

Testimony of

# Patrick Giantonio

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Before the Senate Committee on the Judiciary

"Renewing America's Commitment to the Refugee Convention -  
The Refugee Protection Act of 2010."

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I would like to give my deepest thanks to Senator Leahy and the Senate Judiciary Committee for inviting me to testify before you today. It is a great honor for me and for my organization, Vermont Immigration and Asylum Advocates, to be represented here and to testify in support of the Refugee Protection Act of 2010. This Bill, I believe, will usher in practical, secure and much needed changes to our refugee and asylum systems.

Vermont Immigration and Asylum Advocates – formerly Vermont Refugee Assistance – was founded in 1987. In 1993, VIAA began to provide legal services to immigrants and asylum seekers detained in county jails in Vermont. Since that time, VIAA has conducted hundreds of legal orientation presentations and provided legal assistance to thousands of detained and non-detained immigrants and asylum seekers. Last year, VIAA co-founded NESTT, or New England Survivors of Torture and Trauma Program. NESTT is now one of the Office of Refugee Resettlement-funded torture treatment programs. In 2009, VIAA provided legal assistance to 741 immigrants and asylum seekers from 101 countries.

Because the work of VIAA is primarily related to representing applicants for asylum and working with asylum seekers in detention, those are the elements of the proposed Bill that I will address here today.

On this 30th anniversary of the Refugee Act of 1980, it is an appropriate time to pause and reflect on just who these asylum seekers are and why we should care about them. It is also time to reaffirm our commitment to maintain an asylum system that welcomes those who have fled persecution and torture.

This was the case for one of our clients – a 29 year old mother of three from the Republic of Congo who was arrested, detained, accused of anti-government activities because of her ethnicity, tortured, and raped repeatedly by military officers for more than a year before escaping and finding her way to the U.S. to seek asylum.

Most of these individuals never planned or intended to come to the United States. Their path to security is often a frightening epic journey that leaves their loved ones and all they have known behind.

These are the asylum seekers that we are talking about and why the Refugee Protection Act of 2010 is important to pass and sign into law.

Regarding the One Year Filing Deadline:

Most individuals in this room will likely recall that the one year deadline to apply for asylum was enacted in 1996 with the primary intention of preventing fraud. At that time, members of Congress were concerned that individuals were filing fraudulent claims and then being granted work authorization while they waited years for their cases to be adjudicated. In addition, there were concerns about the substantial backlogs in the asylum system, which by 1994 had reached approximately 425,000 cases pending at the Asylum Office.<sup>1</sup>

Nonetheless, the legislative intent in 1996 was very clear that the one year filing deadline should not bar legitimate asylum applicants from receiving protection. In 1996, Senator Orin Hatch assured the Senate that, "I am committed to ensuring that those with legitimate claims of asylum are not returned to persecution, particularly for technical deficiencies. If the time limit is not implemented fairly, or cannot be implemented fairly, I will be prepared to revisit this issue in a later Congress."<sup>2</sup>

Even the legacy agency INS questioned the need for the one year rule when it was debated in 1996. By that time, the agency had implemented procedures that addressed issues of fraudulent applications, and imposed new restrictions on work authorization for asylum seekers. By 1996, the INS had also developed an expedited adjudication process for the immigration courts whereby Immigration Judges were given goals to attempt to rule on asylum cases within 180 days. By increased staffing and other reforms at the Asylum Office, the number of asylum claims had dropped from 122,589 applications in 1994 to 53,255 in 1995. New asylum claims had dropped from 127,129 in 1993 to 30,261 in 1999 – a 75% drop. Approval rates had risen from 15% to 38% in the same time period. Doris Meissner, INS Commissioner claimed the reforms as a "dramatic success" that had "fixed a broken system".<sup>3</sup>

Reasons for late filing of an asylum application can be related to fear of revealing the basis of the persecution such as domestic or sexual abuse, sexual orientation, lack of counsel or reliable information, trauma related to torture, or loss of family members and home. Numerous cases illustrate that Immigration Judges do not recognize psychological issues such as avoidance symptoms and how they might affect late filing. It is widely understood by mental health experts that "delayed reporting" is a well documented symptom of an individual experiencing Post Traumatic Stress. Also, as we face constantly evolving law, the cases of some individuals whose current claims are based, for example, on gender or domestic violence, might not even realize that the standards and requirements of asylum include and protect them.

