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CONGRESS'S UNTAPPED AUTHORITY TO CERTIFY U VISAS

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A crucial path to legal status for immigrant victims of crimes is the U visa, which Congress established with strong bipartisan support to protect victims of particular crimes who are helpful to law enforcement. Because the U visa was intended to encourage reporting of crimes, the application requires a certification form to be completed by a federal, state, or local authority that is investigating or prosecuting the alleged offense. Arbitrary and inconsistent certification decisions by state and local authorities make it especially important to identify relevant federal authorities that can serve as certifying authorities for U visas. This Piece argues that congressional committees and subcommittees that engage in investigations qualify as certifying authorities under the statute and regulations. To date, these congressional committees have never certified a U visa. The Piece provides three examples of congressional investigations in which U visa certification would be warranted: investigations into medical abuses of detained women, the so-called "Zero Tolerance" family-separation policy, and the use of solitary confinement in immigration detention.

INTRODUCTION

In November 2022, a twenty-three-year-old undocumented woman, Karina Cisneros Preciado, traveled from Florida to Washington, D.C., to testify before the U.S. Senate Permanent Subcommittee on Investigations (PSI) about her experience in immigration detention. PSI had just concluded an eighteen-month investigation into "multiple allegations of medical abuse" against women detained at the Irwin County Detention Center

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(ICDC) in Ocilla, Georgia.[1] In its report, PSI found that detained women "appear[ed] to have been subjected to excessive, invasive, and often unnecessary gynecological procedures"[2] and stated that "[t]here appear[ed] to have been repeated failures to secure informed consent."[3]

One physician in rural Georgia had performed over 90% of certain OB-GYN procedures that were performed on all immigrants detained across the country between 2017 and 2020.[4] Irwin County held only 4% of women detained in immigration custody, and only 6.5% of all OB-GYN visits from 2017 to 2020 had involved this particular OB-GYN, but he performed 94% of all laparoscopies, 93% of Depo-Provera shots, 92% of limited pelvic exams, and 82% of dilation and curettage procedures performed on people held in immigration detention centers nationwide.[5] Both the federal government and the State of Georgia had previously sued the doctor for Medicaid fraud related to ordering unnecessary and excessive medical procedures.[6] He had also been dropped by a major insurer.[7] Yet ICE, which is part of DHS, failed to identify any red flags before allowing him to treat detained women who, due to the circumstances of their detention, had no ability to choose their medical providers.[8]

Several medical experts who reviewed thousands of pages of medical records for PSI determined that the doctor had followed a consistent pattern of treatment for most detained patients.[9] This pattern involved performing a transvaginal ultrasound for women who reported bleeding or pain, diagnosing ovarian cysts (which are often perfectly normal), giving a Depo-Provera injection to treat the cysts, and then proceeding to surgery before the Depo-Provera injection even had time to take effect.[10]

In her testimony, Karina explained how this pattern had affected her.[11] When Karina was detained, she was separated from her four-month-

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1. Staff of Permanent Subcomm. on Investigations of S. Comm. on Homeland Sec. & Governmental Affs., 117th Cong., Rep. on Medical Mistreatment of Women in ICE Detention 3 (2022), https://www.hsgac.senate.gov/imo/media/doc/2022-11-15%20PSI%20Staff%20Report%20-%20Medical%20Mistreatment%20of%20Women%20in%20ICE%20Detention.pdf [https://perma.cc/3T49-VF8E] [hereinafter PSI Report].

2. Id. at 17.

3. Id. at 3.

4. Id. at 5.

5. Id. at 5–6.

6. Id. at 4.

7. Id. at 15.

8. Id. at 6.

9. Id. at 63–66.

10. Id. at 66.

11. Id. at 49–50. For a video recording of Karina's testimony, see Medical Mistreatment of Women in ICE Detention, Permanent Subcomm. on Investigations of S. Comm. on Homeland Sec. & Governmental Affs., at 32:24 (Nov. 15, 2022), https://www.hsgac.senate.gov/subcommittees/investigations/hearings/medical-mistreatment-of-women-in-

old daughter; at ICDC, she had repeatedly requested medical care because she had not yet had her postpartum visit and was experiencing pain.[12] One day, a nurse told her she was going off-site for a pap smear.[13] She was taken off-site to see an OB-GYN. She testified that, without explaining what he was doing or why, the OB-GYN performed a vaginal ultrasound, told her she had an ovarian cyst, gave her a Depo-Provera shot, and said that if the shot did not work in four weeks, she would need surgery.[14] Luckily, before any surgery could be scheduled, news about the doctor's pattern of abuse became public through a whistleblower complaint.[15]

Karina testified before PSI about her experience at ICDC because she wanted to hold the government accountable and did not want any other women to go through what she did.[16] She never thought that testifying would benefit her personally. But her testimony before the subcommittee could potentially qualify her for a U visa as the victim of a crime.

Congress created the U visa to encourage all immigrants, regardless of status, to report crimes and assist in their investigation.[17] The U visa provides temporary legal status and creates a path to apply for permanent residence in the United States. To qualify for a U visa, an individual must (1) have been the victim of a qualifying crime; (2) have suffered physical or mental abuse as a result of the criminal activity; (3) have information about the criminal activity; and (4) demonstrate that they have been helpful, are being helpful, or are likely to be helpful to a law enforcement official, a judge, a prosecutor, or "*other Federal, State, or local authorities investigating or prosecuting [the] criminal activity.*"[18] This broad statutory language regarding who may certify a U visa encompasses congressional committees and subcommittees that investigate criminal activities.

But, to date, no congressional committee or subcommittee has ever certified a U visa. This Piece is the first to argue that congressional certification of U visas is a critical, untapped resource to prevent crimes against one of the most vulnerable populations: immigrants. As commentators have previously recognized, obtaining a U visa certification often poses a

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ice-detention/ (on file with the *Columbia Law Review*) [hereinafter Recording of Karina's Testimony].

12. PSI Report, supra note 1, at 49.

13. Id.

14. Id. at 50.

15. Id.

16. See Recording of Karina's Testimony, supra note 11, at 36:50.

17. See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 102, 114 Stat. 1464, 1466 (codified at 22 U.S.C. § 7101 (2018)).

18. 8 U.S.C. § 1101(a)(15)(U) (2018) (emphasis added).

tremendous obstacle to survivors of crimes.[19] Police departments and other state authorities have adopted arbitrary and inconsistent certification requirements, denying certifications based on factors like "anti-immigrant bias, lack of training, or misunderstanding of the role of certifying agencies."[20] Because the decision to certify is discretionary and unreviewable, there are no checks on the process.[21] The difficulty in obtaining certifications from traditional sources underscores the need to explore less obvious options.[22] Federal authorities, in particular, merit attention due to the "geographic roulette" that has resulted from divergent state and local certification practices.[23] While Congress cannot compel state authorities to certify U visas, it can, at a minimum, urge its own committees to use their authority appropriately to accomplish the U visa's goals.

Part I explains why congressional committees are authorized under the statute and regulations to certify U visas. Part II then provides three examples in which such congressional certification is warranted. These examples include congressional investigations into alleged medical abuses of detained women, the so-called "Zero Tolerance" family-separation policy, and the use of solitary confinement in immigration detention.

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19. Sylvia Lara Altreuter, Note, Family Courts as Certifying Agencies: When Family Courts Can Certify U Visa Applications for Survivors of Intimate Partner Violence, 86 Fordham L. Rev. 2925, 2927 (2018).

20. Danielle Kalil, Certified Disaster: A Failure at the Intersection of the U Visa and the Child Welfare System, 35 Geo. Immigr. L.J. 513, 516 (2021) (discussing the unwillingness of child protection agencies to certify U visas and arguing that "[t]his ad hoc approach by state agencies has resulted in inconsistent and disparate access to humanitarian immigration relief for the very victims the U visa was meant to protect"); see also Jamie R. Abrams, The Dual Purposes of the U Visa Thwarted in a Legislative Duel, 29 St. Louis U. Pub. L. Rev. 373, 411 (2010) (proposing reforms to address the "inconsistent application of the governing legal rules at the local law enforcement level").

21. See Ordonez Orosco v. Napolitano, 598 F.3d 222, 226 (5th Cir. 2010), cert. denied, 562 U.S. 863 (2010) (noting that the decision to issue a law enforcement certificate (LEC) is discretionary); Rachel Gonzalez Settlage, Uniquely Unhelpful: The U Visa's Disparate Treatment of Immigrant Victims of Domestic Violence, 68 Rutgers U. L. Rev. 1747, 1767 (2016) ("The decision whether or not to issue an LEC is left entirely to the discretion of the certifying official and is not subject to review."); Alizabeth Newman, Reflections on VAWA's Strange Bedfellows: The Partnership Between the Battered Immigrant Women's Movement and Law Enforcement, 42 U. Balt. L. Rev. 229, 270–71 (2013) (describing the "unchecked discretion" of law enforcement agencies to decide "if and when to sign the certificate").

