that would require “value judgements.” Thus, critical issues such as physical and sexual abuse of detainees were not reported on by GAO, nor were other issues such as detainee transfer without notice to counsel and facility compliance with posted attorney visiting hours and procedures.
- GAO’s sole sources of information regarding detention conditions in the facilities were facility tours and discussions with facility officials. It did not attempt to gather additional information through interviews with detainees or their attorneys.
- Although GAO reported that its review of detention facilities was informed by INS detention standards, it failed to describe the relevant standards in detail, or to discuss whether and to what degree the facilities visited were in compliance with these standards. For example, the INS standard on telephones requires that there be a working telephone for every 25 detainees, that phone calls be in an area affording privacy, that indigent detainees be permitted to make free calls to attorneys, courts, and consular offices, and that detainees be able to utilize a free preprogrammed direct dial service to pro bono attorneys. The GAO’s discussion on telephones does not discuss any of these requirements.

Problems Indicated by GAO’s Findings

- In violation of INS, ACA and UNHCR guidance, at a number of facilities, detained asylum seekers were not segregated from the criminal population.
- One jail did not have a law library and two jails did not have libraries with current immigration law materials. Although INS standards at the time of GAO’s review required access to a law library with current immigration law materials, including those related to expedited removal, two contract facilities had no legal materials related to expedited removal.
- GAO’s finding that conditions varied in the detention facilities, as well as at ports of entry, means that asylum seekers subject to expedited removal will receive widely disparate treatment depending solely on the location of their detention and the degree of a particular facility’s compliance with standards.

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- Although GAO reported that INS had recognized the need for uniform detention standards, and that INS was in the process of developing such standards, the INS's standard on telephone access will not provide uniform treatment for detainees in different types of facilities (INS Service Processing Centers, contract facilities, local jails) used to detain asylum seekers.

**THE EXPEDITED REMOVAL STUDY: EVALUATION OF THE
GENERAL ACCOUNTING OFFICE'S SECOND REPORT ON EXPEDITED REMOVAL**

INTRODUCTION

The expedited removal laws were enacted in 1996 and implemented on April 1, 1997. Under these laws, if an immigration officer at a port of entry determines that a person is not in possession of valid and proper travel documents or is attempting entry through fraud or misrepresentation, the officer has the authority to rule that the person is inadmissible and to issue a removal order. This determination is not subject to review and bars such person from entry to the United States for five years. The immigration officer has discretion to permit persons to withdraw their applications for admission to the United States and thus avoid this bar on return.

Pursuant to the law, there are two groups of persons who receive additional process: persons who express an intent to apply for asylum or a fear of return to their country of citizenship or residence, and persons claiming lawful status as U.S. citizens, lawful permanent residents, refugees, or asylees. Persons claiming a fear of return or an intent to apply for asylum are referred to a credible fear interview with an asylum officer (AO), in which it is determined if they will be allowed to present their claims through the regular process provided by law. They are further entitled to review of this determination by an immigration judge (IJ). Persons claiming lawful status are also entitled to review of their claims by an IJ. No further review is available. Persons subject to expedited removal must be detained, except under very limited circumstances.

Because the expedited removal laws were among the most controversial provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) and constituted one of the most fundamental changes in immigration law and policy in many decades, in the legislation enacting expedited removal Congress requested that the General Accounting Office (GAO) conduct a study of the process; this study was released in March 1998.¹⁰ This first study by the GAO entailed limited on-site observation of the expedited removal process (sixteen secondary inspections, nine credible fear interviews, and five reviews by immigration judges of adverse credible fear determinations). The GAO relied largely upon the INS's own records of compliance or non-compliance with procedural requirements – examining files, for example, for INS officers' notations as to whether they had asked the questions during secondary inspection pursuant to Form I-867B (Sworn Statement in Proceedings under Section 235(b)(1) of the Act) regarding fear of persecution, provided individuals with information regarding Torture Convention protection during the credible fear interview, and informed individuals of their right to have IJ review of a negative credible fear determination. GAO also compared the nature of the

¹⁰ See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, 110 Stat. 3009 (1996) Appendix B, Requirement for Study and Report on Implementation of Removal Procedures; GAO, ILLEGAL ALIENS: CHANGES IN THE PROCESS OF DENYING ALIENS ENTRY INTO THE UNITED STATES (1998) (“GAO 1998 Report”).

expedited removal process to that which existed previously (the exclusion process), analyzed INS data, and reported on discussions with UNHCR and NGOs regarding concerns about the implementation of expedited removal and specific problems alleged by individuals subject to the process.¹¹ The GAO did not attempt to engage in a qualitative evaluation of the process, such as an assessment of the accuracy of credible fear determinations, as it had been directed to do by Congress.¹² The GAO has explained that it does not have the required legal expertise to carry out such an analysis.

In light of continuing questions and debate regarding expedited removal, a provision of the International Religious Freedom Act of 1998 (IRFA) passed by Congress on October 27, 1998, required the GAO to carry out a second study of expedited removal to determine whether INS officers: (1) improperly encourage asylum seekers to withdraw their applications for admission; (2) fail to refer asylum seekers to credible fear interviews; (3) incorrectly remove asylum seekers to countries where they may be persecuted; and (4) improperly detain asylum seekers or detain such persons under inappropriate conditions.¹³ IRFA directed the GAO to submit its findings by September 1, 2000, to the Senate and House Committees on the Judiciary, the Senate Committee on Foreign Relations, and the House Committee on International Relations.

In the GAO's opinion, it could not directly answer the questions because: (1) it lacked the technical expertise to evaluate legal decision-making and did not think that it was an appropriate role for GAO to readjudicate or evaluate legal decisions; (2) it could not identify a feasible methodology to adequately answer aspects of the questions; and (3) it thought that a direct answer to the questions would require an inordinate amount of resources.¹⁴ In light of these constraints, GAO discussed with congressional committees and their staff what GAO could do in an effort to be "reasonably responsive" to the questions.¹⁵ GAO concluded that it could review INS management controls over the expedited removal process, analyze statistics on expedited removal and detention issues, and evaluate certain conditions of detention. It has reported that it specifically committed to review the following:

- INS' [sic] management controls over the expedited removal process, including those related to INS' decision on whether to permit aliens the option of withdrawing their application for admission;

¹¹ GAO 1998 Report, *supra* note 10, at 19-22, 42, 49.

¹² Congress requested that GAO examine "the effectiveness" of expedited removal procedures "in processing asylum claims by undocumented aliens who assert a fear of persecution, including the accuracy of credible fear determinations . . ." IIRAIRA, Pub. L. No. 104-208, 110 Stat. 3009, Appendix B.

¹³ International Religious Freedom Act, § 605(a)(2), Pub. L. No. 105-292, 112 Stat. 2787 (1998).

¹⁴ Blume Interviews, *supra* note 1.

¹⁵ *Id.*

- INS management controls over the credible fear determination process, including those relating to aliens' decisions to recant their claims of a fear of persecution or torture; and the results of the credible fear process;
- factors related to aliens who (1) were subjected to the credible fear process and the effect of those factors on the results of the credible fear determination and (2) were subjected to the credible fear process and subsequently recanted their claim of a fear of persecution or torture and the effect of those factors on the aliens' decision to recant their claim;
- the number of aliens INS detained and the basis for INS' [sic] detention decisions, including the criteria INS used in making its detention decisions;
- the number of aliens who failed to appear before an IJ for their removal hearing after being released from detention; and
- the conditions of the facilities INS used to detain aliens.¹⁶

As with its first report, GAO did not engage in substantial on-site observation or evaluate the legal accuracy of decision making.

Notwithstanding GAO's intention to be "reasonably responsive" to the IRFA questions, significant aspects of these questions remain unanswered by the GAO's report. It is important to analyze the degree to which they remain unanswered. Furthermore, to the extent that GAO's findings may reflect on the questions set forth in IRFA, it is equally important to evaluate the reliability and significance of GAO's conclusions.

This report by the Expedited Removal Study (Study) addresses the GAO's methodology and findings relating to each of the questions set forth in IRFA, beginning with whether INS officers fail to refer asylum seekers to credible fear (Part I), followed by whether INS officers improperly encourage asylum seekers to withdraw applications for admission (Part II), whether INS officers incorrectly remove asylum seekers to countries where they may be persecuted (Part III), whether INS officers improperly detain asylum seekers (Part IV), and whether INS officers detain asylum seekers under inappropriate conditions (Part V).

I. Incorrectly Failing to Refer Bona Fide Asylum Seekers

Congress asked in IRFA whether immigration officers incorrectly fail to refer asylum seekers for a credible fear interview.¹⁷ Under the expedited removal laws, during secondary inspection, immigration officers are to take a sworn statement from the individual seeking admission, which includes the answers to three questions the officer is to ask to assist in the identification of bona fide asylum seekers. The three questions are: (1) why did you leave your

¹⁶ GENERAL ACCOUNTING OFFICE, *ILLEGAL ALIENS: OPPORTUNITIES EXIST TO IMPROVE THE EXPEDITED REMOVAL PROCESS* (GAO/GGD-00-176), at 31 (Sept. 2000) ("GAO Report").

¹⁷ International Religious Freedom Act § 605(a)(2).

home country or country of last residence?; (2) do you have a fear or concern about being returned to your home country or removed from the U.S.?; and (3) would you be harmed if you were returned to your home country? (referred to as the “three fear questions”). Persons who express a fear of return to their home country or an intent to apply for asylum, in response to these questions or at any time during secondary inspection, are to be referred to an interview with an asylum officer (known as the “credible fear interview”),¹⁸ in which it will be determined if they will be permitted to apply for asylum and have full hearings on their claims. Among those to be referred are persons who express fear or an intent to apply for asylum through non-verbal acts; furthermore, officers are instructed to refer even those persons whose claims may appear to fall outside the refugee definition.¹⁹

The question of whether asylum seekers are correctly referred to a credible fear interview or removed at secondary inspection pursuant to expedited removal is critical to any evaluation of the process. Congress intended that legitimate asylum seekers have the opportunity to apply for protection, and not be turned away at the port of entry. However, because of the nature of the expedited removal process, and in the absence of monitoring, it has been impossible to systematically assess who is turned away at secondary inspection. Attorneys have no access to the secondary inspection stage of expedited removal, and information about a return at this juncture is rarely available to researchers or attorneys. Commentators have referred to secondary inspection as the “black box” of expedited removal, because so little is known about the characteristics of the persons removed or the reason they were denied admission to the United States.

As noted above, GAO intended to be “reasonably responsive” to the IRFA questions. Below, the Study discusses the fact that the first IRFA question remains for the most part unanswered. Additionally, to the extent that GAO’s findings reflect on the issue of correct referral, questions of reliability are raised because GAO’s methodology relied on INS self-reporting (despite the existence of an incentive to misreport). GAO did not incorporate other research techniques that would have permitted an evaluation of the qualitative aspects of the process (such as the legal accuracy of decision making or the adequacy of interpretation) which

¹⁸ Immigration and Nationality Act (INA) § 235(b)(1)(A)(ii).

¹⁹ Office of Programs, INS, Memorandum: Supplemental Training Materials on Credible Fear Referrals (Feb. 6, 1998) (Attachment 1 to THE EXPEDITED REMOVAL STUDY, REPORT ON THE FIRST YEAR OF IMPLEMENTATION OF EXPEDITED REMOVAL (May 1998) (“First Year Report”). Under INS policy, the following persons should generally be referred for a credible fear interview: (1) persons who exhibit non-verbal clues such as crying, hysteria, trembling, unusual behavior, or incoherent or difficult speech patterns; (2) persons who express a fear of physical or psychological harm from any individual or organization, or mention past physical or psychological harm; (3) persons who are determined to have made inconsistent statements or presented inconsistent documents; (4) persons who appear to be barred from asylum by statute; and (5) persons whose claims involve unresolved legal issues such as domestic violence, sexual abuse of children, whistle-blowers on government corruption, homosexuality, and AIDS. *Id.* INS further emphasizes that immigration officers should not make a determination on whether the facts asserted by the applicant for admission to the U.S. appear to demonstrate nexus to a protected ground of asylum. *Id.*

might impact the referral decision, and would have helped to neutralize any biases which could arise from reliance on INS self-reporting.²⁰

A. GAO's Methodology & Findings

GAO's methodology principally consisted of a review of INS's management controls over the expedited removal process.²¹ The management controls examined by the GAO were: (1) documentation of required procedures; (2) training; and (3) monitoring of the process.

1. Documentation of Required Procedures (GAO Report pp. 38-42)

In each case where an INS inspector processes a person under expedited removal, he or she is required to create a record of the facts of the case, using the Form I-867 – Sworn Statement in Proceedings under Section 235(b)(1) of the Act.²² The inspector must read the mandatory information on the Form I-867 regarding the nature and consequences of the expedited removal process. The officer is required to question the individual to establish identity, citizenship, and admissibility to the United States, and document in writing the questions asked and the responses the individual provided. The inspector must also ask the three questions noted above that are intended to elicit information regarding any fear the individual might have of return to his home country. These questions are set forth on the Form I-867, and the inspector is required to record the individual's responses in the spaces provided for each question. At the end of this process, the officer is to request that the individual read the Form I-867, or in the alternative, the inspector is to have the form read to the individual for review. The inspector is to obtain the individual's signature below a statement attesting that he read the Form I-867, or that it was read to him, and that the answers provided are true, and that the form constitutes a "full, true and correct record of . . . [the] interrogation . . ." ²³ Interpretative assistance is to be used at any point where necessary.²⁴

Before any person is ordered removed, the inspector must also present the file to the appropriate supervisor (second-line or higher) for review and approval. The inspector is required to properly inform the supervisor of all facts in the case. Approval by telephone or fax is

²⁰ Throughout this evaluation of the GAO's report, the Study highlights research techniques which the GAO did not undertake. As noted previously, GAO's decisions regarding scope and methodology were informed by its consideration of issues of expertise, feasibility and resources.

²¹ GAO Report, *supra* note 16, at 31.

²² 8 C.F.R. § 235.3(b)(2).

²³ Form I-867 (Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act).

²⁴ 8 C.F.R. § 235.3(b)(2).

permitted where no appropriate supervisory personnel is present at the port.²⁵ The inspector is to obtain the supervisor's signature on the expedited removal order, or check the box indicating that concurrence was obtained telephonically or by other means.²⁶

In order to analyze compliance with these procedures, GAO reviewed a random sample of 365 of 47,791 fiscal year 1999 files in which persons attempted entry at San Ysidro, Los Angeles International Airport (LAX), New York's John F. Kennedy International Airport (JFK), and Miami International Airport, and were ordered removed without a referral. GAO examined the files to determine if: (1) they contained documentation indicating that the three fear questions were asked; (2) an appropriate supervisor signed the expedited removal order, or there was notation in the file indicating that supervisory approval was obtained by telephone or other means because a supervisor was not present; and (3) the individuals subject to the process signed their sworn statements. Based on its review of these files, the GAO concluded that INS officers were generally complying with expedited removal procedures,²⁷ and specifically reported the following:

- **Three Fear Questions:** INS officers reported a range of compliance from 84-100%. The GAO examined this reported compliance by port of entry, and by the particular fear question. There was notation in 84% (San Ysidro) to 99% (Miami and JFK) of the files indicating that inspectors had asked why the individual had left his or her home country, in 96% (LAX) to 100% (San Ysidro) of the files that inspectors asked whether the individual had a fear or concern of being returned, and in 93% (LAX) to 99% (San Ysidro, JFK) of the files that the inspectors had asked whether the person would be harmed upon return to her home country.
- **Supervisory Review:** 97% to 100% of the files included notation of supervisory review (97% at LAX and San Ysidro, 99% at Miami, and 100% at JFK) – either the signature of an appropriate supervisor on the expedited removal order, or the checking of a box indicating that supervisory approval had been obtained by telephone or other means in cases where no supervisor was present. At JFK, 80 of the 94 files GAO reviewed had checkmarks indicating approval was obtained telephonically or by other means because no supervisor was present. Although INS Headquarters informed the GAO that it had recommended that a log be kept of telephonic reviews to ensure integrity of the process, a JFK official stated that no such log was being maintained.

²⁵ 8 C.F.R. § 235.3(b)(2); INSPECTOR'S FIELD MANUAL, 17.15(b)(2)-(3).

²⁶ See Form I-860 (Attachment 7 to the Second Year Report). See also INSPECTOR'S FIELD MANUAL, 17.15(b)(3).

²⁷ GAO Report, *supra* note 16, at 4.

- **Signature on I-867 by Individual Subject to Expedited Removal:** In 95% (LAX), 97% (JFK, Miami), and 100% (San Ysidro) of the random files reviewed, individuals had signed their sworn statements.²⁸

GAO also reported that, although seven files reviewed had documentation evidencing that a fear was expressed, there was no referral to a credible fear interview. Six of these files were from JFK, while the other was from LAX.

2. Training (GAO Report pp. 32-33, 42-43)

The training of personnel who conduct expedited removal proceedings was the second INS management control reviewed by the GAO. As a means of evaluating INS training, GAO interviewed officials at INS Headquarters in Washington, D.C., as well as officials and inspectors at the four INS districts it visited, and distributed a questionnaire to 401 inspectors to elicit their views on the nature, adequacy, and frequency of the training they received. GAO reported on training requirements and the inspectors' evaluations of their training, but made no value judgement itself as to the scope, content or adequacy of the training. GAO noted the following:

- **Training for Officers Conducting Expedited Removal Proceedings:** INS officers are to complete a twelve week basic (i.e., not specific to expedited removal) training and one year field training and probationary period before being permitted to conduct expedited removal proceedings. The Expedited Removal Working Group, an INS oversight entity described below, also provides training on expedited removal.
- **Inspectors' Evaluations of Training:** 149 of 182 inspectors and supervisors who responded to the questionnaire indicated that they were "satisfied" or "generally satisfied" with their training. Twenty-eight observed that the content or frequency of training could be enhanced. The GAO noted that despite INS policy requiring the referral of all persons expressing a fear at secondary inspection, some inspectors raised questions regarding the meaning of credible fear, and whether they should refer persons who express the slightest indication of fear.

3. Internal Monitoring (GAO Report pp. 37, 43-45)

GAO examined a third INS management control – INS self-monitoring efforts. Specifically it reviewed the efforts of the Expedited Removal Working Group and the Office of Internal Audit, two INS entities with authority to carry out internal monitoring of the expedited removal process. Although GAO reported on the nature of INS's self-monitoring, and some

²⁸ Local officials at LAX, JFK and Miami additionally stated that in order to ensure compliance with procedures, an Assistant Area Port Director is required to sign a checklist. Of the files reviewed from these ports, 93% (LAX) to 100% (JFK) had this signature. GAO Report, *supra* note 16, at 42.

limited findings made by these two groups, GAO did not evaluate or make any judgements as to the quality, comprehensiveness, or adequacy of these efforts.

Expedited Removal Working Group (ERWG) (GAO Report pp. 37, 43-44)

ERWG was established in 1997 “to identify and address questions, procedural and logistical problems, and quality assurance concerns related to the expedited removal process.”²⁹ It is comprised of officials from INS’s Offices of Inspections, International Affairs, Asylum, Detention and Deportation, Field Operations, and General Counsel.

GAO reported that ERWG’s monitoring consisted of both site visits and file reviews. Since expedited removal was implemented in April 1997, ERWG had conducted 38 one to two day site visits and had requested 1,010 individual case files for review (802 in fiscal year 1998, 168 in fiscal year 1999, and 40 in fiscal year 2000, as of April 2000). ERWG did not produce any written reports addressing expedited removal implementation issues or problems. It informed the GAO that the only problem identified by site visits in fiscal year 1999 involved an unidentified port that had a large number of paperwork “errors,” which ERWG said was addressed by additional training and monitoring. In its own examination of 36 of the 168 files ERWG had requested for review in fiscal year 1999, GAO found that in more than half, the Form I-867 was incomplete or the wrong form had been utilized to take the sworn statement. It also found signatures by persons other than second-line or higher supervisors on expedited removal orders, and failures to update the cases in the appropriate databases. GAO reported that ERWG has reduced its monitoring over time, citing the small number of errors identified, limited resources, Office of Internal Audit oversight (discussed below), and the number of site visits already made. At this point in time, monitoring is left primarily to the districts and regions.

Office of Internal Audit (OIA) (GAO Report p. 45)

The OIA is an INS internal audit agency which is charged with examining overall agency compliance with controlling requirements. The OIA incorporated criteria relevant to expedited removal into INSpect, its existing audit program.³⁰ The criteria relating to expedited removal include whether documentation, such as the Form I-867, is complete, whether expedited removal orders are reviewed by second-line or higher supervisors, and whether timely updates are made to expedited removal databases.

²⁹ GAO Report, *supra* note 16, at 37 n.1.

³⁰ The full name of OIA’s INSpect program is Program for Excellence and Comprehensive Tracking. INSpect is in effect at eleven districts, and GAO states its primary goals as the following: “to assess office effectiveness; determine compliance with applicable laws, regulations, and procedures; measure performance against established standards; and provide a means to share local successes and solutions applicable to servicewide problems.” GAO Report, *supra* note 16, at 45 n.8.

