

**STRENGTHENING INTERIOR ENFORCEMENT:
DEPORTATION AND RELATED ISSUES**

JOINT HEARING
BEFORE THE
SUBCOMMITTEE ON IMMIGRATION, BORDER
SECURITY AND CITIZENSHIP
AND
SUBCOMMITTEE ON TERRORISM, TECHNOLOGY AND
HOMELAND SECURITY
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**STRENGTHENING INTERIOR ENFORCEMENT:
DEPORTATION AND RELATED ISSUES**

THURSDAY, APRIL 14, 2005

UNITED STATES SENATE,
SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY AND
CITIZENSHIP AND THE SUBCOMMITTEE ON TERRORISM,
TECHNOLOGY AND HOMELAND SECURITY, COMMITTEE ON THE
JUDICIARY,
Washington, DC.

The Subcommittees met, pursuant to notice, at 2:34 p.m., in room SD-226, Dirksen Senate Office Building, Hon. John Cornyn, Chairman of the Subcommittee on Immigration, Border Security and Citizenship, presiding.

Present: Senators Cornyn, Kyl, Hatch, Sessions, Coburn, and Kennedy.

**OPENING STATEMENT OF HON. JOHN CORNYN, A U.S.
SENATOR FROM THE STATE OF TEXAS**

Chairman CORNYN. Good afternoon. This joint hearing of the Senate Subcommittee on Immigration, Border Security and Citizenship and the Subcommittee on Terrorism, Technology and Homeland Security will come to order.

First, I want to thank Chairman Specter for scheduling today's hearing and to say that once again, I am pleased that this hearing today is a joint hearing of two committees that have a vital interest in the subject we are going to discuss.

As we noted last week, Senator Kyl and I plan to work together through these hearings and, of course, in negotiations to address problems facing our immigration system.

I also want to express my gratitude to our ranking members of both Subcommittees, Senator Kennedy, the Ranking Member of the Immigration Subcommittee, and Senator Feinstein, the Ranking Member of the Terrorism Subcommittee, as well as their staffs, for working so diligently to make this hearing possible.

While traditional immigration issues do not always involve terrorism issues, we need to remember that terrorists desiring to enter the country explore illegal entry, alien smuggling, and other ways to exploit our immigration laws to facilitate entry into the United States. That is why having these two subcommittees jointly participate in these enforcement hearings brings important perspectives and depth to our review of these issues.

No serious discussion of comprehensive immigration reform is possible without a review of our Nation's ability, or maybe we should say inability at present, to secure its borders and enforce its

immigration laws. These discussions must necessarily include providing sufficient tools and resources to keep out of our country those who should be kept out, to identify those in our country who should be apprehended, and to remove from this country those the Government orders deported.

These issues continue to dominate public discussions across the country and are among the most significant topics facing our Nation today. We are even finding that they are creeping into the war supplemental debate that we are having on the floor right now, unfortunately, from my standpoint.

Just last month, President Bush met with leaders of Canada and Mexico in my home State to discuss, among other things, border security, and I hope today's hearing will build on that discussion.

This is the second in a series of hearings planned on strengthening enforcement. In our first hearing, we examined the challenges faced by our inspectors at ports of entry, including the need for adequate training, the need to provide them with sufficient relevant information, and the need for document integrity.

Beyond today's hearing, I hope to continue this series later this month by examining the tools and resources needed to protect our borders along the perimeter of the country in between authorized ports of entry and other issues important and relevant to this discussion. But, today we will focus on the challenges to adequate enforcement of our immigration laws in the interior of our country, away from the borders.

Generally, when people talk about immigration enforcement, they naturally refer to Border Patrol agents, and Border Patrol agents are critical to the enforcement process. However, illegal immigration issues are not limited to the border or to border States. Equally important are those immigration investigators, detention officers, and other professionals responsible for locating, detaining, and removing those who are in this country in violation of our laws.

Recent events have highlighted the importance of these interior enforcement issues, including intelligence professionals expressing concerns that terrorists intend to surreptitiously enter our country. These concerns are striking given two significant events recently reported by the Homeland Security Department. First, DHS discovered an elaborate tunnel under the California-Mexico border, complete with a cement floor and intercom connecting a house in Mexico to a home in California. Additionally, ICE agents recently rounded up more than 100 gang members from the violent Central American gang MS-13, all of whom were in this country illegally.

Both of these examples—and they are only two examples—illustrate the emerging national security threat that worries intelligence officials as established smuggling routes and violent gangs can easily facilitate terrorists entry into this country for the right price.

Today's hearing addresses this critical portion of our immigration system because no country can effectively carry out its sovereign duty to enforce its laws unless it can effectively apprehend those who should be arrested and efficiently removed from the country. We must scrutinize these issues.

Unfortunately, there are several recent decisions from the United States Supreme Court that may require Congress to act again in this area. These decisions that we will talk about some during this hearing require the Government to release aliens who have been ordered removed from our streets. I intend to ask our witnesses today about the types of aliens ordered removed who have been released into our streets.

Also, I fear that today's hearing will amply demonstrate that we face serious problems with our deportation system that impede the enforcement of our final orders of deportation, particularly as it relates to those who have committed crimes in our country while guests. Simply put, our Nation's process for deporting individuals who are not lawfully present is over-litigated and under-resourced over-lawyered and under-equipped. We must find a better way of removal because if we are not serious about deporting those who have exhausted all of the remedies and who are under final orders of deportation, we can never claim to be serious about reform.

Additionally, we will examine various related issues associated with detention of those here illegally. Specifically, today's witnesses will address detention bed space limitations, alternatives to detention, the difficulty of locating those who abscond, and other alternatives such as using MOUs, memorandums of understanding, with State and local law enforcement, like those already being used in Alabama and Florida.

We will discuss the investigative priorities of interior immigration agents. I hope to hear how they intend to meet their priorities and how they intend to balance them with the approximately 6,000 ICE agents available to address the approximately 10 to 12 million people here illegally. This obvious disparity in numbers is something that we must address.

Our interior enforcement personnel are highly dedicated and professional. They face monumental tasks and carry out their assignments diligently. I hope to hear today how Homeland Security plans to enhance their enforcement efforts and what impediments the Justice Department has identified to effectively removing those ordered removed.

[The prepared statement of Senator Cornyn appears as a submission for the record.]

With that, I would like to turn the floor over to my colleague, the Chairman of the Terrorism Subcommittee, Senator Kyl, for any comments he might wish to make.

**OPENING STATEMENT OF HON. JON KYL, A U.S. SENATOR
FROM THE STATE OF ARIZONA**

Chairman KYL. Thank you, Senator Cornyn.

The purpose of this hearing has been well outlined by Senator Cornyn. We are two Subcommittees today conducting this hearing, not just one, and so we focus both on the terrorism and homeland security implications as well as the immigration implications of the policies that you are going to be discussing today. So we welcome you to this hearing and look forward to your testimony.

As was noted, we are going to examine the challenges facing the Department of Homeland Security as it goes about the business of apprehending and detaining and removing illegal immigrants from

the interior of our country. We will also examine the challenges facing the Department of Justice as it litigates immigration cases in the Federal courts.

Let me take this opportunity first to thank you, Mr. Cohn. You know that we appreciate—many Members of Congress I can certainly speak for appreciate the work that the Department of Justice does to defend and maintain the integrity of the immigration laws in our courts. The Office of Immigration Litigation and the U.S. Attorney's Offices throughout the country have kept the quality of representation high even as the number of immigration cases has soared.

We are also conscious of the fact that you are doing this job nevertheless faced with constraints on resources, as Senator Cornyn noted, and we would like to learn from you today, among other things, what Congress might be able to do to assist you in this area, in addition to taking action on the legislative changes that were discussed in your written statement.

And, Mr. Cerda, I also want to congratulate you and the Department of Homeland Security on the work that Detention and Removal Operations is doing to capture and hold and remove the illegal aliens from our country. I am impressed with the long-range strategic vision that Immigration and Customs Enforcement has formulated for dealing with the absconders and criminal fugitives who are at large in the United States. And I am especially pleased with the efforts to track and locate the sexual predators who would prey on our children. I understand you have located some 5,000 of them. We need to find every one of them and deport them back where they came from.

We are aware of the budget and resource problems that ICE is having, and, again, we would like to have you be as frank as possible in this hearing in advising of what you need to fully enforce our immigration laws from the point of apprehension to the point of removal.

Also, I would like to welcome the second panel, welcome David Venturella from the U.S. Investigative Services and Lee Gelernt from the American Civil Liberties Union. We are also looking forward to your testimony today.

And, again, Chairman Cornyn, thank you for co-chairing this hearing.