22. Kalil, supra note 20, at 534.

23. Id. at 517; see also Jason A. Cade & Meghan L. Flanagan, Five Steps to a Better U: Improving the Crime-Fighting Visa, 21 Rich. Pub. Int. L. Rev. (Symposium Issue) 85, 96–98, 108–11 (2018) (discussing inconsistent and unreliable U visa certifications and proposing, among other reforms, that states and municipalities should provide more concrete guidance and incentives to law enforcement agencies regarding U visa certification).

I. CONGRESSIONAL AUTHORITY TO CERTIFY U VISAS

Under U.S. law and regulations, Congress has the authority to issue U visa certifications for crime victims. Multiple congressional committees have investigated crimes involving immigrants: The Senate Permanent Subcommittee on Investigations held the hearing about ICDC;[24] the House Committees on Oversight and Government Reform ("Oversight Committee") and House Judiciary Committee, among others, held hearings on family separation;[25] and the House Judiciary Committee's Subcommittee on Immigration and Citizenship held hearings on the misuse of solitary confinement of immigrants.[26] These congressional committees are federal authorities engaged in investigations of criminal activity who can certify immigrants' cooperation with their investigations, as required for those immigrants to obtain U visas.

A. *Congress and DHS Have Broadly Defined "Certifying Authorities"*

The Immigration and Naturalization Act (INA) requires DHS to determine that a U visa applicant has been or is likely to be "helpful to a Federal, State, or local law enforcement official, to a Federal, State, or local prosecutor, to a Federal or State judge, to the [Immigration and Naturalization] Service, or to *other Federal*, State, or local *authorities investigating* or prosecuting [the] criminal activity [on which the application is based]."[27]

Congress intended the certification provision to be construed broadly. The Battered Immigrant Women Protection Act of 2000 (BIWPA) created the U visa for survivors of domestic violence and victims of similar crimes.[28] The Act was incorporated into the Violence Against Women Act of 2000, which, in turn, was incorporated into the Victims of Trafficking and Violence Protection Act (VTVPA).[29] The VTVPA was then codified

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24. See PSI Report, supra note 1, at 3.

25. Letter from Mark Meadows, Chairman, Subcomm. on Gov't Operations, and Elijah E. Cummings, Ranking Member, Comm. on Oversight & Gov't Reform, to Kirstjen M. Nielsen, Sec'y, DHS, Alex M. Azar II, Sec'y, HHS, and Jeff Sessions, Att'y Gen., DOJ (July 5, 2018), https://oversightdemocrats.house.gov/sites/democrats.oversight.house.gov/files/documents/Meadows-Cummings%20Letter%20Requesting%20Info%20on%20Separated%20Children.pdf [https://perma.cc/S3DU-ZKTB].

26. See The Expansion and Troubling Use of ICE Detention: Hearing Before the Subcomm. on Immigr. & Citizenship of the H. Comm. on the Judiciary, 116th Cong. 2 (2019) [hereinafter Subcommittee on Immigration and Citizenship Hearings] (statement of Rep. Pramila Jayapal); id. at 177 (statement of Dana L. Gold, Gov't Accountability Project).

27. 8 U.S.C. § 1101(a)(15)(U)(i)(III) (2018) (emphasis added).

28. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, div. B, tit. V, sec. 1513, 114 Stat. 1464, 1533–35 (codified as amended at 8 U.S.C. § 1101); see also H.R. 3083, 106th Cong. (1999); Altreuter, supra note 19, at 2927 .

29. Victims of Trafficking and Violence Protection Act, div. B, 114 Stat. at 1491; H.R. 1248, 106th Cong. (as passed by House, Sept. 26, 2000); see also Altreuter, supra note 19, at 2946–47.

into the INA.[30] As one author notes, the "BIWPA conference report supports broad U Visa certification" because the report focused on strengthening the protections for "battered immigrant women."[31] The conference report describes U visas as tools to help survivors.[32] It "indicates that the congressional purpose was to help as many survivors as possible," and "allowing as many agencies as possible to certify U Visa[s]" would best serve Congress's purpose.[33]

The definition of a "certifying agency" set forth in DHS's regulations further confirms that Congress has certifying authority. The regulations define "certifying agency" as:

> *Federal*, State, or local law enforcement agency, prosecutor, judge, or *other authority*, that has *responsibility for the investigation* or prosecution of a qualifying crime or criminal activity. This definition includes agencies that have criminal investigative jurisdiction in their respective areas of expertise, including, *but not limited to*, child protective services, the Equal Employment Opportunity Commission, and the Department of Labor.[34]

The regulation's second sentence provides examples of qualifying authorities, but certifying authorities are explicitly "not limited to" those kinds of agencies. The regulation's broad definition thus permits congressional committees and subcommittees to certify U visas given their investigatory powers.

B. *Certain Congressional Committees Qualify as "Certifying Authorities"*

Congress is vested with broad investigatory powers that authorize it to certify U visas.[35] Specific congressional committees can constitute investigatory federal authorities for purposes of U visa certifications. The Oversight Committee, for example, is the "main investigative committee

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30. 22 U.S.C. § 7101 (2018); see also Altreuter, supra note 19, at 2934 .

31. Altreuter, supra note 19, at 2947 (internal quotation marks omitted) (quoting H.R. Rep. No. 106-939, at 103 (2000) (Conf. Rep.)).

32. See H.R. Rep. No. 106-939, at 111 ("Generally designed to improve on efforts made in VAWA 1994 to prevent immigration law from being used by an abusive citizen or lawful permanent resident spouse as a tool to prevent an abused immigrant spouse from reporting abuse or leaving the abusive relationship."); see also Altreuter, supra note 19, at 2946–47.

33. Altreuter, supra note 19, at 2948.

34. 8 C.F.R. § 214.14(a)(2) (2023) (emphasis added).

35. See, e.g., Watkins v. United States, 354 U.S. 178, 187 (1957) (finding that Congress has the power to "expose corruption" in federal departments). Examples of these broad investigatory powers include Congress's authority to certify to the U.S. Attorney that persons are in criminal contempt, who then has the power to prosecute such contempt. See 2 U.S.C. §§ 194, 196 (2018). Congress also has expansive civil enforcement powers. For example, the Senate has initiated civil investigations and enforcement orders against William H. Kennedy, former associate counsel to President Bill Clinton, via the Special Committee to Investigate Whitewater Development Corporation and Related Matters in 1995, and against Senator Bob Packwood via the Select Committee on Ethics in 1993. See S. Rep. No. 104-191, at 1 (1995) (Kennedy); S. Rep. No. 104-137, at 1 (1993) (Packwood).

in the U.S. House of Representatives" and has the "authority to investigate the subjects within the Committee's legislative jurisdiction."[36] The Oversight Committee has legislative jurisdiction over, among other topics, the "[o]verall economy, efficiency, and management of government operations and activities."[37] The Oversight Committee is within its purview to investigate criminal activity, such as the abuses that occurred in the family-separation context and in immigration detention more broadly, because relevant ICE policies, such as detention protocols, qualify as "government operations." Additionally, the Oversight Committee has the authority to investigate "'any matter' within the jurisdiction of the other standing House Committees."[38] The Committee on Homeland Security has jurisdiction over the "[o]rganization, administration, and management of the Department of Homeland Security."[39] The Oversight Committee therefore has jurisdiction to investigate ICDC, the family-separation policy, and misuse of solitary confinement in immigration detention because these matters involve abuses that fall under DHS's purview.

Other committees and subcommittees—including PSI, which is part of the Senate Committee on Homeland Security and Governmental Affairs, and the Senate Judiciary Committee—also have authority to sign certifications for victims of qualifying crimes. PSI's investigatory powers include, for example, the authority to subpoena witnesses and to recommend that they be held in contempt if they refuse to testify.[40] The Senate Judiciary Committee has similarly cited individuals as in contempt for failing to appear before the committee and to produce documents related to its investigations.[41]

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36. Committee Jurisdiction, House Comm. on Oversight & Accountability Democrats, https://oversightdemocrats.house.gov/about/committee-jurisdiction [https://perma.cc/DM2FCDUR] (last visited Nov. 3, 2023); see also About, House Comm. on Oversight & Accountability, https://oversight.house.gov/about [https://perma.cc/LT6C-TSPH] (last visited Oct. 28, 2023).

37. Committee Jurisdiction, supra note 36.

38. Id.

39. About, House Comm. on Homeland Sec., https://homeland.house.gov/about/ [https://perma.cc/BJ4T-NXS7] (last visited Nov. 3, 2023).

