THE CLINTON MEMOS

The ACLU's Constitutional Analysis of the Public Statements and Policy Proposals of Hillary Clinton

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Democratic presidential candidate Hillary Clinton has a long political record, with nearly four decades in the public eye. As her political career has evolved, the former first lady, senator from New York, and secretary of state has become a strong defender of Americans' civil rights and liberties in most respects. Three years ago, Clinton finally supported full marriage equality after opposing it for nearly two decades.[1] In 1996, First Lady Clinton championed her husband President Bill Clinton's 1994 crime bill, saying it helped bring young "super predators" "to heel."[2] She has since expressed regret for her remark[3] and emerged as a strong advocate for racial justice and criminal justice reform.

During the 2016 presidential campaign, Clinton has notably made civil rights and liberties issues a core part of her policy platform. She continues to be a staunch defender of women's rights, with a long legislative record protecting reproductive freedom.[4] She has vowed to end the era of mass incarceration.[5] She has promised to fight to repair the Voting Rights Act as well as set national standards for early voting while restoring the voting rights of the formerly incarcerated.[6] And Clinton has declared she will work with Congress and in the courts to protect the rights of the LGBT community.[7]

But there are areas where candidate Clinton could clarify or more fully articulate her positions regarding civil rights and liberties before Election Day. The two areas the ACLU has the most constitutional concerns with are in the realms of immigration and national security. If Clinton is elected president, she should begin to implement the following policies and reforms within her administration's first 100 days and make a clean break with some of her predecessor's worst policy mistakes.

1 Amy Sherman, Hillary Clinton's changing position on same-sex marriage, Politifact (June 17, 2015), http://www.politifact.com/truth-o-meter/statements/2015/jun/17/hillary-clinton/hillary-clinton-change-position-same-sex-marriage/

2 Anne Gearan and Abby Phillip, Clinton regrets 1996 remark on 'super-predators' after encounter with activist, The Washington Post (February 25, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/02/25/clinton-heckled-by-black-lives-matter-activist/

3 Anne Gearan and John Wagner, Clinton expresses regret for 'super-predators' comment from 1996, The Washington Post (February 25, 2016), https://www.washingtonpost.com/politics/clinton-expresses-regret-for-super-predators-comment-from-1996/2016/02/25/4b6efbbe-dc0e-11e5-891a-4ed04f4213e8_story.html

4 HillaryClinton.com, On Roe v. Wade's Anniversary, One Candidate Has Lifelong Record of Fighting for Women: Hillary Clinton (January 22, 2016), https://www.hillaryclinton.com/briefing/factsheets/2016/01/22/lifelong-record-roe-anniversary/

5 HillaryClinton.com, Criminal Justice Reform, https://www.hillaryclinton.com/issues/criminal-justice-reform/

6 HillaryClinton.com, Voting Rights, https://www.hillaryclinton.com/issues/voting-rights/

7 HillaryClinton.com, LGBT Rights and Equality, https://www.hillaryclinton.com/issues/lgbt-equality/

On immigration, Secretary Clinton has signaled her good faith toward immigrant communities and civil rights by selecting Sen. Tim Kaine of Virginia, who has a positive record on immigration policy issues, as her running mate. Clinton should make her commitments concrete by:

- Ending the unnecessary and destructive practice of family detention by closing existing family detention facilities, halting the procurement of new facilities for family detention, releasing all detained families, and prioritizing alternatives to detention that accord with civil libertarian principles.

- Ending the practice of detaining immigrants for prolonged periods without any hearing during removal proceedings as well as providing a hearing before an immigration judge after six months of detention, as two U.S. Courts of Appeals have required.

- Ending the use of profit-motivated private prison corporations for the detention of immigrants.

- Ending large-scale, often militarized, immigration raids that routinely violate the Fourth Amendment's protections again unreasonable searches and seizures.

- Guaranteeing that asylum seekers and children receive appointed counsel during deportation proceedings in accordance with U.S. immigration law and the Due Process Clause of the Fifth Amendment.

On national security, Secretary Clinton should commit to:

- Ending a targeted-killing program that violates international law and the Fourth and Fifth Amendments.

- Revisiting the broader strategic, diplomatic, and rights impact of the targeted-killing program.

- Taking credible outside reports into account when releasing lethal strike statistics — which should be far more detailed and granular — as well as investigating and publicly explaining such strikes to the fullest extent possible.

- Supporting legislative proposals that reform or repeal Section 702 of the FISA Amendments Act, which allows the government to monitor the international communications of Americans inside the United States without a warrant in violation of the Fourth Amendment, and halting unlawful surveillance conducted under this authority.

- Revoking or significantly modifying Executive Order 12,333 to comply with human rights standards and to protect Americans from having their electronic communications intercepted by the National Security Agency in violation of the Fourth Amendment when they are sent, routed, or stored abroad.

- Ensuring that federal Countering Violent Extremism (CVE) programs do not single out American Muslims for discriminatory treatment in violation of the Fifth Amendment.

- Ensuring social media monitoring programs abide by the First Amendment and do not conscript private companies to censor content that the government itself could not censor constitutionally.

- Reforming the government watchlisting system so that it does not restrict people's freedoms without due process of law.

If she is elected president, we urge Hillary Clinton to make good on her promises to protect the civil rights and liberties of all Americans. By working to institute these reforms to America's immigration system and security establishments, Clinton will send a powerful signal that we can be both safe and free without sacrificing the rights and liberties that our government was instituted to protect. But if a President Clinton fails to protect the rights and liberties of the most vulnerable among us, the ACLU stands ready to lead the charge in the courts, Congress, and in the public square against any policy that violates the rights of the people guaranteed by the U.S. Constitution.

CLINTON ON IMMIGRATION

The Clinton campaign has now repeatedly stated that it intends to embark on legislative immigration reform in the first 100 days after taking office, even though there is no clear path to an outcome favorable to immigrants' rights in light of the current balance of power in Congress, particularly the House of Representatives. Nonetheless, our primary ACLU message to the Clinton campaign is that any comprehensive legislative reform effort must accomplish not only a path to citizenship for undocumented immigrants, but also the restoration of due process and fairness in the immigration enforcement and removal system.

The next administration must do better in this area than the Obama administration, which has adopted draconian policies and practices that have violated basic due process norms. This has been part of the Democratic Party's disturbing acquiescence in an immigration reform model that demands locking down the border and furthering a false "families not felons" binary — both of which have drastically eroded civil liberties in the United States — as the political cost of addressing the plight of undocumented immigrants in the United States. If Hillary Clinton breaks out of this mold, she can make her mark in the history books as the president who broke the impasse on immigration reform and restored fairness and due process to our immigration system.

If elected, Clinton should immediately end family detention.

Over the past two years, one of the Obama administration's most troubling decisions was to impose harsh policies against Central American families seeking asylum. Faced with news reports in the summer of 2014 about large numbers of Central American families seeking asylum at our border, President Barack Obama, Vice President Joe Biden, and Secretary of Homeland Security Jeh Johnson announced explicitly that *all* of the Central Americans would be detained and deported rapidly in order to deter others from coming.[8]

8 In a letter to Congress on June 30, 2014, President Obama announced "an aggressive deterrence strategy focused on the removal and repatriation of recent border crossers" and directed the Department of Homeland Security to take "aggressive steps to surge resources to our Southwest border to deter both adults and children from this dangerous journey … and quickly return unlawful migrants to their home countries." Letter from the President -- Efforts to Address the Humanitarian Situation in the Rio Grande Valley Areas of Our Nation's Southwest Border (June 30, 2014), available at: https://www.whitehouse.gov/the-press-office/2014/06/30/letter-president-efforts-address-humanitarian-situation-rio-grande-valle. Vice President Biden stated to members of the press on June 20, 2014 that "none of these [Central American] children or women bringing children will be eligible under the existing law in the United States." Vice President Joseph Biden, Remarks to the Press and Question and Answer at the Residence of the U.S. Ambassador, Guatemala City, Guatemala (June 20, 2014) (emphasis added), available at https://www.whitehouse.gov/the-press-office/2014/06/20/remarks-press-qa-vice-president-joe-biden-guatemala. And on July 10, 2014, Secretary Johnson made a written statement emphasizing that "our message to this group [of Central American asylum seekers] is simple: we will send you back." And he testified the same day before Congress that "[t]he goal of the Administration is to stem the tide and send the message unequivocally that if you come here you will be turned around." Hearing on the Review of the President's Emergency Supplemental Request for Unaccompanied Children and Related Matters, Before the S. Comm. on Appropriations (July 10, 2014), available at: http://www.appropriations.senate.gov/hearings/full-committee-review-of-the-presidents-emergency-supplemental-request (oral testimony of Secretary of Homeland Security Jeh Johnson).

As part of this deterrence strategy, the Obama administration quickly established new immigration jails where children, some as young as a few months old, were locked up with their mothers while the government attempted to deport them as rapidly as possible. In June 2014, U.S. Immigration and Customs Enforcement (ICE) opened a new family detention center in Artesia, New Mexico. After the ACLU and other civil rights groups filed suit over due process violations in the government's treatment of the asylum seekers and, in particular, in the way the government handled the expedited removal process, DHS closed the Artesia facility.[9] But over the next few months, ICE built two new immigration jails for families in Texas — run by the notorious private prison corporations, the Geo Group and Corrections Corporation of America — expanding family detention capacity more than tenfold.

In 2014 and 2015, Clinton supported the Obama administration's position that Central American families should be deported to send a deterrent signal to others[10] — in disturbing disregard of basic due process principles and international human rights norms. She has since appeared to soften that position and has stated in general terms that asylum seekers should have a fair process. In addition, she has recently promised to end family detention and "large-scale" raids on Central American asylum seekers.

In December 2015, under criticism from the left for taking campaign contributions from lobbying firms linked to private prison corporations, Clinton went on record calling for an end to family detention and stating that "[w]e have good alternatives, and we should use them."[11] Clinton should make good on this promise.

There are strong policy arguments in favor of ending the inhumane detention of families with children. The Obama administration's increased use of immigration jails for families with children constitutes a regressive move toward family detention, which was largely abandoned by the federal government after the settlement of an ACLU lawsuit challenging illegal conditions at the T. Don Hutto family detention center in Texas.[12] Advocates immediately pushed back with a wave of high-profile litigation, including an action by the Center for Human Rights and Constitutional Law to enforce a 1997 settlement agreement with the United States concerning the detention of children[13] and multiple ACLU lawsuits to challenge the detention of asylum seekers for deterrence purposes[14] and the government's illegal short-

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9 https://www.aclu.org/legal-document/mspc-v-johnson-complaint

10 Laura Meckler, Wall Street Journal, Hillary Clinton Defends Obama on Deportations, June 17, 2014, available at http://blogs.wsj.com/washwire/2014/06/17/hillary-clinton-defends-obama-on-deportations/ (stating that Clinton "addressed the surge of unaccompanied children attempting to cross the border, making clear that the U.S. cannot let them stay and that people in Central America need to understand that," and quoting Clinton as saying, "[w]e have to send a clear message just because your child gets across the border doesn't mean your child gets to stay . . . . We don't want to send a message contrary to our laws or encourage more to come"); Roque Planas, Huffington Post, Hillary Clinton Defends Call to Deport Child Migrants, August 19, 2015, available at http://www.huffingtonpost.com/entry/hillary-clinton-child-migrants_us_55d4a5c5e4b055a6dab24c2f (reporting that Clinton "said that deporting the children, many of whom are seeking asylum, would send a "responsible message" that would deter Central American families from sending their children to the United States").