Chairman CORNYN. Well, thank you, Senator Kyl.

As you can see, we have got a number of our colleagues here with us indicating the nature of the level of interest.

Chairman KYL. And as we speak, here comes Senator Kennedy. I was going to mention Senator Feinstein will be delayed.

Chairman CORNYN. I understand Senator Feinstein may be delayed. She is the co-Chair of the Subcommittee along with Senator Kyl. But, to the ranking member of the Immigration, Border Security and Citizenship Subcommittee, your timing could not have been better, Senator Kennedy, and the floor is yours, sir.

**STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR
FROM THE STATE OF MASSACHUSETTS**

Senator KENNEDY. Well, thank you very much, Mr. Chairman, and I thank our witnesses. I apologize. There is a lot going on today here in the Senate, as always.

So I thank you, Mr. Chairman, for calling this important hearing on immigration enforcement. The current enforcement has reached an all-time high in terms of deportation. In fiscal year 2004, we deported nearly 160,000 people. The plenary power doctrine gives Congress the authority to deport non-citizens, including long-time lawful permanent residents. But Congress has a responsibility as well, and so do the courts, to see that non-citizens receive due process and that the executive branch is fairly and justly implementing the law. Yet some current proposals would curtail the judicial review for immigrants, and any limitations to rights guaranteed under the Constitution deserve careful and deliberate consideration. Habeas corpus is a bedrock principle of U.S. law, reaching back to the Magna Carta, six centuries before our Constitution. It declared that no free man shall be taken, imprisoned, or in any other way destroyed except by the lawful judgment of his peers or by the law of the land; to no one will we sell, to no one will we deny or delay right or justice.

Habeas corpus is a fundamental principle of American justice. It is called the Great Writ for a reason: because it means justice for people wrongly detained. We owe it to future generations not to undermine the values embedded in our Nation's great legal tradition.

These basic principles and values are under siege by some today and have led to a rise in anti-immigrant activism. Last month, a group of college students in Texas held a "Catch an Illegal Immigrant Day." In our previous Subcommittee hearing, we were told that vigilantes, as President Bush called them, had convened to watch the Southern border and catch immigrants all month. One rancher said he would shoot every single one of them if he had his way. Obviously, vigilante justice violates everything America stands for, and we cannot be content with rhetoric alone against it.

I am looking forward to hearing testimony today on the detention of asylum seekers, men and women who have stood alone, often a great personal cost, against hostile governments for fundamental principles such as freedom of speech and religious liberty. Yet these courageous persons are often imprisoned in U.S. jails when they reach our shores. A recent report by the bipartisan Commission on International Religious Freedom criticized the incarceration used to detain asylum seekers because they are often held alongside criminals in stark conditions, under constant surveillance, 24-hour lights, moved from place to place using shackles. The Commission recommended specific detention standards to improve the plight of asylum seekers and proposed an Office of Refugee Coordinator.

I look forward to today's hearing on all these issues and working with my colleagues to deal with the abuses.

I thank the Chair.

Chairman CORNYN. Thank you very much, Senator Kennedy.

The former Chairman of the full Senate Judiciary Committee, Senator Hatch, is going to have to leave here very quickly and has

asked to say just a few words by way of an opening statement, and I cannot ever—well, rarely could I—say no to him. But, I am going to use the better part of discretion and say please go ahead.

**STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM
THE STATE OF UTAH**

Senator HATCH. Well, thank you, Mr. Chairman that means a lot to me, and I appreciate your courtesy to me.

Let me first say that I am pleased that important immigration issues are being discussed in both the House and the Senate, and I suppose we do need to look at comprehensive immigration review and reform. It is absolutely imperative for us to reinforce our borders and, I think, fix a broken immigration system. So I look forward to this ongoing process.

But let me just say this: Last session, I sponsored FILA, the Fairness in Immigration Litigation Act, because it makes no sense for criminal aliens to get added rights. Now, I plan to reintroduce this bill soon. FILA would reform the judicial review process and streamline criminal alien appeals. The bill levels the playing field between foreign-born nationals who have been convicted of crimes and those who have not. FILA would also curtail the rising number of immigration-related habeas corpus claims filed in the Federal courts since 1996.

Now, I understand that some groups opposed my Fairness in Litigation Act last year that the bill eliminated judicial review, and they have continued that claim as attempts are being made to streamline immigration appeals this year.

My bill does allow constitutional claims and legal questions to be reviewed in the courts of appeals, and I know the House included a similar provision in their bill last year, which was H.R. 418, under their Section 105.

I just wanted to make that point because I think it is important that we get on top of some of these issues while trying to be fair and trying to do what is right. And I intend to continue to work to try and get on top of these issues, and I really appreciate the efforts of you, Mr. Chairman, Chairman Kyl, Senator Kennedy, and others in trying to resolve the many difficult problems that we have in immigration. And I just want to personally thank you for giving me this little bit of time.

Chairman CORNYN. As Senator Kyl noted, we are pleased to have a distinguished panel with us today, and I will introduce the first panel and ask them to—

**STATEMENT OF HON. TOM COBURN, A U.S. SENATOR FROM
THE STATE OF OKLAHOMA**

Senator COBURN. Mr. Chairman? Mr. Chairman, might I be recognized for a minute? I just want to make a point of clarification. And I will not enforce this rule, but we received two testimonies last night by staff memo which I would like to put in the record, one at 6:11 p.m. and one at 6:38 p.m., to be prepared for this testimony.

The Committee rules say that the testimony has to be available 24 hours prior to the Committee hearing, and although I will not enforce that, I will say to the witnesses that you are not a bit

busier than we are. And you have known about this hearing for a period of time, and for us not to have your testimony on a timely basis limits our ability to, number one, correctly understand your positions, but also to ask pertinent and appropriate questions. And so I would just put on notice that I will ask for an enforcement of the rule on any further hearings. I have told that to Senator Specter as well on the general Committee, because I want to be able to be prepared. And I think it is inappropriate that, if we are going to have the rules, we are not going to enforce them because the very purpose of the rule is to allow us to do our jobs more effectively and more efficiently.

And, with that, I would yield back.

Chairman CORNYN. Thank you, Senator Coburn. Your desire to be well prepared for these hearings is commendable, in my view.

Jonathan Cohn is Deputy Assistant Attorney General. He graduated from the University of Pennsylvania in 1994 and then Harvard Law School in 1997. He clerked for Judge O'Scannlain on the Ninth Circuit and for Justice Clarence Thomas on the United States Supreme Court. He has worked for the law firms of Wachtell, Lipton, Rosen & Katz and Sidley Austin Brown & Wood. He is now the Deputy Assistant Attorney General for the Civil Division with the Department of Justice and is in charge of their Office of Immigration Litigation.

Joining Mr. Cohn on our first panel is Victor Cerda. He is the Director of Detention and Removal for the Department of Homeland Security. He was a former chief of staff for the Immigration and Naturalization Service Commissioner James Ziegler and brings a vast amount of immigration experience to the table.

The Committees welcome both of you, and we would be pleased to hear your statements. I would like for you to confine those to 5 minutes, and that will give us plenty of chance then to follow up with appropriate questions. And, of course, your written statements will be made part of the record, without objection, so you do not need to worry that we do not have that before us.

With that, Mr. Cohn, we would be glad to hear your opening statement.

STATEMENT OF JONATHAN COHN, DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. COHN. Thank you, Chairman Cornyn, Chairman Kyl, and members of the Subcommittees, for inviting me to testify today.

At the Department of Justice, we are confronted with an overwhelming flood tide of immigration cases, and we are faced with the significant flaws that current exist in our Nation's immigration laws. Today I would like to talk about two of these flaws, both of which can be fixed legislatively.

The first of these flaws concerns the judicial review of criminal aliens' removal orders, namely, the *St. Cyr* problem. Since 1961, Congress has consistently provided that only the courts of appeals and not the district courts may review deportation and removal orders. This is important because it limits the amount of time an alien can delay his removal through seeking judicial review. He gets one layer of review and not two.

Moreover, district court review is unnecessary because the alien has already typically received multiple levels of administrative review before the case even reaches Federal court.

In 1996, Congress attempted to streamline judicial review for criminal aliens even further. Indeed, Congress tried to eliminate judicial review of their removal orders entirely. Nonetheless, despite Congress' efforts to limit judicial review, the Supreme Court expanded it just 5 years later.

In *INS v. St. Cyr*, the Supreme Court held that criminal aliens, whom Congress decided should have no judicial review, are actually entitled to more review than they had before and more review than non-crimina aliens received. Specifically, the Court held that as a statutory matter, criminal aliens could seek habeas review of their removal orders. With habeas review, the criminal alien gets review in district court and on appeal in the courts of appeals—two levels, not one.