40. See In re U.S. Senate Permanent Subcomm. on Investigations, 655 F.2d 1232, 1240 (D.C. Cir. 1981) ("We can see no [problem] . . . where successive civil contempt sentences are imposed on a Senate witness who continues to refuse to answer legitimate questions and where the Senate, or committee or subcommittee thereof, continues to express interest in the witness' testimony."). PSI has, for example, "recommend[ed] that the Senate authorize a civil enforcement action to compel . . . compl[iance] with [a] subpoena" issued to Carl Ferrer, CEO of Backpage.com, ordering him to provide the committee with certain documents after he failed to produce the documents and failed to appear at a 2015 hearing. Todd Garvey, Cong. Rsch. Serv., RL34097, Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure 83–84, https://crsreports.congress.gov/product/pdf/RL/RL34097 [https://perma.cc/5FGD-ZHDB] (last updated May 12, 2017).

41. Take, for example, the case of Attorney General William French Smith, cited as in contempt by the Senate Judiciary Committee in 1984 for refusing to produce documents

Congressional committee and subcommittee chairpersons can serve as the "certifying officials" who sign the U visa certification, as required under the regulations.[42] A "certifying official" is the "head of the certifying agency, or any person(s) in a supervisory role who has been specifically designated by the head of the certifying agency to issue U nonimmigrant status certifications on behalf of that agency."[43] As such, a chairperson, who is the head of a congressional committee or subcommittee, could issue a U visa certification, or they could delegate another official in a supervisory role to be the designated certifying official.[44]

Entities that certify cooperation for purposes of a U visa need not have the authority to prosecute crimes. The U visa statute and regulations do not require that the perpetrator of the crime be arrested, prosecuted, or convicted for an applicant to be granted a U visa.[45] Police departments, the DOL, and state child welfare agencies are all recognized as certifying agencies due to their investigatory powers[46] even though, like Congress, they do not have the authority to prosecute qualifying crimes.[47] Under the relevant statutory and agency guidance, police departments, congressional committees, and other authorities alike are investigatory authorities that are empowered to offer U visa certifications. It is important to note that although Congress can grant an underlying U visa certification, USCIS has ultimate discretion to grant the

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relating to a fraud probe, and the cases of Joshua Bolten, White House Chief of Staff, and Karl Rove, Deputy White House Chief of Staff, who were found in contempt of Congress after failing to appear, testify, and produce documents pursuant to the Senate Judiciary Committee's subpoena. Garvey, supra note 40, at 84.

42. 8 C.F.R. § 214.14(c)(2)(i) (2023).

43. Id. § 214.14(a)(3)(i).

44. For example, the EEOC has designated the Office of the General Counsel to certify applications on its behalf. See EEOC Procedures: Requesting EEOC Certification for U Nonimmigrant Classification (U Visa) Petitions in EEOC Cases, EEOC, https://www.eeoc.gov/eeoc-procedures-requesting-eeoc-certification-u-nonimmigrant-classification-u-visa-petitions-eeoc [https://perma.cc/GAV9-8GUF] (last visited Oct. 29, 2023).

45. See DHS, U Visa Law Enforcement Certification Resource Guide for Federal, State, Local, Tribal, and Territorial Law Enforcement 11, https://www.dhs.gov/xlibrary/assets/dhs_u_visa_certification_guide.pdf [https://perma.cc/KL63-J8QA] [hereinafter DHS, U Visa Resource Guide] (last visited Oct. 28, 2023). The USCIS Form I-918 (Instructions for Supplement B, U Nonimmigrant Status Certification) states that "[a] certifying agency must be a Federal, state, local, or tribal law enforcement agency; prosecutor; *authority*; or Federal, state, or local judge that has responsibility for the *detection*, *investigation*, prosecution, conviction, or sentencing of the qualifying criminal activity of which the petitioner was a victim." USCIS, Form I-918, Instructions for Supplement B, U Nonimmigrant Status Certification 3, https://www.uscis.gov/sites/default/files/document/forms/i-918supbinstr.pdf [https://perma.cc/SSU9-P56X] [hereinafter USCIS, Instructions for Supplement B] (last updated Dec. 6, 2021) (emphasis added).

46. See 8 C.F.R. § 214.14(a)(2).

47. See Kilbourn v. Thompson, 103 U.S. 168, 182 (1880) (holding that Congress does not have the authority to prosecute crimes).

U visa.[48] Congressional issuance of U visa certification does not remove any of that discretion from USCIS.

II. EXAMPLES OF CONTEXTS WARRANTING CONGRESSIONAL U VISA CERTIFICATIONS

A. *Medical Abuses in Immigration Detention*

Allegations of medical abuses leveled by detained immigrants have potential criminal implications.[49] In fact, several federal agencies have investigated the OB-GYN who was accused of performing unnecessary medical procedures on women detained at ICDC.[50] PSI is a permissible certifying authority for U visas because it is a federal "authority" that took "responsibility for the investigation" of the abuse and medical mistreatment perpetrated at ICDC.[51] PSI undertook a lengthy, bipartisan investigation and issued a detailed report that is over one hundred pages long.[52] The subcommittee also heard testimony from six victims and subpoenaed the accused doctor, who refused to appear at the hearing, invoking his right against self-incrimination.[53] That the subcommittee does not engage in criminal prosecution is irrelevant since prosecution is not required for certification of a U visa.[54]

PSI's report recounts that the women detained at Irwin County felt "*violated* after their treatment by [the OB-GYN]."[55] Some "still live with physical pain and uncertainty regarding the effect of his treatments on their fertility."[56] The women interviewed by PSI described instances in which the OB-GYN "was rough and insensitive while performing procedures, continued despite their complaints regarding pain, and failed to disclose the potential side effects of certain procedures or even answer questions regarding his diagnosis or treatment plan."[57] Another serious

48. See DHS, U and T Visa Law Enforcement Resource Guide 8 (2011), https://www.dhs.gov/sites/default/files/publications/PM_15-4344%20U%20and%20T%20Visa%20Law%20Enforcement%20Resource%20Guide%2011.pdf [https://perma.cc/M3F6-FB27] ("USCIS has the sole authority to grant or deny a U visa. The certification does not guarantee that the U visa petition will be approved by USCIS.").

49. DHS, U Visa Resource Guide, supra note 45, at 4 ("An individual may be eligible for a U visa if . . . [they have] suffered substantial physical or mental abuse as a result of having been a victim of criminal activity.").

50. PSI Report, supra note 1, at 4.

51. 8 C.F.R. § 214.14(a)(2).

52. See PSI Report, supra note 1, at i–iii.

53. Id. at 4, 10.

54. See DHS, U Visa Resource Guide, supra note 45, at 11 ("There is no statutory or regulatory requirement that an arrest, prosecution, or conviction occur for someone to be eligible to apply for a U visa.").

55. PSI Report, supra note 1, at 10 (emphasis added).

56. Id.

57. Id. at 10–11.

issue identified by PSI is that there appeared to be repeated failure to secure informed consent.[58] This evidence could support U visa certification based on several potential qualifying offenses, including "abusive sexual contact,"[59] "felonious assault,"[60] "false imprisonment,"[61] "obstruction of justice"—which has been construed to include a conspiracy to defraud the United States—[62] and "any similar activity in violation of Federal, State, or local criminal law."[63] USCIS has explained that "[t]hese are general categories, and not specific crimes or citations to a criminal code."[64] A detailed discussion of each of these offenses is beyond the scope of this Piece, but we briefly analyze abusive sexual contact as an example.

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58. Id. at 3, 11.

59. See 18 U.S.C. §§ 2242, 2244, 2246(2)–(3) (2018).

60. See Ga. Code Ann. § 16-5-21(a)(2) (2023) (defining "aggravated assault," which is a felony, as an assault "[w]ith a deadly weapon *or with any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury*" (emphasis added)); see also id. § 16-5-20(a)(2) (defining "simple assault" as "an act which places another in reasonable apprehension of immediately receiving a violent injury"). A doctor may place patients in reasonable apprehension of a violent injury with medical devices or instruments that can result in serious bodily injury, including infertility.

61. See id. § 16-5-41(a) ("A person commits the offense of false imprisonment when, in violation of the personal liberty of another, he arrests, confines, or detains such person without legal authority."). Force or threat of force is not an element of false imprisonment. Restraint may be effectuated by various means, such as fraud or deceit, physical barriers, or any other form of unreasonable duress. See, e.g., Scofield v. Critical Air Med., Inc., 52 Cal. Rptr. 2d 915, 919–21 (Cal. Ct. App. 1996). Courts have found that nonconsensual confinement, including for purposes of medical transport or care, constitutes false imprisonment. Id at 925. When consent is obtained through misrepresentation or other illegal methods, confinement is still considered nonconsensual. Id. Detained immigrants who are taken to medical appointments in shackles and closely guarded cannot escape while medical procedures are being performed on them. If consent is not obtained, or if consent is obtained by leading a detained woman to believe she needs certain forms of invasive and unnecessary medical care, that may constitute false imprisonment.