The GAO reported that OIA's INSpect program cited eight of the eleven districts where it is in effect for expedited removal-related concerns. These concerns include untimely updates to databases, incomplete documentation, and incomplete review of expedited removal orders. Based on these findings, OIA recommended refresher training on how to take a sworn statement at three ports of entry.

4. Statistics on Characteristics of Persons Removed at Secondary Inspection
(GAO Report p. 81)

GAO reported some basic data regarding removals without referral in fiscal year 1999. This data indicates that of the nation's largest airports, in terms of expedited removals, New York had the highest number of expedited removals without referrals (2,116) in fiscal year 1999, while San Francisco had the lowest (185). Further, more men were ordered removed (4,892) than women (2,551). Most persons ordered removed were between 20 and 49 years of age. Finally, of the regions³¹ of citizenship defined by GAO, Mexico had the largest number of expedited removals without referrals (2,028), while the Middle East had the lowest (169).

B. Evaluation of GAO's Methodology

1. Reliance on Examination of Internal Controls

For the reasons noted above (expertise, feasibility and resources), GAO did not directly ask or answer whether immigration officers have incorrectly failed to refer asylum seekers, resulting in their removal at secondary inspection. Instead, it asked whether INS was following certain aspects of its own procedures and controls which "are designed to help ensure that inspectors handle expedited removal cases in accordance with prescribed guidelines."³² However, compliance would establish correct referral only if the required procedures were fully adequate to ensure correct referral. It remains a matter of controversy whether the expedited removal process, as currently designed, is sufficient to ensure that bona fide asylum seekers are referred. For example, reasonable people disagree as to whether asking three fear questions at secondary inspection is sufficient to elicit an asylum seeker's fear, whether supervisory approval is an adequate review mechanism, and whether the fact that a person signed the Form I-867 is sufficient to ensure that the person actually understood and approved the accuracy of his statements recorded on the form.³³ There are situations where an officer could comply with these

³¹ See *infra* Part III(B)(2); see also *supra* note 8.

³² GAO Report, *supra* note 16, at 32.

³³ The Study and other organizations have received reports of a number of asylum and non-asylum cases in the expedited removal context in which individuals were directed to, or in fact did sign their sworn statements without understanding or being made aware of the contents of what they were signing. See Lawyers Committee for Human Rights (LCHR), *IS THIS AMERICA?: THE DENIAL OF DUE PROCESS TO ASYLUM SEEKERS IN THE UNITED STATES* (Appendix Two) (Oct. 2000) ("LCHR Report") (available at

procedures, but nonetheless fail to properly identify and refer an asylum seeker. For example, this could be the case if proper interpretation was not provided during the secondary inspection interview,³⁴ impeding communication between the officer and the asylum seeker. However, because of the scope of its study and the fact that it did not include substantial on-site observation as part of its methodology, GAO did not address issues such as interpretation.

In its review of expedited removal training, GAO did not detail the nature or the extent of the training. Although it noted that INS inspectors are required to complete a twelve week basic training program and a one year field training and probationary period, it is unclear how much of this training is specific to expedited removal. Further, GAO's conclusion that INS officers were generally satisfied with their training is based on the response of less than half (182 of 401) of the inspectors surveyed by GAO.

2. Reliance on Self-Reporting

The reliability of GAO's findings is brought into question by the fact that they are based on self-reporting by INS. Although self-reporting is often utilized in research, it is never a preferred methodology where there may be an incentive to misreport. The incentive to misreport exists here,³⁵ and the GAO should have discussed its possible effect on the reliability of its findings. The only mention GAO makes regarding reliability is in a footnote relating to the three fear questions, where it noted that the "absence (or presence) of documentation in the file does not necessarily mean that the inspector did not (or did) ask the required questions."³⁶ The Study has received reports of failures to refer bona fide asylum seekers to a credible fear interview despite indications in the documentation to the contrary, which as discussed below, were not

<http://www.lchr.org/refugee/is_this_america_toc.htm>).

³⁴ The regulations state that "[i]nterpretative assistance shall be used if necessary to communicate with the alien." 8 C.F.R. § 235.3(b)(2)(i). There are a number of situations in which a failure to provide competent interpretive services could arise. First, if an asylum seeker spoke very limited English, the officer could mistakenly conclude that the individual spoke enough English to understand and be understood, even if that were not the case. Second, the officer could call in an interpreter, but the interpreter called could be incompetent to interpret the particular language or dialect spoken by the asylum seeker. Finally, there could be instances of misconduct, in which an officer might fail to request an interpreter even where it is clear to him that one is needed.

³⁵ The Study is not implying that INS officers or others did misreport, but simply that the incentive is present in circumstances such as these where: (1) individual officers are reporting on their own compliance with agency requirements; and (2) officers and persons at the management level are reporting on, and evaluating, their own programs to an agency which reports to Congress.

³⁶ GAO Report, *supra* note 16, at 39 n.3.

investigated by GAO.³⁷ Such allegations underscore concerns regarding the reliability of self-reported data.

While the GAO does not so state in its report, it informed the Study that the same is true of documentation indicating supervisory review.³⁸ Supervisory signatures do not necessarily verify that the supervisor reviewed the facts before approving the case, and a notation that supervisory approval was obtained telephonically does not verify that such approval was obtained. The converse is also true – the absence of such documentation does not establish that there was no supervisory review – although, as noted above, there is an incentive to indicate compliance with procedures, which exists in the former, and not the latter set of circumstances.

3. Decision Not to Employ Other Methodologies Beyond Self-Reporting

As discussed below, GAO made a decision not to incorporate additional methodologies which could have increased the reliability of its findings regarding INS compliance with internal controls, and could have provided information more directly related to the IRFA question regarding the failure to refer asylum seekers. These additional methodologies include on-site observation, qualitative review of files, and increased consultation with NGOs that have reported cases in which INS officer or interpreter misconduct resulted in the removal of an asylum seeker without referral to a credible fear interview.

Limited On-Site Observation and Lack of Qualitative File Review

As detailed in the introduction, the GAO adopted a methodology which it considered to be: (1) consistent with its technical expertise; (2) feasible; (3) possible to carry out without the expenditure of an inordinate amount of resources. In light of these considerations – particularly those related to feasibility and resource issues – GAO did not engage in a substantial amount of on-site observation. It observed only seven inspections at the ports of entry it visited and did not

³⁷ In one case, two Ecuadorans were not referred to a credible fear interview although they alleged that they repeatedly told officials at JFK that they feared return to Ecuador and wanted to apply for asylum. If the Ecuadorans' claim that they expressed a fear and desire to apply for asylum in the U.S. was not recorded in documentary evidence in the associated files provided by INS, it would not have been discovered by a researching entity such as the GAO. See THE EXPEDITED REMOVAL STUDY, REPORT ON THE SECOND YEAR OF IMPLEMENTATION OF EXPEDITED REMOVAL, Part V(A)(1) (May 1999) ("Second Year Report"). In a second case, an Egyptian Coptic Christian claimed that when he tried to explain his fear and the problems he suffered at the hands of Muslims, the inspecting officer interjected: "I am a Muslim. What is your problem with Muslims?" As a result, the asylum seeker refrained from saying anything disparaging about Islam, stated he was not seeking asylum, and was not referred to a credible fear interview. The alleged statements by the inspector were not recorded in the I-867. THE EXPEDITED REMOVAL STUDY, REPORT ON THE FIRST THREE YEARS OF IMPLEMENTATION OF EXPEDITED REMOVAL, Section V(C) (May 2000) (NOTRE DAME JOURNAL OF LAW, ETHICS & PUBLIC POLICY, forthcoming Winter 2000-01) ("Third Year Report").

³⁸ Blume Interviews, *supra* note 1.

make any specific findings based on these observations.³⁹ Researchers have consistently emphasized that observation of the process can assist in an investigation of whether INS fails to refer bona fide asylum seekers. Through on-site observation a researcher can directly evaluate INS compliance with mandated procedures, and can assess other important elements of the process, including availability and quality of interpretation which impact correct referral.

Also, for the reasons noted above – most specifically the issue of expertise – GAO did not undertake a qualitative file review.⁴⁰ Such a review could have enabled the GAO to report to Congress on the quality and accuracy of legal decision-making.⁴¹ In the absence of a qualitative file review, GAO was not able to address potential problems with the process which it had identified, such as the failure to refer in a number of cases where individuals had expressed a fear. GAO identified seven cases where individuals had expressed fear but were not referred to a credible fear interview. If an individual’s fear were totally unrelated to the refugee definition, an inspector could appropriately decide not to refer the individual to a credible fear interview. However, the GAO does not discuss whether the failure to refer was appropriate or not, because it did not engage in a qualitative review of these files.⁴²

Decision Not to Report on NGO Allegations of INS Misconduct

GAO did not report on or investigate allegations of misconduct during the expedited removal process raised by NGOs that represent asylum seekers or who have engaged in research on the implementation of the process. The GAO’s rationale was set forth in a letter to the Lawyers’ Committee for Human Rights (LCHR). The LCHR had written the Comptroller General expressing concern regarding its failure to investigate “numerous complaints of improper conduct by INS personnel during expedited removal proceedings – including cases in

³⁹ Such a small number of observations is unlikely to reveal non-compliance, as during very short periods of observation, persons who are observed are likely to conform to required procedures. GAO performed slightly more observations for its first report (16 secondary inspections, nine credible fear interviews, and five IJ reviews) than it did for this second report. See GAO Report, *supra* note 16, at 21.

⁴⁰ A qualitative file review is one in which there is a substantive review and analysis of the information contained in the file. It would include an analysis of the accuracy of a decision to refer to a credible fear interview, or to remove without referral. The GAO’s file review was not qualitative in that it was limited to determining if boxes were checked off or if a supervisor’s signature was present.

⁴¹ A researcher will only be able to assess the accuracy of the decision-making through substantive file review if the inspector has properly recorded all of the required information. The Study recognizes that in some cases, even if the inspector has properly recorded all of the required information, there may not be sufficient facts in the file to reach a conclusion as to whether the decision was consistent with requirements.

⁴² Not all seven files contained sufficient information for a qualitative review; GAO reported that only three of the seven contained information regarding the basis of the fear. GAO Report, *supra* note 16, at 40.

which refugees were wrongly removed, cases where asylum seekers were not referred to an asylum officer⁴³ GAO responded that:

Our review of case files and interviews [sic] INS officials who interact with aliens showed that INS had generally followed the prescribed procedures for handling expedited removal cases in the locations we visited. We recognized in our report that the presence or absence of documentation does not necessarily indicate that INS officials acted properly in dealing with every alien. However, without such documentation, we would need to rely on the recollections of INS officials that might have been involved in a particular event that occurred some time ago. Given the large number of aliens that INS officials deal with every day, recollections would be questionable at best, and any investigation into a particular allegation of mistreatment could quickly turn on a difference in recollection or opinion.⁴⁴

GAO similarly informed the Study that its standards preclude the reporting of allegations that have not been corroborated, and that it did not have the resources to engage in the corroboration of allegations.⁴⁵ GAO added that it could consider and discuss these allegations as concerns raised by NGOs, but that it chose not to because it had already done so in its first report.⁴⁶

Lack of Statistical Analysis of Characteristics of Persons Removed at Secondary

As noted above, there is very little known about the characteristics of persons turned away at secondary inspection without a referral to a credible fear interview. This is an area of interest and concern; 189,177 persons were removed pursuant to expedited removal between April 1, 1997, and September 30, 1999, a number of whom came from countries which the United States recognizes as refugee-producing.⁴⁷ Although the GAO reported some basic data on the characteristics of persons removed at secondary without a referral (gender, region of nationality, age, and airports at which the individual sought entry), it informed the Study that it was unable to engage in a statistical analysis to determine how these characteristics may relate to

⁴³ Letter from Gene Guerrero, Director, Torchlight Campaign, LCHR, to David Walker, GAO Comptroller General (Aug. 10, 2000) (Appendix 6 to LCHR Report, *supra* note 33).

⁴⁴ Letter from Richard Stana, Associate Director, Administration of Justice Issues, GAO, to Gene Guerrero, Director, Torchlight Campaign, LCHR (Sept. 18, 2000) (on file with Expedited Removal Study).

⁴⁵ Blume Interviews, *supra* note 1.

⁴⁶ In its prior report, GAO reported NGO concerns that persons subject to expedited removal did not understand the process, and that the competency of interpreters varied. GAO 1998 Report, *supra* note 10, at 54-55.

⁴⁷ These countries include: Guatemala, Colombia, Peru, China, Nigeria and Sri Lanka. See Third Year Report, *supra* note 37, Part IV(A)(2) & Table INS-2.

secondary inspection outcome because INS data was not sufficiently reliable.⁴⁸ The Study has gathered anecdotal information on the characteristics of persons who were referred to credible fear interviews. Its findings have raised questions about whether nationality, gender, port of entry, and socio-demographic characteristics may impact whether a person is referred to a credible fear interview or removed at secondary inspection without a referral.⁴⁹

C. Problems Indicated by GAO's Findings

To the degree that there is an incentive by the INS to misreport, the incentive is to misreport compliance, rather than non-compliance. Thus, evidence demonstrating INS non-compliance may be accorded more reliability than that indicating compliance. Taking this into account, the GAO's findings on problems in the expedited removal process raise concerns.

1. Failure to Refer Despite Expression of Fear

GAO reported that in seven of 365 cases in which a fear was expressed there was no referral to a credible fear interview. It further reported that in four of the seven cases, the reason for the fear was not clear from the facts documented in the file, while in two, the individuals cited fear of reprisals because of debt and because they had left their home country. In the other case, the individual stated that he was afraid but would not be harmed upon return. Consistent with the scope of its study, GAO did not engage in a qualitative analysis of the three files in which there was some information regarding the basis of the fear, in order to determine if INS's failure to refer was appropriate.

The lack of a referral in seven of 365 cases indicates that the failure to refer rate may be as high as 2% in cases where there has been an expression of fear.⁵⁰ Further, a breakdown by port indicates that the failure to refer rate at JFK may be as high as 6%.⁵¹ This failure to refer rate at JFK is higher than at LAX, Miami, and San Ysidro. GAO limited itself to an examination of JFK, LAX, Miami, and San Ysidro in order to ensure a large number of attempted entries, geographic diversity, and the inclusion of two major types of port (land and air). It is important to recognize that its methodology would not uncover port-specific problems among the approximately 250 U.S. ports of entry.

⁴⁸ Blume Interviews, *supra* note 1. The GAO did carry out such an analysis in relation to credible fear outcomes. See *infra* Part III(B)(4).

⁴⁹ See Third Year Report, *supra* note 37, at notes 189-92 and accompanying text; Second Year Report, *supra* note 37, Part IV(C)(3); First Year Report, *supra* note 19, Part III(F), (M).

⁵⁰ On the basis of the information provided, it is not possible to determine whether there was any legitimate basis for the decision not to refer.

⁵¹ The GAO examined 365 cases, including 94 from JFK; six of the JFK files had documentation that a fear was expressed, but that no referral was made.

Although insufficient information is known in these cases to analyze whether an inspector failed to refer a bona fide asylum seeker, the Study has received detailed reports alleging such failures. Two of these reports involved incidents at JFK; one involved a group of Ecuadorans⁵² while the other was a Sri Lankan Tamil asylum seeker who reported that he was ridiculed by an interpreter provided by INS. The Tamil asylum seeker alleged that the interpreter was unable to translate his request for asylum into English. Although the asylum seeker was briefly detained and allowed to call an attorney, who in turn contacted the INS to clarify that the man wanted asylum, he was removed without a referral to Turkey, his last port of embarkation, where he was detained for four days, interrogated, and beaten by authorities.⁵³ In a third case reported to the Study, an ethnic Albanian student from Kosovo arrived at a California port of entry, and although he spoke only Albanian, he was provided with a telephonic Serbian interpreter. When the interpreter informed INS that the asylum seeker could not speak Serbian, the INS officer reportedly hung up the phone and returned this man to Mexico City, where his flight to the U.S. had originated. If the asylum seeker had not again attempted entry at JFK, his story would never have become known.⁵⁴

The Sri Lankan and Kosovar Albanian cases underscore the importance of competent interpretation to the decision whether to refer an asylum seeker to a credible fear interview. Further, they indicate that interpreter problems are unlikely to be revealed by file review, as the inspecting officer may not recognize that interpreter error or misconduct has occurred.

2. Incomplete Documentation and Failure to Update Databases

Both the ERWG and OIA have cited incomplete supervisory review and documentation as expedited removal-related problems at certain ports of entry, with OIA citing eight of the eleven districts (72%) it analyzed. These are two of the three management controls relied upon in the GAO report to evaluate INS compliance with required procedures. The ERWG informed GAO that it was reducing its on-site visits and file review, because it believed that the relevant personnel had “overall familiarity with the expedited removal process” and that “few errors” were being identified. Given OIA’s findings of problems at eight of the eleven districts, and continuing allegations of problems in the expedited removal process that have arisen in the media

⁵² See *supra* note 37.

⁵³ See Statement of Senator Patrick J. Leahy on the Refugee Protection Act of 1999, at 2 (on file with the Expedited Removal Study); LCHR, *supra* note 33, Appendix Two.

⁵⁴ *Id.*

and NGO reports,⁵⁵ it is a matter of concern that ERWG visited a relatively small number of ports (38 of approximately 250) and reduced its monitoring activities.

II. Improperly Encouraging Asylum Seekers to Withdraw

In IRFA, Congress requested that GAO examine whether, pursuant to expedited removal, asylum seekers are improperly encouraged to withdraw their applications for admission to the United States.⁵⁶ An application for admission may be withdrawn in the discretion of the Attorney General where it would be in the best interest of justice, and the individual may depart without being subject to the five year bar⁵⁷ or other potentially serious immigration consequences associated with an order of expedited removal.⁵⁸ Although withdrawal may benefit individuals, in that they can depart the U.S. without serious immigration consequences, Congress is concerned that asylum seekers may be improperly encouraged to withdraw their applications for admission (and asylum) by INS officers during secondary inspection. Given this concern, and the fact that withdrawals constitute a highly significant aspect of the expedited removal process, making up fully half of the 160,000 persons subjected to it in fiscal year 1998,⁵⁹ it is critical to analyze whether asylum seekers are improperly encouraged to withdraw their applications for admission to the United States.

As described below, the GAO report left unanswered the question whether INS officers improperly encourage asylum seekers to withdraw. GAO's methodology was mostly limited to an examination of files for INS officers' documentation of compliance with required procedures. However, an INS officer would be unlikely to document improper encouragement in file documents. Other research techniques, such as substantial on-site observation, might have increased the reliability of the data and addressed Congress' question more directly. For the reasons already noted (expertise, feasibility and resources), GAO did not employ these other methodologies.

⁵⁵ The Study has reported on alleged problems in the expedited removal process. *See* First Year Report, Part IV; Second Year Report, *supra* note 37, Parts V & VI; Third Year Report, *supra* note 37, Part VI. *See also* LCHR Report, *supra* note 33; Susan Sachs, *Report Faults Snap Deportations*, NEW YORK TIMES, Oct. 6, 2000; UNHCR, *ASYLUM AND THE LAW* (Sept. 1999). A documentary on problems associated with expedited removal and the asylum process, "No Turning Back," aired on PBS on June 14, 2000 (on file with the Expedited Removal Study).

⁵⁶ International Religious Freedom Act § 605(a)(2).

⁵⁷ INA § 235(a)(3); Office of Programs, *Withdrawal of Application for Admission* (Dec. 22, 1997) (Attachment 4 to First Year Report, *supra* note 19).

⁵⁸ Persons issued an order of expedited removal order on the ground of attempted entry through fraud or misrepresentation (INA § 212(a)(6)(C)(i)) may be barred from returning to the U.S. for life. *See infra* note 78.

⁵⁹ INS, *Fact Sheet: FY 1998 Update on Expedited Removals* (June 21, 1999).

A. GAO's Methodology & Findings

GAO primarily reviewed INS compliance with required procedures and controls. In addition, it included a review of INS statistics to obtain percentages at various airports nationwide of expedited removal cases which were resolved by withdrawal (GAO Report Table I.1). GAO also observed seven secondary inspections, interviewed local and INS Headquarters officials and reviewed INS materials that give guidance to INS inspectors on secondary inspection procedures.⁶⁰

1. Documentation of Required Procedures (GAO Report p. 45)

An INS inspector who allows an individual to withdraw his or her application for admission, rather than being ordered removed pursuant to expedited removal, must: (1) take a sworn statement (Form I-867) as in all expedited removal cases, and ask the three fear questions; (2) fill out an I-275 (Withdrawal of Application for Admission/Consular Notification), which the individual must sign; and (3) obtain supervisory approval.⁶¹ In contrast to other aspects of expedited removal process, local INS offices determine the extent of supervisory oversight of withdrawals. At LAX, JFK and Miami, the local procedures require review by second-line supervisors. GAO reported that an INS Headquarters official explained that there is no need for INS Headquarters to set a required level of supervision in these cases "since INS has been allowing this procedure for decades and inspectors have been routinely processing these types of cases as part of normal operations."⁶²

In order to examine compliance with certain procedural requirements, GAO reviewed 220 files in which individuals who would have been subject to expedited removal were permitted to withdraw, which were randomly selected from the total pool of 1,611 such cases dating from fiscal year 1999 at three airports – LAX, Miami and JFK. The purpose of GAO's review was to determine whether all three of the fear questions were asked, and whether supervisory review took place. Although San Ysidro was one of the four ports included in GAO's overall evaluation of expedited removal procedures, withdrawal cases from San Ysidro were not considered because, notwithstanding the requirements described in the previous paragraph, "the port did not create and retain case files in the vast majority" of withdrawal cases – which in fiscal year 1999 at San Ysidro involved 11,815 such cases.⁶³ As to the three ports which maintained files, in its

⁶⁰ However, GAO did not report any withdrawal-related information based on these observations, interviews, or materials.