The result of *St. Cyr* is that Congress's 1996 reforms are turned on their head. The beneficiaries of this include child molesters, like Oswaldo Calderon-Terrazas, who was convicted of two counts of sexual abuse for drugging and then raping a 15-year-old girl. Calderon-Terrazas was able to delay his removal for 2 years by filing a habeas action in district court and then an appeal to the Fifth Circuit. To prevent this from happening in the future, Congress should pass Section 105 of H.R. 418, the REAL ID bill, which would clarify that judicial review of removal orders is available solely in the courts of appeals and now in the district courts. Quite significantly, unlike the 1996 reforms, this bill does not attempt to eliminate judicial review, but simply restores such review to its former settled forum, back in 1961 to 1996, the courts of appeals.

Moreover, the bill complies with *St. Cyr*, in which the Court said in no uncertain terms that Congress could, without raising any constitutional questions, provide an adequate substitute to habeas review through the courts of appeals. Accordingly, I encourage Congress to enact this reform.

The second flaw I would like to discuss is equally troubling. Sometimes it is difficult for the executive branch to remove terrorists or criminal aliens who present a danger to the community. When an alien cannot be removed, there are basically two options for the United States: one, release him into the American public; or, two, detain him.

Before 1996, there was a 6-month limit on the detention of deportable aliens who are ordered removed. Thus, after 6 months, the alien had to be released irrespective of the danger he posed. Recognizing this problem, in 1996 Congress eliminated the 6-month limitation. But 5 years later, however, the Supreme Court held, as a matter of statutory construction, that the 6-month limit still generally remained, and this past term the Supreme Court extended this holding to cover aliens who are stopped at the border.

Among the aliens that will benefit are criminals who have murdered their wives, molested young children, and brutally raped several women. To give an example, Carlos Rojas-Fritze sodomized, raped, beat, and robbed a stranger in a public restroom and called it "an act of love." I understand that DHS and the Public Health Service are currently working on his conditional release into the

American public on account of *Zadvydas* and *Suarez-Martinez*, the Supreme Court decisions.

Another example is Tuan Thai, who has raped, tortured, and terrorized women and vowed to repeat his grisly acts. Among other crimes, Mr. Thai repeatedly raped his friend's girlfriend over the course of several months, beginning while she was 6 months' pregnant. He then monitored her phone calls and threatened to poison her with cocaine and harm her other children if she tried to kick him out of the house. He also threatened to beat up his own girlfriend slowly until she died. And he later threatened to kill his immigration judge and prosecutor after his release. Needless to say, Tuan Thai should not be released, and I respectfully urge Congress to pass a law permitting the continued detention of aliens like Tuan Thai.

Thank you.

[The prepared statement of Mr. Cohn appears as a submission for the record.]

Chairman CORNYN. Thanks, Mr. Cohn.

Mr. Cerda, we would be glad to hear from you.

STATEMENT OF VICTOR X. CERDA, ACTING DIRECTOR OF DETENTION AND REMOVAL OPERATIONS, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, DEPARTMENT OF HOMELAND SECURITY, WASHINGTON, D.C.

Mr. CERDA. Good afternoon, Chairman Cornyn, Chairman Kyl, and distinguished members of the Committee. My name is Victor Cerda, and I am the Acting Director for Detention and Removal Operations at the Bureau of Immigration and Customs Enforcement. It is my privilege to appear before you today to discuss DRO's mission to promote public safety and national security.

The role that DRO plays is recognized in our strategic plan, "Endgame," which seeks to reach a point where for every order of removal issues, a removal is effectuated. While we have a significant road ahead to achieve these results, I am pleased to say that our recent accomplishments indicate that we are moving in the right direction.

Unlike the prior INS organizational structure, DRO now is a distinct law enforcement division in ICE that reports directly to the Assistant Secretary. The DRO field chain of command was also improved with the creation of direct reporting lines from the field offices to headquarters management. These DHS changes recognize the importance of the DRO role in enhancing the integrity of our immigration system and supporting the Department's national security mission.

DRO's core mission is the apprehension, detention, and removal of deportable aliens, the management of non-detained aliens, and the enforcement of removal orders. DRO is also implementing an aggressive national fugitive operation program that targets fugitive aliens who have ignored judicial orders of removal. Another part of the enhanced DRO role in immigration enforcement is the Criminal Alien Program and the strategic approach of targeting criminal aliens regardless of their location or stage of prosecution.

I would now like to share with you some of ICE's accomplishments showing the positive direction in which we are moving and

describe some initiatives implemented in order to achieve better enforcement results.

Record removal numbers. In fiscal year 2004, ICE removed 160,000 aliens from the United States, including 84,000 criminal aliens. Since the creation of DHS, ICE has removed approximately 302,000 aliens.

Record number of fugitive apprehensions. In fiscal year 2004, ICE had 16 fugitive operations teams deployed across the country. These teams apprehended a record 11,000 fugitive aliens with final orders of removal, an increase of 62 percent from the prior fiscal year. Moreover, 458 of these fugitives were individuals with records of sexual offenses against children—a high priority for ICE under Operation Predator.

Alternatives to detention. With the support of Congress, we are exploring alternatives to detention—innovative approaches that may allow us to released those aliens who do not pose national security or public safety risk—while at the same time ensuring that they comply with court hearing dates and removal orders. We have deployed electronic bracelet capabilities and telephonic voice recognition systems to all our field offices, and the Intensive Supervision Alien Program piloted in eight cities is out there with the goal of reversing the historically abysmal rates of compliance with hearing dates and removal orders.

We are also trying to improve the removal process by focusing on enhanced performance. For example, one of the biggest delays we face in removing aliens is the timely issuance of travel documents from foreign governments. We are working aggressively with the Department of State and foreign embassies to identify ways to facilitate the issuance of travel documents. Similarly, we have centralized the process for arranging country clearances for escort removals, are working closely with the Justice Prisoner Alien Transportation System, and continue to work with charter and commercial airline companies to facilitate removal scheduling.

Providing timely information to State and local law enforcement. Operating 24 hours a day, the Law Enforcement Support Center provides local, State, and Federal law enforcement agencies with timely immigration status and information on aliens suspected or convicted of criminal activity. In fiscal year 2004, the LESC responded to more than 667,000 requests for information.

Worksite enforcement. ICE worksite enforcement focuses on unauthorized workers employed in sensitive security sites. Operation Tarmac specifically targets employers who hire unauthorized workers and give them access to sensitive airport areas. ICE has conducted investigations at 196 airports, audited nearly 6,000 businesses, obtained 775 criminal indictments, and arrested over 1,000 unauthorized alien workers as part of this operation. We are doing similar worksite enforcement operations for nuclear facilities, defense facilities, shipyards, and transportation sites.

These are just a few of ICE's immigration enforcement accomplishments. We should be proud of our rich tradition of being a Nation of immigrants. I personally am a product of that rich tradition. At the same time, the United States has a rich tradition of respect for the rule of law and the integrity of our legal system. Respect for immigration laws should not be the exception.

I thank you for the opportunity to testify before the Committee. I request my statement to be included in the record, and I look forward to your questions.

[The prepared statement of Mr. Cerda appears as a submission for the record.]

Chairman CORNYN. Thank you, Mr. Cerda.

We will start a 5-minute round of questions and go until we exhaust the questions or exhaust the panel, whichever comes first.

Let me ask first, Mr. Cohn, the *St. Cyr* decision by the United States Supreme Court, you said, provides criminal aliens more judicial review than aliens who have not committed a crime. Is that your position?

Mr. COHN. That is absolutely correct, Senator Cornyn.

Chairman CORNYN. And is that because the Court said that unless Congress was more explicit, there would be presumed not only to be review at the court of appeals, but there would be access to the writ of habeas corpus.

Mr. COHN. That is exactly right, Senator.

Chairman CORNYN. Is that something in your view that, if Congress so chose to make sure that criminal aliens did not have more review than those who were here and who have not committed crimes, that we can do so by explicit statutory language?

Mr. COHN. That is exactly right. Indeed, the Supreme Court invited Congress to do so or expressly allowed it to do so in Footnote 38 of the *St. Cyr* opinion. The Supreme Court expressly said that review can be removed from district court into the courts of appeals.

Chairman CORNYN. You talked about two other decisions. One is the *Zadvydas* decision and the other, I believe, is the *Suarez-Martinez* decision, which the Court said that you can only detain aliens for 6 months and then you must release them, even if their country of origin is unwilling to accept them back, simply release them into the general population in the United States.

What sort of aliens are being released from detention because of these decisions?