62. See Charles Doyle, Cong. Rsch. Serv., RL34303, Obstruction of Justice: An Overview of Some of the Federal Statutes That Prohibit Interference With Judicial, Executive, or Legislative Activities 1, https://crsreports.congress.gov/product/pdf/RL/RL34303 [https://perma.cc/M6EJ-UP6H] (last updated Apr. 17, 2014) (listing conspiracy to defraud the United States as one of six general federal offenses prohibiting obstruction of justice). The elements of conspiracy to defraud the United States are (1) an agreement between two or more individuals (2) to defraud the United States and (3) an overt act by one of the conspirators in furtherance of the scheme. 18 U.S.C. § 371. The OB-GYN who treated women at ICDC had previously been sued by the DOJ and the State of Georgia for "Medicaid fraud by ordering unnecessary and excessive medical procedures," resulting in a $520,000 settlement. See PSI Report, supra note 1, at 4. PSI found that the doctor's "treatment practices of ICE detainees after the settlement, from 2017 to 2020, *identified a similar pattern of potentially excessive medical procedures*." Id. at 5 (emphasis added). A doctor who conspires with at least one other person (e.g., someone at the hospital where they operate) to perform medically unnecessary procedures on detained immigrants for financial gain may be guilty of obstructing justice by defrauding the United States.

63. 8 U.S.C. § 1101(a)(15)(U)(iii) (2018).

64. DHS, U Visa Guide, supra note 45, at 4.

If someone has "sexual contact" with an individual in federal custody "without that other person's permission," the offense is a federal crime punishable by up to two years of imprisonment.[65] Under federal law, the term "sexual contact" does not require an intent to arouse or gratify sexual desire; touching the genitalia of another person with an intent to "abuse, humiliate, harass, [or] degrade" satisfies the definition.[66] Engaging in a nonconsensual "sexual act" with someone in federal custody is an even more serious offense, punishable by up to fifteen years.[67] The definition of a "sexual act" includes "the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."[68] A "sexual act" may therefore include penetration with fingers, a vaginal ultrasound, speculum, or other medical device with an intent to humiliate, harass, or degrade. A doctor who engages in such nonconsensual touching or penetration of a detained immigrant in federal custody with the requisite intent would thus be committing a crime.

Certifying a U visa does not require *proof* that a qualifying offense occurred. If the standard were "proof beyond a reasonable doubt," a criminal conviction would be required—but a certification may be signed without a conviction, a criminal charge, or even an investigation.[69] The INA provides that DHS may consider "*any credible evidence*" in acting on a U visa petition.[70] Since neither the INA nor the regulations specify a different standard for certifying that the immigrant was a victim of a qualifying offense, the "any credible evidence" standard should be applied to the certification as well.[71] This is a lower standard of proof than both "clear and convincing evidence" and a "preponderance of the evidence."[72]

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65. 18 U.S.C. § 2244(b).

66. Id. § 2246(3).

67. Id. § 2243(b).

68. Id. § 2246(2)(C).

69. See DHS, U Visa Guide, supra note 45, at iii ("A current investigation, the filing of charges, a prosecution, or a conviction are *not* required to sign the law enforcement certification." (emphasis added)).

70. 8 U.S.C. § 1184(p)(4) (2018) (emphasis added).

71. See Imogene Mankin, Abuse-in(g) the System: How Accusations of U Visa Fraud and *Brady* Disclosures Perpetrate Further Violence Against Undocumented Victims of Domestic Abuse, 27 Berkeley La Raza L.J. 40, 51 (2017) (stating that the U visa "requires the applicant to interface with an authority who must certify that the applicant was a victim of a qualifying crime, by *any credible evidence* (and not necessarily that the perpetrator is guilty beyond a reasonable doubt)").

72. Maura M. Ooi, Note, Unaccompanied Should Not Mean Unprotected: The Inadequacies of Relief for Unaccompanied Immigrant Minors, 25 Geo. Immigr. L.J. 883, 905–06 (2011) (explaining that "[i]n selecting this lowest standard of proof for the U visa, Congress recognized the difficulties victims of crimes in the United States face in obtaining

The Chair of PSI, Senator Jon Ossoff, described what had transpired at ICDC as "a catastrophic failure by the Federal Government to respect basic human rights" and among the most "serious abuses this Subcommittee has investigated during the last two years."[73] As a federal body authorized to investigate criminal activities, PSI has the power to help right such a wrong. If PSI determines that there is "any credible evidence" that a qualifying offense was committed, it may certify U visas for the women involved.

Likewise, the House Oversight Committee is a permissible certifying authority. In September 2020, the House Oversight Committee announced that it was "investigating allegations" regarding nonconsensual gynecological procedures and violations of COVID-19 protocols at ICDC.[74] The Oversight Committee requested pertinent documents to assist the investigation and issued a subpoena for those records.[75] If the Oversight Committee finds "any credible evidence" that a qualifying offense has been committed, it, too, may certify U visas.[76]

B. *Family-Separation Policy*

Another context appropriate for congressional certifications of U visas is family separations pursuant to the so-called "Zero Tolerance" policy of the Trump Administration.[77] The policy, designed at the highest levels of the federal government, intentionally

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evidence, particularly relating to crimes of domestic violence and other instances where perpetrators hide and destroy evidence").

73. Medical Mistreatment of Women in ICE Detention: Hearing Before the Permanent Subcomm. on Investigations of the S. Comm. on Homeland Sec. & Governmental Affs., 117th Cong. 1 (2022) (statement of Sen. Jon Ossoff, Chairman, Permanent Subcomm. on Investigations).

74. Letter from Bennie G. Thompson, Chairman, Comm. on Homeland Sec., Carolyn B. Maloney, Chairwoman, Comm. on Oversight & Reform, Kathleen Rice, Chairwoman, Subcomm. on Border Sec., Facilitation & Operations, and Jamie Raskin, Chairman, Subcomm. on C.R. & C.L., to Tony H. Pham, Senior Off. Performing Duties of the Dir., ICE, Rodney Cooper, Exec. Dir., LaSalle Corr., and Phil Bickham, Warden, Irwin Cnty. Det. Ctr. 1 (Sept. 21, 2020), https://democrats-homeland.house.gov/imo/media/doc/ICDC%20investigation%20letter.pdf [https://perma.cc/H6DU-D8B5].

75. Id.; Press Release, House Comm. on Oversight & Accountability, Chairs Thompson and Maloney Announce Subpoena Regarding Allegations of Mistreatment at Irwin County Detention Center (Nov. 25, 2020), https://oversightdemocrats.house.gov/news/press-releases/chairs-thompson-and-maloney-announce-subpoena-regarding-allegations-of [https://perma.cc/346B-8KL9] [hereinafter Comm. on Oversight & Accountability, Subpoena Announcement].

76. The House Committee on Homeland Security also investigated ICDC in conjunction with the Oversight Committee. It was the entity that formally issued the subpoena and is also a potential certifying agency. See Comm. on Oversight & Accountability, Subpoena Announcement, supra note 75.

77. Memorandum from Jeff Sessions, U.S. Att'y Gen., to Fed. Prosecutors Along the Sw. Border (Apr. 6, 2018), https://www.justice.gov/opa/press-release/file/1049751/download [https://perma.cc/LGF5-Y5PE].

sought to separate parents from their children at the border with the purpose of inflicting extraordinary trauma on them.[78] The trauma was not an incidental byproduct of the policy—it was the very point.[79] The federal government sought to inflict so much distress on parents and children seeking asylum that other families would be deterred from trying to seek refuge in this country.[80] Multiple congressional committees have investigated the family-separation policy, and each has the authority to issue U visa certifications for the affected families.[81]

By way of background, curbing asylum had been a central focus of the Trump Administration's immigration policy. On April 6, 2018, then–Attorney General Jeff Sessions announced that the government would institute a "zero tolerance" policy, mandating the prosecution of all persons who cross the United States border between ports of entry.[82] The purpose of the "zero tolerance" policy was to deter Central Americans from seeking asylum or otherwise coming to the United States.[83] As of 2021, the federal government "identified 3,913 children who were separated from their families at the U.S.–Mexico Border between July 1, 2017[,] and January 20, 2021, based on the 'Zero-

78. See Caitlin Dickerson, The Secret History of the U.S. Government's Family-Separation Policy, The Atlantic (Aug. 7, 2022), https://www.theatlantic.com/magazine/archive/2022/09/trump-administration-family-separation-policy-immigration/670604 (on file with the *Columbia Law Review*) ("[A] mountain of evidence shows that . . . [s]eparating children was not just a side effect [of the Zero Tolerance policy], but the intent. Instead of working to reunify families after parents were prosecuted, officials worked to keep them apart for longer.").