11 See https://www.hillaryclinton.com/post/hillary-clinton-gave-major-speech-immigration-heres-what-you-need-know/ ("We have alternatives to detention for those who pose no flight or public safety risk, such as supervised release, that have proved effective and cost a fraction of what it takes to keep families in detention."). (Dec. 14, 2015).

12 Comm'n on Immigr., Family Immigration Detention: Why the Past Cannot be Prologue, A.B.A. (Jul. 31, 2015). Available at https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/FINAL%20ABA%20Family%20Detention%20Report%208-19-15.authcheckdam.pdf

13 Flores v. Meese, Stipulated Settlement Agreement Plus Extension of Settlement, available at https://www.aclu.org/legal-document/flores-v-meese-stipulated-settlement-agreement-plus-extension-settlement ; Also see., Mot. to Enforce, Flores v. Johnson et al. (9d Cir. 2016). No. 85-4544.

14 https://www.aclu.org/cases/rilr-v-johnson

cut removal procedures.[15] This litigation resulted in court orders that, among other things, forbade the government from using "deterrence" as a reason to lock up asylum-seeking mothers with children.[16]

In response, the Obama administration has released more asylum-seeking families, many of whom have passed the initial screening test (the credible fear interview), which is their first step in making an asylum claim. The administration has also announced that it is detaining these families for shorter periods of time,[17] generally releasing them within 20 days. However, the Obama administration remains committed in principle to family detention and, as recently as this summer, ICE was reportedly seeking new locations for family immigration jails.[18]

In the meantime, hundreds of women and children remain locked up every day while they are awaiting screening of their asylum claims or while they are seeking judicial review or reconsideration of their removal orders. Some of these families, who are represented by the ACLU, have been detained for prolonged periods while they challenge their deportation orders in federal court. Twenty-two such mothers at the Berks facility in Pennsylvania — some of whom have been detained for about a year — recently began a hunger strike to protest their ongoing detention.[19]

If she is elected, Clinton should make good on her promise to end family detention by:

- Closing the existing Dilley, Karnes, and Berks family detention facilities;
- Halting any efforts to procure new or expanded family detention facilities;
- Releasing all detained families, with priority to those detained six months or longer. This includes families who have failed their credible fear interviews but whose removal orders have been stayed while they seek judicial review;
- Prioritizing the use of alternatives to detention based upon individualized assessments of the least restrictive means to ensure that a family appears in immigration court as directed. Specifically, ICE should create a truly community-based case management and support system, equivalent to the pretrial services system for federal criminal defendants, to help asylum seekers understand and meet their obligations to appear, without unnecessary use of onerous conditions like ankle-worn electronic monitoring devices.

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15 See, e.g., https://www.aclu.org/cases/castro-v-department-homeland-security; see also https://www.aclu.org/legal-document/mspc-v-johnson-complain,

16 See R.I.L.R. v. Johnson, 80 F. Supp. 3d 164 (D.D.C 2015); see also Flores v. Lynch, __ F.3d ___, 2016 WL 3670046 (9th Cir. July 6, 2016) (rejecting government's argument that settlement agreement which set strict limits on detention of immigrant children did not apply to family detention and confirming that settlement covers children detained with their mothers, not simply children who are unaccompanied, as the government argued).

17 See Mike Lillis, DHS chief defends child detention, The Hill. (Aug. 3, 2016). Available at http://thehill.com/policy/national-security/290316-dhs-chief-defends-child-detention-practices; see also Defendants' Response in Opposition to Plaintiffs' Motion to Enforce Settlement and Appoint a Special Monitor at 26, Flores v. Lynch, Case No. CV 85-4544 (C.D. Cal., June 3, 2016), ECF 208.

18 Jason Buch, Ice still on the hunt for new family detention center, San Antonio Express News (Aug. 07, 2016).

19 Nicholas Kristof, Mothers to Homeland Security: We Won't Eat Until We Are Released, The New York Times (Aug. 12, 2016), available at http://mobile.nytimes.com/blogs/kristof/2016/08/12/mothers-to-homeland-security-we-wont-eat-until-we-have-asylum/?referer ; Joshua Holland, Why is the Obama Administration Keeping Toddlers Behind Bars? The Nation. (Aug. 17, 2016) available at https://www.thenation.com/article/why-is-the-obama-administration-keeping-toddlers-behind-bars/

If elected, Clinton should immediately end immigration raids on asylum seekers, which routinely violate the Fourth Amendment.

In addition to family detention, the Obama administration has carried out high-profile immigration raids against asylum-seeking families who have been ordered deported. Clinton has signaled that she would depart from those practices by expressing opposition to the use of "large-scale" raids as an immigration enforcement tool, at least in the context of families and children seeking asylum. Her position is well-grounded in both law and policy and should avoid the rampant civil rights violations that have attended these ICE raids.

ICE has consistently conducted raids targeting even individuals sought for removal who have no criminal history. The ACLU has litigated cases in recent years to challenge civil rights violations in the course of these raids.[20] During these ICE raids, agents typically arrive in full SWAT gear in the early morning or late evening hours. Far too frequently ICE agents obtain cooperation from residents through the use of ruses — such as pretending to be a police agency other than ICE or misleading residents regarding the purpose and potential consequences of the encounter — raising serious questions regarding whether consent was properly obtained. Agents routinely enter homes without a search or arrest warrant and without consent, often with guns drawn, and forcibly detain all individuals in the residence, including children and others who were not the original target of the operation. Such Fourth Amendment violations have been well documented and the subject of large monetary settlements through litigation.[21]

While these operations received notoriety during the George W. Bush administration, many of those same problematic practices have persisted into the Obama administration — most recently with the month-long operation to detain asylum seekers in early January 2016. These recent ICE raids, with a high-profile announcement during the holiday period, caused national uproar and resulted in reports of widespread constitutional violations, including warrantless entries, excessive force, and students arrested on their way to school.[22]

Clinton has come out against the use of raids at least with respect to those targeting asylum seekers. As Clinton stated, these raids "tear families apart and sow fear in communities"[23] and "are not consistent with our values."[24] Her administration should put an end to all raids immediately and require that federal immigration authorities abide by best law enforcement practices and constitutional norms. For example, Clinton should direct ICE to end the routine use of ruses in enforcement operations, a practice that breeds distrust and calls into question whether consent is properly obtained.[25]

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20 Case Overview, El Balazo Raids, available at https://www.aclu.org/cases/matter-maria-de-jesus-ortiz-mejia-and-other-respondents-el-balazo-cases; Case Overview, Escobar v. Gaines, available at https://www.aclu.org/cases/escobar-v-gaines.

21 Case Overview, Aguilar v. ICE, available at http://ccrjustice.org/home/what-we-do/our-cases/aguilar-et-al-v-immigration-and-customs-enforcement-ice-et-al; ACLU Announces Settlement In Lawsuit Over Warrantless Raid By US Immigration Agents And Nashville Police, available at https://www.aclu.org/news/aclu-announces-settlement-lawsuit-over-warrantless-raid-us-immigration-agents-and-nashville.

22 Families in Fear, The Atlanta Immigration Raids, available at https://www.splcenter.org/sites/default/files/splc_families_in_fear_ice_raids_3.pdf; The Dark Side of Immigration Discretion, N.Y.Times, April 20, 2016, available at http://www.nytimes.com/2016/04/20/opinion/the-dark-side-of-immigration-discretion.html

23 Jesse Byrnes, Sanders, Clinton Slam New Round of Deportation Raids, The Hill, May 12, 2016, available at http://thehill.com/blogs/ballot-box/presidential-races/279754-sanders-slams-new-round-of-deportation-raids.

24 Wendy Feliz, Tracking Hillary Clinton's Promises on Immigration Reform, American Immigration Council, available at http://immigrationimpact.com/2016/07/15/hillary-clinton-immigration-reform/.

25 See Memo from John P Torres, Acting Director, ICE Office of Dentention and Removal Operations, "Use of Ruses in Enforcement Opera-

If elected, Clinton should guarantee the due process rights of asylum seekers in accordance with the Fifth Amendment, the Immigration and Nationality Act, and international law.

Clinton's position has also appeared to evolve on the process available to asylum seekers. As noted above, in 2015, she expressed support for the Obama administration's deterrence policies and stated that the federal government "should focus on expediting the deportation cases of children and people locked in family detention."[26] Most recently, however, she has recognized that "[f]amilies fleeing violence in Central America must be given a full opportunity to seek relief."[27] The candidate's more recent focus on ensuring a "full opportunity" for asylum seekers to seek relief is a welcome shift, as it is a position that is more in keeping with our Constitution's Fifth Amendment guarantee of due process for all persons in our country and our treaty obligations and international human rights norms.

Clinton's previous positions emphasizing deporting children to send a message and expediting the deportation of immigrants fleeing violence in Central America raise numerous concerns. Regardless of immigration status, our Constitution,[28] statutes,[29] and international human rights obligations[30] guarantee every asylum seeker facing removal from the U.S. a fair procedure for seeking asylum. Although the immigration laws currently permit ICE to use "expedited removal" — a short-cut deportation process without a hearing before an immigration judge for certain newly arrived noncitizens[31] — aggressive attempts to "expedite" the deportation process are inconsistent with providing each asylum seeker's case with meaningful and fair consideration before a neutral decision maker. They do not permit immigrants a real opportunity to find a lawyer, research and develop their claims, gather the necessary evidence, or obtain court review.[32]

Clinton's more recent recognition that immigrants fleeing violence must be given a "full opportunity to seek relief" is a step in the right direction. But to truly protect the rights of all asylum seekers, Clinton should commit to suspending and eliminating the use of expedited removal, call on Congress to repeal

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tions," March 6, 2006 ("The use of ruses in the performance of US Immigration and Custom Enforcement (ICE) mission remains a valuable and effective tool.")

26 Roque Planas, Huffington Post, Hillary Clinton Defends Call to Deport Child Migrants, August 19, 2015, available at http://www.huffingtonpost.com/entry/hillary-clinton-child-migrants_us_55d4a5c5e4b055a6dab24c2f.

27 Jessie Byrnes, Sanders, Clinton slam new round of deportation raids, The Hill, May 12, 2016. See also https://www.hillaryclinton.com/issues/immigration-reform/ (pledging to "ensure refugees who seek asylum in the U.S. have a fair chance to tell their stories").

28 See U.S. Const. amend. V ("No person shall be … deprived of life, liberty, or property, without due process of law").

29 See, e.g., 8 U.S.C. § 1158(a)(1) ("Any alien who is physically present in the United States or who arrives in the United States. . . irrespective of such alien's status, may apply for asylum"); 8 U.S.C. § 1225(b)(1)(A)(ii), (B) (providing that noncitizen applicants for admission who express a fear of returning to their home countries are entitled to an interview with an asylum officer as well as "an opportunity for the alien to be heard and questioned by the immigration judge"); 8 C.F.R. § 1240.11(c)(3) ("Applications for asylum and withholding of removal. . . will be decided by the immigration judge . . . after an evidentiary hearing to resolve factual issues in dispute."); see also 8 U.S.C. § 1229a(b)(4)(B) ("the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government."); 8 C.F.R. § 1240.11(c)(3)(iii) ("During the removal hearing, the alien shall be examined under oath on his or her application and may present evidence and witnesses in his or her own behalf.").

30 See, e.g., Convention relating to the Status of Refugees, art. 33, 189 U.N.T.S. 150, entered into force April 22, 1954 ("the Refugee Convention") (implemented in U.S. law through INA Section 208); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture), adopted December 10, 1984, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (no. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987, art. 3., ratified by the United States on October 21, 1994.