Mr. COHN. Senator Cornyn, the aliens that are being released include murderers, rapists, and child molesters.

On the eve of *Suarez-Martinez*, there were roughly 920 aliens, dangerous criminal aliens, in detention who have since been released or who are in the process of being released. These aliens include Mr. Carlos Rojas-Fritze, the person who thought rape was an act of love.

It also includes aliens like Lourdes Gallo-Labrada who literally set her boyfriend on fire.

It also includes Guillermo Perez-Aguillar who repeatedly committed sex crimes against children.

These are among the aliens that have to be released as a result of the Supreme Court's decisions in *Zadvydas* and *Suarez-Martinez*.

Chairman CORNYN. Well, you mentioned cases where people have committed crimes, and very serious crimes, but we are not just talking about people who committed crimes; we are talking about suspected terrorists too. One thing clear in *Zadvydas* is that it is constitutional to hold a small segment of particularly dangerous individuals such as suspected terrorists. Does the Department of Jus-

tice believe that Section 236(a)'s indefinite detention of terrorists is constitutional in light of the discussion in *Zadvydas*?

Mr. COHN. We do, Senator. We believe that 236(a) is constitutional because *Zadvydas* expressly said—first of all, *Zadvydas* was not a constitutional holding. We should be clear about that. *Zadvydas* simply was a statutory holding. It addressed the scope of the currently existing statute 241(a)(6). The Supreme Court avoided the constitutional issues. It has no constitutional holding.

Moreover, on the issue of terrorism and national security, as you noted very correctly, the Supreme Court said that special circumstances, including terrorism, are ones in which indefinite detention could be permissible. We believe that 236(a) is constitutionally permissible.

Chairman CORNYN. And just to clarify, when you say the Court avoided the constitutional issue and dealt with the statutory issue, that is a traditional approach by a Court to deal with the statutory problem that Congress could fix, as opposed to a constitutional defect that Congress cannot fix. Is that right?

Mr. COHN. That is absolutely correct, Senator.

Chairman CORNYN. Does the Department of Justice believe that Congress can constitutionally authorize extended detention of suspected terrorists, serious foreign policy threats, and others deemed a danger to the community as opposed to those who are apprehended merely for, let's say, a visa violation?

Mr. COHN. We do, Senator. First of all, again, as noted, *Zadvydas* and *Suarez-Martinez* left the door open because they did not resolve the constitutional issue. Moreover, roughly 50 years ago, in the *Mazai* case, the Supreme Court held that indefinite detention is permissible with respect to aliens who are stopped at the border and excluded.

With respect to those who made an entry, the calculus is a little bit different because these aliens do have greater due process rights. But it is important to note in this context we are only dealing with aliens who have been ordered removed. And at that point, those who have made an entry are on equal footing with those who have not made an entry. The Fifth Circuit and the Tenth Circuit have so recognized, and they upheld the constitutionality of indefinite detention.

Moreover, it is important to note they were talking only about a very narrow class of aliens, as you pointed out, aliens who are a significant danger to the national security, foreign policy, or the community—a very narrow, targeted group of aliens, and that explains why it is constitutional.

Furthermore, we endorse the procedural protections that Congress provided in 236(a) and that ensures that all aliens receive the process to which they are due.

Chairman CORNYN. Thank you, Mr. Cohn. I did not mean to just pick on you. I have some questions for Mr. Cerda, but my time is up here for the first round. So, let me turn the floor over to Senator Kennedy for any questions he may have.

Senator KENNEDY. Thank you very much, and this has been interesting and it is obviously enormously troublesome.

All of these individuals have actually been to jail, have they? They were all sentenced? Were they all sentenced under the old guidelines, Mr. Cohn?

Mr. COHN. Yes, Senator. The aliens in the *Zadvydas* context have all served time in jail. That is correct.

Senator KENNEDY. Let me just ask both of you about the vigilantes, whether the Justice Department and the Department of Homeland Security has a position on those. Do you have a position? Is it written up? Will you provide it for us? I know this is not directly probably in the Civil Division, and in Homeland Security you probably have something. If not, can you provide it for us? Or if you do know it, can you state it?

Mr. COHN. I am sorry, Senator—

Senator KENNEDY. On vigilantes, what exactly is the Department of Justice position with regard to vigilantes now on the border, on the Arizona border?

Mr. COHN. At this point, Senator, I probably should not comment on that because the scope of my testimony has been limited to the issues of *St. Cyr* and *Zadvydas*.

Senator KENNEDY. Mr. Cerda?

Mr. CERDA. Senator, I am not in a position either to comment on that. It really does not impact the Detention and Removal Operations side.

Senator KENNEDY. Well, you have responsibility of detention and removal, and as the Acting Director of Detention and Removal for Homeland Security, you don't have any position? Because the vigilantes are obviously involved in either—I guess some detention and some removal on the border. But that does not come across your plate?

Mr. CERDA. I am not aware of any specifics to that, Senator, so I am not prepared to comment.

Senator KENNEDY. All right. Well, if you can find out if there is one, I would be glad to have it, because it would seem to me that the Homeland Security would have at least some position on this since it is directly related to people who are at the border. And there have been reports of vigilantes tripping detection devices for border crossers and other kinds of activities which are directly related to Homeland Security. So I just was interested to see whether you have some—if there is a policy or if you want to submit it, we would be glad to have it. I have not seen one yet from the Department, but if you have it, we would like to have it.

Mr. CERDA. I will follow up with our Congressional Office, Senator.

Senator KENNEDY. Thank you, Mr. Chairman.

Chairman CORNYN. Senator Kyl?

Chairman KYL. Thank you. I might mention to the Senator from Massachusetts, as you may imagine, our newspapers and other media in Arizona report extensively on this every day, and at least to my knowledge, the reporting has only suggest one case where there was a detention by one of these so-called Minutemen who was released and the immigrant was treated appropriately by the Border Patrol. So I don't think there are any situations like that, at least that have been reported publicly in the media. But when the whole exercise is over with, I think it would be a useful exer-

cise to have somebody official report on it so that we do have a good handle on what is going on.

Senator KENNEDY. If the Senator would just yield, what I was just asking is what is the current position with regard to the groups. I mean, do they have a policy position with regards to it and what is the policy? You know, what was the policy? That is what I was interested in finding out from Homeland Security and from the Justice Department. I appreciate Mr. Cohn is here on a very specialized issue, and this has been enormously interesting. And I think it is asking a lot to ask you for a detailed position on it, but there has to be at least some reaction from the Justice Department in terms of the Border Patrol and the rest. There must be some policy kinds of issues or questions, and I was just interested in what the Department's was. But I do not want to delay Mr. Cohn or other questions on the matters that are before the Committee.

Chairman KYL. And again, in response to that, I know there were a lot of arrangements worked out between both the Cochise County sheriff's department and the Border Patrol and these beforehand to try to prevent improper activities. And, again, it is appropriate to understand what our Government's policies in that regard are.

Senator KENNEDY. Thank you.

Chairman KYL. Perhaps, Mr. Cohn, you could—well, let me get Mr. Cerda since he has not been given a question yet here. How many of the illegal immigrants released into the interior of the United States each year are due to lack of detention space to keep them detained?

Mr. CERDA. The DRO in Homeland Security and ICE is budgeted for 19,400 beds. Last year, we had over 200,000 admissions, initial admissions in our detention situations, and the population rotates through there, whether it is through deportations, through bonding, through granting of relief, terminations, voluntary departures, different scenarios. So on a constant basis, we are at 100-percent capacity.

We make decisions daily on a case, national security, criminal aliens, mandatory detainees. Those remain and will continue to be our priority cases.

Chairman KYL. So you have to then make decisions as to which ones to release because you do not have space even though they should be detained versus those who are a higher priority to keep in detention. Is that correct?

Mr. CERDA. On the non-mandatory cases where there is discretion, we will look at them, and we have our prioritization list out there

Chairman KYL. Can you give us any sense in terms of quantification of maybe even a percentage or something like that, where on a weekly or a monthly basis you have had to make that determination and release people who otherwise would have been detained had you the bed space?

Mr. CERDA. I would not be able to tell you on a daily basis where we are with that. What I can say is right now we have in the non-detained document, which are individuals who are in some form of phase in proceedings, immigration proceedings, not detained, our

non-detained document right now just recently reach over a million. So we have—

Chairman KYL. Over a million people?

Mr. CERDA. Correct. So we have a million individuals who are in some phase of immigration proceedings at this point in time who are not in custody, released on a variety of conditions. Some are under alternatives to detention. Some are on bond, having posted bond. Some of them are released to relatives in the United States.