79. See Adam Serwer, The Cruelty Is the Point, The Atlantic (Oct. 3, 2018), https://www.theatlantic.com/ideas/archive/2018/10/the-cruelty-is-the-point/572104 (on file with the *Columbia Law Review*) ("The cruelty of the Trump administration's policies, and the ritual rhetorical flaying of his targets before his supporters, are intimately connected. . . . It is not just that the perpetrators of this cruelty enjoy it; it is that they enjoy . . . shared laughter at the suffering of others . . . ."). In the words of then–Attorney General Jeff Sessions, "We need to take away children." Dickerson, supra note 78 (internal quotation marks omitted) (quoting U.S. Attorneys' notes characterizing a phone call with Sessions, as recorded in a DOJ review of the family-separation policy).

80. See Dickerson, supra note 78 ("[Tom Homan, soon-to-be Acting ICE Director,] said he wanted to apply the perceived lessons of Operation Streamline to migrant families, by prosecuting parents who crossed the border illegally with their children . . . trigger[ing] an automatic family separation . . . as a way to deter migration to the United States.").

81. See infra notes 97–106 and accompanying text.

82. Memorandum from Jeff Sessions, supra note 77.

83. See Dickerson, supra note 78 ("Caravans of asylum seekers from Central America had formed, . . . and 24-hour coverage of them incited a new level of panic in the administration about border crossings. . . . [Then, Customs and Border Protection Commissioner Kevin] McAleenan took his most direct step to push for prosecuting parents, knowing that they would be separated from their children . . . . ").

Tolerance' policy."[84] The actual number of separated children may be far higher.[85]

Administration officials at the highest levels knew well before implementing the policy that it would harm families.[86] While serving as Secretary of Homeland Security, John Kelly stated that he "would do almost anything to deter the people from Central America" from migrating to the United States, including separating children from their parents.[87] After the forced separations began, Sessions confirmed that the goal was deterrence.[88] In May 2018, Kelly, who had since become President Donald J. Trump's Chief of Staff, callously dismissed any concern about the government's forced separation of a child from her mother, remarking: "The children will be taken care of—put into foster care *or whatever*."[89] Despite widespread condemnation and legal challenges, President Trump continued to defend the policy through December 2018 as a deterrent to migration from Central America when he tweeted, "[I]f you don't separate, FAR more people will come."[90] Sadly, the most senior members of the U.S. government intentionally chose to cause parents and small children, including infants and toddlers, extraordinary suffering to accomplish their policy objectives.

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84. Press Release, DHS, Family Reunification Task Force Provides Initial Progress Report and Announces Upcoming Reunification of 29 Families (June 8, 2021), https://www.dhs.gov/news/2021/06/08/family-reunification-task-force-provides-initial-progress-report-and-announces [https://perma.cc/5WR3-4TA7].

85. Dickerson, supra note 78 (reporting that government records showed at least 5,569 children were separated as of January 20, 2021).

86. See Jeremy Stahl, The Trump Administration Was Warned Separation Would Be Horrific for Children, Did It Anyway, Slate (July 31, 2018), https://slate.com/news-and-politics/2018/07/the-trump-administration-was-warned-separation-would-be-horrific-for-children.html [https://perma.cc/J6HL-HMTH]. Commander Jonathan White, a former HHS senior official, testified before Congress that he had warned the administration that implementing a family-separation policy would have harmful effects on the children, including "significant potential for traumatic psychological injury to the child." Id. The policy was launched a few weeks after he raised his concerns. Id. (internal quotation marks omitted) (quoting Oversight of Immigration Enforcement and Family Reunification Efforts, S. Comm. on the Judiciary, at 03:17:43 (July 31, 2018), https://www.judiciary.senate.gov/committee-activity/hearings/oversight-of-immigration-enforcement-and-family-reunification-efforts (on file with the *Columbia Law Review*)).

87. Philip Bump, Here Are the Administration Officials Who Have Said that Family Separation Is Meant as a Deterrent, Wash. Post (June 19, 2018), https://www.washingtonpost.com/news/politics/wp/2018/06/19/here-are-the-administration-officials-who-have-said-that-family-separation-is-meant-as-a-deterrent/ (on file with the *Columbia Law Review*) (internal quotation marks omitted) (quoting John F. Kelly).

88. Id.

89. Transcript: White House Chief of Staff John Kelly's Interview With NPR, NPR (May 11, 2018), https://www.npr.org/2018/05/11/610116389/transcript-white-house-chief-of-staff-john-kellys-interview-with-npr [https://perma.cc/FA7F-GZ55] (emphasis added).

90. Donald J. Trump (@realDonaldTrump), Twitter (Dec. 16, 2018), https://twitter.com/realDonaldTrump/status/1074339834351759363 [https://perma.cc/WZR2-PN9F].

Once the policy was implemented and immigration officers had separated children from their parents, DHS transferred children to the Office of Refugee Resettlement (ORR), "which is responsible for the long-term custodial care and placement of unaccompanied [noncitizen] children."[91] Meanwhile, separated parents were transferred to ICE custody.[92] But DHS failed to take even the most basic steps to record which children belonged to which parents, highlighting the government's utter indifference to the dire consequences of the policy on the separated families.[93] When the "Zero Tolerance" policy went into effect, ICE's system "did not display data from [Customs and Border Protection (CBP)] systems that would have indicated whether a detainee had been separated from a child."[94] As a result, when ICE was processing detained individuals for removal, it "made no additional effort to identify and reunite families prior to removal."[95] As emphasized by Judge Dana M. Sabraw in *Ms. L. v. ICE*, the agencies' failure to coordinate tracking of separated families was a "startling reality" given that

> [t]he government readily keeps track of personal property of detainees in criminal and immigration proceedings. Money, important documents, and automobiles, to name a few, are routinely catalogued, stored, tracked and produced upon a detainee's release, at all levels—state and federal, citizen and [noncitizen]. Yet, the government has no system in place to keep track of, provide effective communication with, and promptly produce [noncitizen] children. The unfortunate reality is that under the present system migrant children are not accounted for with the same efficiency and accuracy as *property*.[96]

At least four congressional committees have investigated the Trump Administration's family-separation policy. First, the House Energy and Commerce Subcommittee on Oversight and Investigations held a hearing on February 7, 2019, at which Chair Diana DeGette condemned the "cruel" and "shameful" policy that caused "unnecessary long-term harm" to thousands of children.[97] Second, at the House Judiciary Committee's

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91. Memorandum from John V. Kelly, Acting Inspector Gen., DHS, to Kevin K. McAleenan, Comm'r, U.S Customs & Border Prot., and Ronald D. Vitiello, Acting Dir., ICE 3 (Sept. 27, 2018) https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf [https://perma.cc/TES9-FK3G].

92. Id. at 2.

93. The DHS Office of Inspector General found that the "lack of integration between CBP's, ICE's, and HHS' respective information technology systems hindered efforts to identify, track, and reunify parents and children separated under the Zero Tolerance Policy" and that "[a]s a result, DHS has struggled to provide accurate, complete, reliable data on family separations and reunifications, raising concerns about the accuracy of its reporting." Id. at 9.

94. Id. at 9–10.

95. Id. at 10.

96. 310 F. Supp. 3d 1133, 1144 (S.D. Cal. 2018).

97. Examining the Failures of the Trump Administration's Inhumane Family-Separation Policy: Hearing Before the Subcomm. on Oversight & Investigations of the H.

hearing on February 26, 2019, Chair Jerrold Nadler promised to "hold the administration accountable for its indefensible and repugnant family-separation policy and for the injuries it has inflicted on thousands of children and families."[98] Nadler invoked the criminality of the policy, explaining, "When a stranger rips a child from a parent's arms without any plan to reunify them, it is called kidnapping."[99] The House Judiciary Committee launched a twenty-one-month investigation and issued a report with its findings.[100] Third, on March 26, 2019, the House Homeland Security Subcommittee on Border Security, Facilitation, and Operations held a hearing at which Chair Kathleen Rice explained, "Congress has a responsibility to continue questioning DHS's implementation of Zero Tolerance, its handling of families and children in its custody, its compliance with reunification efforts, and the standards used to determine if a family should be separated."[101] Finally, the House Oversight Committee investigated the family-separation policy for nearly three years. Its investigation began in July 2018,[102] included a subpoena for records in February 2019[103] and a hearing in July 2019,[104] continued into 2020,[105] and culminated with a hearing on February 4, 2021.[106]

Comm. on Energy & Com., 116th Cong. 4 (2019) (prepared statement of Rep. Diana DeGette, Chairwoman, Subcomm. on Oversight & Investigations).

98. Oversight of the Trump Administration's Family-Separation Policy: Hearing Before the H. Comm. on the Judiciary, 116th Cong. 1 (2019) (statement of Rep. Jerrold Nadler, Chairman, H. Comm. on the Judiciary).