31 See 8 U.S.C. § 1225(b)(1).

32 See, e.g., ACLU report, American Exile: Rapid Deportations that Bypass the Courtroom, at 4, 32-43, available at https://www.aclu.org/files/assets/120214-expeditedremoval_0.pdf.

the expedited removal provisions of our immigration laws, and agree to exercise discretion to give all asylum seekers (and all immigrants) access to full immigration court proceedings as well as federal court review before a removal order is effectuated.

If elected, Clinton should abandon the Obama administration's policy of denying judicial review to asylum seekers in violation of the Suspension Clause in Article I of the Constitution.

In order to flesh out her evolved position that asylum seekers should get a fair hearing, Clinton should abandon the Obama administration's position (in defending against ACLU litigation) of denying judicial review for Central American families fleeing horrific violence and persecution and seeking asylum in the United States.[33] There has never been a time in the history of this country when noncitizens who have entered the United States were denied access to the federal courts to test the legality of their removal. Indeed, the Supreme Court has repeatedly reaffirmed that noncitizens have the right to go to court to challenge their removal orders through the great writ of habeas corpus.[34]

Yet the Obama administration has now taken the extraordinary position that the Central American mothers and children fleeing persecution should be sent back based solely on an executive branch determination that they are not entitled to asylum, a determination that is made at the border in an expedited hearing in which the families lack meaningful representation or time to prepare. Clinton should reject that position and should reaffirm the historic right of noncitizens to challenge their removal in court.

If elected, Clinton should guarantee counsel to asylum seekers in accordance with the Fifth Amendment and immigration law.

The recent influx in asylum seekers from Central America has highlighted another huge problem: the lack of appointed counsel, or any government-provided assistance whatsoever, to help individuals prepare and pursue their asylum claims. While U.S. immigration law provides for a right to be represented by counsel in removal proceedings,[35] and it is well established that the Due Process Clause provides a right to a fair hearing,[36] the government interprets the statute as not requiring the appointment of counsel, even in asylum cases where representation may literally make the difference between life and death. Indeed, the government does not even provide language assistance to asylum seekers attempting to prepare their cases. If Clinton means what she says about giving asylum seekers a fair hearing, then she must implement policies to ensure that asylum seekers understand the proceedings against them and can meaningfully defend themselves and raise their asylum claims, including by providing appointed counsel and language assistance.

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33 Gov't Brief in Castro v. DHS, No. 16- 1339 (3d Cir.) (argued May 19, 2016; under submission).

34 INS v. St. Cyr, 533 U.S. 289 (2001) (discussing history of habeas over removal orders). See also Boumediene v. Bush, 553 U.S. 723 (2008) (reviewing history of habeas corpus and finding that noncitizen enemy combatants at Guantanamo are entitled to habeas corpus review).

35 8 U.S.C. §1229a(b)(4)(A)

36 Salgado-Diaz v. Gonzales, 395 F.3d 1158, 1162 (9th Cir. 2005)

In defending its policies, including its high-profile raids, the Obama administration insists that it is only seeking to deport Central American asylum seekers who have had their claims fairly considered and rejected.[37] Yet the government's own data paints a very different picture. According to a recent analysis of the "women with children" category of cases that were completed during 2016, "nearly every family that went unrepresented — more than 96 percent of all such cases — was ordered to leave the country."[38] The small minority of families who were represented by counsel "were 10 times more likely to be granted protection from deportation than families without counsel."[39] Thus representation by counsel was "the single most important factor" in determining the outcome of these cases.[40]

With the government refusing to provide appointed counsel, the gap has been partially filled by pro bono efforts such as those organized to assist the families detained, first in Artesia, New Mexico, and currently in the Karnes and Dilley family detention facilities in Texas. The effect of these volunteer efforts by lawyers has been remarkable. In Artesia, for example, the passage rate for the credible fear interview (the initial screening hurdle for asylum) rose from 40 percent to close to 80 percent in little more than a month.[41] Families with counsel were released, and nearly all represented families ultimately won asylum. [42]

But pro bono efforts like those organized for family detainees are extremely resource-intensive, difficult to sustain, and impossible to expand to the scale necessary for the system to work fairly for all. For example, while these efforts have benefited family detainees, thousands of adult asylum seekers without children remain detained in remote facilities without any access to pro bono attorneys. Moreover, even for those released from detention, the lack of counsel remains an obstacle. With no one to explain their rights and obligations, many fail to appear for their removal proceedings, resulting in issuance of *in absentia* removal orders. Central American women with children who lacked counsel received *in absentia* removal orders at a rate ten times greater than those who were represented.[43]

As set forth below, Clinton has tentatively endorsed appointed counsel for children,[44] but she has said nothing about the need for appointed counsel for other vulnerable groups, like asylum seekers. This is a major due process gap in Clinton's position on immigration.

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37 Clara Long, Dispatches: New Twist in a Flawed US Asylum System. Human Rights Watch (Jan. 07, 2016)("Homeland Security Secretary Jeh Johnson claimed that [the Central Americans targeted for removal] had all "exhausted appropriate legal remedies," suggesting that their deportation orders came after a real and fair opportunity to present their asylum claims.")

38 AILA, "Due Process Denied: Central Americans Seeking Asylum and Legal Protection in the United States," 6/16/16,http://www.aila.org/infonet/report-due-process-denied, at p 15 (citing TRAC Immigration, http://trac.syr.edu/phptools/immigration/mwc/

39 AILA, "Due Process Denied: Central Americans Seeking Asylum and Legal Protection in the United States," 6/16/16,http://www.aila.org/infonet/report-due-process-denied, at p 15

40 See TRAC Immigration, "Representation Makes Fourteen-Fold Difference in outcome: Immigration Court 'Women with Children' Cases." http://trac.syr.edu/phptools/immigration/mwc/

41 AILA, "Due Process Denied: Central Americans Seeking Asylum and Legal Protection in the United States," 6/16/16,http://www.aila.org/infonet/report-due-process-denied, at p 16

42 See generally Stephen W Manning, Ending Artesia: The Artesia Report (Jan. 20, 2014)

43 See TRAC, supra n. 28

44 Time, 2/12/16 ("what I've called for is counsel for every child so that not child has to face any kind of process without someone who speaks and advocate for that child….")

If elected, Clinton should commit to ensuring every child has counsel during an immigration hearing in accordance with the Fifth Amendment and immigration law.

During the summer of 2014, when the United States was seeing an increase in children and families crossing the southern border, then-Secretary of State Clinton declared: "We have to send a clear message just because your child gets across the border doesn't mean your child gets to stay . . . We don't want to send a message contrary to our laws or encourage more [children] to come."[45] While she has not disavowed this view, Clinton has since clarified that children in immigration court should have lawyers appointed to defend them against deportation: "I think now what I've called for is counsel for every child so that no child has to face any kind of process without someone who speaks and advocates for that child, so that the right decision hopefully can be made."[46] However, her statements indicate that she wrongly believes this should be accomplished through congressional action.[47]

Notwithstanding Clinton's recent statements, the federal government refuses to recognize that it has a legal obligation to provide counsel to children. In July 2014, the ACLU and our allies filed a lawsuit seeking to establish a right to appointed counsel for children in removal proceedings. This lawsuit asserts that requiring *pro se* children to represent themselves, particularly in life-and-death immigration cases, violates the Due Process Clause of the Fifth Amendment and the Immigration and Nationality Act, both of which guarantee fair hearings for individuals facing deportation.[48]

The Obama administration has fought tooth and nail to get our lawsuit dismissed and has continued to insist that it is fundamentally fair to let children — including toddlers — face off in immigration court against trained government prosecutors.[49] And despite paying these prosecutors to represent its interests, the federal government claims that it need not level the playing field by giving children lawyers. Not only that, the Obama administration recently succeeded in persuading a panel of the U.S. Court of Appeals for the Ninth Circuit that our lawsuit on behalf of children should be dismissed on the theory that the children cannot even get their constitutional claims heard by the federal courts. But in an unusual concurring opinion, two of the judges called upon the political branches to act to provide counsel for children. If elected, Clinton should heed that call, abandon the wrongheaded defense against our lawsuit and recognize that the Due Process Clause and U.S. immigration law require the government to provide appointed counsel for children facing deportation.

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45 Laura Meckler, Hillary Clinton Defends Obama on Deportations, The Wall Street Journal (Jun. 17, 2014), available at http://blogs.wsj.com/washwire/2014/06/17/hillary-clinton-defends-obama-on-deportations/.

46 Katie Reilly, Clinton and Sanders Spar Over Unaccompanied Minors, Time (Feb. 12, 2016), available at http://time.com/4218850/democratic-debate-bernie-sanders-hillary-clinton-central-america-unaccompanied-minors/; see also Transcript: The Post-Univision Democratic debate, annotated ("Post-Univision debate transcript"), Washington Post, (Mar. 9, 2016), available at https://www.washingtonpost.com/news/the-fix/wp/2016/03/09/transcript-the-post-univision-democratic-debate-annotated/ ("I did say we needed to be very concerned about little children coming to this country — on their own, very often — many of them not making it. And when they got here, they needed, as I have argued for, legal counsel, due process, to make a decision.").

47 Washington Post, 3/9/16 ("I would like to see those laws changed. I would like to see added to them, a guaranteed counsel and other support for children."

48 See https://www.aclu.org/cases/jefm-v-lynch, last updated June 24, 2016. See Yamataya v. Fisher, 189 U.S. 86 (1903); 8 U.S.C. § 1229a(b)(4)(B).

49 Defendants' Appellant's Opening Brief at 1-2, J.E.F.M. v. Lynch, Nos. 15-35738, 35739 (9th Cir. Dec. 28, 2015), ECF No. 9.

The federal government can solve this humanitarian crisis now. Clinton has suggested that she believes a legislative fix is the best way to provide appointed counsel for children in removal proceedings.[50] But the federal government *already* possesses the authority — as well as the constitutional, legal, and moral obligation — to provide counsel for children and to schedule their cases so as to ensure that no unrepresented child is ordered removed. Indeed, the government currently allocates millions of dollars to provide lawyers for some children in immigration proceedings, even though thousands more remain unrepresented. Clinton should commit to ensuring that *every* child in immigration proceedings receives a lawyer to defend them.

If elected, Clinton should end the use of private prison corporations for immigration detention.

Although initially criticized for accepting campaign contributions from private prison lobbyists, Hillary Clinton later agreed to refuse future industry contributions and donate the existing contributions to charity.[51] She has since pledged to end the use of federal private prisons and end the use of private immigration detention centers, characterizing incarceration as a "core responsibility of the federal government" that should not be contracted out to private corporations.[52] Citing the recent wave of hunger strikes by people in detention, Clinton has also said that, "We need to be focused on detention conditions."[53]

Both her pledge to end reliance on private prison companies and her admonition to improve detention conditions are legally sound. According to recent estimates, 73 percent of people in ICE detention are held in the custody of private, for-profit prison companies.[54] Among other things, these companies lobby to avoid public accountability. Legislation to treat private prisons the same as public prisons under the Freedom of Information Act has been defeated nearly a half-dozen times since 2005 in the face of industry lobbying.[55] They also use a revolving door of former federal officials to help boost their business. In 2012, for example, ICE assistant director David Venturella joined GEO Group (a private prison company and major ICE contractor) as executive vice president of corporate development.[56] Yet the industry's public record has repeatedly illustrated that handing control of prisons and immigration detention over to for-profit companies is a recipe for abuse, neglect, and misconduct.[57]

A recent report by the ACLU, Detention Watch Network, and the National Immigrant Justice Center examined eight deaths where ICE's own internal investigations identified violations of medical

50 See Transcript: The Post-Univision Democratic debate, annotated ("Post-Univision debate transcript"), Washington Post, (Mar. 9, 2016), available at https://www.washingtonpost.com/news/the-fix/wp/2016/03/09/transcript-the-post-univision-democratic-debate-annotated / ("[Y]ou were asking me were about children seeking asylum. And we have laws. That was the most critical thing I said. Under our laws, I would like to see those laws changed. I would like see added to them, a guaranteed counsel and other support for children.").