The application of the one year rule has been rigid and led to a constellation of unintended consequences – for applicants and the asylum system. Despite exceptions for changed or extraordinary circumstances, thousands of meritorious asylum claims were denied simply because of not meeting the one year filing deadline. Since the passage of the 1996 law and the subsequent implementation of the one year filing deadline, asylum attorneys and advocates from around the United States have witnessed those who fled persecution and sought this country's protection returned into the hands of their persecutors. This is underscored by the findings by the Center for Gender and Refugee Studies, which reviewed case files for denials of asylum based on the one year deadline. Many of those who were denied asylum were then granted Withholding of Removal ("withholding") or protection under the Convention Against Torture (CAT), both of which require the applicant to meet a higher standard of proof than an asylum seeker.<sup>4</sup>

While someone who is granted withholding or CAT will not be returned to their home country (without going through additional proceedings only if country conditions in their home country change significantly and this is very rare), they still face legal and societal challenges in the

United States. For example, they can never adjust their status to permanent resident or U.S. citizen, thereby undermining their integration into American society. They also cannot travel outside our borders and cannot bring family members to join them in the United States. The enactment of the one year filing deadline diverts time from judging the merits of an asylum claim at both the Asylum Office and in immigration court. Unfortunately, the one year filing deadline has resulted in thousands of cases being referred to a heavily overburdened immigration court system. Many Immigration Judges believe that enforcing the one year filing deadline is a threshold burden for asylum claims. Also, for many judges, the focus of an asylum hearing becomes the extraneous issue of when the person entered the United States, rather than examining the merits of the asylum claim.

Recent alarming statistics highlighted in a report by the National Association of Immigration Judges (NAIJ), entitled "Immigration Court Needs – Priority Short List of the NAIJ", shows an immigration court system at a breaking point. The report states that immigration courts now handle more than 350,000 matters a year, with each judge averaging about 1,500 proceedings a year. This volume of cases is far larger than those of other federal adjudicators. Furthermore, according to NAIJ report, case backlogs have grown by 23 % in the last eighteen months, and by a staggering 82% over the last ten years.<sup>6</sup>

It is undisputable that the one year filing deadline has been needlessly contributing to the enormous burdens and backlogs on the immigration court system.

The following are fundamental reasons to repeal the one year filing deadline:

- The reasons for which it was originally enacted in 1996 were fully addressed long ago by other procedures such as training in fraud detection for Asylum Officers, placing restrictions on employment authorization, and scheduling expedited immigration hearings.
- The original Congressional intent of the one year deadline has been violated by denying meritorious asylum cases, and returning bona fide refugees to the home countries.
- There are already fraud prevention components built into the asylum system such as the necessity that each applicant carries the burden of demonstrating a well founded fear of persecution and obtaining a positive credibility finding from the adjudicator. There are also serious penalties for filing a frivolous claim.
- The rule causes waste and inefficiency by placing even more burdens on an immigration court system that is already struggling to keep up with the caseload. Many of these asylum cases could be adjudicated more expeditiously and efficiently at the Asylum Office level. The Asylum Office was developed to adjudicate cases in an administratively efficient manner.
- The U.S. is in violation of its international obligations whenever it returns bona fide refugees to countries where they fear persecution.

Repealing the one year filing deadline would increase efficiency and save resources, increase the level of protection for asylum seekers and maintain the U.S. commitment not to return bona fide refugees to persecution.

Protecting Certain Vulnerable Groups of Asylum Seekers

Social Visibility

The Immigration and Nationality Act establishes that a person is eligible for a discretionary grant of asylum if she or he has suffered past persecution or has a well founded fear of future persecution on account of their race, religion, nationality, membership in a particular social group or political opinion.<sup>7</sup>

Some of the most vulnerable asylum applicants seek protection and asylum on account of their membership in a particular social group – a group which due to the sensitive nature of the claim,

does not always meet the standard of being "socially visible" that has been required by some recent Board of Immigration Appeals (BIA) decisions. The recent BIA decisions have imposed additional requirements such as "particularity" and "social visibility," which have been inconsistently applied and difficult to follow.