⁶¹ See Office of Programs, *supra* note 57.

⁶² GAO Report, *supra* note 16, at 45.

⁶³ See GAO Report, *supra* note 16, at 46 n.10. It is unclear, given the requirement that sworn statements and I-275s be filled out, why withdrawal files are not maintained at San Ysidro, the largest port of entry for expedited removals in the United States. GAO noted that these files are only created at San Ysidro when the

report, GAO did not specify the nature of the documents it reviewed within the files to obtain information regarding the three fear questions and supervisory review.⁶⁴

Based on its review, GAO made the following findings:

- **Three Fear Questions:** INS officers reported a level of compliance (i.e., the asking of all three questions) ranging from 74-95%. There was significant variation between the ports of entry as to the rate of reported compliance. In 21% of cases from Los Angeles, the documents reflect that none of the three fear questions were asked; in 5% of cases, only one or two of the questions were asked. At JFK, none of the three fear questions were asked in 5% of cases; there were no cases in which only some questions were asked. In Miami, in 2% of cases, the files indicated that none of these questions were asked; in 3% of cases, only one or two of the questions were asked.
- **Supervisory Review:** There was documentation of supervisory review in 93-100% of cases (93% at Los Angeles, 100% at JFK, 98% at Miami). Each of the three airports also require second-line supervisory review, but the rate of compliance with that requirement was considerably lower, at 66%, 94% and 61% respectively. GAO was unable to determine at what point in the process the supervisor had actually signed the form, because in many cases INS did not document dates or times of review.

2. Withdrawal Statistics

GAO reported that there were wide variances in the percentages of persons allowed to withdraw, in lieu of being placed in expedited removal, at airports nationwide.⁶⁵ First, the percentages of persons subject to expedited removal who were allowed to withdraw at the nine largest airports (in terms of expedited removals) range from 59% (461 withdrawals) at San Francisco and 58% (1,123 withdrawals) at Houston on the high end, to 13% (381 withdrawals) at JFK and 18% (509 withdrawals) at Miami at the low end. Second, GAO's statistics reflect a wide variance in withdrawal rates at U.S. airports depending on the geographic region of the individual's origin. Only 8% of individuals from the Caribbean and 14% of Africans were permitted to withdraw their applications at airports, while 49% of Central Americans and 43% of Mexicans were permitted to withdraw. The highest rate of withdrawal – 63% – is found under the “Other” category, which includes individuals from Europe, Australia, New Zealand and Canada. Third, women at airports were allowed to withdraw in 37% of cases, as compared to

individual is involved with criminal activities or claims eligibility for an immigration benefit. *Id.*

⁶⁴ The GAO has informed the Study that in the case of withdrawals and referrals at secondary inspection it examined I-867s (Sworn Statements) when they were present in the file; it also examined other materials in the file which would provide information regarding officer compliance with requirements. Blume Interviews, *supra* note 1.

⁶⁵ GAO Report, *supra* note 16, at 81 (Table I.1.).

31% for men. Last, the withdrawal rate increased with the age of the individual, from a low of 27% for individuals aged 18-19 to a high of 52% for individuals aged 50 and older.

B. Evaluation of GAO's Methodology

The GAO's report leaves unanswered Congress' question whether immigration officers are improperly encouraging asylum seekers to withdraw. GAO performed a file review to determine whether the INS was generally following its own procedures and internal controls. As outlined above, the particular procedures the GAO considered in its file review were the reading of the three fear questions and the securing of supervisory review. Compliance with such procedures does not establish that there was no improper encouragement to withdraw. It is feasible that an officer could ask the three fear questions and secure supervisory review, but nonetheless make statements to the individual which could constitute improper encouragement to withdraw. Furthermore, as was pointed out in relation to failure to refer, a file review reveals next to nothing concerning availability and competency of interpretation, which would affect the overall integrity of the withdrawal process.

An additional limitation of GAO's reliance on file review is that GAO was unable to evaluate the issue of withdrawals at San Ysidro, the largest port of entry (with 44% of all expedited removals between fiscal years 1997 and 1999⁶⁶) because the port did not create files for nearly all of its 11,782 withdrawal cases in fiscal year 1999.⁶⁷

Furthermore, a concern is raised by the GAO's reliance on INS self-reporting. As noted in detail in Part I, reliance on self-reporting is problematic where, as here, there may be an incentive to misreport. Inspectors are required to ask the three fear questions, and, pursuant to their local procedures, are also required to secure supervisory review. As discussed in more detail in Part 1(B)(2), there is an incentive to report compliance with these requirements.⁶⁸ It would have been useful to its readers if the GAO had discussed the presence of this incentive and any resulting potential bias in its data.

Finally, for reasons discussed above, the GAO did not incorporate other methodologies, particularly on-site observation, which would have helped to more directly answer the question of improper encouragement to withdraw, and to neutralize any bias resulting from self-reporting. On-site observation is an important and necessary element in answering this question in particular, as improper encouragement is likely to manifest through verbal and non-verbal actions not recorded in the file. Although INS officers may conform their behavior when being observed, this possibility may be lessened with lengthier periods of observation. The need for

⁶⁶ See Third Year Report, *supra* note 37, at 164 (Table INS-13).

⁶⁷ GAO Report, *supra* note 16, at 46 n.10.

⁶⁸ The Study is not implying that INS officers misreport, but simply that the incentive to misreport is present in circumstances such as these.

on-site observation is heightened given a situation such as exists at San Ysidro, the country's largest port of entry, where case files were not maintained, and the only means of evaluation would have been through such observation.

C. Problems Indicated by GAO's Findings

Although it failed to do so in its discussion of compliance with withdrawal procedures, in other sections of its report the GAO observed that the presence or absence of proper documentation in a particular file is not necessarily probative of whether an INS officer actually did or did not perform the indicated action (i.e., asking the three fear questions).⁶⁹ Nonetheless, as discussed in Section 1(C) above, data demonstrating non-compliance or problems may be more reliable than that indicating compliance. Some of the information noted by GAO, if it is in fact reliable, raises concerns regarding INS compliance with required procedures.

1. Failure to Ask the Three Fear Questions

Review of the documentation filled out by INS officers indicates that a significant percentage of persons were not asked any credible fear questions prior to withdrawal, at Los Angeles (21%) and JFK (5%). These percentages raise a serious concern that a significant number, possibly hundreds, of persons who withdraw are not being asked credible fear questions at these ports. Further, it raises a question whether other ports of entry not encompassed in the GAO's study may have varying levels of withdrawal cases in which the mandatory three fear questions are not asked.

2. Supervisory Review

An additional concern is related to supervisory review. GAO informed the Study that it was unable to confirm when supervisory review occurred because INS frequently does not record the time and date of the review. If supervisory review is relied upon by INS as a control to prevent asylum seekers from being improperly encouraged to withdraw, such review must occur prior to the individual's departure from the United States in order to constitute a meaningful safeguard.

3. Variance in Withdrawals at Ports of Entry and by Nationality

Absent coercion, intimidation, or improper encouragement by INS officers, INS's policy of allowing certain individuals to withdraw their applications for admission may benefit such individuals, in that, as noted above, they may avoid the serious consequences of an expedited removal order. Although the question asked by IRFA was specific to whether asylum seekers were improperly encouraged to withdraw their claims, data provided by GAO is relevant to an

⁶⁹ In a discussion with the Study, GAO recognized that this it should have noted this point regarding its withdrawal-related findings. Blume Interviews, *supra* note 1.

inquiry of whether INS applies its withdrawal policy in a fair and uniform manner in cases where improper encouragement does not occur.⁷⁰ As described above, GAO reported wide variances in the percentages of persons subject to expedited removal who were allowed to withdraw among different geographic regions⁷¹ and airports. These variances raise the question whether INS officers uniformly apply withdrawal policy to persons of different regions or who enter at different ports of entry.⁷² However, without substantive file review, in conjunction with on-site observation, it is not possible to explore whether the variance reflects real differences in the cases, or non-uniform application of the withdrawal criteria.

III. Incorrect Removal of Asylum Seekers

Congress asked in IRFA whether INS officers incorrectly remove asylum seekers to countries where they may be persecuted.⁷³ As noted previously, persons who are subject to expedited removal are asked three questions at secondary inspection that are intended to elicit whether they have a fear of return to their country or intend to apply for asylum. Persons who express a fear or an intent to apply for asylum are to be referred by the INS inspector to an interview with an asylum officer (AO) who determines if they have a “credible fear of persecution.”⁷⁴ Incorrect removal of asylum seekers at secondary inspection, through the failure

⁷⁰ INS officers are to consider allowing withdrawal in cases where it would be in the best interest of justice. In making the decision whether to permit an individual to withdraw his application for admission to the United States, INS officers are to consider the seriousness of the immigration violation, previous findings of inadmissibility, intent to violate the law, ability to easily overcome the ground of inadmissibility, age, health, and humanitarian or public interest considerations. Office of Programs, *supra* note 57.

⁷¹ GAO reported that it grouped countries by regions “because of the small number of cases in some countries.” GAO Report, *supra* note 16, at 81 n.b; *see also supra* note 8. This regional grouping limits the usefulness of the statistics reported in that country conditions vary widely among countries in regions, and individuals from varying countries in a region may be subject to differing stereotypes or biases.

⁷² The INS’s own reporting on withdrawal rates raises further questions. In a 1999 fact sheet on expedited removal, the INS reported that withdrawal rates varied from 27% at southern land ports to 95% at northern land ports; the rate at airports was 39%. INS, *supra* note 59.

⁷³ International Religious Freedom Act § 605(a)(2).

⁷⁴ A “credible fear” of persecution is established if “there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under Section 208.” INA § 235(b)(1)(B)(v).

The interview is not to be scheduled sooner than 48 hours after arrival, unless the individual waives this requirement. Office of the Deputy Commissioner, INS, Memorandum: Implementation of Expedited Removal (Mar. 31, 1997) (Attachment 3 to First Year Report, *supra* note 19). Applicants may have a consultant present at the credible fear interview, but such person’s role is much more limited than that of an attorney in regular removal proceedings. 8 C.F.R. § 208.30(b). The consultant “may be permitted, in the discretion of the asylum officer, to present a statement at the end of the interview.” *Id.* According to INS policy, an AO “must have solid reasons to exercise discretion to disallow a consultant from making a statement or comment.” Office of International Affairs/Asylum Division, INS, Memorandum: Role of Consultants in the Credible Fear Interview (Nov. 14, 1997)

inquiry of whether INS applies its withdrawal policy in a fair and uniform manner in cases where improper encouragement does not occur.⁷⁰ As described above, GAO reported wide variances in the percentages of persons subject to expedited removal who were allowed to withdraw among different geographic regions⁷¹ and airports. These variances raise the question whether INS officers uniformly apply withdrawal policy to persons of different regions or who enter at different ports of entry.⁷² However, without substantive file review, in conjunction with on-site observation, it is not possible to explore whether the variance reflects real differences in the cases, or non-uniform application of the withdrawal criteria.

III. Incorrect Removal of Asylum Seekers

Congress asked in IRFA whether INS officers incorrectly remove asylum seekers to countries where they may be persecuted.⁷³ As noted previously, persons who are subject to expedited removal are asked three questions at secondary inspection that are intended to elicit whether they have a fear of return to their country or intend to apply for asylum. Persons who express a fear or an intent to apply for asylum are to be referred by the INS inspector to an interview with an asylum officer (AO) who determines if they have a “credible fear of persecution.”⁷⁴ Incorrect removal of asylum seekers at secondary inspection, through the failure

⁷⁰ INS officers are to consider allowing withdrawal in cases where it would be in the best interest of justice. In making the decision whether to permit an individual to withdraw his application for admission to the United States, INS officers are to consider the seriousness of the immigration violation, previous findings of inadmissibility, intent to violate the law, ability to easily overcome the ground of inadmissibility, age, health, and humanitarian or public interest considerations. Office of Programs, *supra* note 57.

⁷¹ GAO reported that it grouped countries by regions “because of the small number of cases in some countries.” GAO Report, *supra* note 16, at 81 n.b; *see also supra* note 8. This regional grouping limits the usefulness of the statistics reported in that country conditions vary widely among countries in regions, and individuals from varying countries in a region may be subject to differing stereotypes or biases.

⁷² The INS’s own reporting on withdrawal rates raises further questions. In a 1999 fact sheet on expedited removal, the INS reported that withdrawal rates varied from 27% at southern land ports to 95% at northern land ports; the rate at airports was 39%. INS, *supra* note 59.

⁷³ International Religious Freedom Act § 605(a)(2).

⁷⁴ A “credible fear” of persecution is established if “there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under Section 208.” INA § 235(b)(1)(B)(v).

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of INS officers to refer such persons to this credible fear interview, or through improper encouragement to withdraw on part of the INS, is discussed above. This part discusses the GAO's examination of issues related to the incorrect removal of asylum seekers after they are referred to a credible fear interview.

Persons determined by an AO to have a credible fear of persecution are allowed to present their claims through the regular removal process provided by law. Those who fail to establish a credible fear may request *de novo* review by an IJ, to be held within seven days of the credible fear interview;⁷⁵ there is no right to representation or to have a consultant present at the IJ review.⁷⁶ If the decision of the AO is affirmed by the IJ, the person will be summarily removed from the United States. The statute precludes any further administrative or judicial review. If the AO's decision is vacated, the individual will be able to apply for asylum and have a full hearing on the asylum claim.⁷⁷

At any time during the credible fear process, a person who decides not to go forward with the process may "give up" or "dissolve" his or her claim of fear. In these cases, INS officers have the discretion to issue an expedited removal order, which may carry serious immigration consequences,⁷⁸ or to allow the person to withdraw his or her application for admission to the United States, which does not carry such consequences.

(Attachment 2 to Second Year Report, *supra* note 37).

⁷⁵ INA § 235(b)(1)(B)(iii)(III).

⁷⁶ Immigration judges have discretion as to whether consultants may be present at this review, and whether they may make opening statements, call and examine or cross-examine witnesses, object to written evidence or make a closing argument. Executive Office for Immigration Review, Interim Operating Policy and Procedure Memorandum 97-3: Procedures for Credible Fear and Claimed Status Reviews, at 4 (Mar. 25, 1997) (Attachment 10 to First Year Report, *supra* note 19).

⁷⁷ INA § 235(b)(1)(C).

⁷⁸ An expedited removal order may result in a significant or lifetime bar on entry to the United States. Persons subject to expedited removal include those who are found to have engaged in fraud or misrepresentation in seeking admission to the United States. INA § 212(a)(6)(C)(i). Once charged on the ground of fraud and misrepresentation, a person becomes inadmissible to the U.S. unless they meet the requirements for the relevant waiver. The waiver of fraud and misrepresentation requires that the applicant demonstrate that the refusal to admit her to the U.S. would result in extreme hardship to a U.S. citizen or legal permanent resident spouse or parent. INA § 212(i)(1). Further, persons who falsely represent or have falsely represented themselves to be U.S. citizens are inadmissible under INA § 212(a)(6)(c)(ii). The waiver discussed above is not available for these persons. A waiver may be available to asylees who attempt to adjust their status to permanent residents under INA § 209(c) after having been charged with this ground. This provision allows the Attorney General to waive this ground of inadmissibility for an asylee or refugee for humanitarian purposes, to assure family unity, or when it is in the public interest. INA § 209(c).

In its report, GAO uses the term “recant” to describe cases in which a person gives up or dissolves a claim of fear. However, the term recant is generally associated with a disavowal or renunciation of formerly held beliefs.⁷⁹ The use of this term by the GAO is misplaced because, as discussed below, persons who give up their claims of asylum are not necessarily disavowing their fear, but – as GAO itself notes – may dissolve their claims because they cannot tolerate detention, or wish to be reunited with their family.

Prior to the enactment of expedited removal, every person seeking to enter the U.S. at a port of entry, including asylum seekers, had the opportunity for a formal administrative hearing of their claims, with the right to representation by legal counsel and findings based on record evidence. Earlier law also provided for administrative and judicial review of the determination made at the administrative hearing. Under expedited removal, there is no right of representation or judicial review. For these reasons, it is critical to examine whether the relatively new credible fear process is sufficient to prevent the incorrect return of bona fide asylum seekers. However, as described below, the GAO report leaves largely unanswered the question of whether INS officers incorrectly remove asylum seekers to countries where they may be persecuted. GAO’s limitations regarding its scope and methodologies meant that it did not examine the legal accuracy of decisions made during the credible fear process, and did not include on-site observation.⁸⁰ Furthermore, it did not report on the findings and concerns of NGOs. Instead, GAO relied primarily on INS self-reporting.

A. GAO’s Methodology & Findings

GAO adopted a methodology which leaves unanswered aspects of the question whether asylum seekers are incorrectly removed to countries in which they fear persecution. GAO reviewed relevant law and policy, examined INS management controls, and carried out a quantitative statistical analysis of outcomes in the credible fear process. The management controls GAO reported on included documentation of required procedures, training, and supervisory and quality assurance review by INS officials. In examining INS management controls, the GAO focused on two categories of cases – those in which there had been a negative credible fear determination, and those in which the individual had given up (dissolved) his or her claim. The GAO focused on these same two categories of cases in a substantial portion of its statistical review, examining the impact of certain factors (region of citizenship, gender, age, Asylum Office, and fiscal year) on the likelihood of a negative determination or dissolution of a claim of fear. The GAO provided additional data on the credible fear process including statistics on credible fear referrals and credible fear passage rates. The sources of the data for these

⁷⁹ See e.g., WEBSTER’S NEW WORLD DICTIONARY 1119 (1994).

⁸⁰ GAO Report, *supra* note 16, at 31. For more information on the scope, objectives and methodologies of GAO’s report, see the introduction to this Report.

analyses by GAO include INS's Asylum Pre-Screening System (APSS) database⁸¹ and EOIR's Automated Nationwide System for Immigration Review (ANSIR) database.⁸²

1. Documentation of Required Procedures (GAO Report p. 32)

As noted above, in its evaluation of management controls, the GAO focused on those cases in which there had been negative credible fear determinations, or in which the individuals had given up (dissolved) their claims. It reviewed two groups of files: (1) all fiscal year 1999 files in the Miami, New York, and Los Angeles Asylum Offices in which there was a negative credible fear determination (totaling forty-five); and (2) a random sample of fiscal year 1999 files in these same Asylum Offices in which an asylum seeker who expressed a fear gave up his or her claim (133 of 232 files). The GAO did not examine files in which a person received a positive credible fear determination.

Negative Credible Fear Determination Files (GAO Report pp. 47, 52-54)

The credible fear interview is conducted by an AO, who, using Form I-870 (Record of Determination/Credible Fear Work Sheet),⁸³ is required to create a written record of the credible fear determination. The record is to include a summary of the material facts as stated by the applicant, other facts relied upon by the AO, and the determination,⁸⁴ which is to be reviewed by a supervisory officer before it is communicated to the asylum seeker.⁸⁵ Form I-870 also serves as a script and includes several paragraphs which the AO is required to read to the asylum seeker during the credible fear interview. These paragraphs explain: (1) the purpose of the credible fear

⁸¹ APSS "is a mainframe INS database that the Asylum Office created to track data on aliens subject to expedited removal who were referred to an asylum officer for a credible fear interview." GAO Report, *supra* note 16, at 88. Data is entered at the individual Asylum Offices, and is to be reviewed monthly for accuracy by INS Headquarters officials. APSS provides information on the basic characteristics of individuals referred to a credible fear interview (age, gender, nationality), in addition to the credible fear decision. *See id.* at 88, 97.

⁸² ANSIR tracks cases handled by IJs and the Board of Immigration Appeals in regular removal proceedings (i.e. persons whose cases begin in regular removal proceedings, in addition to persons whose cases begin in expedited removal proceedings, are found to have a credible fear of persecution and are allowed to pursue their claim in regular removal proceedings). ANSIR is to be updated daily at each EOIR field location. The fields provide information on nationality, whether a person applies for asylum, dates and locations of hearings, changes of hearing location, detention, and results of hearings. GAO Report, *supra* note 16, at 97.

⁸³ This form is eight pages long, and requires the AO to fill out information on the background of the individual, certain aspects of the interview itself (whether an interpreter or consultant is present, length of interview, etc.), place of detention, release criteria, and the basis of decision. For a sample I-870, see Attachment 7 to the Second Year Report, *supra* note 37.

⁸⁴ 8 C.F.R. § 208.30(b).

⁸⁵ GAO Report, *supra* note 16, at 47. *See also* 8 C.F.R. § 208.30(b).

interview;⁸⁶ (2) the right to de novo review by an IJ of an adverse decision by an AO; and (3) the fact that the AO will ask questions relating to torture because the U.S. protects from removal persons in danger of being subjected to torture. Next to each of the questions is a box which the officer is to check off to indicate that the paragraph was read. The form also includes boxes to check off for the basis of the decision (i.e., not credible, no nexus to a statutory ground for asylum, etc.) and a line for the reviewing supervisor to sign.