51 http://www.huffingtonpost.com/entry/hillary-clinton-private-prisons_us_562a3e3ee4b0ec0a389418ec

52 https://www.hillaryclinton.com/issues/criminal-justice-reform/; https://www.hillaryclinton.com/issues/immigration-reform/

53 http://cmsny.org/end-private-detention/

54 http://www.usnews.com/news/articles/2016-08-18/private-prison-companies-punched-in-the-gut-will-keep-most-federal-business

55 http://www.motherjones.com/mojo/2014/12/will-private-prisons-ever-be-subject-open-records-laws

56 http://www.rollingstone.com/politics/news/the-for-profit-immigration-imprisonment-racket-20130222

57 https://www.aclu.org/banking-bondage-private-prisons-and-mass-incarceration; https://www.aclu.org/warehoused-and-forgotten-immigrants-trapped-our-shadow-private-prison-system

standards that contributed to the person's death; of these, six occurred in facilities run by private prison companies.[58] Since then, the deaths have continued. In 2015, for example, a 31-year-old man being held at Eloy, a Corrections Corporation of America detention facility in Arizona, suffocated himself to death in a solitary confinement cell by jamming a rolled-up sock into his throat. Despite knowing of his recent history of suicide attempts and erratic behavior in custody, CCA staff had removed him from suicide precautions the day before he died.[59]

Although DHS recently announced it would review the agency's use of private prisons, recent statements by ICE director Sarah Saldaña—claiming that ending ICE's reliance on private prisons would "turn our system upside down" because "we are almost completely contractor-run"—call into question the legitimacy of this review and highlight the need for clear presidential leadership on this issue.[60]

If elected, Clinton should end the mass incarceration of immigrants and the Fifth Amendment violations that accompany the practice.

Ending the federal government's disturbing reliance on for-profit prisons for immigration detention is not the only or even the central problem that should be fixed. The U.S. Department of Homeland Security imprisons tens of thousands of immigrants every day in federal detention facilities and local jails across the country. Many are incarcerated for months or even years in violation of the Fifth Amendment while the courts resolve their immigration cases.

Moreover, under Obama administration policies, many of these individuals never receive the most basic element of due process: a bond hearing in immigration court to determine if their detention is even necessary. As a result, immigrants are routinely subjected to prolonged detention even when they have strong claims to lawful residence in the U.S. and pose no flight risk or danger to public safety. These include asylum seekers fleeing violence and persecution in their home countries as well as longtime green card holders whom the government is seeking to deport based on minor crimes, such as shoplifting or turnstile jumping. Such unnecessary detention causes severe harm to individuals, families, and communities, and it imposes significant costs on U.S. taxpayers — at the rate of $161 per detainee per day.[61] In total, detention operations cost taxpayers approximately $2 billion every year.[62]

Courts across the country — in decisions by judges across the ideological spectrum — have firmly rejected the government's detention policies. Two federal circuit courts have required bond hearings after six months of detention,[63] and four other circuit courts have prohibited mandatory detention for

58 https://www.aclu.org/report/fatal-neglect-how-ice-ignores-death-detention

59 https://www.themarshallproject.org/2016/07/15/the-strange-death-of-jose-de-jesus#.MAcLyJtA5; https://www.hrw.org/news/2016/07/07/us-deaths-immigration-detention

60 http://www.huffingtonpost.com/entry/immigration-enforcement-private-detention_us_57e40391e4b08d73b82ff35c

61 Nat'l Immigration Forum, Detention Costs Still Don't Add Up to Good Policy (Sept. 24, 2014), available at https://immigrationforum.org/blog/detention-costs-still-dont-add-up-to-good-policy/.

62 See, e.g., DHS Budget in Brief, FY 2017 at 5, available at https://www.dhs.gov/sites/default/files/publications/FY2017_BIB-MASTER.pdf (requesting $2.2 billion for immigration detention in FY 2017).

63 See Lora v. Shanahan, 804 F.3d 601 (2d Cir. 2015); Rodriguez v. Robbins, 804 F.3d 1060 (9th Cir. 2015).

unreasonable periods of time.[64] Nonetheless, the Obama administration has insisted on defending its draconian detention policies, which will be reviewed by the Supreme Court this term.[65] Clinton should abandon the Obama administration's unconstitutional detention practices and adopt a nationwide rule requiring — at a minimum — that all immigrants receive individualized bond hearings at six months so that they are not unlawfully deprived of their liberty.

If elected, Clinton must move quickly to rein in the rampant Fourth and Fifth Amendment abuses carried out by Customs and Border Protection officers and agents.

Few elected officials discuss the border with any nuance. Yet tens of millions of people live, work, and attend school in border communities, which are vital parts of the nation's economy and culture. These contributions have been hindered by a massive, wasteful, and unchecked militarization of border enforcement over the past 15 years.[66]

Hillary Clinton's position on border security has moved in a favorable direction on some issues, such as Central American refugees. Even so, she has not yet directly confronted systemic civil rights violations — of citizens and noncitizens alike — committed by the nation's largest police force, U.S. Customs and Border Protection (CBP). If elected, Clinton must put CBP at the center of federal police-reform initiatives, make CBP oversight integral to immigration-reform legislation, and restore border communities' freedoms that have been trampled by CBP's unchecked culture of abuse[67] that results in excessive uses of force[68] and unconstitutional searches/seizures in violation of the Fourth Amendment,[69] racial profiling prohibited by the Fifth Amendment, and a general lack of accountability.[70]

Border communities — called home by U.S. citizens and non-citizens, many of whom self-identify as Latino or Hispanic after having lived here for generations, and many of whom travel within the region to see family and go about their daily lives without crossing the border — deserve the same transparency and accountability from CBP that we demand of any other law enforcement agency. Border Patrol agents need to be trained adequately on the constitutional, statutory, and policy limits on their power and should face transparent, prompt consequences for exceeding them. Clinton has committed herself to being an ally for communities demanding greater accountability from state and local police departments, and communities plagued by CBP abuses urgently need those same reforms.

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64 See Reid v. Donelan, 819 F.3d 486 (1st Cir. 2016); Diop v. ICE/Homeland Security, 656 F.3d 221 (3d Cir. 2011); Ly v. Hansen, 351 F.3d 263 (6th Cir. 2003); Sopo v. Attorney General, __ F.3d __, 2016 WL 3344236 (11th Cir. 2016).

65 See http://www.scotusblog.com/case-files/cases/jennings-v-rodriguez/.

66 American Civil Liberties Union & Southern Border Communities Coalition, Written Statement for a hearing on Open Borders: The Impact of Presidential Amnesty on Border Security (Dec. 2, 2014), https://www.aclu.org/sites/default/files/assets/sb-cc-aclu-nbc_statement-_house_homeland_security_hearing_12-2-14.pdf.

67 Garrett M. Graff, The Green Monster, Politico, Nov./Dec. 2014, http://www.politico.com/magazine/story/2014/10/border-patrol-the-green-monster-112220.

68 Chris Rickerd, Blog, Border Patrol Violence Must Stop, Huff. Po., June 5, 2015, http://www.huffingtonpost.com/chris-rickerd/border-patrol-violence-must-stop_b_7523786.html.

69 Daniel Denvir, Curbing the Unchecked Power of the U.S. Border Patrol, City Lab, Oct. 30, 2015, http://www.citylab.com/crime/2015/10/curbing-the-unchecked-power-of-the-us-border-patrol/413392/.

70 See, e.g., ACLU of Arizona, Record of Abuse (2015), http://www.acluaz.org/node/5415; ACLU of New Mexico Regional Center for Border Rights, Guilty Until Proven Innocent (May 2015), https://www.aclunm.org/guiltyuntilproveninnocent/2015/05/.

A Clinton administration must break from the Obama administration's failure to fully reform CBP policies and practices. Too often in recent years, reforms commendably urged on state and local police by the Department of Justice (DOJ) — including body-worn cameras, implicit bias training, and data collection and public reporting to guard against discriminatory profiling — have been blocked by CBP's culture of exceptionalism, which leaves the agency without adequate oversight. In fact, there is no reason CBP should be held above the laws that apply to every other law enforcement agency or roam within a vast "100-mile zone" that leads to operations far from any actual border.[71]

If elected, Clinton should direct CBP to implement common-sense police accountability reforms that will save lives and protect constitutional rights. First, she must require CBP to submit to the same DOJ prohibitions on racial profiling and other illegal bias-based policing that apply to other federal agents.[72] Second, Border Patrol should collect data on every stop and search it makes beyond brief checkpoint questioning and publicly report on that data.[73] Third, when someone wants to file a complaint about CBP, there should be a clear, effective, multilingual process for doing so.[74] Fourth, she should ensure that recommendations made by independent reviews, such as the CBP Integrity Advisory Panel, on matters like use-of-force and disciplinary reform are implemented;[75] return migrants' confiscated property;[76] and overhaul the deplorable conditions in CBP detention facilities.[77] Fifth, CBP should widely deploy body-worn cameras within a thoughtful policy framework that includes robust privacy protections.[78] Sixth, she should eliminate the use of checkpoints more than 25 miles from an international border and reduce the area where agents enter private property without a warrant to 10 miles.[79] Finally, Clinton should disavow the Obama administration's outrageous legal position that Border Patrol agents who shoot across the border and kill Mexican children cannot be held accountable under the U.S. Constitution.[80]

Absent these reforms, a Clinton administration would perpetuate a lower standard of conduct for CBP than the basic standards that apply to other law enforcement agencies in the United States. The current

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71 The Constitution in the 100-mile border zone, ACLU, https://www.aclu.org/constitution-100-mile-border-zone.

72 Chris Rickerd, A Dangerous Precedent: Why Allow Racial Profiling at or Near the Border, ACLU, (Dec. 8, 2014), https://www.aclu.org/blog/speakeasy/dangerous-precedent-why-allow-racial-profiling-or-near-border.

73 Sophia Kunthara, ACLU says lack of reporting allows abuses by Border Patrol agents, Cronkite News, July 12, 2016, https://cronkitenews.azpbs.org/2016/07/12/aclu-says-lack-reporting-allows-abuses-border-patrol-agents/.

74 ACLU, Factsheet: Recommendation to DHS to Improve Complaint Processing (2015), https://www.aclu.org/files/assets/14_5_5_recommendations_to_dhs_to_improve_complaint_processing__final.pdf.

75 Homeland Security Advisory Council, Final Report of the CBP Integrity Advisory Panel (Mar. 15, 2016), https://www.dhs.gov/sites/default/files/publications/HSAC%20CBP%20IAP_Final%20Report_FINAL%20(accessible)_0.pdf; ACLU, Implementing Law Enforcement Best Practices for our Nation's Biggest Police Force (Nov. 5, 2015), https://www.aclu.org/sites/default/files/field_document/aclu_backgrounder_re_cbp_profiling_and_police_best_practicesfinal.pdf.

76 Esther Yu His Lee, Border Patrol Agents Allegedly Loot Immigrants Before Deporting Them Back To Mexico, Think Progress, Apr. 6, 2016, https://thinkprogress.org/border-patrol-agents-allegedly-loot-immigrants-before-deporting-them-back-to-mexico-5f4d47bb5408#.b8il4ltb1.

77 James Lyall, ACLU and Partners File Suit Against US Border Patrol for Savage Treatment in Detention Facilities, ACLU, (June 10, 2015), https://www.aclu.org/blog/speak-freely/aclu-and-partners-file-suit-against-us-border-patrol-savage-treatment-detention.