Chairman KYL. I am sure you do not have any statistics right here today as to how many people show up versus how many skip their bond.

Mr. CERDA. Historically, we have a situation where you have two areas of concern. The first one is individuals who fail to appear for their hearings with the immigration judge, and historically that has been in general in the range of 30 percent who are not detained at the times of their hearing, 30 percent fail to appear, essentially become in absentia cases, fugitives. Subsequent to that, of those that do appear for hearings, the other point of critical concern here is that of those ordered removed, you are looking at 80, 85 percent failing to appear and comply with removal orders.

Chairman KYL. So for those ordered to be removed, 80 to 85 percent do not comply.

Mr. CERDA. That is our historical data.

Chairman KYL. And I presume we do not know where they are.

Mr. CERDA. Those will be leading into the fugitive situation that we have. We are trying to address it aggressively, but right now at this time we have a large fugitive alien population.

Chairman KYL. Well, what would it take—and perhaps you need to get back to us in writing on this. But what would it take both to end this catch-and-release program in terms of the detention space? And, secondly, what would it take in terms of manpower or other requirements that you would have to successfully apprehend those who do skip out?

Mr. CERDA. We can get back on that, and I think, again, what we are trying to approach it is not only solely a situation of additional detention beds but the resources. You have judges involved; you have attorneys involved. And we are also looking at alternatives to detention that are very effective and actually do raise compliance that we are looking at right now.

Chairman KYL. Mr. Cohn, let me just ask you one question here before my time is up. What kind of difficulties do you have in removing violent criminals to their countries of origin? And, specifically, I have reference to the possibility that some countries decline to repatriate their own nationals who have committed violent crimes here in the United States. Who are they and what is being done to get those countries to take their people back?

Mr. COHN. Thank you, Senator Kyl. You are absolutely correct. There are certain countries that do refuse to repatriate their own nationals. One of those countries is Vietnam, which is why Tuan Thai is still in this country.

We also have difficulty repatriating aliens back to Cuba, and we also have difficulty with other countries, for example, Somalia. Although we are lawfully permitted to remove aliens to Somalia, we encounter practical difficulties.

Now, these are not legal hurdles in the U.S. law that we are talking about. These are practical difficulties, international realities that prohibit us in certain cases from removing an alien back to his home country.

As for what steps should be taken, we would like to work with the State Department and Homeland Security and the rest of the administration to remove these hurdles. But the hurdles we are talking about in these cases, again, are not hurdles within the INA but, rather, practicalities and international realities.

Chairman KYL. Thank you.

Chairman CORNYN. Senator Sessions?

Senator SESSIONS. Just to follow up, Mr. Cerda, on the 80, 85 percent that don't comply with a deportation order, one of the things that is trouble to me is that those who are not complying who become fugitives in violation of a court order are not readily placed in the Crime Information Center, so that if they are arrested for DUI or petty larceny or a serious offense or speeding and they are identified, they run their identification, it is not coming back to the local police officer that this person has absconded.

What is the status of cutting down—or putting these names in the center, in the Information Center, so it is available to police officers all over America? And let me just say for those who may not understand how fugitives are apprehended in this country. Fugitives are apprehended more often than not by some police officer in some town who stopped them for speeding and they ran an NCI check on them, and it becomes a positive and they hold them to find out what the charges are. We do not have thousands of police officers going out and looking for these people who are absconding. They get picked up in the normal course of business. But they cannot be identified if we are not putting them in the system.

So can you tell me how you are doing with that? I have raised it in other hearings, and that is the reason I raise it with you.

Mr. CERDA. I think we have different tracks available to the State and locals on cooperation. One is the entry of the names into NCIC. I don't want to—I hesitate in terms of the number. It has slipped my mind. But I can get back to you in terms of the actual numbers we have entered into NCIC.

Senator SESSIONS. Well, as I recall the numbers, of those 400,000 that are listed as absconders, we had about 15,000 in the system, the last report I got, which is a terribly bad thing. What about somebody today who absconds today? Do their names immediately go in the system?

Mr. CERDA. No, they don't go immediately into the system.

Senator SESSIONS. Why not? That would be my question.

Mr. CERDA. Right now I think the last number I had was substantially larger than the 15,000. What we have done is prioritize the cases we enter into NCIC. We have entered all cases that we can enter into NCIC with respect to criminal aliens.

Senator SESSIONS. I believe the number is now 38,000, is the latest figure I have that have been entered in there. Maybe it has gone up some.

Mr. CERDA. I will follow up on that, but it is a priority to get it in there. We have entered all the criminal aliens—

Senator SESSIONS. If you get arrested—I hate to interrupt you, but people need to understand. If you get arrested for DUI in any town in America and you don't show up for court, your name goes in the system that day. And if you get picked up somewhere else in another town in another State, they are going to know you are a fugitive. Why are these cases not being put in the system?

Mr. CERDA. Again, one, you have the numbers that are out there, over 400,000 cases. We do have to prioritize those numbers. In addition, though, we do have available to all State and locals 24/7 the Law Enforcement Support Center, which can be contacted, where they will get a determination of alienage to include somebody who has been ordered deported. That can be done today.

In addition to that, we do have an immigration violators file in NCIC, a sub-file in NCIC that has additional access that they can do queries directly with the Law Enforcement Support Center. That exists 24/7 available to the State and locals. In that sense, we do have that access, that connectivity, and they are an important partner for us.

Senator SESSIONS. I have checked with people that I know in law enforcement for many years. They don't know this. They don't have this phone number out on their vehicle that they know who to call. They don't even know there is another system. Everybody else that they deal with, if they are a fugitive, are in the National Crime Information Center. I have asked the question. It is not a matter of technology. The system can handle the extra names. It just would strike me that you are not serious about it. I hate to say that. But if you were serious about the absconders, Mr. Cerda, wouldn't the first thing you would do would be to put their names in the system?

Mr. CERDA. I would agree in that approach. It is a multiple approach. There is not one single solution. We are aggressively with the fugitive ops teams—last year, we had significant numbers, using intelligence, using the local law enforcement. This year, again, we are ahead of those numbers. We are taking this issue of fugitive aliens seriously. We are taking an aggressive approach, and we will continue to enter into NCIC. We will continue to promote. And if it is an issue locally in your area that they are not cognizant of the service, we will be happy to go out there and promote it even more aggressively.

Senator SESSIONS. Well, they are not knowledgeable anywhere. They are just not knowledgeable. The system is not working. If you want it to work, you will put the names in NCIC. If you don't want it to work, you won't. Right now I assume you do not want it to work because you are not putting names in the system. How can I conclude otherwise?

Mr. CERDA. We did have 667,000 officers out there last year who did make the query who were knowledgeable of the system. Clearly, that is not the goal. We are going to continue to grow that. This is something serious.

Senator SESSIONS. There were that many queries made, and a lot of those were Federal queries. I assume the average police officer in the average town does not know about this system. I have to believe that is so.

Mr. CERDA. We will continue to promote it, sir, and get the word out.

Senator SESSIONS. My time is up, Mr. Chairman.

Senator COBURN. Just a rhetorical question. What difference does it make if most of the names are not in it? If the names are not in it, it does not matter whether they know about the system.

Senator SESSIONS. There is another system that ICE has that—

Senator COBURN. Where they have to call a phone number when they are in the midst of doing this rather than go on the computer in their car.

Senator SESSIONS. Right. That is correct. So he is saying that it is in that system, but as a practical matter, it is not available to the officer routinely, and that is why they are not picking them up.

Senator COBURN. Actually, I want to ask a tougher question. Will you give this Committee an answer on what you are going to do with the 450,000 names and when you are going to put them into the system?

Mr. CERDA. We will give you what numbers are—how much we have entered so far.

Senator COBURN. No, no. What is your plan to get the numbers into the system so that you can use it?

Mr. CERDA. We will give you our plan to that.

Senator COBURN. I want to ask a question. You know, it is somewhat humorous to me that the group of Minutemen are called vigilantes, and I know our President has called them that. But it just means to me he does not get it. The fact is this country is extremely worried about our border. And everything that each of you have talked about today will never be solved until we control our border. And I don't know how you are not depressed every day, because you can do your job thoroughly, but it is just going to multiply every year that we don't control the border.

I would like to ask each of you, what is your understanding of our border control policy in this country? And the fact that we don't have a border control policy that is effective, how does it impact your job?

Mr. CERDA. Well, clearly, it is a significant challenge that we have out there. In my perspective, Detention and Removal Operations, we are the supporting unit for the arresting agents out there. The numbers are significant, and as our numbers are showing, we are hitting historical records throughout. Plenty of business, plenty of clients out there to process through the system, and, you know, frustrated. I am not going to be here in a position to say we are going to throw our hands up and surrender over here. We are not. We are going to continue to tackle the process, the problems.