The GAO's review of negative credible fear determinations was primarily limited to the questions of whether asylum officers documented that they had read the mandatory paragraphs,⁸⁷ and that supervisors had documented their required review. The GAO reviewed the Form I-870 to determine if the relevant boxes had been checked or spaces had been filled in. On the basis of its review of the forty-five files from Miami, New York, and Los Angeles Asylum Offices in which there had been a negative credible fear determination, GAO concluded that AOs "generally complied with requirements, including documenting that mandatory paragraphs were read to the aliens during the interview process and that documentation in the aliens' files indicated that supervisors' review took place."⁸⁸ The GAO specifically found that AOs had documented that they read the three fear questions all of the time in the New York and Miami Asylum Offices, and most of the time in the Los Angeles office,⁸⁹ and that forty-four of forty-five files had evidence of the required supervisory review.

Files in Which an Individual Gave up (Dissolved) a Claim of Fear (GAO Report pp. 58-61)

GAO reported that at the time it performed its research, if an individual expressed an intent to dissolve his or her claim, the INS was required to obtain either a written request to give up the claim, or a signed statement indicating the voluntariness of the decision; INS did not require supervisory review of this process. GAO's review of the management controls applicable to dissolved claims consisted of a review of 133 files randomly selected from a total of 232 fiscal year 1999 case files in the New York, Miami, and Los Angeles Asylum Offices to determine if INS had obtained the required written requests or signed statements. Based on its review, GAO

⁸⁶ The paragraph explains that the AO will ask questions to determine whether the individual has a credible fear of persecution in his or her home country. The paragraph emphasizes that the individual should tell the truth, that the information provided will not be communicated to his or her home country, and that false or frivolous asylum claims may result in permanent ineligibility for immigration benefits.

⁸⁷ The GAO also looked at file information on the basis for denial, but as discussed below, did not engage in substantive legal analysis of this information.

⁸⁸ GAO Report, *supra* note 16, at 47.

⁸⁹ Among the Los Angeles cases, documentation indicated that in 23 of 24 cases, the AOs had read the asylum seekers required information on the credible fear interview; that in 21 of 24 cases, the AOs had read information on the IJ review process; and that in 22 of 24 cases, the AOs had read information on Torture Convention relief. GAO Report, *supra* note 16, at 53-54.

found general compliance with INS's requirement of obtaining the applicant's written request or signed statement. GAO observed that requiring INS to document reasons for an individual's giving up of his or her claim,⁹⁰ and incorporating supervisory review, would result in uniformity of procedures and further ensure that individuals were not giving up their claims for a reason unrelated to their fear. Prior to issuing its report, GAO suggested to INS that it adopt such procedures, and as of July 26, 2000, INS instituted a requirement that asylum officers question an individual about his or her reason for giving up the claim, fill out a form documenting the reason, explain the removal process and ability to pursue protection prior to removal, and obtain supervisory review.⁹¹

2. Training (GAO Report pp. 32-33, 54-55)

The second management control examined by GAO was training. The GAO interviewed INS officials, reviewed training materials, and solicited the opinion of AOs through a questionnaire. GAO reported that all AOs are required to have completed a training course and one year of interviewing experience before they are permitted to conduct credible fear interviews. It also reported that of the 64 (out of 108) AOs who responded to its questionnaire, most reported being "satisfied" or "generally satisfied" with the training received, although some noted that they would like additional training on the credible fear standard. Others expressed concern "with the implementation of the standard and a requirement, they believe, to find that everyone had a credible fear."⁹²

3. Internal Review (GAO Report pp. 55-56)

The third management control reviewed by GAO was INS's quality control procedures. Pursuant to these procedures certain categories of decisions are reviewed by a quality assurance team based at INS Headquarters. The team is mandated to review: (1) all negative credible fear

⁹⁰ There was no uniformity in the files reviewed by the GAO as to the information regarding the basis of fear and the reason for a decision not to pursue the claim. The files from New York contained only a standardized letter signed by the individuals stating that they did not want to go through the credible fear process, that they would be allowed to go home as soon as travel arrangements were made, that they were aware that they would be barred from entry, and that their decisions were voluntary. Fifteen of 45 Miami files had not only the standardized letter, but a memo summarizing the reason for fear. In Los Angeles, 37 of 40 files had written or signed statements as to the reasons for the dissolution, or documentation indicating the AO asked questions about the original claim of fear. In total, GAO was only able to establish the reason for which a individual dissolved his claim in 39 of 133 cases; the reasons cited included the inability to tolerate detention and the wish to be reunited with family. GAO Report, *supra* note 16, at 58-59.

⁹¹ The Study looks positively on the GAO's efforts to raise procedural issues with INS relating to this important aspect of the credible fear process; however, the Study does not have adequate information to conclude whether these steps will decrease the likelihood that an asylum seeker would give up his claim even though he fears persecution.

⁹² GAO Report, *supra* note 16, at 54-55.

decisions; (2) some number of positive credible fear decisions; and (3) positive or negative credible fear cases involving torture, high profile persons, claims related to gender persecution, and “domestic violence claims unrelated to gender.” GAO reported that in forty-one of the forty-five negative credible fear cases it examined, it found evidence of review by the quality assurance team. INS officials commented that the lack of documentation evidencing review in the remaining four cases did not necessarily mean that review had not taken place.⁹³ GAO also reported that it read “a number of” the quality assurance team critiques, and noted that INS provided extensive positive and negative feedback to AOs on their decisions, and in some cases suggested follow-up questions, additional ways to analyze claims based on particular social group, and alternative wording for summarizing key points. The quality assurance team also identified failures to follow procedural guidance and questioned time lags in case processing.

4. Statistics

As discussed above, GAO carried out an evaluation of internal controls focused principally on cases in which there had been a negative credible fear determination, or a decision to give up a claim of fear. The GAO similarly carried out a statistical analysis of credible fear outcome and dissolution of a claim of fear. Using advanced statistical techniques, the GAO attempted to isolate how certain select factors, detailed below, affected the likelihood of a negative credible fear determination by an AO or the giving up of a claim of fear. In addition, the GAO analyzed and presented an array of other quantitative data related to the credible fear determination process, including statistics on credible fear referrals and passage rates, information on the characteristics of asylum seekers, and statistics on the relief rate in regular (post-expedited) removal proceedings.

Statistical Analysis of Impact of Certain Factors on the Credible Fear Process

Using advanced (logistic regression or multivariate) statistical techniques and data from INS’s APSS database, GAO analyzed whether and how the region of citizenship,⁹⁴ gender, age,

⁹³ The GAO reviewed “case working files” rather than the official “A” (alien) files and INS suggested that the official A files most likely contained the missing information. GAO did not review the official files in these four cases because they were not “readily available.” GAO Report, *supra* note 16, at 56 n.15.

⁹⁴ As discussed above, see *supra* note 8, GAO reported that because of the “limited number of cases by country of citizenship,” with the exception of Mexico, it grouped countries by regions of the world. It described the regions as follows:

The regions we used include the following countries, among others: Asia (includes China, India, Pakistan, the Philippines, and Sri Lanka), Africa (includes Ghana, Niger, Nigeria, and Somalia), the Caribbean (includes Cuba, the Dominican Republic, Haiti and Jamaica). Central America (includes El Salvador, Guatemala, and Honduras), the Middle East (includes Algeria, Iran, Iraq, Israel, and Lebanon), South America (includes Brazil, Colombia, Ecuador, Peru, and Venezuela), and the former Soviet Bloc (includes Albania, the Czech Republic, the Ukraine, Russia and Yugoslavia) and Other (includes Australia, Canada, France, Great Britain, and New Zealand). We included Mexico separately because it was the only North American country included in the

fiscal year, Asylum Office, and whether the individual traveled alone or as a lead member of a family group affected the likelihood of a negative credible fear determination by an AO or the likelihood of giving up a claim of fear. This technique isolates the size and statistical significance of the effect of a particular characteristic, such as age, while the effects of other characteristics are estimated and controlled for simultaneously. Although in its report the GAO did not explain how this analysis related to its attempt to answer the IRFA question, it did inform the Study that its purpose was to examine whether certain factors existed that could predict or explain an adverse credible fear determination or dissolution of a claim.⁹⁵

Impact on Likelihood of a Negative Credible Fear Determination by Asylum Officers (GAO Report pp. 50-51, 95)

Based on its analysis of nationwide data on credible fear cases in which persons sought entry to the U.S. between April 1, 1997, and September 30, 1999, derived from INS's APSS database, GAO made the following findings:⁹⁶

- **Region of Citizenship:** Persons from Mexico, the Caribbean, Central America, South America, the Middle East, and former Soviet Bloc countries had a higher likelihood of receiving a negative credible fear determination than persons from Asia and Africa.
- **Gender:** Women were about 75% as likely as men to receive a negative decision.
- **Asylum Office:** The Chicago, Los Angeles, New York, San Francisco, and Miami Asylum Offices were quite similar in their likelihood of producing negative findings, while the Arlington, Newark, and Houston offices were two to three times as likely to produce an adverse determination than Miami.

analysis and traditionally has been responsible for the largest group of illegal aliens in the United States.

GAO Report, *supra* note 16, at 81 n.b (Table I.1).

⁹⁵ Blume Interviews, *supra* note 1.

⁹⁶ As noted, these findings are the result of an advanced statistical analysis that isolates the impact of a particular characteristic on the likelihood that a person receives a negative credible fear determination. Additionally, GAO reported some raw data on credible fear referrals which does not isolate the impact of a specific characteristic, but merely reflects percentages based on gross numbers:

- Of the airports, Miami (52%), Los Angeles (37%) and Chicago (31%) had the highest rates of referral to a credible fear interview, while Dallas (2%), Houston (4%), and Atlanta (6%) had the lowest.
- Africa and Asia had the highest rates of referral (57% and 51% respectively) while Mexico and Central America had the lowest (1% and 6% respectively). Men and women were referred to a credible fear interview in nearly the same percentage of cases (25% and 24% respectively at the airports).
- At the largest land port of entry, San Ysidro, Cuba and Bulgaria had the highest rates of referral (85% and 82% respectively), while Mexico and the Dominican Republic had the lowest (2% each).

See GAO Report, *supra* note 16, at 81, 85 (Tables I.1, I.11).

- **Fiscal Year:** Individuals were about 13% as likely to receive a negative credible fear determination in fiscal year 1998 as in 1997, and 8% as likely in fiscal year 1999 as in 1997.⁹⁷
- **Age:** Age did not have a significant impact on credible fear outcome.

Impact on Likelihood of Giving Up (Dissolution of) One's Claim of Fear
(GAO Report pp. 57-58)

Also using nationwide data from INS's APSS database on credible fear cases in which individuals sought entry to the U.S. between April 1, 1997, and September 30, 1999, GAO made the following findings:

- **Region of Citizenship:** Region of citizenship had the most pronounced effect on the likelihood of dissolving a claim. Mexicans, Central Americans, and South Americans were more likely to dissolve their claims than persons from other regions.
- **Asylum Office:** Individuals processed at the Houston Asylum Office were about one-half as likely to dissolve their claims as those processed at Miami, while those processed at Arlington, Newark, and New York were two to five times as likely to dissolve their claims as those processed in Miami.
- **Gender:** Men were twice as likely as women to dissolve their claims.
- **Age:** Individuals thirty years or over were two to three times as likely as those under thirty to dissolve their claims.

Statistics on Credible Fear and the Regular Removal (Post-Expedited Removal) Processes

In addition to the data reported from its multivariate analysis, the GAO reported statistics on the credible fear process based on gross numbers. These statistics do not isolate the significance of particular characteristics.

Credible Fear Process (GAO Report pp. 48-49, 51, 81, 85)

Based on information in INS's APSS database, GAO reported the following regarding cases in which persons sought entry to the U.S. between April 1, 1997, and September 30, 1999:

⁹⁷ The significance of this finding is not clear, but it is assumed that persons in fiscal years 1998 and 1999 were less likely to receive a negative credible fear determination, because the credible fear approval rate continued to rise.

- **Referrals by Major Nationality:** 11,087 persons were referred for a credible fear interview,⁹⁸ of whom 27% were Chinese, 14% were Sri Lankan, and 13% were Haitian.
- **Credible Fear Passage Rate:** As of November 20, 1999, determinations had been made in 9,870 credible fear cases, 96% of which were found to have a credible fear.⁹⁹ The credible fear passage rate increased from 82% in fiscal year 1997 to 98% in fiscal year 1999.
- **IJ Review:** EOIR data indicated that 376 persons requested IJ review of an adverse credible fear determination by an AO between April 1, 1997, and September 30, 1999, and that in 86% of the cases, the decisions were affirmed, while in 14% the decisions were vacated. The data provided by EOIR and INS are in conflict as to the percentage of persons who request IJ review after receiving an adverse credible fear determination.¹⁰⁰ (In its report, the GAO did not explicitly acknowledge or attempt to reconcile this conflict.)

Giving Up (Dissolution of) a Claim of Fear (GAO Report pp. 48, 56, 58-59)

Based on INS's APSS database, GAO reported that between April 1, 1997, and September 30, 1999, 885 of the 10,755 (8%) persons who were referred for a credible fear

⁹⁸ As of June 24, 2000, INS had revised this number to 11,104. Based on data also provided by INS from APSS, in its Third Year Report, *supra* note 37, the Study reported that 14,951 persons who sought entry during this same period of time had been referred to a credible fear interview (April 1, 1997, through September 30, 1999). When the Study asked the INS to explain the discrepancy in numbers, INS informed the Study that it had accidentally included credible fear referrals for part of fiscal year 2000 in the total for fiscal years 1997 through 1999. Thus, Tables INS-24 and 26 in the Study's Third Year Report should be corrected to reflect that its total of credible fear referrals (14,951) covers the period of time from April 1, 1997, through early March 2000.

⁹⁹ In Table 26 of its Third Year Report, *supra* note 37, the Study reports a 88% credible fear passage rate. The reason that this percentage differs from that provided by GAO (96%) is that the GAO looked at those persons who had received positive credible fear determinations as a percentage of those who had a credible fear determination made in their cases – either positive or negative, while the Study looked at those who had received a positive decision as a percentage of a larger pool of persons – those who had a credible fear determination in their cases *or* whose cases were terminated for other reasons. The Study also finds a 96% passage rate when it utilizes the same method as GAO.

¹⁰⁰ INS reported that 68% of persons who receive a negative credible fear determination requested IJ review, while calculations based on a combination of INS and EOIR data result in a showing that 95% of persons with a negative credible fear determination requested IJ review. The combination of INS and EOIR data which shows the 95% request rate is as follows: INS reported that 96%, or 9,475 of 9,870 persons, received a positive credible fear determination, indicating that 395 or less persons received negative credible fear determinations and could have requested IJ review. At the same time, EOIR reported that 376 persons requested IJ review of an adverse determination. If 376 of 395 persons requested IJ review, the percentage of persons with an adverse determination seeking review would be approximately 95%, not 68% as reported by the INS.

interview and whose cases were closed¹⁰¹ gave up their claims of fear at some point during the credible fear process. GAO estimated, based on its review of fiscal year 1999 files involving individuals who dissolved their claims at the New York, Miami, and Los Angeles Asylum Offices, that 220 of 232 individuals were not permitted to withdraw their applications for admission, but were rather given expedited removal orders which carry specified bars to entry to the United States.

Post-Expedited Removal Process: Relief Granted in Regular Removal Proceedings (GAO Report pp. 51-52)

Persons found to have a credible fear of persecution are no longer subject to expedited removal; they are permitted to pursue an asylum claim in regular removal proceedings. GAO provided statistics on the granting of relief at this stage of proceedings. Based on INS and EOIR data, GAO reported that decisions had been made by IJs in 5,102 of 7,947¹⁰² (64%) cases in which persons had been found to have a credible fear. Of these 5,102 cases, relief had been granted in 30%, orders of removal had been entered in 61%, and 9% remained pending.¹⁰³

B. Evaluation of GAO's Methodology

GAO examined internal controls, reported statistics derived from INS and EOIR databases on the credible fear and regular removal stages, and analyzed the impact of certain characteristics (such as gender and region of citizenship) on the credible fear process. This methodology left unanswered Congress' question whether asylum seekers are incorrectly removed from the United States.

¹⁰¹ GAO characterized "closed cases" as those in which there was a credible fear determination (9,870 persons) or there was dissolution of a claim (885 persons). GAO did not include cases terminated in other manners. See *infra* notes 135-37 and accompanying text.

¹⁰² GAO reported, based on INS data, that 96% of 9,870 persons who sought entry between April 1, 1997, and September 30, 1999, passed credible fear, which totals approximately 9,475 persons. In order to calculate relief rates in regular removal proceedings (and the failure to appear which will be discussed later), GAO had to merge INS and EOIR database fields. In doing so, GAO had to exclude a significant number of cases (cases that did not match up between the two databases, cases that predated expedited removal, asylum-only hearings, IJ reviews of negative credible fear determinations, claimed status reviews, etc.), and thus ended up with only 7,947 cases upon which to base this analysis, which is approximately 1,500 less than the number reported by INS to have passed credible fear. See GAO Report, *supra* note 16, at 49, 98-99.

¹⁰³ GAO informed the Study that "pending cases" include cases in which an IJ terminates an expedited removal case because the INS's charges are found not to be sustainable, but the INS retains the authority to recharge the individual and reopen his or her proceedings. Blume Interviews, *supra* note 1; GAO Report, *supra* note 16.

1. Examination of Internal Controls (GAO Report pp. 47, 52-56)

As detailed above, the procedures and internal controls reviewed by the GAO include the documentation of required procedures (the reading of mandatory information during the credible fear interview and supervisory review of the decision), training of credible fear decision-makers, and oversight by a quality assurance team at INS Headquarters. On the basis of its review, the GAO concluded that “asylum officers generally complied with requirements,” “that supervisors’ review took place[,]” that officers were “satisfied with the . . . training INS provided[,]” and that the quality assurance team was “performing . . . reviews” and “providing feedback . . .”¹⁰⁴

There are a number of significant limitations to the GAO’s approach which raise questions regarding the reliability and usefulness of its conclusions. First, the GAO based its finding of AO compliance on self-reporting, which, as discussed in Part I(B)(2), may lack reliability where there is an incentive to misreport. Substantial on-site observation of the credible fear interview process could have increased the reliability of GAO’s findings. On-site observation would have provided the opportunity not only to more objectively assess the issue of AO compliance with requirements, but also to evaluate aspects of the process not evident through file review alone, such as availability and quality of translation,¹⁰⁵ which may have a significant impact on the credible fear determination process. However, GAO only carried out minimal observation (six credible fear interviews and two IJ reviews).

Second, and perhaps more important, because GAO did not see its role as engaging in the evaluation of legal decisions, it declined to address any substantive legal issues, including asylum officers’ understanding of the credible fear standard, as well as the accuracy of legal determinations made in the credible fear process. In reviewing AO training, the GAO reported on “satisfaction” level of the officers, but did not address the AOs’ knowledge of the relevant standards. The GAO also reviewed forty-five case files in which a negative credible fear determination had been made, but did not address whether the adverse findings were consistent with controlling legal standards.¹⁰⁶ Further, GAO examined INS quality assurance team review in forty-one of these forty-five files, but did not detail substantive aspects of the assurance team’s comments, or provide any information as to whether the review led to reversals of adverse

¹⁰⁴ GAO Report, *supra* note 16, at 47.

¹⁰⁵ In its Second Year Report, *supra* note 37, Part VI(A), the Expedited Removal Study reported on translation errors which, if they had gone uncorrected, could have impacted the credible fear outcome. The interpreters for a group of Chinese asylum seekers had difficulty translating the terms “forced sterilization” and “forced abortion,” the names of certain occupations and religions, and the nature of the many permits that Chinese citizens are required to have. One interpreter translated the word “sterilization” as related to cleanliness, rather than as a population control measure.

¹⁰⁶ In credible fear proceedings, AOs and IJs must determine if the asylum seeker establishes that “there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under Section 208.” INA § 235(b)(1)(B)(v).

decisions in these cases. The absence of a methodological component to address legal accuracy clearly limited the ability of the GAO to answer the question put forward by the Congress: whether asylum seekers are incorrectly removed to a country where they may be persecuted.