99. Id. at 2.

100. See Majority Staff of Subcomm. on Immigr. & Citizenship of H. Comm. on the Judiciary, 116th Cong., The Trump Administration's Family-Separation Policy: Trauma, Destruction, and Chaos (2020), https://democrats-judiciary.house.gov/uploadedfiles/the_trump_administration_family_separation_policy_trauma_destruction_and_chaos.pdf?utm_campaign=4526-519 [https://perma.cc/BML9-GYN7] [hereinafter Trump Administration's Family-Separation Policy].

101. The Department of Homeland Security's Family-Separation Policy: Perspectives From the Border: Hearing Before the Subcomm. on Border Sec., Facilitation & Operations of the H. Comm. on Homeland Sec., 116th Cong. 3 (2019) (statement of Rep. Kathleen M. Rice, Chairwoman, Subcomm. on Border Sec., Facilitation & Operations).

102. See Letter from Mark Meadows, supra note 25.

103. Press Release, Comm. on Oversight & Accountability, Oversight Committee Approves First Subpoenas of the 116th Congress—And They Are Bipartisan (Feb. 26, 2019), https://oversightdemocrats.house.gov/news/press-releases/oversight-committee-approves-first-subpoenas-of-the-116th-congress-and-they-are [https://perma.cc/W847-XSZA].

104. The Trump Administration's Child Separation Policy: Substantiated Allegations of Mistreatment: Hearing Before the H. Comm. on Oversight and Reform, 116th Cong. (2019).

105. See Letter from Carolyn B. Maloney, Chairwoman, Comm. on Oversight & Reform, and Jamie Raskin, Chairman, Subcomm. on C.R. & C.L., to Chad F. Wolf, Acting Sec'y, DHS (Jan. 23, 2020), https://oversightdemocrats.house.gov/sites/democrats.oversight.house.gov/files/2020-01-23.CBM%20JR%20to%20Wolf-DHS%20re%20Child%20Separation.pdf [https://perma.cc/2NKR-QEEN] [hereinafter Letter from Reps. Maloney and Raskin].

106. See Accountability and Lessons Learned From the Trump Administration's Child Separation Policy: Hearing Before the H. Comm. on Oversight & Reform, 117th Cong. (2021).

All four of these congressional committees are permissible certifying authorities for U visas. As the regulations require, each is a federal "authority" that took "responsibility for the investigation" of thousands of family separations.[107] At the conclusion of its twenty-one-month investigation, the House Judiciary Committee concluded that "[d]espite full knowledge that hundreds of children would likely be lost to their families forever, the Administration chose to expand the pilot program into a permanent nationwide policy."[108] The Judiciary Committee further found that the family-separation policy "was driven by an Administration that was willfully blind to its cruelty and determined to go to unthinkable extremes to deliver on political promises and stop migrants fleeing violence from seeking protection in the United States."[109] Ultimately, the Committee found that "hundreds of migrant children may never be reunited with their parents."[110] Likewise, the House Oversight Committee stated that it was "deeply concerned by . . . the lack of clear and transparent processes" under which the children were taken from their families.[111] In reviewing a separate report on the Trump Administration's child separation policy, the Oversight Committee concluded, among other things, that "Attorney General Sessions and his top advisors misled key DOJ officials and other agencies about the purpose and implications of the child separation policy."[112]

These congressional findings provide a basis for qualifying offenses for the U visa. Among the U visa's qualifying offenses are "abduction," "kidnapping," and "any similar activity" under federal or state law.[113] Federal law defines these offenses as covering "[w]hoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds" a person "willfully transported in interstate or foreign commerce."[114] Federal officers sent many of the thousands of children they forcefully separated "to shelters in different states" than their parents.[115] DHS officials intentionally forced children across state lines far from their parents to

107. 8 C.F.R. § 214.14(a)(2) (2023); see also 8 U.S.C. § 1101(a)(15)(U) (2018) (referring to "[f]ederal . . . authorities investigating . . . criminal activity").

108. Trump Administration's Family-separation policy, supra note 100, at 3.

109. Id. at 21.

110. Id. at 22.

111. Letter from Reps. Maloney and Raskin, supra note 105, at 3.

112. Press Release, House Comm. on Oversight & Accountability, Oversight Committee Examines IG Report on Trump Administration's Policy of Separating Immigrant Children From Their Families (Feb. 4, 2021), https://oversightdemocrats.house.gov/news/press-releases/oversight-committee-examines-ig-report-on-trump-administration-s-policy-of [https://perma.cc/G3R2-TRDG].

113. 8 U.S.C. § 1101(a)(15)(U)(iii) (2018); see also USCIS, Instructions for Supplement B, supra note 45, at 2 (requiring petitioners for U visas to select the types of criminal activity to which they were subjected).

114. 18 U.S.C. § 1201(a)(1) (2018).

115. Dickerson, supra note 78.

prevent family reunifications.[116] Matt Albence, who oversaw the ICE division responsible for deportations, "suggested that the Border Patrol deliver separated children to HHS [which would often transport them across state lines] 'at an accelerated pace[]' . . . to minimize the chance that they would be returned to their parents."[117] For these families whose children were forcibly transported across state lines without their consent, the facts offer a basis for certifying U visas.

Another qualifying offense for the U visa is obstruction of justice.[118] Given that the Trump Administration failed to comply with multiple requests from the House Oversight Committee's investigation,[119] the Oversight Committee would be well within its power to issue U visa certifications based on this qualifying crime to families affected by the family-separation policy. According to a lawyer who investigated Zero Tolerance for a congressional committee, "DHS was lying to us and not giving us documents . . . . They very much withheld stuff from us, and I would catch them red-handed and flag it for them, and they're like, 'Oh well, we'll go back and look,' and it was a constant BS battle."[120] If there is sufficient evidence that the Trump Administration intimidated, threatened, or corruptly persuaded witnesses to withhold testimony or records from official proceedings, witness tampering[121] may also be a basis for qualifying offense for a U visa.[122]

Finally, international law arguments could be developed in support of U visa certifications. Commentators have argued that family separation

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116. Id. (detailing ICE official Matt Albence's concern that "if the parents' prosecutions happened too swiftly, their children would still be waiting to be picked up by HHS in Border Patrol stations, making family reunification possible" and noting that Albence "saw this as a bad thing").

117. Id. (quoting Matt Albence).

118. Section 1505 criminalizes efforts to "obstruct[] or impede . . . the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House." 18 U.S.C. § 1505.

119. Staff of House Comm. on Oversight & Reform, 116th Cong., Child Separations by the Trump Administration 4–7 (2019), https://oversightdemocrats.house.gov/sites/democrats.oversight.house.gov/files/2019-07-2019.%20Immigrant%20Child%20Separations-%20Staff%20Report.pdf [https://perma.cc/KVQ3-E27T].

120. Dickerson, supra note 78 (internal quotation marks omitted) (quoting an anonymous source who served as a lawyer for a congressional committee).

121. See 18 U.S.C. § 1512 (describing the elements of the crime of witness tampering).

122. One possible hurdle in seeing family separation as a crime is that it is also "a common consequence of criminal conviction." See Alexis Karteron, Family Separation Conditions, 122 Colum. L. Rev. 649, 650 (2022). Additionally, public discourse treats undocumented immigrants as criminals even if they are mothers. See Juliet P. Stumpf, Justifying Family Separation: Constructing the Criminal Alien and the Alien Mother, 55 Wake Forest L. Rev. 1037, 1043 (2020) (examining how "official discourse about asylum seekers at the southern border employed both the criminalization of parents and themes of child abuse and neglect to reframe family separation as a collateral consequence of border enforcement").

constitutes a crime against humanity under international criminal law.[123] According to medical experts affiliated with Physicians for Human Rights (PHR), a nonprofit organization, "the U.S. government's treatment of asylum seekers through its policy of family separation constitutes cruel, inhuman, and degrading treatment and, in all cases evaluated by PHR experts, rises to the level of torture."[124] The medical experts reached these conclusions based on the "pervasive symptoms and behaviors consistent with trauma" exhibited by the formerly separated families;[125] this pervasive trauma persisted even years after families had been reunified.[126] PHR has also noted that the family-separation policy constituted enforced disappearance.[127] When U.S. officials intentionally carried out family separations to cause severe pain and suffering in order to punish, coerce, or intimidate asylum seekers to give up their claims,[128] U visa certification may be appropriate based on the U.S. officials' actions.

As federal bodies authorized to investigate criminal activities, the aforementioned congressional committees have the authority to aid separated families by certifying their U visas.