Imagine a case based on the threat of an honor killing because a woman wants to marry a person of her choice. Being "socially visible" could put her in even more danger.

As Judge Posner of the Seventh Circuit Court of Appeals recently observed, the "social visibility" requirement "makes no sense" because "if you are a member of a group that has been targeted for assassination or torture or some other mode of persecution, you will take pains to avoid being socially visible."<sup>7</sup>

The language of the Refugee Protection Act would return the requirements for the "social group" standard to the longstanding BIA precedent decision *Matter of Acosta*,<sup>8</sup> which defines "social group" as possessing the characteristics of being "fundamental and immutable."

#### Corroborating Evidence

The REAL ID Act of 2005 placed new burdens on asylum applicants to provide corroborating evidence when an Immigration Judge requests that evidence, even if the judge finds the applicant credible.

Most of the asylum seekers I represent are from Central Africa, and several are from the Democratic Republic of Congo, where war has been raging since the mid-1990s. Often, when people are fleeing war and turmoil, they are also leaving behind a tattered, scorched past. An environment such as this can make it extremely difficult for individuals to retrieve important documents and other corroborating evidence.

In some cases, Immigration Judges have denied asylum due to the requirement that applicants offer corroborating evidence, even where the applicant was not notified of the need for evidence or given the opportunity to try and obtain it. There have been denials even in cases where the Immigration Judge found the asylum applicant credible.

It is only reasonable that the applicant be notified if corroborating evidence will be required by the Immigration Judge, and that the applicant be given an opportunity to retrieve such documentation or provide good reasons why such documentation is unavailable. That is an important change to current law that would be made by the Refugee Protection Act.

#### Explaining and Clarifying Inconsistencies in a Claim

In the adjudication of asylum cases, the credibility of the testimony of the applicant is of paramount importance to winning a favorable decision.

While it is generally understood that between 5% and 35% of refugees are survivors of torture, our case data at VIAA illustrates a much higher percentage for our asylum clients. More than 90% of our recent asylum clients are survivors of torture. Understanding that credibility is primary to an Immigration Judge or Asylum Officer approving an asylum claim, it is somewhat counter-intuitive to expect that an individual who is suffering from symptoms related to Post Traumatic Stress can always recount their stories of horrific rape, imprisonment or torture in a consistent fashion.

Mental health experts understand full well that it is common for individuals who experience symptoms related to Post Traumatic Stress to recount their traumatic events through "piece meal reporting." For example, one of our asylum clients retold the traumatic events of his story (which included months of detention and electric shocks, sexual abuse, beatings to the head, and water torture) in the comforting and supportive setting of a therapy session. Nonetheless, he was so

psychologically and physically affected by the harsh memories that he had to be admitted to the Emergency Room for treatment.

In addition, traumatized individuals are not necessarily the best judges of what is most important to tell an adjudicator, or the best way to present their asylum claim. This is especially the case with asylum applicants who are unrepresented by attorneys or accredited representatives.

One recent client of VIAA most likely would have presented inconsistencies in his initial application or testimony, leading to a negative credibility finding, if he had been unrepresented. The reason for this was that he did not equate his mistreatment by his government's military as torture. The arrests, beatings and horrible treatment that he experienced are what you would expect if you were arrested by the military in his country, he said.

In Vermont, we now couple psychological treatment/therapy with preparation for immigration court or asylum interviews. We do so with the goal of balancing the effects of Post Traumatic Stress and reducing the chances of presenting inconsistencies during testimony. This protocol has been quite successful in balancing and reducing the effects of Post Traumatic Stress during the asylum interview or court proceedings and we believe, helping to lead to a positive credibility finding and approval of asylum. It is important to note that we often also use expert psychological evaluations and testimony that help to identify and explain possible inconsistencies in the application or testimony. All of this takes a full legal team, with medical and psychological experts often devoting hundreds of hours to one single case. Services such as these are simply not available for many applicants and traumatized individuals presenting their case pro se. They face hurdles and barriers to stay on track, stay consistent and present their case in a credible fashion. This is due not to any lack of credibility on their part, but rather how their past trauma – the very trauma that makes their case compelling and approvable – affects their recounting of the story before authorities.