Last, for reasons described in Part I, the GAO did not report on the concerns of NGOs or researchers regarding the implementation of the credible fear determination process. The inclusion of any information from independent organizations could have contributed to a more balanced evaluation of the credible fear process, and could have brought information to the GAO's attention which was not available through its review of documentation requirements, INS training, and quality control.¹⁰⁷

2. Statistical Analysis

As described above, using advanced statistical techniques and data from INS's APSS database, GAO analyzed how select factors or explanatory variables (region of citizenship, gender, age, fiscal year, Asylum Office, and whether the individual traveled alone or as a lead member of a family group) affected the likelihood of a negative credible fear determination by an AO or the dissolution of a claim. GAO informed the Study that it performed this analysis in order to investigate the relationships between the select variables and credible fear outcomes, i.e., whether these variables may predict or explain such outcomes.¹⁰⁸

The GAO explained that, due to the small numbers of cases from many countries, it carried out its multivariate analysis on the basis of geographic region rather than country of citizenship (except in the case of Mexico). On the basis of its multivariate analysis, GAO reported the statistical significance of the effect of select variables noted above on the likelihood of a negative credible fear determination and the dissolution of claims. For example, GAO reported that persons from the Middle East and the former Soviet Bloc were two to three times more likely to receive an adverse credible fear determination than were persons from Asia. A

¹⁰⁷ In a letter to the GAO's Comptroller General, LCHR expressed concern over the GAO's failure to investigate complaints of improper conduct by INS, including "cases in which refugees were wrongly removed." See LCHR, *supra* note 33, Appendix 6. A response from GAO indicated that without INS documentation of the allegations in the complaints, GAO would need to rely on recollections of INS officials occurring in the past, which would be "questionable at best," and that any investigation into complaints could "quickly turn on a difference in recollection or opinion." For a more detailed discussion of LCHR's letter and the GAO's response, see Part I(B)(2).

¹⁰⁸ The Study has performed some analysis of the likelihood that certain factors may impact expedited removal outcomes; it examined whether individuals who were male, fluent in English, or of a high socio-economic status were favored by the expedited removal process. See Third Year Report, *supra* note 37, Part IV(C)(2); Second Year Report, *supra* note 37, Part IV(B), (C), (G). However, as indicated in the Study's reports, a finding that credible fear outcome (or removal rate) varies by gender, nationality, etc., does not evidence improper determinations; nor, conversely, does a finding that credible fear outcome does not vary by gender, nationality, etc., evidence proper determinations. Such conclusions could only be reached through on-site observation of the process and evaluation of the facts of relevant cases.

limitation of this finding is that asylum correlates heavily with individual country conditions, and using region rather than country is therefore unlikely to provide useful information unless the countries within a region are relatively homogenous, which they are not. GAO did perform a “sensitivity analysis,” similar to the multivariate analysis, for sixteen countries which had a sufficient number of cases.¹⁰⁹ GAO found that there was “considerable variability” between countries within regions as to credible fear outcomes, but did not report what those variances were.¹¹⁰ It would have been helpful for GAO to have provided information specific to countries on the variability in credible fear outcomes.

In both the multivariate and sensitivity analysis, GAO did find factors that consistently influenced outcome regardless of the country and region. These factors were Asylum Office and fiscal year.¹¹¹ The GAO reported that there was a higher likelihood of a negative credible fear decision or dissolution of a claim at certain Asylum Offices than at others.¹¹² However, due to GAO’s decisions regarding scope and methodology of its study, it did not engage in substantive research by which it could have determined the possible explanations for the differences in outcome identified by its analysis. Without such research, however, it is impossible to explain the difference by Asylum Office and to know whether expedited removal procedures are being applied consistently and in a uniform manner.

Last, GAO’s methodology did not include an examination of other potentially significant factors in its multivariate statistical analysis which may have impacted and provided greater understanding of the credible fear determination process. These factors include additional characteristics related to the applicant and her claim (language of fluency, nature of claim, relatives in the United States), as well as information on the qualitative aspects of the process, such as the competency of the interpreter, or the presence of a consultant.¹¹³

¹⁰⁹ Blume Interviews, *supra* note 1.

¹¹⁰ GAO Report, *supra* note 16, at 89 n.1.

¹¹¹ The GAO’s finding of the significance of fiscal year can be explained by the fact that the credible fear passage rate steadily increased between 1997 and 1999.

¹¹² *See supra* Part III(A)(1).

¹¹³ In its third year report, the Study raised the question whether having a consultant during the credible fear process and higher socio-demographic characteristics may impact the likelihood of receiving a positive credible fear determination by an asylum officer. This question was raised on the basis of the Study’s review of a non-random sample of over 900 cases collected from NGOs and private attorneys and over 130 records of proceedings in cases where an IJ reviewed an adverse credible fear determination by an AO. *See* Third Year Report, *supra* note 37, Part IV(C)(2); Second Year Report, *supra* note 37, Part IV(B), (C), (G). In explaining why it did not look at such factors, the GAO stated that it limited itself to “those variables contained in INS’ [sic] database and other existing data ... deemed reliable” for its report. Stana Letter, *supra* note 7.

3. Statistics on Relief in Regular Removal Proceedings

GAO reported data on the granting of relief in regular removal proceedings. Since expedited removal was first implemented, proponents and opponents of the process have expressed an interest in the relief rate; some have made comments that a high grant rate would demonstrate the bona fide nature of the claims raised in expedited removal, while a low grant rate would indicate the opposite, and could be relied upon to justify the existing policy of detention of persons found to have a credible fear. Although the GAO does not make clear its purpose in presenting relief data, in the Study's opinion, this analysis is in some part a response to the interest articulated by those on both sides of the issue. Given the potential impact which these findings might have, one might have expected the GAO to have anticipated and avoided any aspects of its methodology which could have resulted in a distortion of the findings. However, as detailed below, the GAO did two things which were problematic and created an appearance of bias: (1) it failed to separate out in absentia orders from denials on the merits of asylum claims; and (2) it inadequately addressed the potentially inflated denial rate resulting from the rapid disposition of cases in which an individual failed to appear.

The GAO reported the following statistics for post-expedited removal relief rates: 30% grant, 61% denial, 9% pending. It stated that it arrived at these figures by reviewing the dispositions in the 5,102 cases of persons who had passed credible fear and had a decision made by an IJ after a full hearing on their asylum claims. However, GAO did not discuss whether the 61% denial rate included persons removed in absentia because they failed to appear for a hearing. The failure to investigate or report the percentage of denials which resulted from a failure to appear is a matter of concern because the GAO's analysis of a separate pool of INS and EOIR data indicates that a significant number of persons (approximately 1,000) were removed in absentia during a similar time period. Readers are likely to assume that the grant/denial rates provide an indication of the strength and legitimacy of the claims adjudicated. This assumption does not apply to denials based on a failure to appear; in absentia orders do not indicate whether the claim would have met the legal standards required for asylum, but simply reflect whether the asylum seeker appeared at his hearing.¹¹⁴ Given the very real differences between a denial after

¹¹⁴ As the Study has reported, some individuals with potentially valid asylum claims have been placed in expedited removal when transiting through the United States on their way to Canada, where they have close friends and family. A number of these individuals left for Canada when paroled by INS, and failed to appear for their U.S. hearings. See Parts V(A)(4) and VI(B) of the Second Year Report, *supra* note 37, and Part VI(B) of the Third Year Report, *supra* note 37. For example, the Study detailed the case of Mr. D, a Sri Lankan Tamil truck driver, who had been arrested and detained by the army in his country and accused of assisting the Liberation Tigers of Tamil Eelam, who had stolen merchandise from him on numerous occasions. Mr. D left Sri Lanka to seek asylum in Canada, where his nephew and two brothers had been granted asylum and became naturalized citizens. He was placed in expedited removal in Puerto Rico, through which he transited on his way to Canada. After two months of detention, he was released and left for Canada. When Mr. D arrived in Canada, he filled out the appropriate paperwork at the U.S. Embassy in Ottawa to notify the U.S. of his departure, and with the assistance of a U.S. lawyer, he obtained a termination of his U.S. immigration proceedings. Second Year Report, *supra*, Part V(A)(4). Although some IJs terminate proceedings under these circumstances, others have ordered such persons removed in absentia. Further, Canadian-bound asylum seekers who are unrepresented may be unaware of the formal process by

full adjudication, and a denial for failure to appear, one would have expected the GAO to distinguish between these two categories of cases.

Furthermore, the percentage of cases with an in absentia order may be artificially high within the pool of cases analyzed (i.e. 5,102 cases in which there was a decision by an IJ). This is due to the fact that in absentia orders occur quickly (generally at the master calendar stage), while hearings on the merits of an asylum claim tend to be scheduled a year from the date of the master calendar hearing. Although, after it was brought to its attention by EOIR, GAO noted this issue in its discussion of the rate at which people fail to appear for removal hearings,¹¹⁵ GAO did not address it in the context of relief rates.

C. Problems Indicated by GAO's Findings

Notwithstanding the limits of the GAO's methodology, its findings regarding adverse credibility findings on the basis of nexus and its findings on dissolved cases raise concerns regarding the process.

1. Almost All Adverse Credible Fear Determinations were on the Basis of Nexus

GAO reported that almost all (forty-four of forty-five) of the fiscal year 1999 negative credible fear determinations at the Los Angeles, New York, and Miami offices were denied on nexus. In each of those cases, the AO had ruled that the persecution feared did not relate to one of the five statutory grounds for asylum. It is troubling that a failure to prove nexus was the basis of denial in the overwhelming majority of cases. Nexus determinations can involve highly complicated factual and legal issues. The credible fear interview, which is not intended to be a full asylum hearing¹¹⁶ and often involves applicants who are unrepresented, may not be the most appropriate venue for making such complex decisions. Without knowing more about each of these forty-five cases, it is not possible to determine whether these particular denials on the basis of nexus are cause for concern. The Study is aware of numerous cases where questionable nexus

which one can give notice to the immigration court of having departed the United States, and without such notification they will certainly be removed in absentia although they have departed.

¹¹⁵ See GAO Report, *supra* note 16, at 68 (reporting EOIR's comments to the GAO's draft report).

¹¹⁶ Executive Office for Immigration Review, Interim Operating Policy and Procedure Memorandum 97-3: Procedures for Credible Fear and Claimed Status Reviews, at 7 (Mar. 25, 1997) (Attachment 10 to First Year Report).

determinations were made,¹¹⁷ and ongoing reliance on this ground as a basis of denial raises concerns in the absence of an evaluation which incorporates substantive review.

2. Most Persons Giving Up Their Claims of Fear Were Ordered Removed

GAO estimates that 220 of 232 persons who gave up their claims of fear in fiscal year 1999 in the Los Angeles, Miami, and New York Asylum Offices were ordered removed, rather than being permitted to withdraw their claims without immigration consequences. In the majority of files, the reasons for giving up the claim were not clear; however in 39 of the 133 files there was some information recorded. Included among the reasons was that the individual did not want to be in detention, and that he wanted to be reunited with family in the home country.

As noted above, INS may allow persons who give up their claims of fear to withdraw their applications for admission to the U.S. without immigration consequences, or, in the alternative, it may order them removed, with a five year bar on entry and other potentially serious immigration consequences.¹¹⁸ INS Headquarters has instructed that officers have the discretion to allow withdrawal where it “would be in the best interest of justice,” and emphasizes that “[i]n light of the serious consequences of issuing an expedited removal order . . . the decision of whether to permit withdrawal should be based on a careful balancing of relevant favorable and unfavorable factors in order to reach an equitable decision.”¹¹⁹ These factors include but are not limited to: the seriousness of the immigration violation; previous findings of inadmissibility; intent to violate the law; ability to easily overcome the ground of inadmissibility (i.e. lack of documents); age or poor health; and other humanitarian or public interest considerations.¹²⁰

The failure to allow asylum seekers who cannot tolerate detention or separation from their family members to withdraw their applications for admission raises questions regarding proper application of INS policy on withdrawal. Under this policy INS officers are to consider

¹¹⁷ For example, in one case involving an asylum seeker from the Republic of the Congo who did not have a consultant present and who appears to have been taking several medications for psychological conditions at the time of the interview, an AO made an adverse credible fear determination on the grounds that no nexus to a protected ground of asylum was established. This man, who was Tutsi and Muslim, had informed the AO that his family was killed by the military, that there was a civil war in his country, that the military was against the civilians, and that everyone was fleeing and dying. No follow-up questions to these statements appear to have been asked; the AO’s notes indicate one of the shortest credible fear interviews the Study is aware of to date. It is questionable whether an AO could make a determination that no protected ground of asylum was implicated given the limited facts elicited from the asylum seeker. Second Year Report, *supra* note 37, Part V(B)(7). See also *id.* Part V(2), (3), and (6); Third Year Report, *supra* note 37, Part V(J).

¹¹⁸ For a discussion of the consequences of an order of expedited removal, see footnote 78 above.

¹¹⁹ Office of Programs, *supra* note 57.

¹²⁰ *Id.*

humanitarian considerations, as well as the seriousness of the violation and intent to violate the law. In cases where asylum seekers are forced to seek entry with false or no documents, due to circumstances in the country they are fleeing, it seems that the violation is less serious, and the asylum seeker was most likely not motivated by an intent to violate U.S. law. The Study considers that the failure to allow these persons to withdraw raises serious policy and humanitarian concerns.¹²¹

IV. Improper Detention of Asylum Seekers

In IRFA, Congress also asked “whether INS officers improperly detain asylum seekers.”¹²² The INA provides for mandatory detention, until removal, of all persons subject to expedited removal proceedings.¹²³ A very limited form of “parole” (release from detention) is available for individuals subject to expedited removal, in accordance with INA § 212(d)(5), if “the Attorney General determines, in the exercise of discretion, that parole is required to meet a medical emergency or is necessary for a legitimate law enforcement objective.”¹²⁴ However, a person who establishes a credible fear of persecution is no longer subject to expedited removal proceedings, but rather to regular removal proceedings under INA § 240, and is thus eligible for parole. In cases where credible fear is established, parole may be granted on a case by case basis for urgent humanitarian reasons or significant public benefit, if such persons do not pose a security risk or a risk of absconding.¹²⁵ This is a discretionary grant made by INS district directors. However, INS Headquarters has emphasized that “parole is a viable option” and “should be considered” for individuals who are found to have a credible fear, can establish identity, have community ties, and are not subject to any statutory bars to asylum involving violence or misconduct.¹²⁶ Further, INS has stated that persons found to have a credible fear fall

¹²¹ In one case reported by the Expedited Removal Study, the mother and daughter of a Peruvian family that had suffered death threats from a guerrilla group requested asylum upon their arrival and were separated. The mother, who was detained in a criminal facility, made a decision to abandon her asylum claim after she was told she faced many weeks of detention and separation from her daughter, and they were both ordered removed. Her husband has since been granted asylum in the United States, but his wife and daughter cannot join him because they are subject to the five year bar on entry. See Third Year Report, *supra* note 37, at Part V(B).

¹²² International Religious Freedom Act § 605(a)(2).

¹²³ INA § 235(b)(1)(B)(iii)(IV); 8 C.F.R. § 235.3(b)(2)(iii).

¹²⁴ 8 C.F.R. §§ 235.3(b)(2)(iii), (b)(4)(ii).

¹²⁵ INA § 212(d)(5); 8 C.F.R. §§ 208.30(d), 212.5.

¹²⁶ Office of Field Operations, INS, Memorandum on Expedited Removal: Additional Policy Guidance (December 30, 1997) (Attachment 27 to First Year Report, *supra* note 19).

under the INS's low priority detention group,¹²⁷ and that "it is INS policy to favor release of aliens found to have a credible fear of persecution, provided that they do not pose a risk of flight or danger to the community."¹²⁸

The detention of asylum seekers is a highly controversial issue that remains subject to debate by policy makers, scholars, international agencies such as UNHCR, and NGOs. Because the expedited removal laws require the detention of asylum seekers subject to expedited removal, it is critical to analyze whether asylum seekers are released from detention by INS when appropriate under current regulations and policy. Congress' concern regarding this issue is demonstrated not only by the provision of IRFA that requires GAO to research whether asylum seekers subject to expedited removal are improperly detained, but also by a 1998 congressional request that the INS provide it with information on the number, age, and gender of asylum seekers in detention, as well as the facilities they are detained in and the average length of detention. INS has not yet provided this information to Congress.¹²⁹ However, as described below, the question of whether asylum seekers subject to expedited removal are improperly detained remains largely unanswered by the GAO's study, because of the questionable reliability of the data it relied upon. It also remains unanswered because GAO focused on persons who had been released, rather than those who remained in detention. GAO informed the Study that it would have had to engage in evaluation of legal decision making, which it is not competent to perform, in order to answer the question whether asylum seekers who remained in detention were improperly detained.¹³⁰

A. GAO's Methodology & Findings

Based on a review of relevant law and policy guidance, analysis of INS data, and the distribution of a survey to INS district detention and deportation branches, GAO provided information on: (1) INS detention policy; (2) the criteria used by INS in making detention decisions; (3) the number of asylum seekers in expedited removal who were released after

¹²⁷ Office of Field Operations, INS, Memorandum: Detention Guidelines Effective October 9, 1998, at 6, reprinted in 75 INTERPRETER RELEASES 1523 (Nov. 2, 1998) (Attachment 10 to Second Year Report, *supra* note 37).

¹²⁸ *Id.* at 3.

¹²⁹ Congress required the INS to submit its first report with this information on October 1, 1999, and then with updated information on October 1 of each year thereafter. 114 Cong. Rec. 11190-91 (Oct. 18, 1998). INS was unable to meet the October 1999 deadline, and negotiated an extended deadline of January 15, 2000, which it was also unable to meet. John Bjerke, Chief, Demographic Statistics Section, INS Statistics Branch, informed the Study on April 6, 2000, that INS was unable to meet the various deadlines because it was simultaneously required by a subpoena served by Congress to produce information on the release of criminal aliens, which has required much of the time and efforts of the Statistics Branch. As of October 2000, INS informed the Study that it still had been unable to compile the information requested.

¹³⁰ Blume Interviews, *supra* note 1.

receiving positive credible fear decisions between fiscal years 1997 and 1999; and (4) whether persons found to have a credible fear filed an asylum application and appeared for their hearings in regular removal proceedings between fiscal years 1997 and 1999. In addressing the issue of appearance rates in regular removal proceedings, the GAO also reported on the Vera Institute of Justice's Appearance Assistance Program, a program commissioned by the INS.

1. Review of Law and Policy Guidance (GAO Report pp. 34, 62-63, 67)

In order "to determine how INS exercised its authority to detain or release aliens who arrive at ports of entry and claim a fear of persecution or torture," GAO reviewed INS Headquarters guidance, in addition to applicable laws and regulations. Based on this review, GAO reported that once an asylum officer determines that an individual has a credible fear of persecution, INS policy favors the release of such individual if the responsible INS district director or certain other INS officials determine that he or she is likely to appear for removal hearings, and will not pose a danger to the community. GAO noted that INS considers persons who pass credible fear to be the fourth, and lowest, priority group for detention, and that INS favors their release where they do not pose a risk of flight or danger to the community.¹³¹

GAO reported that INS plans to issue instructions that would require that noncriminal asylum seekers subject to expedited removal be given a uniform letter that specifies the reasons for the decision to grant or deny parole. INS's purpose in requiring this letter is to standardize release decisions among district offices.

2. Mail Survey (GAO Report pp. 34, 64-67, 71)

The GAO mailed questionnaires to the Detention and Deportation branches of all thirty-three domestic INS district offices "to determine how each district exercised its discretion to release or detain an alien after an asylum officer determines that the alien has a credible fear of persecution or torture."¹³² In the survey, GAO asked questions regarding: (1) the nature of the factors these local INS officials considered in deciding whether to release individuals who pass credible fear; (2) the number of credible fear cases processed within their districts in fiscal year 1999; (3) the number of individuals detained and released in their districts in fiscal year 1999; and (4) a list of the facilities they use for detention, including those used to detain persons claiming a fear of persecution.¹³³

¹³¹ A more detailed description of the parole process and applicable regulations and policy is set forth above at the beginning of Part IV.

¹³² GAO Report, *supra* note 16, at 34.

¹³³ GAO did not list all the detention facilities at which INS districts said they detained asylum seekers subject to the credible fear process. However, it appears that GAO used this information in order to select the twelve facilities it visited, which INS reported housed 70% of all asylum seekers subject to expedited removal in fiscal year 1999. *See* GAO Report, *supra* note 16, at 35. For information on the twelve facilities GAO visited, and

Of the thirty-three districts, two (Anchorage, Alaska, and Honolulu, Hawaii) informed GAO that they routinely transferred all credible fear cases to other districts. Out of the remaining thirty-one, twenty-nine responded and indicated wide variances in the release rates and parole policies, described below. These variances have apparently been recognized by INS, as GAO reported that INS Commissioner Doris Meissner had requested an internal study that examines the reason that all INS district offices are not following Headquarters' guidance that favors the release of individuals determined to have a credible fear of persecution.

Specifically, GAO reported the following based on the responses to its mail questionnaire:

- **Individuals Released:** Twenty-nine INS districts reported that they had released 3,432 of 4,391 (78%) individuals who were found to have a credible fear of persecution.¹³⁴ The remaining 22% may have been subsequently released after meeting certain conditions, such as the posting of bond.
- **Release Policy:**
 - Twelve districts, which processed 68% of all persons passing credible fear in the twenty-nine responding districts, reported that they released 98% of individuals passing credible fear. Of these twelve, ten noted that they released such persons in accordance with INS policy (i.e. where the individual was not a threat to the community or flight risk). One released such persons because of a lack of detention space. The remaining district considered all individuals passing credible fear to be flight risks and normally did not grant parole without requiring a \$5,000 bond.
 - Four districts reported that based on their interpretation of INS Headquarters directives, they generally did not release individuals passing credible fear, although detention space and lawyers' requests for parole were also considered.
 - Thirteen districts did not identify a general practice on the detention of persons passing credible fear. Ten of these thirteen did not comment on their detention practices, while the remaining three noted that they determined whether to release these individuals on a case by case basis and considered the strength and credibility of the claim of fear involved in making the decision.
- **Criteria Considered for Release:** There was variation in the number and combination of factors considered by INS districts in making release decisions; for example, one district office reported only considering community ties, despite INS's requirement that they

the purpose of these visits, see Part V(A)(1), *infra*.