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123. See Elena Baylis, White Supremacy, Police Brutality, and Family Separation: Preventing Crimes Against Humanity Within the United States, 2022 U. Ill. L. Rev. 1475, 1491–94 (arguing that the family-separation policy constituted psychological torture or the "enforced disappearance of persons" (internal quotation marks omitted) (quoting Int'l Law Comm'n, Rep. on the Work of Its Seventy-First Session, U.N. Doc. A/74/10, at 12–13 (2019) (reproducing draft Articles on Prevention and Punishment of Crimes Against Humanity))); Ediberto Román & Ernesto Sagás, A Domestic Reign of Terror: Donald Trump's Family Separation Policy, 24 Harv. Latinx L. Rev. 65, 106 (2021) (arguing that the Trump Administration should be tried before the International Criminal Court for its family-separation policy); Reilly Frye, Comment, Family Separation Under the Trump Administration: Applying an International Criminal Law Framework, 110 J. Crim. L. & Criminology 349, 368–72 (2020) (arguing that the Trump Administration's Zero Tolerance policy was implemented as "part of a widespread or systematic attack . . . directed against a civilian population" and thus constitutes a crime against humanity).

124. Hajar Habbach, Kathryn Hampton & Ranit Mishori, Physicians for Hum. Rts., "You Will Never See Your Child Again": The Persistent Psychological Effects of Family Separation 5 (2020), https://phr.org/wp-content/uploads/2020/02/PHR-Report-2020-Family-Separation-Full-Report.pdf [https://perma.cc/7VJJ-EJPH]; see also Brittney Bringuez, Kathryn Hampton, Ranit Mishori, Cynthia Pompa, Vidya Ramanathan & Barbara Robles Ramamurthy, Physicians for Hum. Rts., "Part of My Heart Was Torn Away": What the U.S. Government Owes the Tortured Survivors of Family Separation 2–3 (2022), https://phr.org/wp-content/uploads/2022/04/PHR_-Report_Deported-Parents_2022.pdf [https://perma.cc/9JK3-JL6G] (documenting the psychological harms experienced by migrant families subjected to the Trump Administration's family-separation policy).

125. See Habbach et al., supra note 124, at 3.

126. See Bringuez et al., supra note 124, at 38.

127. See Habbach et al., supra note 124, at 5.

128. The United Nations Convention Against Torture defines "torture" as an intentional act that causes severe physical or mental suffering for the purpose of coercion, punishment, intimidation, or for a discriminatory reason, by a state official or with state consent or acquiescence. U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 1, 1465 U.N.T.S. 85.

C. *Solitary Confinement*

Congressional investigations that reveal the misuse and overuse of solitary confinement in immigration detention also provide a basis for U visa certifications. The harmful impact of solitary confinement has long been known.[129] In 2013, ICE issued a directive stating that "[p]lacement of detainees in segregated housing is a serious step that requires careful consideration of alternatives" and "should occur only when necessary and in compliance with applicable detention standards."[130] The 2013 directive notes that "placement in administrative segregation due to a special vulnerability should be used only as a last resort and when no other viable housing options exist."[131] The directive further places a thirty-day limit on solitary confinement for disciplinary purposes, with some exceptions.[132] Yet, as congressional hearings have revealed, ICE and its contractors often misuse solitary confinement for individuals with mental illness, and immigrants are held in solitary for prolonged periods, including for months at a time.

The House Judiciary Committee's Subcommittee on Immigration and Citizenship held hearings in 2019 on the "Expansion and Troubling Use of ICE Detention." Whistleblower reports submitted in the course of those hearings highlighted ICE's troubling misuse of solitary confinement for immigrants with mental illness, including immigrants on suicide watch, as well as prolonged use of solitary confinement for fifteen-to-forty-five-day periods for disciplinary infractions such as "insolence" and "failure to follow an order."[133] Citing the lack of meaningful oversight and the government's awareness of the system's failures, Representative Pramila Jayapal noted on the record that an ICE supervisor had "warned that ICE's own medical service provider was 'severely dysfunctional and that preventable harm

129. See, e.g., Stuart Grassian, Psychiatric Effects of Solitary Confinement, 22 Wash. U. J.L. & Pol'y 325, 327 (2006) ("It has indeed long been known that severe restriction of environmental and social stimulation has a profoundly deleterious effect on mental functioning . . . ."); Craig Haney, Restricting the Use of Solitary Confinement, 1 Ann. Rev. Criminology 285, 299–301 (2018) ("The increasingly broad and deep scientific consensus on the painfulness and harmfulness of solitary confinement . . . has led . . . organizations to issue policy statements and recommendations that mandate significant restrictions on whether solitary confinement should or can be used . . . ."); Jeffrey L. Metzner & Jamie Fellner, Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics, 38 J. Am. Acad. Psychiatry & L. 104, 105 (2010) ("All too frequently, mentally ill prisoners decompensate in isolation, requiring crisis care or psychiatric hospitalization. Many simply will not get better as long as they are isolated.").

130. ICE, Directive 11065.1, Review of the Use of Segregation for ICE Detainees § 2 (2013), https://www.dhs.gov/sites/default/files/publications/segregation_directive.pdf [https://perma.cc/7PKC-CGA5].

131. See id.

132. Id. §§ 5.1–.3.

133. See Subcommittee on Immigration and Citizenship Hearings, supra note 26, at 177 (internal quotation marks omitted) (quoting regional jail report).

and death to detained people ha[d] occurred'" in the case of an immigrant with schizophrenia who committed suicide while held in solitary confinement.[134]

Hearings held by the House Committee on Homeland Security's Subcommittee on Oversight, Management, and Accountability revealed similar abuses, including deaths by suicide of immigrants placed in solitary confinement and government inspections of facilities that "fail[] to ensure compliance with ICE's own detention standards."[135] Testimony submitted to the subcommittee emphasized the "fatal consequences" of solitary, including two men at Stewart Detention Center who had "hanged themselves in their isolation cells" after they were placed in solitary confinement instead of receiving mental health care for their worsening schizophrenia symptoms.[136] Other abuses cited included the prolonged time in solitary; one immigrant was cumulatively detained for over nine hundred days in solitary.[137]

These practices, which violate ICE's own directives as well as federal detention standards and statutes, can constitute qualifying crimes for purposes of U visa certification.[138] Most relevant in the context of solitary confinement, USCIS has identified the qualifying crimes of "false imprisonment," "obstruction of justice," "unlawful criminal restraint," and "torture" as general crime categories that may qualify victims for U visas.[139]

In terms of obstruction of justice, multiple reports have documented the misuse of solitary confinement at ICDC as a measure to prevent the investigating or reporting of rights violations.[140] That conduct could constitute obstruction of justice under U visa regulations, which explain that

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134. See id. at 2 (quoting whistleblower reports).

135. Oversight of ICE Detention Facilities: Is DHS Doing Enough?: Hearing Before the Subcomm. on Oversight, Mgmt. & Accountability of the H. Comm. on Homeland Sec., 116th Cong. 11 (2019) (statement of Katherine Hawkins, Senior Legal Analyst, Project on Gov't Oversight).

136. Id.

137. Id. at 14.

138. Victims of Criminal Activity: U Nonimmigrant Status, USCIS, https://www.uscis.gov/humanitarian/victims-of-human-trafficking-and-other-crimes/victims-of-criminal-activity-u-nonimmigrant-status [https://perma.cc/43ZR-A989] [hereinafter USCIS, Victims of Criminal Activity] (last updated Mar. 20, 2023) (listing torture as a qualifying crime). Solitary confinement has been discussed as a form of torture in several pieces of scholarship. See infra note 147.

139. 8 U.S.C. § 1101(a)(15)(U)(iii) (2018); see also USCIS, Victims of Criminal Activity, supra note 138 (listing the qualifying crimes for victims' U visa eligibility).

140. See Priyanka Bhatt, Katie Quigley, Azadeh Shahshahani, Gina Starfield & Ayano Kitano, Violence & Violation: Medical Abuse of Immigrants Detained at the Irwin County Detention Center 2, 16, 18–19 (2021), https://projectsouth.org/wp-content/uploads/2021/09/IrwinReport_14SEPT21.pdf [https://perma.cc/G24T-NEZF] ("[A detained immigrant] experienced escalating sexual harassment and abuse from another detained

"[a] petitioner may be considered a victim" of obstruction of justice or witness tampering if they were "directly and proximately harmed by the perpetrator" and the offense occurred "as a means" to either prevent investigation or facilitate the perpetrator's abuse or control over the petitioner.[141]

Additionally, the definition of "false imprisonment" under Georgia law, for example, includes confinement and detention without legal authority[142] and could include solitary confinement when it is misused as a retaliatory measure. Similarly, as the congressional hearings and investigations by the DHS Office of Inspector General have demonstrated, facilities often do not meet the requisite ICE standards for solitary confinement,[143] and the crime of unlawful restraint[144] may therefore be certified.