78 ACLU, Factsheet: Strengthening CBP with the Use of Body-Worn Cameras (June 27, 2014), https://www.aclu.org/strengthening-cbp-use-body-worn-cameras.

79 American Civil Liberties Union & Southern Border Communities Coalition, Written Statement for a hearing on Moving the Line of Scrimmage: Re-Examining the Defense-In-Depth Strategy (Sept. 13, 2016), https://homeland.house.gov/wp-content/uploads/2016/08/Testimony-Ramirez.pdf.

80 Mark Binelli, 10 Shots Across the Border, N.Y. Times Magazine, Mar. 3, 2016, http://www.nytimes.com/2016/03/06/magazine/10-shots-across-the-border.html.

administration has not adequately tackled CBP's transparency and accountability failings even as it has made many of the above recommendations for state and local officers in the final report by President Obama's Task Force on 21st Century Policing and the White House Police Data Initiative.[81] A Clinton administration must do better.

In addition to reforming CBP, Clinton should end mass criminal prosecutions of border crossers, which have been an expensive, inhumane failure in the decade since Operation Streamline started in 2005.[82] Unjust, disproportionate criminal penalties for migrants striving to rejoin their U.S. citizen children and other relatives have fueled mass incarceration. Border-crossing prosecutions funnel tens of thousands of people into federal prisons annually by cruelly and unnecessarily referring migrants who are not DOJ public-safety priorities for criminal prosecution rather than civil deportation proceedings. Operation Streamline and related "zero-tolerance" programs accomplish their goals through a grotesque system of assembly-line justice that includes prosecution of asylum-seekers in contravention of international law.[83] Defendants in these cases often have as little as two minutes to meet with their appointed attorneys.[84] And even beyond the border region, the Justice Department has expanded the prosecution of illegal entry/reentry, including migrants who do not pose a public safety risk and only seek to be reunited with family members. This practice wastefully skews federal criminal prosecution and incarceration resources nationwide. A Clinton Administration should apply DOJ's "Smart on Crime" principles to significantly reduce immigration prosecutions and refocus on true criminal priorities,[85] as well as ending CBP's punitive, inflexible Consequence Delivery System.[86]

If elected, Clinton must begin with focused resolve to seize vital opportunities to complete and improve upon her predecessor's approach to CBP abuses. Reducing the footprint of CBP enforcement in border communities is urgently necessary to secure border residents' human rights and uphold American values of freedom, equality, and justice.

If elected, Clinton should assure state and local law enforcement that the federal government will not conscript them into immigration enforcement.

Many cities and counties, and some states, have adopted laws or policies limiting their involvement in federal immigration enforcement. More than 300 states and localities have decided not to detain individuals simply because ICE asks them to do so on a "detainer" form.[87] Other policies ensure that

81 President's Task Force on 21st Century Policing, Final Report of the President's Task Force on 21st Century Policing (2015), http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf; see also Megan Smith and Roy L. Austin, Jr., Launching the Police Data Initiative, White House (May 18, 2015), https://www.whitehouse.gov/blog/2015/05/18/launching-police-data-initiative.

82 Judith A. Greene, Bethany Carson, & Andrea Black, Grassroots Leadership, Indefensible: a Decade of Mass Incarceration of Migrants Prosecuted for Crossing the Border (July 2016), http://grassrootsleadership.org/reports/indefensible-decade-mass-incarceration-migrants-prosecuted-crossing-border.

83 Dep't of Homeland Security, Office of Inspector General, Streamline: Measuring Its Effect on illegal Border Crossing (May 15, 2015), https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-95_May15.pdf.

84 ACLU, Factsheet: Criminal Prosecutions for Unauthorized Border Crossing, https://www.aclu.org/operation-streamline-issue-brief.

85 Attorney General's Smart on Crime Initiative, U.S. Dep't of Justice, https://www.justice.gov/ag/attorney-generals-smart-crime-initiative.

86 Daniel Martinez, Effectiveness of DHS' "Consequences Delivery System" Questioned, American Immigration Council (Apr. 3, 2015), http://immigrationimpact.com/2015/04/03/effectiveness-of-dhs-consequences-delivery-system-questioned/.

87 http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2014/10/31/more-jurisdictions-defying-feds-on-deporting-immigrants;

officials do not inquire into immigration status,[88] broadly prohibit the use of public resources for immigration enforcement,[89] or otherwise seek to disengage from ICE.[90] Jurisdictions with any of these policies are frequently, although inaccurately,[91] lumped together as "sanctuary cities."

As a legal matter, states and cities clearly have the authority to decline to participate in immigration enforcement.[92] Officials have cited a variety of sound policy reasons for exercising that option, including improving public safety by reducing fear and distrust of the police among immigrants,[93] disentangling state and local police from constitutionally problematic enforcement practices,[94] recognizing and promoting the integration of immigrants into the larger community,[95] and reserving scarce state and local resources for state or local purposes.[96]

Hillary Clinton has generally voiced support for at least some sanctuary city policies. When asked in 2008 whether she would "crack down on the sanctuary cities," Clinton said that she would not, explaining that in such cities "police officers turn a blind eye" because "[t]hey want [immigrants] to report crimes."[97] A spokesperson reiterated in 2015 that Clinton "believes that sanctuary cities can help further public safety. . . ."

While positive, this position remains vague and incomplete, particularly since she has taken no position on the Obama administration's repeated attempts to cajole or threaten states and localities into backing away from their policies. For example, the current director of ICE asked for federal legislation that would make detainers mandatory. (He retracted the request when it caused an uproar.) The Justice Department's Office of the Inspector General has recently released a report that uses a breathtakingly overbroad reading of a federal statute, 8 U.S.C. § 1373, to suggest that limited-detainer policies and other "sanctuary" policies could be a basis to pull federal assistance grants from states or localities. And while DHS has paid lip service to community concerns and constitutional issues by retiring the Secure Communities brand under which it previously sought state and local participation in immigration enforcement, it has since relaunched many of the same initiatives under a new name as the "Priority Enforcement Program."

Clinton should make clear that her administration will not try to conscript states and localities as immigration enforcers. Instead, she should promise to provide genuine support to those jurisdictions that — in order to "further public safety" or for other good reasons — decide to stay out of the business of immigration enforcement. Her agencies can do that by issuing guidance and legal analysis that reiterate and reaffirm state and local authority to enact sanctuary policies; by respecting the limitations on state and local participation set by state and local policymakers; and by opposing,

http://www.migrationpolicy.org/article/sanctuary-cities-come-under-scrutiny-does-federal-local-immigration-relationship

88 E.g., New York City Executive Order 34, http://www1.nyc.gov/assets/immigrants/downloads/pdf/eo-34.pdf

89 E.g., San Francisco Administrative Code § 12H.2

90 E.g., http://www.latimes.com/local/education/lausd/la-me-edu-ice-agents-school-campuses-20160209-story.html

91 See https://www.aclu.org/sites/default/files/field_document/15_8_4_sign_on_letter_opposing_stop_sanctuary_cities_act_final.pdf

92 See, e.g., Galarza v. Szalczyk, 745 F.3d 634, 641 (3d Cir. 2014)

93 E.g., California TRUST Act, A.B. 4 (CA 2013)

94 http://immigrationimpact.com/2014/07/24/avalanche-of-local-detainer-limits-underscores-need-for-federal-policy-reform/

95 Cristina Rodríguez, "The Significance of the Local in Immigration Regulation," 106 Mich. L. Rev. 567, 604-05 (2008).

96 California TRUST Act, supra.

97 Fox News, 5/2/08

rather than inviting, federal legislation that would undermine such policies. Clinton should also work with states and localities that are working to integrate immigrants through other common-sense public safety policies like providing access to driver's licenses regardless of immigration status.

CLINTON ON TARGETED KILLING

Unless Hillary Clinton changes course, her presidency will further entrench the dangerous "global war" paradigm initiated under President Bush and expanded under President Obama through the continued use of lethal force outside the limits posed by international law and the Constitution. Clinton has defended the Obama administration's expansive targeted killing program as lawful and effective. As secretary of state from 2009 to 2013, she played an important role as an influential member of the president's national-security team. Both during and after her tenure, she has spoken approvingly of the administration's lethal-force program, calling it "one of the most effective . . . elements of the Obama administration's strategy against al Qaeda and like-minded terrorists in hard-to-reach places."[98] She has defended it as the "course of action . . . least likely to harm civilians" and emphasizing that targeted killings are subject to a "rigorous legal and policy review."[99]

Although the details of Clinton's participation in the targeted-killing program remain classified, as secretary of state she regularly weighed in on the program, including on particular strikes.[100] At the same time, though, Clinton has reportedly expressed reservations about the strategic costs of a secretive killing program in the larger context of American interests around the globe. Any such strategic reservation should be a starting point for a much-needed course correction that focuses both on adherence to long-established legal frameworks that safeguard against unlawful killing and promotion of long-term peace and security. The Obama's administration targeted-killing program violates international and domestic law, operates without meaningful transparency and oversight, results in harm to innocents, and sets a dangerous precedent for other countries. As president, Clinton must take a different path.

If elected, Clinton must end a targeted-killing program that violates international law and the Fourth and Fifth Amendments.

The international legal framework governing the use of lethal force is clear and long-established. Both international human rights law and the Constitution prohibit the United States from using lethal force outside of an armed conflict unless it is a last resort against a concrete, specific, and imminent threat to life and the use of force is proportionate.[101] In the narrow context of an armed conflict — the existence of which is based on facts, such as the intensity and duration of any hostilities and the level of organization

98 See, e.g., Hillary Rodham Clinton, Hard Choices 171 (2014).

99 Id. at 172.

100 See, e.g., id. at 172; Adam Entous & Devlin Barrett, Emails in Clinton Probe Dealt With Planned Drone Strikes, Wall Street J., June 9, 2016, http://www.wsj.com/articles/clinton-emails-in-probe-dealt-with-planned-drone-strikes-1465509863.

101 Human Rights Committee, General Comment No. 6, HRI/GEN/1/Rev.6 (1982), para. 3; see also Rep. of the Special Rapporteur on extrajudicial, summary or arbitrary executions, U.N. Doc. A/HRC/14/24/Add.6 (2010) ("Alston Report"), para. 32.

of an armed group — international humanitarian law (also known as the "law of war") applies.[102]

Under this body of law, lethal force may only be used against the armed forces of an opposing state, against civilians who are directly participating in hostilities, or in pursuit of legitimate military objectives. States must also abide by key legal principals, including that of "distinction," which mandates that states distinguish between combatants (against whom lethal force may be used) and civilians.[103] In an armed conflict between a nation state and an armed group — which is known as non-international armed conflict because it is not between two nation states — it is clearly established that individuals who are not members of state armed forces are civilians who may not be directly targeted "unless and for such time as they take a direct part in hostilities."[104] Finally, international law prohibits the use of force in the territory of other states, except in narrow circumstances, including self-defense and consent.[105]

The Obama administration's targeted-killing program violates this international legal framework. The administration insists that international humanitarian law (or law-of-war) standards, and not human rights law, applies to lethal strikes, even outside the context of conventionally recognized armed conflict. The U.S. government's claimed authority has virtually no meaningful temporal or geographic limits and is accepted by virtually no other nation.[106] Perhaps in recognition of criticisms of the targeted killing program and out of concern that the authority President Obama claims could be even more grossly misused by the next president, the Obama administration has articulated certain constraints as a matter of policy — but not of law.