We welcome the sections of the Refugee Protection Act that enhance procedural fairness by requiring Immigration Judges to allow applicants to explain and clarify inconsistencies in testimony. These changes will lead to fair adjudication of asylum claims, upholding the standards and legal requirements while recognizing the reality of adjudicating the cases of traumatized refugees.

Efficient Asylum Determination Process for Arriving Asylum Seekers

Expedited Removal was included in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 with the intention of removing immigrants who arrive without proper documents. Under Expedited Removal, these individuals can be removed back to their home country without a hearing before an Immigration Judge. In order to ensure the United States is not returning refugees to persecution, an individual who expresses a fear of returning to their home country should be granted a "credible fear hearing". If the individual is found to have a credible fear, their case is then referred to an Immigration Judge for a full hearing on his or her asylum claim. Under current law, asylum seekers in Expedited Removal are subject to mandatory detention unless they are granted release on parole.

As underscored by a 2007 Report Card on the Expedited Removal Process by the U.S. Commission on International Religious Freedom (USCIRF)<sup>9</sup>, there are numerous problems and issues related to the implementation of Expedited Removal. Some of these issues have led to the return to the home country of bona fide refugees.

One recommendation made in the original 2005 report by USCIRF that is also contained in the Refugee Protection Act, is for Asylum Officers to be able to grant asylum at the credible fear

interview.

There should be no reason why arriving asylum seekers should be treated differently than those who file an affirmative claim from inside the United States. Once the asylum seeker has been able to establish credible fear, they should be scheduled for an asylum interview rather than immediately placed in immigration court proceedings. This would be better for the arriving asylum seeker and more efficient for the immigration courts, keeping thousands of cases out of an already over-burdened system.

Anyone who has represented an asylum applicant – or even been present as a translator or witness – in both an immigration court hearing and asylum interview, would attest to the notable difference between the two. An asylum interview is normally non-adversarial and relatively informal. Conversely, the immigration court forum is, by design, an adversarial forum. The immigration court's complex rules and often contentious environment should be reserved for cases that were referred to the court by an Asylum Officer.

We welcome the section of this Bill that would develop parity systems for both arriving asylum seekers and those applying from within the United States. This makes fiscal sense, will be less traumatic for the applicants, and avoid unnecessary detention of asylum seekers.

Also, while we welcome the current Department of Homeland Security (DHS) policy on the release and parole of asylum seekers, we fear that these advances could slip unless they are signed into law. This section of the RPA will help ensure that asylum seekers are released from detention once they have passed credible fear, established their identity, and shown that they are not a threat to security or at risk of flight.

We also encourage the Departments of Homeland Security and Justice to revise regulatory language (and/or Congress to enact legislation) to provide arriving asylum seekers and other immigrants in detention with the chance to have their custody reviewed in a hearing before an Immigration Judge. This would prevent the prolonged and unnecessary detention of asylum seekers at taxpayer expense.

#### Improvements in Detention Conditions

While the meteoric rise in the number of immigrants detained in the United States is troubling to most immigration advocates (from approximately 202,000 in 2002 to approximately 442,000 in 2009),<sup>10</sup> the unnecessary and prolonged detention of asylum seekers is even more disturbing.

Our organization, VIAA, has been providing legal services and conducting (non-federally funded) legal orientation presentations to immigrants and asylum seekers in Vermont since 1993 and in Northeast New York State jails since 2006. We have worked very closely with our local Immigration & Customs Enforcement (ICE) offices, Border Patrol, Customs and Border Protection and our local sheriffs who maintain the detention facility contracts. These relationships have ensured our agency's consistent and open access to these facilities. Our stakeholder partners in the legacy INS and subsequent ICE, as well as our local sheriffs, have stated very clearly over the years that they have witnessed the benefits of our presence and legal services in their jails. In addition, it has often been clear to many of our stakeholder partners – although they would normally be reticent to publicly state this – that there are sometimes abhorrent conditions within their own facilities.

The lack of legally enforceable immigration detention standards has created a detention environment that has resulted in many deaths, cost tax payers millions of unnecessary dollars, and created a monstrous and unwieldy system with little oversight.