The use of solitary confinement in immigration detention can also meet the definition of "torture" as set forth by the United Nations Special Rapporteur on Torture.[145] The Special Rapporteur on Torture has defined

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immigrant. Due to her history of sexual abuse, she was terrified of being sexually assaulted, so she reported this individual to ICDC guards. . . . [After], she was sent to the medical room, which is used for solitary confinement."); Alexandra Cole, ACLU Found. of Ga., Prisoners of Profit: Immigrants and Detention in Georgia 91 (2012), https://www.prisonlegalnews.org/media/publications/georgia_aclu_prisoners_of_profit_immigrants_and_detention_in_georgia_2012.pdf [https://perma.cc/ARZ6-QSEJ] ("Over two-thirds of the detainees interviewed expressed fear and concern at the possibility of complaining. Threats of being yelled at, of being placed in the mental health unit, or of being thrown into 'the hole' dominate their thoughts when they consider complaining."); Penn State L. Ctr. for Immigrants' Rts. Clinic & Project S., Imprisoned Justice: Inside Two Georgia Immigrant Detention Centers 48–50 (2017), https://projectsouth.org/wp-content/uploads/2017/06/Imprisoned_Justice_Report-1.pdf [https://perma.cc/8DH8-2SWR] ("Most detained immigrants interviewed for this report described segregation as a tool used for disciplinary purposes."); Mary Small, Dawy Rkasnuam & Silky Shah, Det. Watch Network, A Toxic Relationship: Private Prisons and U.S. Immigration Detention 5 (2016), https://www.detentionwatchnetwork.org/sites/default/files/reports/A%20Toxic%20Relationship_DWN.pdf [https://perma.cc/66MG-ZQNP] ("The use of solitary confinement, both due to overcrowding and as inappropriate or disproportionate punishment, is particularly consistent [across interviews of detained immigrants].").

141. 8 C.F.R. § 214.14(a)(14)(ii) (2023).

142. See Ga. Code Ann. § 16-5-41(a) (2023); cf. Scofield v. Critical Air Med., Inc., 52 Cal. Rptr. 2d 915, 924 (Cal. Ct. App. 1996) ("[T]he law of this state clearly allows a cause of action for false imprisonment notwithstanding the fact a plaintiff suffered merely nominal damage.").

143. See, e.g., Off. of Inspector Gen., DHS, OIG-23-13, Violations of Detention Standards at ICE's Port Isabel Service Processing Center 9 (2023), https://www.oig.dhs.gov/sites/default/files/assets/2023-02/OIG-23-13-Feb23.pdf [https://perma.cc/Q48F-9LX7] (concluding that "Port Isabel [d]id [n]ot [p]rovide [r]equired [s]ervices to [d]etainees in [s]egregation").

144. See Tex. Penal Code Ann. § 20.02 (West 2023).

145. See Press Release, UN Gen. Assemb., Special Rapporteur on Torture Tells Third Committee Use of Prolonged Solitary Confinement on Rise, Calls for Global Ban on Practice, U.N. Press Release GA/SHC/4014 (Oct. 18, 2011), https://press.un.org/en/2011/gashc4014.doc.htm [https://perma.cc/XUK4-C2Y7].

"solitary confinement" as twenty-two to twenty-four hours per day in physical and social isolation in a confined space.[146] After fifteen days, this prolonged solitary confinement can constitute torture and thereby qualify as a certifiable crime for purposes of a U visa.[147]

Indeed, the Special Rapporteur on Torture has specifically cited concerns about the routine use of solitary confinement in the United States, including for individuals with mental health conditions, which may "trigger and exacerbate psychological suffering, in particular in inmates who may have experienced previous trauma or have mental health conditions or psychosocial disabilities."[148] The conditions of solitary confinement vary depending on the facility in which immigrants are held, but individuals are typically housed in small, windowless cells with little, if any, time outside.[149] As the Special Rapporteur explained upon reviewing U.S. practice,

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146. Id.

147. Id. Studies have repeatedly documented the severe, negative impact of solitary confinement on mental and physical health. Just seven days of isolation can cause symptoms similar to physical torture, including "perceptual distortions and hallucinations; increased anxiety and nervousness; . . . severe and chronic depression; appetite loss and weight loss; heart palpitations; . . . headaches; problems sleeping; confusing thought processes; nightmares; dizziness; self-mutilation; and lower levels of brain function." ACLU, The Dangerous Overuse of Solitary Confinement in the United States 4 (2014), https://www.aclu.org/sites/default/files/field_document/stop_solitary_briefing_paper_updated_august_2014.pdf [https://perma.cc/FLP2-H7ML] (footnotes omitted). For examples of scholarship discussing solitary confinement as torture, see Jules Lobel, Prolonged Solitary Confinement and the Constitution, 11 U. Pa. J. Const. L. 115, 122 (2008) ("International law also supports the proposition that very lengthy, virtually permanent conditions of harsh solitary confinement constitute either torture or cruel, inhuman, and degrading treatment."); Allegra M. McLeod, Prison Abolition and Grounded Justice, 62 UCLA L. Rev. 1156, 1178–80 (2015) ("[T]he United Nations Special Rapporteur on Torture has found that certain U.S. practices of solitary confinement violate the U.N. Convention Against Torture and Other Cruel, Inhuman and Degrading Punishment. Numerous psychiatric studies likewise corroborate that solitary confinement produces effects tantamount to torture." (footnote omitted)); Alexander A. Reinert, Solitary Troubles, 93 Notre Dame L. Rev. 927, 965 (2018) (noting that the "Special Rapporteur concluded that the use of solitary confinement constitutes torture and other cruel, inhuman, or degrading treatment, depending on the circumstances" including "(1) punitive solitary confinement[;] . . . (2) pretrial solitary confinement as an intentional technique to aid interrogation or confessions; and (3) indefinite solitary confinement" (footnote omitted)); Samuel Fuller, Comment, Torture as a Management Practice: The Convention Against Torture and Non-Disciplinary Solitary Confinement, 19 Chi. J. Int'l L. 102, 109 (2018) ("Under Article 1 of the Convention against Torture, the U.N. considers disciplinary solitary confinement to be torture.").

148. Press Release, Off. of the High Comm'r for Hum. Rts., United States: Prolonged Solitary Confinement Amounts to Psychological Torture, Says UN Expert (Feb. 28, 2020), https://www.ohchr.org/en/press-releases/2020/02/united-states-prolonged-solitary-confinement-amounts-psychological-torture [https://perma.cc/YTA4-2R22] (internal quotation marks omitted) (quoting Nils Melzer, UN Special Rapporteur on Torture).

149. See, e.g., Off. of Inspector Gen., DHS, supra note 143; Ian Urbina & Catherine Rentz, Immigrants Held in Solitary Cells, Often for Weeks, N.Y. Times (Mar. 23, 2013), http://www.nytimes.com/2013/03/24/us/immigrants-held-in-solitary-cells-often-for-weeks.html (on file with the *Columbia Law Review*).

such confinement may cause "severe and often irreparable psychological and physical" harm, ranging from "progressively severe forms of anxiety, stress, and depression to cognitive impairment and suicidal tendencies."[150] The Special Rapporteur concluded that such "deliberate infliction of severe mental pain or suffering may well amount to psychological torture."[151]

CONCLUSION

Given Congress's in-depth investigations into each of these issues, one might wonder why congressional committees are not certifying U visas. The most obvious answer is fear of political pushback for helping undocumented immigrants. But the U visa bill was passed with broad bipartisan support.[152] To the extent some legislators were worried that immigrants would try to obtain U visas through fraud,[153] that concern should not exist in situations in which bipartisan congressional committees have investigated and documented the abuses against those immigrants. Failing to certify immigrants who are willing to cooperate in congressional investigations also makes them more vulnerable to removal, which undermines Congress's ability to investigate the alleged abuses.

Each of the foregoing case studies highlights an aspect of the brutality that immigrants face in U.S. detention as well as the investigations by congressional committees and subcommittees into those harms. Notably, congressional committees and subcommittees have the authority to do more than simply investigate these abuses and issue reports with their findings. Congressional committees and subcommittees can and should offer meaningful relief to immigrant survivors by certifying their U visas. While this certification process would not offer survivors lawful status in the United Status—since only USCIS can grant U visas—congressional certifications of U visas would be a meaningful step to redress harms inflicted by the U.S. government and its contractors. Simply put, Congress should use its authority to do what is legally authorized and morally and ethically required in the wake of government-caused harms.

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150. See Press Release, Off. of the High Comm'r for Hum. Rts., supra note 148 (internal quotation marks omitted) (quoting Nils Melzer, UN Special Rapporteur on Torture).

151. See id. (internal quotation marks omitted) (quoting Nils Melzer, UN Special Rapporteur on Torture).

152. Mariela Olivares, Battered by Law: The Political Subordination of Immigrant Women, 64 Am. U. L. Rev. 231, 249 (2014).

153. See Battered Immigrant Women Protection Act of 1999: Hearing on H.R. 3083 Before the Subcomm. on Immigr. & Claims of the H. Comm. on the Judiciary, 106th Cong. 60 (2000) (statement of Rep. Lamar S. Smith, Chairman, Subcomm. on Immigr. & Claims) (warning that the U visa program could "open up our immigration system to widespread fraud as [undocumented noncitizens] learn that the way to defeat our immigration laws is simply to claim to be battered").