¹³⁴ As discussed below, GAO noted that INS Headquarters determined that the number of persons who passed credible fear in fiscal year 1999 was 6,515, and that the discrepancy between this number and the number cited by the districts (4,391) resulted from Headquarters' use of a standardized database, which was not utilized by most of the districts. See *infra* Part IV(B)(1).

consider flight risk and danger to the community, while another office reported eight factors of consideration. The GAO reported the factors and number of districts considering a particular factor as follows: community ties-24; criminal history checks-24; behavior and demeanor-10; ability to establish identity-9; health and medical considerations-9; manner of entry into U.S.-6; need to assist law enforcement efforts-5; means of support (so as not to become a public charge) - 4; detention does not serve public interest-4; strength of credible fear claim-2; legal bars to asylum-2; and miscellaneous factors-7. GAO noted that 28 districts stating they were in compliance with INS detention guidance reported factors other than flight risk and danger to the community when making their decisions.

3. Statistics (GAO Report pp. 67-70)

Using a database that merged fields from INS's APSS database and EOIR's ANSIR database,¹³⁵ GAO reported 7,947 persons were found to have a credible fear of persecution between April 1, 1997, and September 30, 1999. Of those 7,947, 5,320 or 67% had been released as of February 22, 2000. Based on information in the same merged database, these initial statistics, and other information where noted, GAO reported the following findings:

- **Appearance Rate:**
 - 2,351 of the 5,320 persons who were released had decisions by IJs as of February 22, 2000, of which 42% (1,000 of 2,351 persons) had been ordered removed "in absentia" because they did not show up for a scheduled hearing. GAO further noted that when EOIR reviewed its draft report, EOIR provided information indicating that the 42% statistic might be artificially high. EOIR explained that the majority of in absentia orders are entered at the master calendar stage, while cases in which an individual appears and has a full hearing are scheduled on average a year after the initial master calendar date; consequently, as more of the cases are completed over time, a smaller percentage of the cases will have resulted in absentia orders. The lowering of the in absentia rate was already apparent at the time of EOIR's review of GAO's draft report – EOIR informed GAO that the rate had dropped from 42% to 34% as of August 10, 2000. EOIR predicted that the in absentia rate would drop as low as 25% upon closure of all 5,320 cases examined by GAO.
 - Three nationalities – Sri Lankans (44%), Chinese (16%), and Haitians (12%) – represented 72% of the 1,000 individuals ordered removed in absentia.
- **Change of Hearing Location (Venue):**
 - Fifty-six percent, or 557, of the 1,000 persons who were ordered removed in absentia had requested and received a change of venue.

¹³⁵ For information on these databases, see footnotes 81-82 above.

- Of all persons who were released and received a change of venue, 38% (or 557 of 1,467 persons) were ordered removed in absentia.
- **Filing of Asylum Applications:**
 - Of the 7,947 positive credible fear cases, 3,140 individuals had not filed for asylum as of February 22, 2000; 43% of these (1,338 of 3,140 persons) missed the one year filing deadline.¹³⁶
 - Of the 3,140 persons who had not filed for asylum, 1,239 were ordered removed, of which 59% (733 of 1,239) missed the one year filing deadline.

From these statistics, GAO concluded that “indications suggest many aliens may be using the credible fear process to illegally remain in the United States.”¹³⁷ As additional support for this conclusion, they referenced two studies which addressed the situation of Chinese migrants, who as noted above constituted 16% of all persons who had decisions by an IJ and were removed in absentia. The studies the GAO referenced are the recent INS National and Regional Intelligence Assessments (NARIA) and a March 2000 Canadian Parliamentary Report. The NARIA had reported that the smuggling of people from China is an “ongoing and growing phenomenon,” that many smuggled persons were coached to ask for asylum and found to have a credible fear of persecution, and that few appeared for their removal hearings. The Canadian report stated that Chinese migrants who arrived by boat in Canada had paid large sums of money to traffickers, and were headed ultimately for New York City.

4. Report on the Vera Institute of Justice’s Appearance Assistance Program (AAP) (GAO Report pp. 70-72)

The GAO reported on the AAP, a three year program commissioned by INS intended to increase appearance rates in removal proceedings without resorting to detention through supervision of asylum seekers who met certain criteria. To qualify for participation in the AAP, individuals were required to show that they had community ties, had a record of compliance in previous proceedings, and were not a threat to public safety. Those that qualified were supervised throughout their immigration proceedings by the AAP if paroled by INS.¹³⁸

¹³⁶ Pursuant to laws passed in 1996, asylum seekers must file an asylum application within one year of their arrival in the U.S. absent changed circumstances which materially affect the asylum seeker’s eligibility for asylum or extraordinary circumstances justifying the delay in filing. INA § 208(a)(2)(B). *See also* 8 C.F.R. § 208.4.

¹³⁷ GAO Report, *supra* note 16, at 67.

¹³⁸ The AAP described its selection and supervision process as follows: At detention centers, intake staff recommend eligible detainees for release by the INS into program supervision. Participants released from detention are required to check in regularly at the program’s Reporting and Assistance Center. Supervision in the community, including random home visits, ensures a quick response to a missed court or office appearance. Those who violate the rules of supervision are reported to the INS and may be re-detained. Participants who are

GAO reported the following findings of AAP. Of the eighty-five persons subject to expedited removal who qualified for participation in the AAP, INS approved the release of seventy-nine. Of the seventy-nine, forty-six had decisions in their cases – eighteen were granted relief, seventeen were ordered removed, six were ordered removed in absentia, four were allowed to remain in the United States on grounds other than asylum, and one was granted voluntary departure. GAO noted that the AAP had concluded that with supervision, a high degree of compliance with immigration procedures and requirements can be obtained at a lower cost and without detention.

Regarding the AAP's findings, GAO stated that "[i]t is not clear if the results of the AAP demonstration could be widely implemented with the same outcomes" To support this point, the GAO referred to the comment of a New York INS official who said that the AAP supervisees were not representative of detainees generally because the "AAP's selection process favored aliens claiming a credible fear of persecution or torture who had more easily established and verifiable identities, more community ties, and a greater likelihood of appearing." The official further suggested that the fact that persons voluntarily participated in the program may have impacted the AAP study results.

B. Evaluation of GAO's Methodology

As noted above, the detention of asylum seekers is controversial. Congress asked GAO to report on whether asylum seekers are improperly detained. This question remains largely unanswered.

First, in gathering data about release and detention policy, GAO relied heavily on information provided by the INS itself. GAO carried out a mail survey of INS officials and it analyzed a database it created by merging fields from INS's APSS and EOIR's ANSIR databases. On the basis of INS district responses to its mail survey, GAO reported on the number of persons released by district and each district's general parole policy. Based on the merged INS and EOIR database, GAO reported on: (1) how often persons who passed credible fear (and thus were no longer subject to expedited removal) and were paroled by INS showed up for their scheduled removal hearings with IJs; (2) how often persons who requested and received a change of hearing location failed to appear for a removal hearing; and (3) how often persons who passed credible fear applied for asylum. This reliance on INS data is a matter of concern because: (1) INS district offices' responses to the GAO's mail survey constitutes self-reporting, and therefore raises the same reliability problems which have been discussed in earlier sections of this report;

ordered removed are detained but may be re-released to supervision pending an appeal.
AAP, *About the Appearance Assistance Program* <<http://www.vera.org/aap/index.html>> (visited May 7, 2000).

and (2) because INS data does not provide an accurate, precise and consistent record of key expedited removal and parole figures.¹³⁹

Second, GAO focused on those individuals who had passed credible fear and been released by the INS. It examined their appearance and asylum application rates, and in doing so was essentially asking whether these individuals had been *improperly released*. GAO did not attempt to report on the situation of those asylum seekers who were *not* released from detention by INS after being found to have a credible fear in order to determine whether they were *improperly detained*, pursuant to the applicable regulations and policy. The GAO has informed the Study that it did not do so because it would have required a substantive or qualitative file review to investigate whether parole criteria were accurately applied in these cases, and this is outside its area of competency.

Finally, to the degree that appearance and asylum application rates may be relevant to the question at hand, the rates reported by the GAO are problematic. As detailed below, where there were alternative approaches to calculating rates, GAO chose those approaches which resulted in the highest failure to appear and asylum filing rates. GAO then used these rates and other reports of questionable relevance to support its conclusion that many individuals are using the credible fear process to remain illegally in the United States.

1. Reliance on Self-Reporting and the Absence of a Qualitative, Substantive Analysis

Self-Reporting

In order to determine parole policy and release rates, GAO distributed a mail survey to INS district offices inquiring about parole policies, including the factors considered in making parole determinations and the number of persons paroled. The use of mail surveys is a form of INS self-reporting, which, as noted previously, is never a preferred methodology where there may be an incentive to misreport. In this context, there exists some incentive for INS district directors to report that their parole policy is consistent with the regulations and directives which apply to release decisions, even if that is not the case.

In addition to the potential of misreporting, it appears that there may have been a serious problem with the reliability of the data reported. GAO reported a 78% parole release rate (3,432

¹³⁹ As noted above, see note 134, and as discussed below in Part IV(B)(1), there was a significant conflict in the number of persons reported by INS districts (4,391) and by INS Headquarters (6,515) found to have a credible fear of persecution in fiscal year 1999. Additionally, as described in Part III(A)(4), there was a conflict between INS and EOIR data on persons who received a negative credible fear determination from an AO and who requested review by an IJ in fiscal years 1997 through 1999 – EOIR data indicates that 95% of persons requested IJ review, while INS reported 68%. Finally, the GAO informed the Study that it did not analyze how certain factors (such as gender, nationality, the port of entry at which an individual seeks admission) correlated with INS's decisions to refer an individual for a credible fear interview or with INS's parole decisions because of the unreliability of INS's data. Blume Interviews, *supra* note 1.

of 4,391 persons) for fiscal year 1999. However, there are three factors which demonstrate the questionable reliability of this data. First, this rate was based on the responses of only twenty-nine of thirty-one INS districts with credible fear cases, as two failed to provide any numbers to GAO. Second, of these twenty-nine districts, only nine gave actual numbers – sixteen of the districts provided estimated numbers; two gave a combination of exact and estimated numbers; and two did not indicate the nature of the numbers given. Third, there was a significant discrepancy between the number of positive credible fear cases reported by district directors (4,391) as compared to that reported by INS Headquarters (6,515) – a difference of 2,124, or 33%. GAO explained that this discrepancy was a result of the fact that INS Headquarters uses a standard database while the districts do not, and it also appears to be in small part a result of the fact that two districts with credible fear cases did not respond to GAO. GAO implied that the discrepancy did not significantly impact its findings because, based on its comparison of Headquarters figures with district figures, it determined that three district offices (Los Angeles, Chicago, and Miami) accounted for 1,759 of the 2,124 discrepancy and these three districts reported that they “released virtually all credible fear aliens under their jurisdiction.”¹⁴⁰

The substantial discrepancy between district and INS Headquarters data, the fact that a significant number of districts had estimated their numbers, the failure of two unnamed districts to respond to GAO with any numbers, and the reliance on self-reporting by the districts raise serious concerns regarding which, if either, of the sets of data provided by INS Headquarters and the INS districts is accurate. Nonetheless, GAO utilized data provided by the districts to determine the fiscal year 1999 parole release rate of 78%.

Lack of Qualitative, Substantive Review

For reasons noted above, the GAO did not perform any qualitative, substantive review of INS’s parole decisions made in individual cases. Although the granting of parole is a discretionary decision, there are established criteria that INS directors are to consider in making decisions on release.¹⁴¹ Through its mail survey the GAO asked district directors to identify the factors they consider. It did not, however, carry out any independent case review to determine whether and how these factors were applied in individual cases,¹⁴² or whether district directors may have been abusing their discretion by considering inappropriate factors.¹⁴³ A qualitative,

¹⁴⁰ GAO Report, *supra* note 16, at 64 n.4.

¹⁴¹ For information on parole criteria and policy, see footnotes 123-28 and accompanying text.

¹⁴² It should be noted that neither the GAO nor INS commented on whether the factors considered by district directors are permissible pursuant to INS regulations and policies.

¹⁴³ On the basis of statistical analysis of the Study’s anecdotal data, questions have been raised as to whether nationality may impermissibly impact length of detention, or whether longer detention periods may be associated with certain ports of entry. *See* Second Year Report, *supra* note 37, Part IV(E); Third Year Report, *supra* note 37, Part IV(C)(2). However, the Study has emphasized that qualitative review, either through on-site observation or substantive file review, is necessary in order to address these questions. As noted in footnote 139,

substantive review would have more directly answered the question posed by IRFA. Furthermore, in cases where the applicant was represented by an attorney who filed a formal request for parole, the GAO would have had the opportunity to examine materials from a source independent of the INS, which could have contributed to a more balanced pool of information.

2. Analysis and Conclusions Derived from Data on the Failure to Appear at Regular (Post-Expedited) Removal Hearings and Failure to Apply for Asylum

“A Significant Number of Released Aliens Are Not Appearing for Their Removal Hearings” (GAO Report pp. 67-69)

Calculation of Rate at which Persons Fail to Appear

Between April 1, 1997, and September 30, 1999, INS paroled 5,320 of 7,947 persons who had been found to have a credible fear. As of February 22, 2000, 1,000 of the 5,320 (19%) had failed to appear for their removal hearings, and were thus ordered removed “in absentia” by an IJ. Based on this same data, GAO did not report a 19% failure to appear rate; instead, it reported a 42% failure to appear rate. GAO arrived at this higher percentage by looking at the failure to appear cases as a percentage of those cases which had come to a final decision by an IJ (2,351), rather than as a percentage of all cases in which persons found to have a credible fear were paroled (5,320).

GAO’s approach could be justified if the pool of cases that came to final decision were representative of the pool of all cases. This is not the case, however, because in absentia orders occur more quickly than rulings on the merits.¹⁴⁴ Thus, the pool of cases which had already come to a final decision at the time of the GAO’s review (2,351) was likely to have a higher percentage of in absentia orders than the larger pool of all cases involving parole (5,320). This fact was borne out by figures reported by EOIR when it commented on the GAO’s draft report. EOIR informed GAO that the in absentia rate had dropped from 42% to 34% as of August 10, 2000, and that it could drop to an estimated 25% as pending cases came to final decision.

The GAO’s treatment of terminated cases also may have resulted in an inflation of the failure to appear rate. The GAO did not place cases which had been terminated by an IJ in the category of cases which had come to a decision. Thus, appearances by these individuals were not counted towards the overall appearance rate. If they had been counted, the failure to appear rate

the GAO was unable to perform a statistical analysis similar to that carried out by the Study because GAO considered the relevant INS data to be unreliable.

¹⁴⁴ EOIR informed GAO that cases that are set for a merits hearing in removal proceedings (i.e. a full hearing on the asylum claim) are scheduled on average of one year from the date of the initial hearing in immigration court, while in absentia orders, entered because of a failure to appear, are mostly entered at early stages of the proceedings. See GAO Report, *supra* note 16, at 68.

would have dropped an additional 4%.¹⁴⁵ GAO informed the Study that in a number of terminated cases, IJs had determined that the charges against the individual could not be sustained, but that it did not consider these cases to have come to a decision since the INS could still bring new charges against the individual.¹⁴⁶

Vera Institute of Justice's Assistance Appearance Program (AAP)

In reporting on appearance rates, the GAO failed to cite relevant findings of a program that were directly on point – the AAP.¹⁴⁷ As noted above, the AAP was commissioned by INS to “implement and validate with formal research” a supervision program that would increase appearance rates in removal proceedings through supervision of persons who met certain criteria and were paroled by INS.¹⁴⁸ One of the groups that participated in the AAP was asylum seekers, seventy-nine of whom were subject to expedited removal.

In its report, GAO reported the AAP's findings on the granting of relief to persons who passed credible fear and had received decisions by IJs, including the number of in absentia orders and the AAP's conclusion that a high appearance rate of asylum seekers can be obtained with supervision. However, GAO did not note that, on the basis of the AAP's figures, the failure to appear rate would be 8%¹⁴⁹ – considerably lower than that which the GAO itself reported.

The GAO raised questions about the AAP's conclusion that “with supervision, a high degree of compliance with immigration procedures and requirements can be obtained at a lower cost, without detention.”¹⁵⁰ GAO noted that it was “not clear if the results of the AAP

¹⁴⁵ This fact is buried in the GAO report, appearing in a footnote in an appendix on “scope, methodology, and additional results of analysis.” GAO Report, *supra* note 16, at 100 n.6.

¹⁴⁶ Blume Interviews, *supra* note 1.

¹⁴⁷ GAO informed the Study that it did not do so because the AAP's final report was not issued until GAO's report was in its final stages of review, and GAO did not have sufficient time to evaluate the AAP study. Stana Letter, *supra* note 7; Blume Interviews, *supra* note 1.

¹⁴⁸ AAP/Vera Institute of Justice, *About the Appearance Assistance Program* <<http://www.vera.org/aap/index.html>> (visited Apr. 17, 2000).

¹⁴⁹ In discussions with the Study, the AAP reported that, of the 79 asylum seekers subject to expedited removal whom it supervised, only six failed to appear during the duration of the program, resulting in a failure to appear rate of 8% (or an appearance rate of 92%). Telephone interview with Oren Root, National Director of the Appearance Assistance Program (May 11, 2000) (“Root Interview”). If one were to calculate the appearance rate by only considering persons who had received a decision by an IJ at the time the AAP did its analysis (as GAO did when it analyzed INS data), 13% (six of forty-six persons) failed to appear – an appearance rate of 87%.

¹⁵⁰ GAO Report, *supra* note 16, at 71.

demonstration could be widely implemented with the same outcomes.”¹⁵¹ The GAO appeared to rely upon statements by a New York INS official in questioning the AAP’s conclusions. This official had stated that the AAP’s selection process favored persons who had community ties and verifiable identities and who were more likely to appear, and that the voluntariness of participation in the AAP by immigration detainees may have impacted the results.¹⁵²

GAO did not contact the AAP for responses to these comments from the INS official. However, in conversations with the Study, the AAP agreed that it selected persons who were more likely to appear, emphasizing that the selection criteria were a core concept of a program whose goal was to help increase appearance rates without resorting to detention.¹⁵³ However, the AAP had established a comparison group for its research, tracking a group of similarly situated asylum seekers (individuals subject to expedited removal who were granted parole and released from Elizabeth Detention Facility after having been found to have a credible fear of persecution). These asylum seekers, who were not supervised by the AAP, also demonstrated a relatively low failure to appear rate of 22% (or a high appearance rate of 78%).¹⁵⁴ The AAP further found that this failure to appear percentage dropped to around 10% if it excluded a number of persons paroled from Elizabeth who had been placed in expedited removal while in transit to Canada, who either explicitly or implicitly intended to leave for Canada when released.¹⁵⁵

Regarding whether its results could be duplicated in other parts of the country, the AAP informed the Study that because it used a rigorous process of testing its methods with a variety of groups with different profiles, although it could not say so conclusively, it had no reason to believe the same results could not be achieved in other locations.¹⁵⁶

Last, the AAP stated that the voluntariness of participation had no impact on its findings, as (1) the comparison group in Elizabeth, which did not participate in the AAP or a similar program, demonstrated a high appearance rate; and (2) in a number of INS districts, persons must generally request parole in order to be considered for release, and such persons are volunteers in

¹⁵¹ GAO Report, *supra* note 16, at 71.

¹⁵² *Id.*

¹⁵³ Root Interview, *supra* note 149.

¹⁵⁴ Root Interview, *supra* note 149. *See also* APPEARANCE ASSISTANCE PROGRAM, VERA INSTITUTE OF JUSTICE, TESTING COMMUNITY SUPERVISION FOR THE INS: AN EVALUATION OF THE APPEARANCE ASSISTANCE PROGRAM, Volume 1, at 27 (2000) (“AAP Report”).

¹⁵⁵ Root Interview, *supra* note 149; AAP Report, *supra* note 154.

¹⁵⁶ Root Interview, *supra* note 149.

the same sense as those who participated in the AAP program – they voluntarily act to obtain their release.¹⁵⁷

“Many Aliens Who Changed Removal Hearing Location Were Not Appearing for Their Hearings”

GAO also reported a relatively high percentage of failures to appear among persons who passed credible fear, were paroled, and were granted a change of venue. It reported that 3,695 of the 5,320 individuals who passed credible fear and were released from detention had been granted a change of venue, that 1,467 of the 3,695 cases had come to a decision by an IJ, and that 557, or 38%, of these 1,467 individuals were ordered removed in absentia because they failed to appear.

As with its overall calculations of failure to appear, discussed above, GAO made a comparison to cases which had come to decision by an IJ (1,467) rather than to the larger pool of change of venue cases (3,695), which would include closed cases as well as pending cases in which individuals had appeared for their hearings. If the failure to appear rate is calculated by comparing the 557 persons who were paroled, changed venue, and were removed in absentia to the 3,695 persons who were paroled and changed venue, the percentage of persons who failed to appear is 15%, rather than 38%. Although this percentage may underestimate the actual percentage when all fiscal year 1997 through 1999 pending cases are closed, the figure reported by GAO almost certainly over-estimates it.