According to a recent Human Rights First report on the detention of asylum seekers, ICE has spent approximately 300 million dollars to detain asylum seekers from 2003 – 2009. 11

On May 11-14, 2008, The Washington Post ran a four-day exposé of the grossly inadequate health care in immigration detention centers and on August 18, 2009, The New York Times reported 104 deaths of immigrants held in ICE custody since October 2003. These articles illuminate systemic problems that have often led to unnecessary suffering and avoidable deaths. One of these deaths in detention, sadly, involved a detainee that was previously held in Vermont for 10 weeks in one of our county jails.

One of the most shocking statistics regarding individuals held in detention is that 84 percent are unrepresented.

I applaud the nationwide expansion of Legal Orientation Programs included in the Refugee Protection Act. The Legal Orientation Program is an effective initiative of the Executive Office for Immigration Review of the Department of Justice that is managed through a contract with the Vera Institute for Justice. The Vera Institute subcontracts with non-profit legal service providers to provide basic legal information to some of the 84 percent of detainees who are unrepresented. The Legal Orientation Program (LOP) provides basic, but critical legal information to detained immigrants and also helps to connect them with pro bono legal services. The LOP has received widespread praise from Immigration Judges for increasing efficiency and effectiveness in court proceedings. Immigration Judges have witnessed the increased ability of detainees to understand the court process and identify possible forms of relief for their case. It has also been found to reduce the average length of detention by 13 days per person offered an LOP. Those with potential relief can build a case and appear in court, but those who come to understand they have no potential for relief typically accept an order of deportation and depart the United States quickly.

In the course of legal orientation presentations that VIAA staff provided for detained immigrants in Clinton County Jail (in northeast New York State) during 2008, we noted several compelling complaints about the harsh conditions and negligent provision of health services in the jail. Some detainees stated: "I did not eat for three days, could not talk; and was crying all the time." "I was spitting blood for three days and never saw the doctor." "I was verbally abused when I did not feel well enough to clean my room."

Byzantine phone systems and contracts with high-priced providers greatly limit detainee access to telephones, and can have the effect of restricting contact with legal counsel and family members. In addition, many jails have inadequately stocked legal libraries, or have law libraries that are poorly maintained and do not have trained staff or librarians. In one of the county jails that we serve, there is a computer with an electronic law library, but it is not offered and detainees cannot easily access it.

Based on our detention work since 1993, we clearly understand the value of legal orientation presentations. We witness the relief experienced by detained individuals as they begin to understand the process and what legal options might be available to them. Even individuals for whom there is no possible relief from removal can make better-informed decisions, often deciding to accept deportation. This saves the government unnecessary expenses and reserves the courts for the most meritorious cases.

The challenges for an asylum seeker who is detained and without legal counsel are enormous. It is difficult enough for a pro se asylum applicant who is not detained to compile and present a thorough case. The hurdles for someone who is detained are all too often multiplied by lack of counsel, inability to access important documents, lack of contact with family members and critical witnesses, lack of legal resources and most importantly, the re-traumatizing effects of detention and of recalling torture and abuse. Yet another challenge is that the asylum application

and accompanying documents must be submitted to the court in English.

Most asylum applicants want to be active in their own defense. Detention severely limits their ability to be their own best advocate.

While proposed DHS detention reforms<sup>12</sup> will ideally result in much needed changes and a more efficient and humane immigration detention system, the establishment of enforceable standards, as proposed in the Refugee Protection Act, will codify and add enforcement mechanisms to the DHS reforms.

We applaud the Refugee Protection Act's effort to make necessary changes to the immigration detention system by requiring DHS to finally promulgate enforceable regulations and procedures for detention conditions. The Bill also establishes a detention commission to report on compliance with the regulations.

We also applaud the Bill's intention to expand the Legal Orientation Program, creating a nationwide program for group legal orientation presentations.