Senator COBURN. Do you send information back up the food chain so that they say, you know, we are working here trying to do this, but if you don't make the necessary movements in terms of Border Patrol, enhance technology on the border, that you are not going to allow us ever to be able to do our job? Does that information head back up?

Mr. CERDA. We have to work hand in hand with the Border Patrol, with the investigators, with the inspectors at the airport. The ABC approach that we have out there, that is an integrated ap-

proach to try to stem one of the weaknesses on the border. That process there is not an individual Border Patrol. It is a DHS effort there. We are contributing beds. We are taking a strong deterrence posture on detention in that area. The Border Patrol is adding the resources and the investigation side is adding additional resources.

Senator COBURN. But it is not discouraging to you that there is not the political will in this country right now to control the border so that you can do your job, and instead of 77 percent of everyone convicted commits another crime in this country? That is not discouraging to you because you deport them and they come right back?

Mr. CERDA. I view it as we are Nation of laws and we are going to enforce it regardless of what the situation is. If we fail to continue to pursue the situation, to take the challenge on, then, yes, we do have a problem. The men and women that I work with at Detention and Removal Operations, they are committed. They want to get the job done.

Senator COBURN. I am not questioning the commitment. You are missing my point. I am questioning the commitment of whether or not you are telling the people up above you, You have got to give the border if we are ever going to be able to do our job? Is that communication going in that direction?

Mr. CERDA. Yes, we are communicating.

Senator COBURN. All right. Thank you.

Mr. Cohn?

Mr. COHN. Senator Coburn, I am very glad you raised this issue. I agree with you. there are significant critical flaws in our Nation's immigration laws, and this has tremendously impacted my job and the job of people in my office.

Just to give you an example, in 2001 there were 1,600 petition for review cases. In 2003, there are close to 8,500. In 2004, there are over 10,000.

Now, I am not going to say this increase is due solely to the increased number of illegal immigrants, but it is due partially to that. The people in my office are working extremely hard. They work extremely hard every single day. The average lawyer in my office writes a brief in the appellate courts every single week. They work so hard because there are a lot of illegal aliens in this country and there are a lot of court cases. So I am very, very glad you raised this issue.

Senator COBURN. We also do have a law. It is illegal to come here illegally, and we need to enforce that law first before we start thinking about enforcing the rest of the laws, because we will never win until we enforce that first and utmost law: our border security and integrity. And I would just hope that as you all struggle through—and I praise your work. You are doing the right thing—that you will send it up the chain. I mean, we are spending money down here that we could have not spent had we had the border secured in the first place. Then we can have a national debate on what we do with illegal aliens that are already here that are not criminals. But we are never going to have that debate until we control the border, and I would just hope that you would recognize your job gets made harder every day that that border stays porous.

And I am not against the idea that the people that have gone to Arizona—they are trying to make a point. The Federal Government is not doing its job in terms of border integrity, not only in terms of the number of illegal aliens that come but also in terms of the number of terrorists. And I believe their point is well made.

Thank you, Mr. Chairman.

Chairman CORNYN. Thank you, Senator Coburn.

Let me say, gentlemen, that the purpose of these hearings and to hopefully—well, my purpose in these hearings, and I think Senator Kyl shares this—is to document the challenges that we face in this country when it comes to our immigration system and hopefully provide all of the Members of Congress, not just in the Senate but across the Government and across America, the information that we need in order to tackle the big challenges that you are out there confronting on the front line every day. And we admire and respect your willingness to take on this tough job, but we are trying to figure out how we can add resources, we can be smarter about addressing it in a way that makes some of these problems easier.

But, let me talk to you, Mr. Cerda, about a problem that we have in Texas. Of course, we have a big, long border with Mexico, and, of course, just talking about people who committed crimes; we are talking about suspected terrorists. People come up through southern Mexico and from Central America and other places around the world. So, not only do we have Central American and Mexican immigrants, we have what are sometimes called “other than Mexicans.” OTMs is the name, as you know.

But, we have a policy right now, because of the lack of detention facilities, that some have called “catch and release.” And you know what I am talking about, don’t you? And as I understand it, the policy is once the Border Patrol detains an individual, they will check for their criminal background, and unless they meet certain criteria, their policy is to release them based upon their promise to come back for a hearing at a later date, at which time it will be determined whether they should be deported. Is that correct?

Mr. CERDA. The policy when we apprehend somebody, the arresting officers, one, we are taking clearly—you look at the three key priorities that we have: national security cases; mandatory detainees, aliens who are under our laws required to be detained, mostly because of criminal activity; and then also just anybody else who does not fit that but has a community safety, criminal activity potential out there.

Right now we are—in our overall national population, those three areas right there consume about 80 percent, 75 to 80 percent of our National bed space capacity.

Chairman CORNYN. And your bed space capacity is right around 20,000 now?

Mr. CERDA. Nineteen thousand four.

Chairman CORNYN. Nineteen thousand beds, and for the most part, other than those top three categories you mentioned, and perhaps whoever else you can detain that you consider a flight risk, a special flight risk, basically the policy is to let people go based on their promise to come back.

Mr. CERDA. Based on those three factors, you know, slicing up the pie in terms of detention bed space, you have a sliver for non-mandatory cases where at that point the arresting officer looks at the case and makes a determination of conditions for release.

Chairman CORNYN. For example, in Harlingen, Texas, the Rio Grande Valley, 85 percent of those people who are released never show back up again. Are you familiar with that figure?

Mr. CERDA. I am not familiar with that figure.

Chairman CORNYN. And you said that nationwide it is about 30 percent?

Mr. CERDA. There are two points of departure in the process, two key points.

One is individuals that are released, given their notice to appear to go into their hearings. At that point you are looking at 30 percent that do not appear for their hearings at some point and are ordered deported in absentia.

Subsequent to that, you have those that, while released, they are still going through the process, who are ultimately ordered removed. At that point 85 percent fail to comply.

So those are the two key points that we are trying to address with the alternatives to detention potentials that exist out there.

Chairman CORNYN. And the reason why—and nationwide that figure is 30 percent, but as I pointed out, in places like Texas—and I don't know what it is in Arizona—places where we have massive immigration across our borders, the number is much higher. And the reason we are seeing that happen is primarily because of a lack of detention space, bed space, where these people might be detained pending their deportation hearing. Is that correct?

Mr. CERDA. You essentially have a certain amount of beds, and you have to prioritize within them and operate within them, so correct, you have 19,400 every day, we are at capacity, and decisions have to be made.

Chairman CORNYN. And part of those decisions mean releasing not just economic immigrants, what I would call people who are looking for work from Mexico or Central America, but literally people who fly from China into countries in South America, who come up Central America, fall in that category of OTMs. Correct?

Mr. CERDA. You do have those cases, yes.

Chairman CORNYN. As well as people from Middle East countries, some of whom are areas of special concern to our country because of anti-terrorism concerns. Is that right?

Mr. CERDA. I think we approach those cases not based on—you know, you run the security checks on all these individuals. You could have a serious security situation of somebody from the People's Republic of China or Taiwan, and that individual would be detained as part of it. Similarly, somebody from the Middle East—I don't think we draw a broad brush over the country, but clearly every one of those we look at is a potential vulnerability, is a potential national security risk, and it is a situation where we have to identify them, run the checks, hope the intelligence, if there is any that is negative, is available, and based on that make determinations of detention or release. We have got to scrub the cases.

Chairman CORNYN. Just so we have the picture correct, we know how tough a job the Border Patrol has. We don't know how many

people they actually detain and how many people get through. But they detain, they release the overwhelming majority of those because they do not fall into those high-risk categories that you have talked about. And, of those released, in order to come back for their hearing, a substantial percentage of them never show up.

Mr. CERDA. At least 30 percent up front fail to show up for their hearing.

Chairman CORNYN. And that is across the Nation, correct?

Mr. CERDA. Correct.

Chairman CORNYN. But, I suggest to you that that number would be a lot higher in places like Texas, Arizona, California, and other southwestern border States.

Let me just finish this up, just to complete the thought, and then I will turn it over to Senator Coburn or other colleagues.

You mentioned that 85 percent of those who fail to show up for their deportation hearing after 30 days, 85 percent of them never show up and they become absconders. Is that right?

Mr. CERDA. Correct.

Chairman CORNYN. That is, they basically have forfeited any right they have to pursue any additional legal proceedings, and they are essentially under a final order of deportation.

Mr. CERDA. Correct.

Chairman CORNYN. And we currently have about 465,000 people who are absconders in the United States, and we simply don't know where they are. Is that right?