“Many Aliens Are Not Filing Asylum Applications”

GAO noted that it was looking at the rate at which individuals filed asylum applications in order to determine whether persons in the credible fear process “pursued their claim[s] of asylum.”¹⁵⁸ As of February 22, 2000, of the 7,947 persons who passed credible fear, 1,338 (17%) had failed to file asylum applications within the one year filing deadline. The GAO, however, did not report a 17% missed deadline rate; rather it reported a 43% rate. It arrived at this higher percentage by comparing the numbers of persons who failed to file within a year (1,338) to the smaller pool of persons who had not yet filed for asylum (3,140), rather than the larger number of persons who had passed credible fear (7,947).

This choice by GAO raises concerns because it is irrelevant to an inquiry regarding whether or not these persons will “pursue their claims.” Under current law, asylum seekers must file an asylum application within one year of their arrival in the U.S. absent changed circumstances which materially affect the asylum seeker’s eligibility for asylum or extraordinary

¹⁵⁷ *Id.*

¹⁵⁸ GAO Report, *supra* note 16, at 70.

circumstances justifying the delay in filing.¹⁵⁹ The majority of these 3,140 individuals (1,802) had not missed their one year deadline and the fact that they had not yet filed is not dispositive of whether they will pursue their claims by making a timely filing.

Moreover, the GAO failed to explore the possible relationship between the 1,338 who missed the one year filing deadline and the pool of 1,000 persons who failed to appear and were removed in absentia.¹⁶⁰ It seems likely that there is some, and possibly a very significant, overlap between the 1,338 who did not file for asylum within the one year deadline and the 1,000 individuals GAO reported to have failed to appear for their hearings. If there is a significant overlap between the two groups, the GAO's reporting may provide a false impression that there are two groups of non-compliant persons, the 1,338 who did not file and the 1,000 who did not appear, when in reality these may be largely the same people.

“Indications Suggest Many Aliens May Be Using the Credible Fear Process to Illegally Remain in the Country”

Failure to Consider Canadian-Bound Asylum Seekers

Based on its data on the rate at which persons fail to appear and apply for asylum, GAO concluded that many persons may be using the credible fear process to remain in the U.S. illegally. GAO did not base this important conclusion on an analysis of actual data demonstrating use of the credible fear process to remain illegally in the United States; such data does not exist. For this and a number of additional reasons discussed below, GAO's conclusions are open to question.

GAO did not explore the possibility that a significant percentage of the persons who fail to appear may have been bound for Canada, and upon their release did not remain illegally in the United States, but continued to their preferred destination. The AAP and the Study have information that indicates that this may be especially true in the case of Sri Lankan asylum seekers, who made up 44% (442 persons) of the 1,000 persons reported by GAO to have failed to appear.¹⁶¹

During the course of its supervision project, the AAP screened a total of seventy-six Sri Lankan asylum seekers placed in expedited removal in the New York area for eligibility for release and participation in the AAP. Of these seventy-six persons, forty (53%) were found to be ineligible for the program because they *explicitly* stated they were bound for Canada, while an additional twenty-four (31%) were found ineligible because they had stronger ties in Canada than

¹⁵⁹ INA § 208(a)(2)(B). *See also* 8 C.F.R. § 208.4.

¹⁶⁰ The GAO informed the Study that it could have carried out this comparison but it did not do so. Blume Interviews, *supra* note 1.

¹⁶¹ GAO Report, *supra* note 16, at 67 n.6.

the United States, and the AAP believed that they were likely to leave for Canada if paroled.¹⁶² Consistent with the AAP's experience, the Study has received reports that many Sri Lankans have been placed in expedited removal when attempting to transit through the United States to Canada, where they have strong family and community ties, and that some have been paroled and continued on to Canada. These individuals may then be ordered removed in absentia by U.S. immigration judges.

Thus, although it may be correct that 1,000 persons failed to appear, it does not necessarily follow that 1,000 persons remained illegally in the United States. In fact, considering that Sri Lankans constituted 44% of those who failed to appear, and that many Sri Lankans leave the U.S. for Canada upon being paroled, it is probable that the number of persons who pass credible fear, fail to appear, and remain in the country illegally is much less than that reported by GAO.

Relevance of Other Studies Cited by GAO

To further support its conclusion that some individuals are using the credible fear process to remain illegally in the United States, the GAO cited a recent study carried out by the INS National and Regional Intelligence Assessments (NARIA) and a March 2000 Canadian parliamentary report. The NARIA reported that the smuggling of Chinese is a growing phenomenon, that almost all of the smuggled persons caught had been coached to claim a fear and met the credible fear standard, that almost all were released by INS, and that "only a few" appeared for their hearings, while the Canadian report concluded that Chinese migrants arriving by boat paid large sums of money to traffickers and that many were destined for the United States, not Canada.

Without additional information, it is unclear whether or how strongly these two studies support the GAO's conclusion regarding use of the credible fear process to remain in the United States. GAO does not clarify how many Chinese in the NARIA study appeared for their hearings (reported as "a few"). Regarding the Canadian parliamentary report, it is unclear what the relevance is to the question at hand; the fact that Chinese asylum-seekers were destined for the U.S. does not necessarily translate into a finding that such persons would utilize the expedited removal credible fear process to remain illegally in the United States.

The use of these studies to imply that persons are using the credible fear process to remain illegally in the U.S. is questionable for at least two other reasons. First, the studies are both particular to Chinese, who constituted only 16% of the persons who failed to appear. There is no basis to infer that any findings relevant to the Chinese are equally applicable to asylum seekers of other nationalities. And, second, GAO's own data is in conflict with that reported by NARIA – while NARIA reported that only a "few" Chinese asylum seekers appeared for their

¹⁶² Root Interview, *supra* note 149. See also AAP Report, *supra* note 154.

hearings, GAO reported that of the 488 Chinese who were found to have a credible fear, were paroled, and received an IJ decision, 66% (324 of 488) appeared for their hearings.¹⁶³

Impact of Representation

Last, the limited parameters of GAO's study precluded its consideration of other factors that could impact an asylum seeker's likelihood of failing to appear, other than an intent to illegally remain in the country. One critical factor to examine in this context is legal representation. The AAP, discussed above, found that participation in the AAP not only directly increased appearance rates, but also increased the chances that individuals would be represented by attorneys, which in turn further strengthened the likelihood of appearance.¹⁶⁴ Researchers and advocates have commented that the difference in appearance rates based on whether an individual is represented may reflect, in part, that some people fail to appear because they do not understand the information provided to them about when, how, and where they need to appear, or the consequences of a failure to appear.

C. Problems Indicated by GAO's Findings

There has been ongoing concern regarding the lack of uniformity in decisions on parole.¹⁶⁵ Although, as noted previously, the fact that the GAO relied so extensively on self-reporting raises reliability concerns, its findings confirm this lack of uniformity. As noted above, based on a mail survey to INS districts, the GAO reported a wide variance in parole policy among the twenty-nine responding INS districts, which results in the likelihood of release being based on the location of attempted entry to the United States rather than objective factors. Most significantly, while twelve districts stated that they regularly parole persons passing credible fear in accordance with INS policy, ten stated they generally do not parole such persons because of

¹⁶³ GAO Report, *supra* note 16, at 67 n.6.

¹⁶⁴ AAP Report, *supra* note 154. Fiscal year 1999 EOIR statistics indicates that 30% of those unrepresented persons who applied for asylum affirmatively and were referred to immigration courts failed to appear for their hearings, while only 4% of those who were represented by attorneys failed to appear. Andrew I. Schoenholtz, *The State of Asylum Representation: Ideas for Change*, Institute for the Study of International Migration, Georgetown University, May 2000. The affirmative asylum process involves claims from asylum seekers already present in the United States who voluntarily come forward to ask for relief.

¹⁶⁵ The Study has received numerous complaints regarding more stringent applications of parole criteria in the New York and New Jersey INS districts. In October 2000, detainees at Elizabeth Detention Facility (New Jersey), who are predominantly asylum seekers, commenced a hunger strike to protest an alleged unfair parole policy. Edward Wong, *Detainees Begin Hunger Strike, Advocates for Immigrants Say*, NEW YORK TIMES, Oct. 15, 2000. In 1998, nearly 100 detainees had carried out a hunger strike to protest what they considered tough criteria for parole, as well as detention conditions; in response, immigration officials agreed to review the parole requests of 50 detainees. *Id.* Similarly, in the fall of 1998, detainees at Wackenhut Detention Facility, outside of New York City, carried out a hunger strike in protest of the length of their detentions. Many were asylum seekers who had no criminal records. Somini Sengupta, *Limits on Parole Dash Refugee's Hopes*, NEW YORK TIMES, Nov. 2, 1998; Mae M. Cheng, *Six Immigrants Still on Hunger Strike*, NEWSDAY, Oct. 17, 1998.

their interpretation of INS policy (although they did consider lawyers' requests for parole and detention space).

The districts also reported a wide array of factors considered in making the decision to parole a person who has passed credible fear, ranging from consideration of eight factors to the sole consideration of community ties. It is questionable whether some of the factors are appropriate factors to consider, such as whether the asylum seeker is likely to become a public charge (i.e. dependent on public assistance programs).¹⁶⁶

V. Detaining Asylum Seekers Under Inappropriate Conditions

In IRFA, Congress asked GAO whether INS was detaining asylum seekers "under inappropriate conditions."¹⁶⁷ Detainees of the INS, whether subject to expedited or regular removal, are housed in three types of facilities: (1) INS Service Processing Centers (SPCs), which are owned and operated by INS; (2) detention facilities owned and operated by private corporations that house only immigration detainees ("contract facilities"); and (3) city and county jails and federal prisons designed to hold criminal inmates.¹⁶⁸ GAO reported that, of the 959 persons detained after being found to have a credible fear in fiscal year 1999, 70% were detained in SPCs or contract facilities.¹⁶⁹

The detention of asylum seekers is highly controversial. Persons who have suffered or fear future persecution may be further traumatized if detained, and even more so if under inappropriate conditions. For this reason, many NGOs and UNHCR have issued reports and guidelines on detention conditions. Additionally, INS has and continues to develop its own requirements and standards on detention conditions. As described below, the question of whether asylum seekers subject to expedited removal are detained under inappropriate conditions remains largely unanswered by the GAO's report, in large part because of the limited parameters of its study.

¹⁶⁶ See GAO Report, *supra* note 16, at 66. It appears inappropriate to consider public charge issues in the context of asylum seekers, as that is not relevant to the parole factors of flight risk or a danger to the community. Additionally, ten districts reported that they consider overall behavior and demeanor, which is vague, and could easily encompass both permissible and impermissible factors and result in disparate treatment in different districts.

¹⁶⁷ International Religious Freedom Act § 605(a)(2).

¹⁶⁸ Office of Field Operations, INS, Questions and Answers Regarding INS Detention Facilities (Oct. 2, 1998).

¹⁶⁹ GAO Report, *supra* note 16, at 74.

A. GAO's Methodology & Findings

1. Methodology (GAO Report pp. 35-36)

For the purpose of evaluating detention conditions of asylum seekers subject to expedited removal, GAO visited twelve of the 166 detention facilities reported by INS to be used to detain such asylum seekers (excluding hotels and shelters). These facilities included two SPCs, three contract facilities and seven jails.¹⁷⁰ They are located in six INS districts and were reported by GAO to have housed 70% of the asylum seekers who passed their credible fear interviews in fiscal year 1999. GAO discussed detention policies and procedures with officials and “toured the living, medical, visitation, recreation, library, and kitchen areas in each facility.”¹⁷¹ GAO also visited six ports of entry, to observe temporary detention facilities there.

GAO focused on those aspects of detention conditions which did not require a “value judgement.” Beyond that threshold criteria, it determined what conditions to observe by reviewing draft detention standards developed by the INS, as well as standards issued by the American Correctional Association (ACA) and UNHCR. GAO stated that it also considered a detainee survey developed as part of a class action lawsuit on detention conditions, reports by Amnesty International and Human Rights Watch on the detention of asylum seekers, and information provided in discussions with other immigrant rights advocates. GAO developed a data collection instrument to guide its review of those conditions which it decided to examine.

2. Findings

The GAO made findings in three broad areas: (1) accreditation of INS-controlled facilities; (2) conditions and services in these facilities; and (3) conditions of detention at ports of entry.

Accreditation and Standards (GAO Report pp. 74-75)

GAO reported that INS had issued seventeen standards at the time it performed its research, and expected to issue a total of thirty-nine standards.¹⁷² The seventeen that had been

¹⁷⁰ The twelve facilities are: DuPage County Jail, Illinois and Racine County Jail, Wisconsin (Chicago District); Mira Loma Detention Center and San Pedro SPC, California (Los Angeles District); Krome SPC, Florida (Miami District); Elizabeth Detention Center, New Jersey, and Queens Private Detention Facility (Wackenhut), New York, and York County Prison, Pennsylvania (New York District); San Diego Detention Center, California (San Diego District); and Kern County Sheriff's Department Lerdo Facility, Marin County Jail, and Oakland City Jail, California (San Francisco District). GAO Report, *supra* note 16, at 35 n.26.

¹⁷¹ GAO Report, *supra* note 16, at 35.

¹⁷² The INS has recently indicated that a total of 38, rather than 39, standards will be issued on November 9, 2000.

issued were in effect at SPCs and contract facilities.¹⁷³ GAO also reported that although INS requires all of its SPCs and contract facilities to be accredited by the ACA, only twelve of eighteen SPCs and contract facilities had obtained accreditation at the time it performed its research. Further, although INS reported use of over 700 local jails for detention of immigration detainees, ACA had only accredited seventy local jails throughout the United States, and it was not clear what proportion, if any, of the jails used by INS are ACA-accredited.

Detention Facilities Conditions (GAO Report pp. 76-78)

GAO reported that it found varying conditions at the different detention facilities, noting that: “INS-controlled facilities generally provided the following services in a uniform manner and to a greater extent than did the local jails: segregation of detainees, telephones, diet, law library, visitation, health care, and recreation.”¹⁷⁴ On the basis of its facility tours and discussions with officials at the twelve facilities, GAO reported:

- **Segregation:** Although it violates INS, ACA, and UNHCR guidance, male asylum seekers were not segregated from the criminal population in five of twelve facilities (one contract facility, and four of seven jails), and women asylum seekers were likewise not segregated in six of twelve facilities (one SPC, one contract facility and four jails).
- **Telephones:** Four facilities (one SPC, two contract facilities, one jail) permitted 24-hour access to telephones, while eight placed limits on what time of day the phones could be used. All twelve facilities had phones in areas where persons sleep, and all allowed collect calls. Time limits on the duration of phone calls were enforced at two facilities; the other ten either allowed unlimited calls or did not enforce limits.
- **Meals:** Eleven of the twelve facilities accommodated detainees’ specific dietary needs, related to religious, health or other requirements. Generally, weekly menus were varied and reviewed by a dietician.
- **Law Libraries:** One facility, a jail, had no library. At the other eleven of twelve facilities, detainees were permitted access to legal materials, but two jails had no current immigration law materials, and two contract facilities contained no legal materials related to expedited removal.¹⁷⁵ Generally, access to the library was available daily on request.

¹⁷³ Four standards (visitation, telephone access, group legal rights presentations, and legal materials) are to be reissued in November 2000 and phased in at all facilities.

¹⁷⁴ GAO Report, *supra* note 16, at 76.

¹⁷⁵ Based on visits to INS-controlled facilities and jails in the past, as well as reports from NGOs and attorneys, a former representative of the ABA commented that ABA was aware of only one INS-controlled facility (Florence, Arizona) that had current immigration related materials, and that several SPCs had immigration materials that were not current. She further commented that ABA was aware of a number of jails that did not have any

At the SPCs and contract facilities, free photocopying was allowed and typewriters and/or computers were provided. Two jails did not provide any of these services; the others generally did.

- **Visitation:** There was a wide range of general visitation practices at the jails, while the INS-controlled facilities had more uniform practices. At INS-controlled facilities, hour-long non-contact visits were generally provided for two to four days per week. Hours for such visits at jails varied from half an hour to ten hours, from one day a week to every day of the week. Attorneys could generally visit seven days a week in all facilities, but policies on contact visits and visiting hours varied.¹⁷⁶
- **Health Care:** All twelve facilities required that at least one nurse be available on site at all times, but access to a physician varied from on-site to on-call services. Of the INS controlled facilities, four had on-site accredited health care facilities staffed by a physician and support staff five days a week. Three of the seven jails had such facilities staffed from one to three days per week. Two facilities had on-call services only.
- **Recreation:** While INS-controlled facilities generally provided team games and exercise equipment in outdoor recreation for at least one hour each day of the week, practices at local jails varied. Three jails provided outdoor recreation from one to fourteen hours daily, three to seven days a week. Four jails had team games in their outdoor or indoor programs. However, only one of the jails had exercise equipment and two offered no recreation.
- **Day Room Activities:** All facilities had televisions, and many had cards and board games. Generally, INS-controlled facilities allowed personal radios with headphones, but jails did not.
- **Educational, Vocational and Work Programs:** None of the twelve facilities provided vocational opportunities, while 6 provided some educational services. INS-controlled facilities generally provided paid voluntary work programs, and three jails provided unpaid programs.

current immigration materials. Telephone interviews with Christina DeConcini, Director of Advocacy at CLINIC and formerly Director of the Immigration Pro Bono Development and Bar Activation Project of the ABA (Sept. 25, 2000, and Oct. 24, 2000) (“DeConcini Interviews”).

¹⁷⁶ Three INS-controlled facilities and two jails allowed contact visits between attorneys and detainees, while two INS-controlled facilities and five jails did not. Visiting hours for attorneys ranged from eight and a half to 24 hours daily. GAO Report, *supra* note 16, at 77.

Airport Detention

At the six ports of entry it visited, GAO found that the conditions varied. At some, individuals were handcuffed to wooden benches; others had separate lounges for different genders with “various amenities.” GAO reported that individuals in expedited removal are usually detained for less than 24 hours at ports of entry.

3. GAO’s Conclusions

GAO made no findings as to whether asylum seekers are detained under inappropriate conditions, except to the extent that it recognized the failure to segregate asylum seekers from criminals was inconsistent with INS, ACA and UNHCR standards and guidance. GAO pointed out that INS and ACA detention standards were not in effect at all facilities, that detention conditions in SPCs and contract facilities “were generally different” from those in jails,¹⁷⁷ and that detention conditions at airports varied. GAO noted INS had recognized the need “for all aliens in its custody to be subjected to uniform detention standards,” and was developing and issuing such standards. It concluded that the establishment of these standards “should help ensure that detained aliens are treated consistently at all facilities”¹⁷⁸

B. Evaluation of GAO’s Methodology

In order to answer Congress’ question regarding detention conditions, the GAO visited twelve detention facilities in six INS districts. During these visits it discussed policies and procedures with facility officials and made observations regarding the conditions. GAO stated that its review of detention conditions was informed by INS and ACA standards, UNHCR principles, reports by NGOs including Amnesty International and Human Rights Watch, and discussions with UNHCR and immigrant rights advocates. Notwithstanding its reference to this broad range of materials and resources, the GAO strictly limited the parameters of its inquiry. A significant limitation arose from GAO’s decision to exclude analysis of any conditions that would require “value judgements.” Although in its report the GAO does not explain what it means by “value judgements,” GAO indicated to the Study that this term refers to conditions which could not be evaluated on the basis of its tour of the facility or discussions with facility officials.¹⁷⁹ This self-imposed limit impacted the range of issues which GAO examined, and may have affected the extent to which it investigated those issues which it did examine. Another limitation is that the GAO’s discussion of facility compliance with key standards is lacking in sufficient detail regarding both the requirements of the standards, as well as their implementation

¹⁷⁷ *Id.* at 76.

¹⁷⁸ *Id.* at 78.

¹⁷⁹ Blume Interviews, *supra* note 1.

at the facilities in question. Finally, GAO did not appear to include a component of fact-gathering from detainees or their attorneys.

1. Failure to Comprehensively Evaluate Detention Conditions

GAO stated that it decided to focus on conditions “about which we did not have to make value judgements” It thus failed to investigate several critical aspects of detention conditions that are of interest to policy makers and the public. At least one of these aspects – availability of group legal rights representation – has been identified by the INS and the ABA as one of four key areas of concern.¹⁸⁰ GAO also did not address credible allegations of serious misconduct at detention centers, such as physical abuse of detainees,¹⁸¹ and important issues such

¹⁸⁰ The ABA worked closely with INS to develop detention standards, which were issued in February 1998. These four key standards encompass immigration detainee visitation rights, access to legal materials, telephone access, and group legal rights presentations. After the guidelines were issued, the ABA continued to negotiate with INS over the extension of these standards to all facilities at which immigration detainees are detained. Although the INS agreed to extend these standards, revised drafts of the guidelines did not provide for uniform treatment at all types of facilities. GAO reported on the issues at the heart of three of the standards, including visitation rights, access to legal materials, and telephone access, but failed to address the availability of group legal rights presentations.