The 2013 Presidential Policy Guidance (PPG) — President Obama's drone "playbook" — was released in partially redacted form in August 2016, in response to a court order in Freedom of Information Act litigation brought by the ACLU. It purports to apply heightened standards in what it calls "areas outside of active hostilities," like Pakistan, Yemen, and Somalia.[107] But these standards still fall short of the legal human rights law standards.[108] Moreover, the PPG uses distorted definitions of international law standards. For example, the PPG explains that the government may only use lethal force in areas outside of active hostilities when the target presents a "continuing, imminent threat" — contorting the meaning of imminence beyond any acceptable understanding. Under the government's version of "imminence," lethal force could be used based on a perceived danger that may (or may not) take place at an undefined

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102 See Prosecutor v. Tadić, Case No. IT- 94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (ICTY Appeals Chamber Oct. 2, 1995); Prosecutor v. Haradinaj, Balaj and Brahimaj, Case No. IT-4- 84-T, Judgment, ¶ 38 (ICTY Trial Chamber Apr. 3, 2008).

103 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 78 (July 8); see, e.g., Harold Hongju Koh, Legal Adviser, U.S. Department of State, Remarks at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010).

104 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of NonInternational Armed Conflicts (Protocol II), art. 13(3), June 8, 1977, 1125 U.N.T.S. 609; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; accord Hamlily v. Obama, 616 F. Supp. 2d 63, 77 (D.D.C. 2009).

105 U.N. Charter art. 2, para. 4.

106 See Alston Report ¶¶ 46–47. http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf.

107 See Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities (May 22, 2013), https://www.justice.gov/oip/foia-library/procedures_for_approving_direct_action_against_terrorist_targets/download.

108 See Brett Max Kaufman, Details Abound in Drone 'Playbook'—Except the Ones That Really Matter Most, ACLU Speak Freely Blog (Aug. 8, 2016, 5:30 p.m.), https://www.aclu.org/blog/speak-freely/details-abound-drone-playbook-except-ones-really-matter-most.

point in the future or based on a group's generalized intent to use force against the United States, even if the U.S. government is not aware of any actual plans for a specific attack.[109]

Finally, it is also clearly established that at least when it comes to lethal strikes against U.S. citizens outside the context of armed conflict, the Constitution also provides safeguards — and these safeguards are similar to human rights law standards. The Fourth Amendment unambiguously prohibits the deprivation of life and the use of excessive force in effecting seizures, except where lethal force is a last resort in the face of an imminent threat.[110] Moreover, in the absence of a truly imminent threat, the Fifth Amendment's Due Process Clause requires, at a minimum, fair notice and an opportunity to be heard before government officials may cause such deprivation.[111] But the government's own legal justification for the targeting of Anwar al-Aulaqi, a U.S. citizen, in Yemen makes clear that the government does not consider itself bound by these rules. For example, it both distorts the meaning of "imminence" to encompass generalized threats and omits critical elements of the Constitution's requirements for due process.[112]

If elected, Clinton should revisit the broader strategic, diplomatic, and rights impact of the targeted-killing program.

Although Clinton supports the use of drones for targeted killings and has echoed President Obama's claims that the targeted-killing program is effective, those claims have been called into question by numerous former government officials — including those members of the diplomatic corps overseen by Clinton during her tenure as secretary of state. Cameron Munter, the former U.S. ambassador to Pakistan, said upon his retirement in 2012 that some drone strikes had saved lives but argued that the United States was not using armed drones judiciously or wisely in a broader strategic context. "Do we want to win some battles but lose the war?" Munter asked.[113] Retired general Stanley McChrystal also questioned whether the targeted-killing program provided a net strategic benefit to the United States in its effort to combat terrorism, explaining that "[t]he resentment created by American use of unmanned strikes . . . is much greater than the average American appreciates. They are hated on a visceral level, even by people who've never seen one or seen the effects of one."[114] President Obama's first director of national intelligence, Dennis Blair, acknowledged that targeted killings "play well domestically" but

109 See Department of Justice, Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or An Associated Force (White Paper) (Nov. 8, 2011), https://www.aclu.org/sites/default/files/field_document/november_2011_white_paper.pdf.

110 See Scott v. Harris, 550 U.S. 372, 384 (2007); see also, e.g., Graham v. Conner, 490 U.S. 386, 396 (1989); Tennessee v. Garner, 471 U.S. 1, 11 (1985).

111 See, e.g., Mathews v. Eldridge, 424 U.S. 319, 348 (1976).

112 See David Barron, Office of Legal Counsel, Memorandum for the Attorney General Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi [Redacted] at 21 (July 16, 2010) ("July 2010 Barron Memo"), https://www.justice.gov/sites/default/files/olc/pages/attachments/2015/04/02/2010-07-16_-_olc_aaga_barron_-_al-aulaqi.pdf; see also Plaintiffs' Opposition to Defendants' Motion to Dismiss at 29–39, al-Aulaqi v. Panetta, No. 12-cv-01192 (D.D.C. Feb. 5, 2013), ECF No. 21.

113 Tara McKelvey, A Former Ambassador to Pakistan Speaks Out, Daily Beast (Nov. 20, 2012, 4:45 a.m.), http://www.thedailybeast.com/articles/2012/11/20/a-former-ambassador-to-pakistan-speaks-out.html.

114 David Alexander, David Alexander, "Retired General Cautions Against Overuse of 'Hated' Drones," Reuters, Jan. 7, 2013, http://www.reuters.com/article/us-usa-afghanistan-mcchrystal-idUSBRE90608O20130107.

warned that the counterproductive dangers to American interests posed by the program "only shows up over the long term."[115] Many others have voiced similar concerns.[116]

Especially as a former secretary of state, Clinton should be concerned both about the United States' adherence to law — including its international legal obligations and commitment to human rights — and the broader strategic context and costs of the targeted-killing program. And, indeed, she has stated that it is "crucial that these strikes be part of a larger smart power counterterrorism strategy that included diplomacy, law enforcement, sanctions, and other tools."[117] In her time at Foggy Bottom, Clinton reportedly pressed her colleagues about the role of the drone program in American foreign policy: "The bigger question, folks, is 'What the heck are we doing with drones? What is our policy? Do we have an answer for the American public? Do we have an answer for the left? Do we have an answer for our international allies, who want to know under what criteria, under what conditions, under what international law, are we using them?'"[118]

If elected president, Clinton should make good on the concerns she raised while at the State Department and ensure that issues of international law, human rights, foreign diplomacy, and long-term regional stability are paramount in the official and public discussions about the use of drones.

Clinton previously claimed that drones result in few civilian casualties, but this is not borne out by the facts. Clinton has expressed doubt concerning the accuracy of human rights and other independent groups' estimation of the numbers of civilian casualties caused by U.S. drone strikes, saying "[t]he numbers about potential civilian casualties I take with somewhat big grain of salt."[119] But these groups have documented far more civilian casualties than the Obama administration has itself acknowledged — perhaps as many as eight times the government's estimate.[120]

According to the government's report, between January 20, 2009, and December 31, 2015, it conducted 473 drone strikes in "areas outside active hostilities" — Yemen, Pakistan, and Somalia — killing between 2,372 and 2,581 combatants and between 64 and 116 noncombatants.[121] But independent groups have estimated that U.S. strikes (almost all of which took place under President Obama) have killed more than 4,000 people, including almost 500 civilians.[122] The government claims that it has taken into account

115 Dennis C. Blair, Drones Alone Are Not the Answer, N.Y. Times, Aug. 14, 2011, http://www.nytimes.com/2011/08/15/opinion/drones-alone-are-not-the-answer.html.

116 See, e.g., David Rohde, The Obama Doctrine, Foreign Policy, Feb. 27, 2012, https://foreignpolicy.com/2012/02/27/the-obama-doctrine.

117 Clinton, supra note 2, at 172. It is notable that one of Clinton's closest national-security advisors, Jake Sullivan, is a close ally of former State Department Legal Adviser Harold Koh who defended Koh's role in the targeted-killing program. See Sarah Cleveland & Michael Posner, Guest Post: Letter in Support of Harold Koh, Just Security (Apr. 16, 2016, 1:00 p.m.), https://www.justsecurity.org/22132/guest-post-letter-support-harold-koh; see also Nahal Toosi, Koh in the Crosshairs, Politico (Apr. 19, 5:59 p.m.), http://www.politico.com/story/2015/04/harold-koh-in-the-crosshairs-117110.

118 Mark Landler, Alter Egos: Hillary Clinton, Barack Obama, and the Twilight Struggle over American Power 102 (2016) (quotation marks omitted).

119 Guardian, Hillary Clinton Interview: Edward Snowden, ISIS, Drone Strikes & Women's Rights at 9'25", https://www.youtube.com/watch?v=xqHyU-PJMhI.

120 See, e.g., Scott Shane, Drone Strike Statistics Answer Few Questions, and Raise Many, N.Y. Times, July 3, 2016, http://www.nytimes.com/2016/07/04/world/middleeast/drone-strike-statistics-answer-few-questions-and-raise-many.html.

121 ODNI, Summary of Information Regarding U.S. Counterterrorism Strikes Outside Areas of Active Hostilities (July 1, 2016), https://www.dni.gov/files/documents/Newsroom/Press%20Releases/DNI+Release+on+CT+Strikes+Outside+Areas+of+Active+Hostilities.PDF.

122 Micah Zenko, Questioning Obama's Drone Deaths Data, Council on Foreign Relations (July 1, 2016), http://blogs.cfr.org/zenko/2016/07/01/questioning-obamas-drone-deaths-data.

credible reports of civilian deaths from such groups, but its explanation for the vast discrepancy — that it has "information that is generally unavailable to non-governmental organizations" — boils down to an unacceptable "trust us." Thus, for example, although multiple credible reports indicate that a U.S. drone killed 12 members of a wedding party in Yemen in 2013 and that the government paid compensation to the families of the victims,[123] the government has never publicly acknowledged responsibility for the strike, nor offered an explanation for it.

If elected, Clinton should commit to not only take credible outside reports into account when releasing lethal strike statistics — which should be far more detailed and granular — but to investigate and publicly explain such strikes to the fullest extent possible.

Clinton should make clear that as president she will make public legal memoranda justifying the legality of the targeted-killing program and expand President Obama's executive order on the government's reporting of civilian casualties.

President Obama has repeatedly promised transparency about his targeted-killing program,[124] and he has repeatedly failed to deliver meaningfully on that promise. Remarkably, under President Obama the government has publicly released just two legal memoranda addressing the program, both of which approved the targeting killing of a U.S. citizen.[125] We know from ACLU FOIA litigation that there are in fact over 100 legal memos concerning the lawfulness of the program, including memos applicable to citizens as well as non-citizens, who have been killed in vastly greater numbers. These remain secret.

Although the Obama administration's recent release of the PPG shed light on the several layers of executive-branch review concerning decisions to kill, it failed to elaborate on the government's chosen legal and policy standards that supposedly undergird the PPG's process. And President Obama's release of cumulative, non-specific statistics concerning casualties caused by the use of drones abroad failed to account for independent groups' far-more-dire estimates of the effects of the drone program.

If elected president, Clinton must do much more. She must disclose legal justifications for government lethal strikes in all the various contexts in which it has claimed authority, including the government's controversial use of "signature strikes" that do not target known individuals.[126] She must also release much more factual information about the targeted-killing program than her predecessor.