Mr. CERDA. You have a population of 465,000 fugitive aliens out there.

Chairman CORNYN. And about 80,000 of those or so are criminal absconders, correct? Somewhere around there?

Mr. CERDA. That was the original number that came out. I could not give you the latest. Again, you are looking at statistics throughout there when we were trying to figure out the population. This is something that has been historical.

Chairman CORNYN. I am trying to get a general—

Mr. CERDA. But you do have criminal aliens included in that population.

Chairman CORNYN. A substantial component of that, maybe 20 percent, somewhere around that, are criminals who have committed crimes, who are simply on the run. They are in the United States, and we don't have the people, we don't have the resources to find them and to make sure that they are deported according to law. Is that right?

Mr. CERDA. It is a significant challenge.

Chairman CORNYN. You bet it is, and I think part of what we are trying to do is to understand better how big that challenge really is so we can determine whether we need to provide additional resources, which I think we do, so that you can do that job even better.

Senator Coburn?

Senator COBURN. Yes, just a couple of short questions.

Since there are about 70,000 on the NCIS list and we have got, I think your testimony was, now 460,000 absconders.

Mr. CERDA. Correct.

Senator COBURN. It would seem to me, since you all are so stretched and you only have 20,000 beds or 19,400 beds, that might be a motivation for not having them on the list.

Mr. CERDA. Absolutely not. We have got to step back and recognize that this 465,000 has grown through the decades. Post-9/11 we brought some attention to it, and for the first time, with your support, we have teams dedicated to this. And we are being very aggressive. It is a Nation of laws, and these individuals have had their due process. They have had their hearings, they have had their right to claim benefits, and they have been ordered deported and now have decided to flout the law.

I think you look at it, too, though, in terms of it is not a resource issue but also you have got to recognize the fact that what are the options for these individuals when ordered deported if released. And as I put it, one of the challenges is they could either comply with us and our request to appear for removal processing and get deported, or alternatively, they can make a run for it and see how long it takes for us to catch them; and when we do catch them, the penalty again is they will be deported. But during that period—

Senator COBURN. So there is no downside for them.

Mr. CERDA. And that makes the challenge even larger there.

Senator COBURN. With 19,400 beds, about \$20,000 a year a bed?

Mr. CERDA. Right now we are looking at \$90 a day, and I believe a yearly rate, roughly over \$30,000.

Senator COBURN. So \$30,000 times 19,000, that is half a billion dollars a year that we have got for beds. Wouldn't it be smarter to put the half a billion dollars down on the border and stop the inflow so we don't need the beds? Rather than give more resources here, wouldn't it be smarter to put the resources on the border to control the border? Again, I am telling you, the guys in Arizona get it. We are fixing the wrong problem. The problem is the border.

I will let you go with that. One last thing. Low-priority aliens include those who have committed fraud while applying for immigration benefits with DHS, correct?

Mr. CERDA. You have it in a prioritization list, yes.

Senator COBURN. So why instead of letting these aliens go, why aren't they immediately turned over to DOJ for document fraud prosecution?

Mr. CERDA. You are looking at a situation that if they do come into our custody and prosecution is declined, that is where they fall. But we are aggressively referring re-entry cases, individuals who have been multiple re-entries, for prosecution, document fraud, benefit fraud. Again, we view these as vulnerabilities to national security.

Senator COBURN. Well, I want to thank both our witnesses. You can see from my questioning there is a lot of frustration going on for the people that I represent in Oklahoma and people throughout this country. And I hope it goes up the chain to the administration. The rule of law does need to be enforced, and the first one is the border.

Thank you.

Chairman CORNYN. Mr. Cohn, I just have one more question, and then unless there are other questions of this panel, we will move on to the second panel.

In *St. Cyr*, the Supreme Court decision we were talking about earlier, the Supreme Court wrote that, “A construction that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions.”

Does the Department of Justice believe that H.R. 418 and last year’s S. 2443, streamlining or eliminating judicial review, avoid those substantial constitutional questions? If so, why do you believe that? And, have there been others who also agree with that position?

Mr. COHN. Senator Cornyn, thank you for raising that issue. The answer to your question is the two bills you referred to—the REAL ID Act and the FILA bill—both of those do avoid all the constitutional concerns because both bills contain the same language. In both bills, it is expressly very clear that all aliens, including criminal aliens, can go to circuit court, the circuit courts of appeals, and they can present their constitutional claims and their pure questions of law. Every alien can do that. Every single alien has his day in court. Every criminal alien has a day in court. That day in court would be in the courts of appeals. Pure questions of law, every single one of them, and constitutional claims can be presented.

So both bills you referred to are in compliance with the Supreme Court’s words in *St. Cyr*. And we are not the only ones who believe that. During the *St. Cyr* litigation, there was a companion case, *Calcano-Martinez*, and the ACLU represented the petitioner in that case. And they said the same thing. They said that review in the courts of appeals was constitutionally permissible. And that is precisely what the REAL ID bill does. It puts review in the courts of appeals.

At oral argument, the ACLU was pressed as to what that scope of review had to entail, and the ACLU lawyer made clear that the review had to include simply what was traditionally historically available on habeas, and that includes constitutional claims and questions of law. And the lawyer made clear what he meant by questions of law. It was construction of statutes, interpretations of statutes. That is what has to be reviewed. And that is reviewable under H.R. 418. All pure questions of law and constitutional claims are reviewable.

Moreover, I read the ACLU’s statement for the next hearing, and the two concerns they presented really are not legitimate concerns, with all due respect. They raise one issue about mixed questions of law. They refer to them as applications of law. A mixed question of law is in effect a question with two parts. There is the legal part of the application and the factual part. The legal part, of course, is reviewable, like all questions of law under this H.R. 418. The factual part would not be reviewable, but, again, it is clear that under the historical scope of habeas review, factual questions are not reviewable. And the ACLU agreed to that in *Calcano-Martinez*.

To give an example, let’s look at *St. Cyr* itself. In *St. Cyr*, the question concerned the retroactivity of a provision that abolished a type of relief called 212(c) relief. The question was whether that abolition applied to aliens who pled guilty prior to IIRIRA’s effective date. The Supreme Court held the abolition did not apply, and that is the legal principle.

So if another case were to come around in which an alien said, “I pled guilty prior to IIRIRA’s effective date, I am still entitled to 212(c) relief,” there would be a factual question and a legal question. The factual question is when did he plead guilty. That is not reviewable because factual questions are not reviewable. The legal question, however, embedded within the application, is: Does he have a right to 212(c) relief if he pled guilty after IIRIRA’s effective date?

If a court were to misapply the holding in *St. Cyr* and say he is not eligible, even though he pled guilty prior to the effective date, that would be a misapplication of law, and that would be reviewable under both bills you mentioned because it is a question of law.

Finally, they mentioned the issue about needing a backstop, and I agree there needs to be a backstop. But that backstop, of course, does not have to be in district court. It need not be in habeas. The backstop could simply be in the courts of appeals.

Now, I disagree with them that there is a need to amend the language because all the concerns they raised can be addressed simply through the pre-existing motion to reopen procedure. A denial of the motion to reopen can be challenged in the courts of appeals. However, to the extent anyone were to disagree with that, the solution is simply to amend 242(b)(1) to permit particular claims in the courts of appeals. The solution is not to give a backstop in habeas because that would propagate the pre-existing problem we have now of criminal aliens having twice the review of non-criminal aliens.

Chairman CORNYN. Thank you, Mr. Cohn.

Colleagues, we are ready to move to the next panel unless anyone has any—

Chairman KYL. I have got a couple of questions for the record.

Chairman CORNYN. Very good. Senator Kyl has some questions for the record.

Senator SESSIONS, if you have some questions?

Senator SESSIONS. Mr. Cohn, I have recently done considerable research and we have worked on a legal article on the question of the authority of local law enforcement officers to make arrests of those in violation of Federal immigration laws. As I read the authority, only the Ninth Circuit has held explicitly, and that in dicta, not as part of its holding, that violation of a misdemeanor immigration law, such as an overstay, does not give local law enforcement officers a legal basis, if they have one under State law, to detain someone; and that with regard to the other offenses, such as illegal entry and violations and crimes in the country and that sort of thing, State officers have the authority to do so.

In fact, the other circuits, I believe two or three other circuits, imply that the State and local law enforcement officers have that with regard even to the misdemeanor overstay cases—or the civil, not misdemeanor, civil overstay cases.

What thoughts do you have on that?