¹⁸¹ Allegations and official investigations into misconduct at detention centers had been widely reported at the time GAO performed its evaluation of detention conditions. Allegations against officials at Krome SPC, one of the facilities visited by GAO, sparked a federal investigation in May 2000. Jody Benjamin, *Women Live in Fear at Krome, Advocacy Group Charges*, SUN SENTINEL, Oct. 4, 2000. In June 2000, a lawsuit was filed after a detainee alleged being raped for the second time by the same official. Andres Viglucci, *Detainee Alleges 2nd Sex Attack*, MIAMI HERALD, June 6, 2000. In July the top official at Krome resigned. Andres Viglucci, *Top Official at Krome Steps Down*, MIAMI HERALD, July 7, 2000. “About a dozen Krome detention officers and other INS employees have been indicted, removed from the facility or otherwise disciplined over the last year since the latest allegations of abuse began to surface[.]” which include sexual assaults, bribe-taking and other unspecified “inappropriate behavior.” Alfonso Chardy, *Sexual Abuse Widespread at Krome Detention Facility*, MIAMI HERALD, Oct. 6, 2000. As a result, the Office of the Inspector General, the Bureau of Prisons and the U.S. Attorney’s office in Miami are currently investigating Krome. Susan Sachs, *Sexual Abuse Reported at an Immigration Center*, NEW YORK TIMES, Oct. 4, 2000. In October, after the release of a report on the abuse by the Women’s Commission for Refugee Women and Children, the INS was reported to be planning “a massive cleanup” of the facility, including perhaps the removal of all women detainees. Alfonso Chardy, *Krome’s Women May Relocate*, MIAMI HERALD, Oct. 10, 2000.

In 1999, the FBI investigated allegations of beatings and verbal abuse of asylum seekers at the Elizabeth detention facility visited by GAO. Elizabeth Llorente, *Shackled in The Land of Hope*, THE BERGEN RECORD, April 11, 1999. The investigation arose after the beating of a Palestinian stowaway, who required stitches, and a Nigerian student. A hunger strike organizer was kept in a cell smeared with excrement for six days after the protest; guards said that they feared being fired if they reported mistreatment. *Id.* The Corrections Corporation of America (CCA), which operates the facility, denied the allegations, but a ranking INS official based there told the newspaper, “[s]ome of the force does appear excessive.” *Id.* FBI officials in Newark later said they were not pursuing an investigation, and the U.S. Attorney’s office was reported to be handling the case. Elizabeth Llorente, *Asylum Seekers Sue Elizabeth Jailers Say INS Contractor Has Policy of Abuse*, THE BERGEN RECORD A1, Feb. 25, 2000. A CCA official stated, “We have zero tolerance for any excess or unnecessary use of force.” *Id.* But INS reportedly insisted that CCA transfer the chief of security and bar two supervisors and six officers from going near detainees. *Id.*

as the transfer of detainees without notice to counsel,¹⁸² and the availability of accurate, updated lists of counsel and relevant governmental agencies.

2. Decision Not to Employ Other Methodologies

GAO appeared to rely entirely on its discussions with facility officials and tours of the facility for its information regarding detention conditions. As discussed in earlier sections of this report, self-reporting may not provide the most reliable information if there is an incentive to misreport, as there is in this case.¹⁸³ Further, there are also obvious limits to the quantity and quality of the information which can be gathered through a tour of a facility. For example, during a tour, it would be difficult to determine whether detainees were routinely permitted the access to telephones or law libraries required by INS standards. In addition, during a short tour, facility officials could modify any non-conforming behavior.¹⁸⁴

In order to neutralize any biases in the data and more fully investigate detention conditions, GAO could have surveyed detainees or the attorneys who represent detainees, in the same manner it surveyed INS officials to gather information relevant to other aspects of its study. As has been noted by a number of NGOs, including the ABA, the interviewing of detainees can be an essential step in evaluating detention conditions, as these interviews may reveal information not reported by facility officials or others.¹⁸⁵ GAO also could have reported on information gathered by NGOs, such as Amnesty International and the Lawyers Committee for Human Rights, that have produced detailed reports on detention conditions. GAO could have also noted that there have been federal investigations following abuses reported by NGOs and the

¹⁸² Amnesty International reported that attorneys and asylum seekers believe that in some cases, transfers and threatened transfers are in retaliation for protests over conditions and for making legal appeals. AMNESTY INTERNATIONAL, *LOST IN THE LABYRINTH: DETENTION OF ASYLUM SEEKERS* 44 (July 1999).

¹⁸³ The Study is not implying that there was any misreporting, but simply observing that INS and non-INS facility officials have an incentive to report that they are in compliance with controlling standards, as they could suffer consequences for the detention of persons under inappropriate conditions.

¹⁸⁴ In one well-known example, INS officials facing a visit from congressional investigators to Krome SPC in 1995 were found to have transferred detainees and taken other steps with the explicit intent of deceiving the delegation. Michael Bromwich, Office of the Inspector General, *Alleged Deception of Congress: The Congressional Task Force on Immigration Reform's Fact-Finding Visit to the Miami District of INS in June 1995* (June 1996).

¹⁸⁵ For example, ABA officials were told by detainees that requests to use the law library resulted in forfeiting of recreation privileges at Krome SPC. DeConcini Interviews, *supra* note 175. Such a practice may constitute a violation of the protection from retaliation found in INS guidelines.

media.¹⁸⁶ Although GAO does not report on allegations it cannot corroborate, it could have identified these issues as areas of ongoing concern.¹⁸⁷

3. Failure to Detail Relevant Standards and Identify Violations

As detailed above, GAO selected seven conditions of detention for examination: segregation, telephone access, meals, law libraries, visitation, health care, and recreation (including day room activities and educational, vocational, and work programs). However, in reporting on these conditions, the GAO failed to describe the relevant INS standards in detail, and rarely specified whether any cited practice was in compliance or violation of a particular detention standard or guideline. On only one occasion – with respect to the mixing of asylum seekers with criminals – did GAO point out that the practice is inconsistent with ACA, UNHCR and INS standards.¹⁸⁸

At least three of the seven detention conditions examined by the GAO are the subject of detailed standards which have been developed by the INS in consultation with the ABA;¹⁸⁹ they address telephone access, law libraries, and visitation.¹⁹⁰ These standards have been in effect at INS-controlled facilities since January 1998, and a modified version of these standards will soon be reissued and phased in at all facilities over the next few years. Nonetheless, GAO generally failed to detail these standards or to measure INS performance within their framework. The following section provides these details, and illustrates the limited scope of the GAO's inquiry into detention facility compliance with them.

Legal Materials¹⁹¹

The standard issued by INS on legal materials in January 1998 encompasses a number of significant and detailed requirements, which include:

¹⁸⁶ See *supra* note 181.

¹⁸⁷ See *supra* Part I(B)(3).

¹⁸⁸ Noting that INS standards require accreditation by ACA, GAO also lists the 18 SPCs and contract facilities and notes that six of them are unaccredited; an accompanying table provides their expected accreditation dates. GAO Report, *supra* note 16, at 75.

¹⁸⁹ See Third Year Report, *supra* note 37, at 40-43.

¹⁹⁰ As noted above, GAO failed to investigate compliance with the standard relating to group legal rights representation, which is one of the four standards identified by the INS and ABA as being of fundamental importance.

¹⁹¹ INS, Detention Standard: Access to Legal Materials (Jan 28, 1998) (on file with the Expedited Removal Study).

- **Notice:** library hours must be published in detainee handbooks, or posted at the facility.
- **Minimum Hours:** detainees are to be afforded at least five hours of access to the library per week, and this time is not to infringe upon recreation time or meals.
- **Required Legal Materials:** the library is to provide thirty required materials, including the U.S. Constitution, current immigration statutes and regulations, decisions of the Board of Immigration Appeals, relevant documents prepared by NGOs, State Department Country Reports on Human Rights Practices, the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, and foreign language dictionaries. INS is to update the list of required materials on an annual basis.
- **Library Supplies:** detainees are to have free use of and access to stamps, envelopes, paper, pens, and typewriters.¹⁹²
- **Language Accommodation:** the library must be made accessible to non-English speaking and illiterate detainees; the facility should help the detainee solicit the assistance of fellow detainees and of legal service providers.
- **Protection from Retaliation:** the facility may not punish a detainee for seeking to protect his or her legal rights.¹⁹³
- **Furniture:** the law library must have tables and chairs.

GAO's reporting on law libraries in detention facilities was limited to: (1) whether the facilities had law libraries with current legal materials, including those pertaining to expedited removal; (2) policies on access; and (3) whether the libraries provided access to free photocopying, typewriters, and computers. GAO did not indicate whether it checked to see if the libraries contained the required materials. Further, GAO defined "current" as being dated after the April 1997 enactment of expedited removal, when the standard requires that INS issue annual updates of required materials. Thus, it remains unclear whether even those libraries reported to have "current" materials are in compliance with the standard. GAO did not report on whether library hours notices were posted, the number of hours detainees were permitted to access the libraries, and/or whether there was assistance for non-English speaking or illiterate detainees, among other aspects of the relevant INS standard. Although GAO noted it would not evaluate

¹⁹² The report on detention by Human Rights Watch related the experience of a Nigerian asylum seeker detained in Dallas County Jail who was unable to correspond with attorneys because he was given just two sheets of paper and one envelope once or twice a month. HUMAN RIGHTS WATCH, *LOCKED AWAY: IMMIGRATION DETAINEES IN JAILS IN THE UNITED STATES* 66 (Sept. 1998).

¹⁹³ See *supra* note 185.

any conditions that involved “value judgements,” it appears that GAO did not address some aspects of the standard that would not have involved judgement calls.

Telephone Access¹⁹⁴

The INS standard on telephones issued in January 1998 includes the following requirements:

- **Notice:** information must be provided about the use of and access to telephones in languages spoken by a “significant portion” of the facility’s population.
- **Proportionality:** the facility is to provide one working phone per twenty-five detainees.
- **Privacy:** telephones must be situated so that no facility employee may overhear a detainee’s conversations.
- **Non-Collect Calls:** detainees are to be provided with the ability to make direct calls to the immigration court, BIA, the relevant federal and state courts, as well as consular officials and legal service providers. Indigent detainees are not to be required to pay for these calls. Further, detainees are to be able to use a free preprogrammed direct dial service to call pro bono legal service organizations.
- **Message System for Incoming Calls:** phone messages are to be delivered to detainees at least three times a day.

The GAO reported on whether the facilities had telephones, as well as on whether hour and time limits were placed on calls, where the phones were located, and whether detainees could make collect calls. Despite the fact that it would not appear to entail a “value judgement,” GAO did not report on whether, as required, there was a working telephone for every twenty-five detainees. Nor did GAO make findings on whether indigent detainees had access to free calls to courts, consular offices and/or pro bono attorneys, or a preprogrammed direct dial service to pro bono attorneys, although again no “value judgement” would seem to be required. Last, also of significance, GAO did not report on whether the facilities complied with privacy requirements.

Visitation¹⁹⁵

Elements of the INS standard on visitation issued in January 1998 include:

¹⁹⁴ INS, Detention Standard: Detainee Telephone Access (Jan. 28, 1998) (“INS Telephone Standard”) (on file with the Expedited Removal Study).

¹⁹⁵ INS, Detention Standard: Detainee Visitation (Jan. 28, 1998) (“INS Visitation Standard”) (on file with the Expedited Removal Study).

- **Notice:** schedules and rules for visitation by family, legal assistance providers and consular officials shall be made freely available to detainees and to the general public, and key information is to be provided in languages spoken by a “significant portion” of the facility’s population.
- **Hours:** visiting hours shall be set and made accessible to the general public; visiting hours must include weekends and holidays, and other suitable times to the extent practicable.
- **Visits:** visits are to last at least thirty minutes, and allow some contact.
 - **Legal Visits:** detainees are to be permitted legal visits seven days a week, for eight hours on business days, and four hours on weekends and holidays. Legal meetings must be confidential. Names of free legal services providers shall be posted and legal organizations are permitted to post sign-up sheets.
 - **NGO Visits:** efforts shall be made to accommodate NGO visits following written requests to the District Director.
 - **News Media:** the media is permitted to tour detention facilities on advance notice; requests to interview a particular detainee are to be made in writing to the District Director.

In reporting on visitation, INS reported on the length of visitation hours, weekly access, and whether contact visits were permitted, but failed to address many aspects of the INS standard listed above. For example, although they would not appear to involve “value judgements,” the GAO did not report on whether notice was provided as required, or whether the facilities provided confidential settings for attorney and client meetings.

C. Problems Indicated by GAO’s Findings

GAO’s basic finding was that conditions varied in the detention facilities, but that INS-controlled facilities generally had better access to services. This finding is of serious concern, as asylum seekers subject to expedited removal will receive disparate treatment depending solely on the location of their detention, and the degree of that facility’s compliance with standards. Although GAO reported that INS is in the process of developing uniform standards, at least one of the four standards subject to ABA involvement (regarding telephone access), which are soon to be reissued by INS, will not apply in the same manner in jails as in INS-controlled facilities.

1. Detention Conditions for Asylum Seekers Violate INS and UNHCR Standards

GAO found widespread lack of uniformity in the detention conditions to which asylum seekers and other INS detainees are subject. In the areas that GAO investigated, conditions

varied considerably even at SPCs and INS contract facilities, which are directly subject to seventeen INS detention standards, three of which are detailed above. GAO also visited seven of the approximately 700 local jails in which INS detainees may be housed while they await processing of their cases. At these facilities, which are not currently subject to INS detention standards, GAO found limited resources for INS detainees and widely varying conditions which are also inconsistent with the standards in effect at INS-controlled facilities.¹⁹⁶

Segregation (Mixing with Criminals)

GAO found widespread mixing of asylum seekers and other immigration detainees with convicted criminals, in five of twelve facilities for men and six of twelve facilities for women. This was the one condition which the GAO identified as a violation of INS, ACA and UNHCR detention standards.

The INS attempted to justify its practice with respect to women by telling the GAO that the “comingling of females at these facilities was practiced” because it “believed that females were not as violent as males, and thus, there was no need to separate them.”¹⁹⁷ The INS offered no explanation for the mixing of male asylum seekers with criminals, which occurred in almost as many facilities.

Law Libraries

GAO found that one of the seven jails it visited had no law library, that two other jails failed to provide basic services such as access to typewriters and copy machines, and that four facilities had either no current immigration materials or no information pertaining to the expedited removal laws.¹⁹⁸ Thus, more than half of the visited detention sites did not meet the INS detention standard for provision of legal materials to detainees. This finding is particularly significant because expedited removal is a highly abbreviated procedure, with no right to representation for detainees. Access to basic legal materials could play a key role in an asylum seeker’s ability to avoid return to a country where he or she faces persecution.

¹⁹⁶ Furthermore, although INS requires SPCs and contract facilities to be accredited by the ACA, GAO found that only twelve of the 18 such facilities were in fact accredited. However, the reason the ABA became involved in negotiations with INS over detention standards is because the NGO community views the ACA standards as inadequate. DeConcini Interviews, *supra* note 175. The Attorney General and INS agreed that additional standards were needed in order to regularize practices in facilities holding INS detainees. *Id.*

¹⁹⁷ GAO Report, *supra* note 16, at 76.

¹⁹⁸ An official who worked on detention standard issues for the ABA reported that she was aware of just one INS-controlled facility that has current immigration law materials. She added that few if any jails would have such materials, as the purpose of jails is not to hold immigration detainees and jails are not yet held to INS standards requiring such materials. DeConcini Interviews, *supra* note 175.

Telephones

Unfortunately, little can be said about the significance of GAO's findings with respect to telephones because the GAO report failed to measure detention facility phone policy against the INS detention standard for telephones, including significant aspects such as the ability to make free preprogrammed direct calls to legal services providers, privacy, notice of telephone access policies, and message-taking. As noted previously, the ability to make free preprogrammed direct calls to service providers is of key significance because attorneys and NGOs rarely accept collect calls from detainees at detention facilities. However, GAO did note that two facilities enforce time limits on phone calls, which is an issue of concern to NGOs because the development of an asylum case requires considerable interviewing time.¹⁹⁹ GAO did not detail the length of the time limits placed on phone calls at these facilities.

Other Significant Findings

- **Visitation:** Visitation practices varied widely at the jails, while INS-controlled facilities had more uniform practices. Rules regarding attorney visits also varied widely. NGOs have observed that the absence of uniform standards plays an important role in hampering effective legal representation, as attorneys have difficulty gaining access to clients who are often detained in remote facilities and unable to make visits to the attorneys' offices.²⁰⁰
- **Meals:** One of the twelve facilities did not accommodate detainees' specific dietary needs, which may be required for religious or health reasons. This is in violation of UNHCR guidelines on detention, which emphasize that asylum seekers should have the opportunity to "receive a diet in keeping with their religion."²⁰¹

¹⁹⁹ The ABA reported that it found that all but one of the INS-controlled facilities had time limits on phone calls. DeConcini Interviews, *supra* note 175. GAO reported that only two facilities had and/or enforced such rules.

²⁰⁰ Amnesty International and Human Rights Watch have both raised concerns about the access problems faced by attorneys representing detained asylum seekers. AMNESTY INTERNATIONAL, *supra* note 182, at 38-43; HUMAN RIGHTS WATCH, *supra* note 192, at 66-67.

²⁰¹ UNHCR, Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers, Guideline 10(viii) (Feb. 10, 1999).

In its report, Amnesty International found odd meal schedules at the local jail facilities (3:30 am breakfasts, and 3 pm dinners). AMNESTY INTERNATIONAL, *supra* note 182, at 47. Human Rights Watch reported complaints of inadequate and undercooked meals, and widely differing responses to special dietary needs. HUMAN RIGHTS WATCH, *supra* note 192, at 49.

The Study has reported on the experience of Mr. E, a Sri Lankan asylum seeker who was detained at the Oakland, California, City Jail. Second Year Report, *supra* note 37, at Part V(A)(5). Mr. E, who spoke no English and kept a vegetarian diet pursuant to his religious beliefs, had difficulties meeting his nutritional needs since no effort was made by the Oakland City Jail to accommodate his diet. On several occasions he had to ask his attorney to contact his brother in Canada for money to buy food that he was able to eat.

- **Recreation:** GAO found that recreation practices varied from none at all – at two jails – to outdoor recreation one hour a day and access to exercise equipment and team games at INS-controlled facilities. Only one jail had any exercise equipment. All facilities had televisions, and generally cards and board games. A total absence of recreational facilities for detained asylum seekers is cause for significant concern, and is inconsistent with UNHCR guidelines which state that asylum seekers “should have the opportunity to conduct some form of physical exercise through daily indoor and outdoor recreational activities.”²⁰²
- **Detention Conditions at Ports of Entry:** At the six ports of entry it visited, GAO found that conditions varied. At some, individuals were handcuffed to wooden benches; others had separate lounges for different genders, with some amenities. GAO noted that individuals in expedited removal are usually detained for less than 24 hours at a port of entry.

2. INS Detention Standards Are Not Uniform

GAO reported that INS has stated that it recognizes the need for all detainees to be subject to uniform detention standards. It also reported that INS is in the process of developing such standards. However, central aspects of the telephone standard – aspects that ABA has stated are the “linchpin of access to justice” for most detainees²⁰³ – will not be provided in a uniform manner to all INS detainees. The soon to be reissued new standard on telephone access merely “encourages” state and local facilities to adopt the same standard in effect at SPCs and contract facilities.²⁰⁴ Although recently INS has indicated that the remaining standards to be

²⁰² UNHCR, *supra* note 201, at Guideline 10(vi).

²⁰³ The ABA states:

A telephone standard may appear to be merely another of the many technical standards with which we have been wrestling. But access to adequate telephones is the linchpin of access to justice for most detainees. These detainees are frequently held in remote locations of the country, are unfamiliar with American culture, and find themselves in institutionalized settings. Often the only way to contact a lawyer is by phone; and without phone access, for many there will be no access to lawyers or justice.

ABA, Comments to INS’ Explanation of Why They are Unable to Extend the Same Telephone and Visitation Standard to all Facilities (Dec. 29, 1999) (on file with the Expedited Removal Study).

²⁰⁴ See ABA Comments, *supra* note 203; INS Telephone Standard, *supra* note 194, at 3. As noted earlier in this section, the telephone standard in effect at SPCs and contract facilities requires the provision of access to phones which permit pay calls (coin- or card-operated) or collect calls to courts, consular offices, and pro bono legal organizations; indigent detainees are not to be required to pay for these calls; and detainees should have access to a free preprogrammed direct dial service to pro bono legal attorneys. The ABA has raised a serious concern that while regular phones will be available in INS-controlled facilities (with collect and direct debit options, in addition to preprogrammed direct dial to pro bono attorneys), detainees in jails will have to ask facility officials to use a cell phone with a free preprogrammed direct dial service to pro bono legal attorneys, or make collect calls, which most attorneys will not accept. See ABA Comments, *supra*; INS Telephone Standard, *supra*, at 2-3; DeConcini

issued in November 2000 will be phased in at all facilities, INS has made conflicting statements on the issue.

Interviews, *supra* note 175. ABA is further concerned that detainees in jails may not be properly advised of the cell phone service, that detainees may have to wait eight hours for a cell phone request to be granted, and/or will be reluctant to ask a guard to use the direct dial cell phone out of fear of being looked at as trouble-makers. DeConcini Interviews, *supra*.