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123 Lucy Draper, The Wedding that Became a Funeral: U.S. Still Silent One Year From Deadly Yemen Drone Strike, Newsweek, Dec. 12, 2014, http://www.newsweek.com/wedding-became-funeral-us-still-silent-one-year-deadly-yemen-drone-strike-291403; Michael Isikoff, US Investigates Yemenis' Charge that Drone Strike 'Turned Wedding into a Funeral', NBC News, Jan. 7, 2014, http://investigations.nbcnews.com/_news/2014/01/07/22163872-us-investigates-yemenis-charge-that-drone-strike-turned-wedding-into-a-funeral?lite; Hakim Almasmari, Yemen Says U.S. Drone Struck a Wedding Convoy, Killing 14, CNN, Dec. 13, 2013, http://www.cnn.com/2013/12/12/world/meast/yemen-u-s-drone-wedding.

124 Washington Free Beacon, Obama: This Is the Most Transparent Administration in History at 0'36", https://www.youtube.com/watch?v=r-l7Ab-F0CWI.

125 See July 2010 Barron Memo, supra note 15; David Barron, Office of Legal Counsel, Memorandum for the Attorney General Re: Lethal Operation Against Shaykh Anwar al-Aulaqi [Redacted] (Feb. 19, 2010), https://www.justice.gov/sites/default/files/olc/pages/attachments/2015/04/02/2010-02-19_-_olc_aaga_barron_-_al-aulaqi.pdf.

126 So-called "signature strikes" are lethal strikes against targets whose specific identities are unknown to the government but who "by virtue of their ages, actions, and locations inside countries known to house terrorist operatives . . . bear the 'signature' of militant activity."

President Obama recently issued an executive order requiring an annual report summarizing numbers of "non-combatants" killed in "areas outside active hostilities."[127] Because they are enshrined in an executive order, and not legislation, these "rules" can be wiped away with the mere stroke of the next president's pen — and Clinton should commit to extend and enhance them. Moreover, this information will be of limited use to the public unless a Clinton administration also discloses information about individual strikes — when and where they took place as well as the numbers of casualties they caused. Finally, as president, Clinton should establish a policy of investigating and publicly explaining strikes that kill civilians and of compensating those victims' families — regardless of their citizenship. After an American drone strike killed two Western hostages, Warren Weinstein and Giovanni Lo Porto, President Obama rightly apologized, opened an investigation, and said the government would offer compensation.[128] Citizens of all countries deserve the same, regardless of their nationality.

Dan De Luce & Paul McLeary, Obama's Most Dangerous Drone Tactic is Here to Stay, Foreign Policy, Apr. 5, 2016, https://foreignpolicy.com/2016/04/05/obamas-most-dangerous-drone-tactic-is-here-to-stay.

127 Executive Order: United States Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force (July 1, 2016), https://www.whitehouse.gov/the-press-office/2016/07/01/executive-order-united-states-policy-pre-and-post-strike-measures.

128 Peter Baker, Obama Apologizes After Drone Kills American and Italian Held by Al Qaeda, N.Y. Times, Apr. 23, 2015.

CLINTON ON MASS SURVEILLANCE

For more than a decade, the National Security Agency (NSA) kept a record of substantially all phone calls made or received on major U.S. telephone networks. In June 2013, this bulk collection of Americans' call records was revealed in the press, sparking a heated public debate about the government's surveillance of innocent Americans and the secret expansion of the government's spying powers. The government claimed that this surveillance was authorized under Section 215 of the Patriot Act, a law that has gravely impaired Americans' civil liberties. Hillary Clinton voted for the Patriot Act in 2001 and again in 2006, but she has more recently supported some surveillance reform efforts. On May 7, 2015, the same day the Second Circuit Court of Appeals ruled — in a case brought by the ACLU — that the NSA's bulk collection of call records was illegal, Clinton announced her support for the USA FREEDOM Act.[129] That law put an end to the NSA's nationwide bulk-collection program and enacted other modest reforms.

Although passage of the USA FREEDOM Act was a milestone, it was not the comprehensive surveillance reform that is necessary. As discussed below, the legislation left many of the government's most intrusive and overbroad surveillance powers untouched, and it made only moderate adjustments to disclosure and transparency requirements. Clinton's position on these spying programs is unclear, and she should implement far-reaching reforms that are needed to protect the privacy of Americans in the digital age and to ensure that our intelligence agencies are accountable to the public.

If elected, Clinton should reform or end intelligence programs and policies that allow for the warrantless surveillance of Americans' telephone and email communications in violation of the Fourth Amendment.

Section 702 of FISA

To Clinton's credit, she has called for greater NSA transparency and has recognized that Americans are concerned about the surveillance of their private information,[130] but she has not yet taken a clear position on the government's authority to surveil Americans' communications without a warrant. For instance, Clinton has urged a "better balance" between privacy and surveillance,[131] but she has also proposed an "'intelligence surge' to bolster our capabilities across the board, with appropriate

129 See Julian Hattem, Clinton Breaks Silence, Supports NSA Reform Bill, Hill, May 7, 2015, http://thehill.com/policy/technology/241382-clinton-breaks-silence-supports-nsa-reform-bill; USA FREEDOM Act of 2015, Pub. L. No. 114-23, 129 Stat. 268.

130 Conor Friedersdorf, Hillary's Evasive Views on the NSA, The Atlantic (Feb. 25, 2015), http://theatln.tc/1hBaKkO.

131 Id.

safeguards here at home."[132] The details of Clinton's proposed "surge" are sketchy, but Clinton has said that she wants technology companies to be more cooperative in response to government requests for help intercepting communications.[133]

Insofar as this intelligence surge amounts to an endorsement of the warrantless surveillance of Americans' communications — surveillance that takes place today under Section 702 of the Foreign Intelligence Surveillance Act (FISA) — there are significant constitutional and statutory problems with that surveillance. Indeed, Clinton herself acknowledged some of these problems in 2008, when she voted against Section 702 as a senator.[134] In the intervening years, it has become even more apparent that this statutory scheme is fundamentally defective and results in mass violations of Americans' constitutional rights.

Section 702 of FISA is an unprecedented statutory authority that allows the government to warrantlessly monitor communications between people inside the United States and foreigners abroad.[135] The government relies on this authority to conduct surveillance operations on U.S. soil, including both the "PRISM" and "Upstream" surveillance programs revealed by Edward Snowden. Specifically, Section 702 authorizes the government to intercept the *contents* of communications — including those of U.S. persons — when at least one party to a phone call or internet communication is a foreigner abroad targeted by intelligence officials.[136]

Surveillance under Section 702 may be conducted for many purposes, not just counterterrorism, and it may target individuals who are not suspected of any wrongdoing whatsoever. The statute permits the government to acquire the communications of any foreigner abroad likely to communicate "foreign intelligence information,"[137] even when an American is also party to those communications. Although a secret court reviews the general procedures that the government proposes to use in carrying out its surveillance,[138] it plays no role in approving the government's targeting decisions. In short, the effect of Section 702 is to give the government broad authority to warrantlessly monitor Americans' international communications, with virtually no judicial oversight.

As the ACLU has explained in detail, Section 702 violates the Fourth Amendment because it permits the government to surveil Americans' international communications without ever obtaining a warrant.[139] Some courts have recognized an exception to the warrant requirement in the foreign

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132 Dustin Volz, Clinton calls for U.S. 'intelligence surge' in wake of Orlando attack, Reuters (Jun. 14, 2016), http://reut.rs/1Ui9F42.

133 Id.

134 In a July 2008 statement explaining her vote, Clinton observed that "the oversight in the bill continues to come up short. For instance, . . . the [FISA Court's] ability to serve as a meaningful check on the President's power is debatable. The clearest example of this is the limited power given to the FISA Court to review the government's targeting and minimization procedures." Sam Stein, Clinton: Why I Voted No On FISA, Huffington Post (July 17, 2008), http://huff.to/2bnVx5x. Clinton was also critical of the administration's failure to share information about its warrantless wiretapping with the vast majority of Senators. See id.

135 Section 702 was enacted as part of the FISA Amendments Act of 2008 ("FAA"). By statute, this authority will sunset on December 31, 2017, unless it is reauthorized by Congress.

136 See 50 U.S.C. § 1881(a).

137 Importantly, "foreign intelligence information" is not limited to information about espionage or terrorism; rather, the term is defined extremely broadly to encompass any information bearing on the foreign affairs of the United States. See id. § 1801(e).

138 See id. § 1881a(i).

139 See, e.g., Brief of ACLU & Elec. Frontier Found. as Amici Curiae in Support of Defendant-Appellant, United States v. Mohamud, No. 14-

intelligence context, but no court has recognized an exception broad enough to permit Section 702 surveillance.[140] Furthermore, even if the warrant requirement were inapplicable, Section 702 is unconstitutional because the surveillance it authorizes is unreasonable under the Fourth Amendment. To be reasonable, electronic surveillance must be precise, discriminate, and carefully circumscribed so as to prevent unauthorized invasions of privacy.[141] However, for the reasons described above, Section 702 surveillance fails to satisfy any of these constitutional requirements.[142]

Notably, for the U.S. persons who communicate with the tens of thousands of foreigners monitored under Section 702, the sole safeguard is the requirement that the government "minimize" the acquisition and retention of information concerning U.S. persons. But the government's minimization procedures permit so-called "backdoor searches," in which the government searches some of its repositories of Section 702-collected communications for information about Americans, including for evidence of criminal activity. These kinds of queries are an end-run around the Fourth Amendment: They convert warrantless surveillance directed at foreigners and predicated on "foreign intelligence" needs into a tool for investigating Americans in ordinary criminal investigations. Even President Obama's own nonpartisan review group recommended prohibiting backdoor searches on the grounds that the practice violates Americans' privacy rights.[143]

If elected, Clinton should release or endorse a legislative proposal to reform or end Section 702 of the FISA Amendments Act to prohibit unconstitutional warrantless surveillance of Americans' communications. Until such legislation passes, Clinton should also halt existing unlawful Section 702 programs.

Executive Order 12,333

To the extent that Clinton's proposed intelligence "surge" includes warrantless electronic surveillance of Americans' communications under Executive Order (EO) 12333, that spying also raises grave constitutional concerns. Moreover, surveillance under EO 12333 that collects the communications of foreigners without appropriate safeguards fails to meet human rights standards.

EO 12333, originally issued in 1981 by President Ronald Reagan and subsequently revised, is the primary authority under which the NSA gathers foreign intelligence. It provides broad latitude for

30217 (9th Cir. June 3, 2015), available at https://www.aclu.org/legal-document/us-v-mohamud-amicus-brief; Submission of Jameel Jaffer, Deputy Legal Director of the ACLU, Public Hearing on Section 702 of the FISA Amendments Act Before the Privacy & Civil Liberties Oversight Board (Mar. 19, 2014), available at https://www.aclu.org/sites/default/files/field_document/pclob_fisa_sect_702_hearing_-_jameel_jaffer_testimony_-_3-19-14.pdf.

140 Prior to the passage of FISA in 1978, some courts permitted warrantless surveillance of foreign powers and their agents in certain limited circumstances. See, e.g., United States v. Truong Dinh Hung, 629 F.2d 908, 912–15 (4th Cir. 1980); United States v. Butenko, 494 F.2d 593, 604–05 (3d Cir. 1974). But the country's experience with FISA profoundly undermines the rationale of those cases. It shows that the courts are capable of overseeing foreign intelligence surveillance of U.S. persons' communications.

141 Berger, 388 U.S. at 58.

142 In addition, Upstream surveillance violates Section 702 itself, because it is not limited to the communications of individual targets as the statute requires. See 50 U.S.C. § 1881a(a). Instead, Upstream involves the NSA's bulk seizure and searching of Americans' international internet communications, in order to identify those that are to, from, or about the NSA's targets.