#### Secure Alternatives to Detention

The Refugee Protection Act requires the Secretary of Homeland Security to create a secure alternatives to detention program. This only makes good sense, both for the immigrant or asylum seeker, but also for the government and U.S. tax payer. I encourage you to do the math - detention beds cost on average \$100 per day, while secure alternatives cost on average \$12 per day.<sup>13</sup>

Secure alternatives to detention is not a new concept. The first and most comprehensive pilot program for alternatives to detention was called the Appearance Assistance Program. It was funded by the INS and designed and implemented by the Vera Institute for Justice from 1997 – 2000. Vera noted remarkable results in its findings. It reported appearance rates for asylum seekers of 97 percent. Another alternatives to detention program was coordinated by Lutheran Immigration and Refugee Service (LIRS). LIRS also noted a 97 percent appearance rate.<sup>14</sup> ICE currently implements two supervised release programs, the Intensive Supervised Release Program and the Enhanced Supervision Reporting Program. These programs rely on electronic verification bracelets, home visits, phone check-ins and residence verification. These programs can currently supervise about five percent of the annual detention population.

Secure alternatives to detention, as defined in the Refugee Protection Act, offer a range of release options such as supervised release, or release on recognizance, as well as programs run by private, faith-based and non governmental groups.

A secure alternatives to detention program would save detention space for detainees who are a danger or a risk of flight, it would be more humane, and would ensure compliance with the conditions of release. Secure alternatives to detention should never, however, be a substitute for a fair adjudication and review process.

#### Closing

In closing, I believe that the changes proposed in the Refugee Protection Act represent a very sensible and comprehensive package of much needed changes to law that will restore and ensure integrity and true protection in our refugee and asylum systems. Maintaining integrity and efficiency in these systems should not be a Republican or Democratic issue. Our commitment to welcome refugees who have fled their homelands should also be non-partisan. By passing this Bill and offering fair treatment and safe haven to refugees, we can illustrate to the world and to our own citizens our strength, our confidence and our compassion. Ultimately, any changes should act to maintain and strengthen these cornerstones of America's immigration system. Most importantly, we should continue, through our laws and through our actions, to maintain the full

intention and ability to be the spire of light that elicits hope and safety as we embrace and welcome the persecuted into our homes, our cities and our communities. Mr. Chairman and Committee members, I believe this Bill moves us forward, decidedly, towards achieving these goals.

Thank You.

End Notes:

1. INS Finalizes Asylum Reform Regulations, 71 INTERPRETER RELEASES 1577, Dec. 5, 1994.
2. 142 Cong. Rec. S11840 (Sept. 31, 1996)
3. By increased staffing and other reforms at the Asylum Office, the number of asylum claims had dropped from 122,589 applications in 1994 to 53,255 in 1995. William Branigin, Year-Long Campaign Slashes New Claims by 57%, WASH. POST, Jan. 5, 1996, at A2. New asylum claims had dropped from 127,129 in 1993 to 30,261 in 1999 – a 75% drop. INS Announces Progress Five Years Into Asylum Reform, 77 INTERPRETER RELEASES 186, Feb. 7, 2000. Approval rates had risen from 15% to 38% in the same time period. Id. Doris Meissner, INS Commissioner claimed the reforms as a "dramatic success" that had "fixed a broken system." William Branigin, Year-Long Campaign Slashes New Claims by 57%, WASH. POST, Jan. 5, 1996, at A2.
4. Musalo, Karen; Rice, Marcelle. Hastings International and Comparative Law Review, Summer 2008. Article. Center for Gender and Refugee Studies: The Implementation of the One-Year Bar to Asylum.
5. National Association of Immigration Judges. Immigration Court Needs: Priority Short List of the NAIJ. April, 2010
6. INA § 208, 8 U.S.C. §1158.
7. Gatimi v. Holder No. 08-3197 (7th Cir. Aug. 20, 2009)
8. 19 I&N Dec. 211 (BIA 1985).
9. United States Commission on International Religious Freedom. Expedited Removal Study Report Card: 2 Years Later. 2007
10. Human Rights First. U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison. 2009
11. Human Rights First. U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison. 2009
12. U.S. Department of Homeland Security. Press Release. Secretary Napolitano and ICE Assistant Morton Announce New Immigration Detention Reform Initiatives. October 6, 2009; U.S. DHS. ICE Detention Reform: Principals and Next Steps. October 6, 2009.
13. Human Rights First. U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison. 2009
14. Human Rights First. In Liberty's Shadow. 2004