143 President's Review Group on Intelligence and Communications Technologies, Liberty and Security in a Changing World at 145–50 (2013), http://1.usa.gov/1be3wsO.

the government to conduct surveillance on Americans and others alike — without judicial review or other protections that apply to surveillance conducted under statutory authorities.[144] While much of the electronic surveillance conducted under EO 12333 occurs outside the United States and is ostensibly directed at foreigners, Americans' communications are nonetheless swept up in vast quantity. That is because, in today's interconnected world, Americans' internet communications are frequently sent, routed, or stored abroad — where they may be collected, often in bulk, in the course of the NSA's spying activities.[145]

For example, according to recent news reports, the NSA has relied on EO 12333 to record and store every single cell phone call in, into, and out of at least two countries, including the Bahamas; collect nearly five billion records per day on the locations of cell phones, including those of Americans; collect hundreds of millions of contact lists and address books from personal email and instant-messaging accounts; and surreptitiously intercept data from Google and Yahoo user accounts as that information travels between those companies' data centers located abroad. Despite its breadth, EO 12333 has not been subject to meaningful oversight. The former chairman of the Senate Intelligence Committee, Sen. Dianne Feinstein, has candidly acknowledged that Congress has not been able to "sufficiently" oversee EO 12333 surveillance.[146]

For many of the same reasons that warrantless surveillance of Americans' communications under Section 702 violates the Fourth Amendment, much of the warrantless surveillance conducted under EO 12333 is likewise unconstitutional. As the ACLU recently explained at length in a submission to the Privacy and Civil Liberties Oversight Board, the government is not exempted from the warrant requirement merely because its surveillance is conducted outside the United States or because its surveillance is "targeted" at non-U.S. persons.[147] Moreover, even if the warrant clause did not apply, surveillance under EO 12333 that sweeps up Americans' communications would still be unconstitutional, because it is conducted without any of the safeguards necessary to render this surveillance reasonable under the Fourth Amendment.

If Clinton is elected president, she must end unlawful warrantless surveillance under EO 12333 and revise the executive order to put in place safeguards to protect Americans' and foreigners' privacy.

144 John Napier Tye, Meet Executive Order 12333: The Reagan Rule That Lets the NSA Spy on Americans, Wash. Post (July 18, 2014), http://wapo.st/2bnOU39.

145 Amos Toh et al., Overseas Surveillance in an Interconnected World, Brennan Center for Justice (Mar. 16, 2016), https://www.brennancenter.org/publication/overseas-surveillance-interconnected-world.

146 Ali Watkins, Most of NSA's Data Collection Authorized by Order Ronald Reagan Issued, McClatchy (Nov. 21, 2013), http://www.mcclatchydc.com/2013/11/21/209167/most-of-nsas-data-collection-authorized.html.

147 ACLU Comment on Surveillance Activities Governed by Executive Order 12333, Jan. 13, 2016, https://www.aclu.org/sites/default/files/field_document/aclu_comments_to_pclob_on_eo_12333_0.pdf.

HILLARY CLINTON ON
COUNTERING VIOLENT EXTREMISM, SOCIAL MEDIA MONITORING, AND WATCHLISTS

Hillary Clinton has rightly emphasized that demonizing Muslims — let alone advocating policies that openly discriminate against them — is dangerous, offensive, and contrary to America's founding principles. Nevertheless, she supports Obama administration programs and policies that risk stigmatizing and discriminating against Muslim communities, cast suspicion on law-abiding Americans, view them unfairly through a security lens, and subject them to unjustified surveillance. These programs include "countering violent extremism" initiatives, social media monitoring, and the use of a massive and unfair watchlisting system that disproportionately targets American Muslim, South Asian, and Arab communities. Government policies that target American Muslims in these ways foster our national climate of fear and discrimination. They send the message that when it comes to American Muslims, our nation's actions often do not match the principles of equal treatment and religious freedom enshrined in our Constitution. Should she be elected, Secretary Clinton has the opportunity and obligation to end discriminatory and divisive programs.

If elected, Clinton must ensure that federal Countering Violent Extremism programs do not undermine the freedom and equality guaranteed by the First and Fifth Amendments.

Secretary Clinton has stated that she supports, and would expand, the government's "countering violent extremism" (CVE) programs. Public information about those programs remains limited, but government documents state that CVE programs seek to provide federal support for "preventative programming" and "community-led efforts to build resilience to violent extremism."[148] Secretary Clinton has cited and embraced CVE programs as part of a strategy to "prevent radicalization" in the United States.[149] She has stated that members of American Muslim communities are "most likely to recognize the warning signs of radicalization before it's too late, and the best positioned to block it."[150] She advocated "intensifying contacts in those communities, not scapegoating or isolating them."[151] She also cited the need to "identify the hotspots, the specific neighborhoods and villages, the prisons and schools where recruitment happens in clusters," and to establish "partnerships . . . especially with Muslim community leaders" to counter "extremism" in those areas.[152]

148 See generally Office of the President, Strategic Implementation Plan for Empowering Local Partners to Prevent Violent Extremism in the United States, The White House (Dec. 2011), http://goo.gl/3A6tC, at 1-2.

149 Hillary Clinton, Address at the University of Minnesota (Dec. 15, 2015), https://goo.gl/kQ43ji.

150 Id.

151 Hillary Clinton, Address at Campaign Event in Cleveland, OH (June 13, 2016), http://goo.gl/XDtYnL.

152 Hillary Clinton, Address at the Council on Foreign Relations (Nov. 19, 2015), http://goo.gl/qcPBWd.

Preventing violence is a legitimate objective, but as we[153] and other rights groups[154] have argued,[155] CVE programs threaten to erode privacy, undermine civil liberties, and stigmatize and alienate American Muslim communities. Available information on the programs suggests that they task teachers, religious leaders, and health professionals with monitoring and reporting to law enforcement on individuals they think exhibit the kinds of "warning signs" of engaging in violence that Secretary Clinton has said need to be "recognized."[156] But those "warning signs" include ideas, beliefs, and speech that are protected under the First Amendment.

CVE initiatives therefore risk chilling the freedoms of expression, association, and religion protected by the First Amendment. They also potentially violate the First Amendment's Establishment Clause, which bars the government from expressing a preference for, or interfering with, religion, and they corrupt relationships of trust within communities. Nor are such "warning signs" valid predictors of violence. Decades of social science research show that ethnicity, national origin, and religious beliefs are not good predictors of violence, and studies[157] have yielded no reliable indicators that can be used to predict who will commit a terrorist act.

Secretary Clinton's own emphasis in praising these programs highlights another fundamental problem with CVE efforts: They overwhelmingly target American Muslim communities, despite assurances from the Obama administration that the programs address all forms of extremist violence. In describing her proposals, Secretary Clinton, too, has focused on American Muslim communities, reinforcing the false and corrosive notion that Muslims are inherently suspicious and prone to political violence. At a basic level, policies that view communities through a security lens based on religion, even if well-intentioned, risk harming and alienating communities instead of engaging and strengthening them. And any federal program or policy that intentionally treats Muslims differently on the basis of religion would likely violate the Constitution's guarantee of equal protection of the law, which the Fifth Amendment makes applicable to the federal government.

If elected, Clinton must put an end to social media monitoring programs that threaten the freedoms that the First Amendment protects.

Secretary Clinton has praised government efforts to monitor social media and enlist the help of social media companies in such efforts, which are also included in the Obama administration's CVE programs. She has called for an "intelligence surge" against terror recruits that would include social media monitoring, and she has said that technology companies should be more responsive to

153 ACLU, What Is Wrong With the Government's "Countering Violent Extremism" Programs, https://www.aclu.org/other/aclu-v-dhs-briefing-paper

154 ACLU, Coalition Letter to the White House on Federal Support for Countering Violent Extremism Programs, ACLU (April 22, 2016), https://www.aclu.org/letter/coalition-letter-white-house-re-federal-support-countering-violent-extremism-programs

155 Brennan Center for Justice, Countering Violent Extremism (CVE): A Resource Page (August 26, 2016), https://www.brennancenter.org/analysis/cve-programs-resource-page

156 Danielle Jefferis, The FBI Wants Schools to Spy on Their Students' Thoughts, ACLU (March 11, 2016), https://www.aclu.org/blog/speak-freely/fbi-wants-schools-spy-their-students-thoughts

157 Faiza Patel, Rethinking Radicalization, Brennan Center for Justice (March 8, 2011), https://www.brennancenter.org/publication/rethinking-radicalization

government requests for help in countering online propaganda, tracking patterns in social media, and intercepting communications.[158]

Government monitoring of online speech, however, threatens to chill protected expression and can lead to biased targeting of racial and religious minorities. Systematic, suspicionless surveillance of people's online activity will chill the expression of disfavored beliefs and opinions — all of which the First Amendment protects. Many people will likely stop expressing such beliefs and opinions altogether in order to avoid becoming the subject of law enforcement surveillance. Suspicionless social media monitoring also encourages the targeting of specific racial, religious, or belief communities for investigation, which promotes a climate of fear and self-censorship in those communities.

Pressuring social media companies to monitor and take down online content that is potentially related to "radicalization" does not cure these ills.[159] Social media platforms already have systems in place for identifying and reporting real threats, incitement to violence, or actual terrorism. Further restricting content that is potentially terrorism-related would not only lead to arbitrary, haphazard enforcement, but it also would inevitably sweep in speech that reflects beliefs, expressive activity, and innocent associations with others that are protected by the First Amendment. The government should not attempt an end-run around the Constitution by pushing private companies to censor speech that the government could not censor itself. And censoring speech that the government finds offensive or threatening only makes it harder to identify and respond to that speech, making censored speech all the more dangerous.

If elected, Clinton must reform the federal watchlisting system, which poses a threat to the rights guaranteed by the Fifth Amendment.

Secretary Clinton has also raised the possibility of expanding the government's watchlisting system and using it for policy purposes, such as regulating access to firearms.[160] As we have long documented and criticized, however, the watchlisting system is error-prone and unfair. It uses vague, exception-ridden standards and secret evidence to blacklist people without giving them any meaningful way to correct errors and clear their names.[161]

158 Clinton, supra note 2.

159 Hugh Handeyside, Social Media Companies Should Decline the Government's Invitation to Join the National Security State, ACLU (January 12, 2016), https://www.aclu.org/blog/speak-freely/social-media-companies-should-decline-governments-invitation-join-national

160 Danielle Kurtzleben, In Wake of Orlando Shooting, Clinton Suggests Broader Terrorist Watch Lists, NPR (June 13, 2016), http://goo.gl/62qhU7.

161 ACLU, U.S. Government Watchlisting: Unfair Process and Devastating Consequences, ACLU (March 2014), https://www.aclu.org/other/us-government-watchlisting-unfair-process-and-devastating-consequences?redirect=us-government-watchlisting-unfair-process-and-devastating-consequences; Hina Shamsi, What You Should Know About America's Secret Watchlists, ACLU (March 14, 2014), https://www.aclu.org/blog/what-you-should-know-about-americas-secret-watchlists; ACLU, What's Wrong With the Government's Rules for Watchlisting, https://www.aclu.org/other/whats-wrong-governments-rules-watchlisting

Subjecting people to the negative consequences of placement on a blacklist without providing an adequate means of redress, as the No Fly List process does, violates the guarantee of due process under the Fifth Amendment.[162] Available information also strongly suggests that the government watchlists people in an arbitrary or discriminatory way, particularly members of American Muslim, Arab, and South Asian communities. It therefore may also violate the Fifth Amendment's equal protection guarantee. Given the numerous defects in the watchlisting system — and the inadequacy of the redress process for watchlisted individuals — that system should not be used to restrict people's freedoms.

162 ACLU, Latif et al. v. Lynch, et al. – ACLU Challenge to Government No Fly List (August 10, 2015), https://www.aclu.org/cases/latif-et-al-v-lynch-et-al-aclu-challenge-government-no-fly-list