Mr. COHN. Senator Sessions, I am glad you raise this issue of local law enforcement. It is an extremely serious issue. I wish I could say more about that, but the Department is still developing its position internally on this issue. I would like to share some

thoughts on it, but at this point I have to refrain and not get ahead of other people in my Department on that issue.

Senator SESSIONS. Well, all I would say is this, Mr. Chairman: As a result of one small portion of the law in which one circuit, the Ninth, has indicated States may not have authority, that has been bandied about the country to try to convince police officers and mayors that their officers have no authority in this regard. But they have inherent authority under all the circuits, including the Ninth, to arrest and detain someone found to be in violation of the Federal immigration criminal law, felony or misdemeanor, for that matter. And as a result, some departments out of confusion basically are not participating in a way that they would like to participate. I don't think we need to be mandating local law enforcement to participate, but it is a very huge issue as to whether or not our Federal Government welcomes, encourages, and is appreciative of them when they apprehend people who are violating our laws and turn them over to the Feds for processing from there on.

I know you are ready to go to the next panel.

Senator COBURN. I just had one little gift. I am going to send you both "Groundhog Day," Punxsutawney Phil. You guys have got to be reliving that every day, and I think in that movie, he has got it easy compared to you.

Senator SESSIONS. And I would say that the troops out there, the officers on the ground are doing a good job, but we are not—this system is not working. You talk to my Alabama police officers, as I do on a routine basis, and they tell me if they apprehend someone they find to be here illegally, they don't even bother to call the ICE agents. They are not coming to get them. There was just an article in the Washington Times yesterday, I believe, saying 13 had been arrested and released, 80 percent I assume won't show back up, or any detention order that may occur. So it is undermining public respect here, and we have got to ask you, Mr. Cerda and Mr. Cohn, to work on it, to have some integrity here.

I was a Federal prosecutor for 15 years, and it is just painful to me to see the Federal Government make a mockery of enforcement of this situation. We cannot continue. We have got to have integrity.

Chairman CORNYN. Thank you, Senator Sessions.

And thanks to you, Mr. Cohn and Mr. Cerda, for being here today with us.

We will now move to our second panel of witnesses, and we are pleased to have a distinguished second panel as well today, and I want to thank them for their appearance. If you don't mind, I will start introducing you as you make your way.

On this panel we will hear from David Venturella. Mr. Venturella is currently employed by U.S. Investigations Services. He is a former Acting Director of Detention and Removal for the Department of Homeland Security and has spent close to two decades serving our country in the immigration arena.

Joining Mr. Venturella on this panel is Lee Gelernt, Senior Staff Counsel, Immigrants' Rights Project, American Civil Liberties Union. It is significant to note that Mr. Gelernt was also co-counsel in the *St. Cyr* case, so perhaps he will have some comments about that, which we have already talked about earlier.

Let me extend a welcome to both of you, and thank you for being here with us. Please don't forget to turn on your microphone, like some of us do from time to time, when you begin to speak, and let me ask Mr. Venturella if you will start with your opening statement. We will ask each of you to make 5-minute opening statements, and then we will follow with some questions. Thank you again for being here.

STATEMENT OF DAVID VENTURELLA, U.S. INVESTIGATIONS SERVICES, WASHINGTON, D.C.

Mr. VENTURELLA. Mr. Chairman, I would like to thank you and the other members of the Subcommittee for the opportunity to testify today. I am honored to appear before you to discuss the matter at hand.

Prior to leaving my Federal post last year, I was responsible for enforcing the immigration and naturalization laws of this country for 18 years. I began my law enforcement career as a deportation officer with the former Immigration and Naturalization Service and ended my career as the Acting Director of Detention and Removal Operations with U.S. Immigration and Customs Enforcement. In that capacity, I was in charge of overseeing the detention and removal efforts of criminal and illegal aliens who were in the United States.

Now, on a personal note, I am also the son of an immigrant, and I understand why so many people have risked their lives, leaving their families and homes and everything they know to come to the United States to pursue the American dream. For nearly 230 years, this country has welcomed immigrants from all walks of life, and the contributions of these immigrants have built this great Nation to be what it is today—a free Nation.

However, while we are known worldwide as a shining beacon of light for the countless immigrants who come to our shores, we are also known as a Nation where law and justice prevail. Without strict and fair enforcement of our immigration statutes, our country will remain vulnerable to the threats that arise from individuals who willingly exploit gaps in our immigration system.

The accomplishments of the men and women responsible for enforcing our Nation's laws in the former INS and now in the Department of Homeland Security are extraordinary. Yet, despite their heroic efforts, the number of illegal immigrants living in the United States and coming across our borders continues to grow.

Why have our country's efforts in enforcing immigration laws fallen short of expectations after 9/11, even though Congress has provided significant increases to the budgets of the agencies responsible for carrying out this important function? The answer is simple. Our law enforcement agencies dedicated to this mission have done little to develop a cohesive and comprehensive immigration enforcement strategy.

Instead of viewing the issue holistically, what you see are a number of independent programs and independent efforts competing for resources and delivering mixed results. While immigration is a complex, emotional, and political issue, the inability to understand the importance of linking the enforcement functions of the immi-

gration bureaus to carry out a common mission and strategy is baffling.

Immigration enforcement must be viewed as a continuum. Effective enforcement of our immigration laws will not be achieved until all parts of the continuum are balanced and are in sync with one another.

U.S. Border Patrol agents risk their lives every day, only to see their efforts wasted because of a lack of detention space to hold those they have arrested for crossing our borders illegally.

Moreover, less than 1,000 deportation officers are asked to manage and supervise hundreds of thousands of aliens every year who are in removal proceedings, and then those same dedicated officers are asked to locate those same aliens after years of lengthy appeals and stays resulting in a removal rate of about 60 percent and a growing fugitive population of 400,000 and counting.

Now, these are very real examples of when the enforcement continuum is out of sync or imbalanced. If the goal is to deter individuals from violating our immigration laws, we are not achieving that goal because these individuals suffer no consequence for their unlawful actions.

Now, this is not just a DHS problem. DHS is not the only Department responsible for immigration enforcement. The Department of State and the Department of Justice have significant and vital roles in immigration enforcement. The removal of an alien from the United States is the endgame of immigration enforcement.

Yet our foreign neighbors and allies are refusing to accept their citizens or nationals for deportation. Although in the past couple of years there has been some success in negotiating with countries on individual cases, the State Department is reluctant to leverage the offending country's foreign or economic interest with the U.S. to resolve the repatriation stalemate. Very little has been accomplished when repatriation of foreign nationals is handled as an isolated issue. Eventually, thousands of aliens, in particular criminal aliens, have been released back into our communities because of their countries' unwillingness to accept them and our own unwillingness to sanction the offending countries. In order for the Federal Government to achieve effective immigration enforcement, the State Department must change their position on how to deal with this issue.

The Department of Justice, which oversees the Executive Office of Immigration Review, has looked to improve their performance, and while I applaud their effort to improve the efficiency of the hearing process, I can recall significant delays imposed by immigration judges as well as cases pending many years before the Board of Immigration Appeals. And these lengthy delays have contributed to the growing number of fugitive aliens living in the United States who are currently being sought after for removal.

Any improvement to reduce unnecessary delays in the courts and in the removal process will, without infringing on the due process of individuals, always serve to enhance the Government's ability to achieve effective and efficient enforcement of our immigration laws.

I am very appreciative of the Committee's efforts to highlight this I municipality issue, and I thank you for the opportunity to

testify before you today. I look forward to answering any questions you may have for me at this time.

[The prepared statement of Mr. Venturella appears as a submission for the record.]

Chairman CORNYN. Thank you very much.

Mr. Gelernt?

STATEMENT OF LEE GELERNT, SENIOR STAFF COUNSEL, IMMIGRANTS' RIGHTS PROJECT, AMERICAN CIVIL LIBERTIES UNION, WASHINGTON, D.C.

Mr. GELERNT. Thank you. Chairman Cornyn, Chairman Kyl, Senator Coburn, thank you for the opportunity to testify today. My testimony will focus solely on Federal court review of deportation orders and the issues raised in the Supreme Court decision in *St. Cyr*. That decision made clear that immigrants, including those with past criminal convictions, are entitled to meaningful court review. At a minimum, the Court stressed they are entitled to habeas corpus review, protected by the Suspension Clause of the Constitution.

I want to make two basic points in summarizing my testimony. The first point is I want to stress the complexity and far-reaching importance of the issues raised by the *St. Cyr* case. Those issues transcend the immigration field and go to the very heart of who we are as a country, a country which can now count more than two centuries of unwavering commitment to the rule of law and to the Great Writ of Habeas Corpus.

In light of the complexity and historic importance of the issues, any legislation by the Congress in this area will necessarily raise profound constitutional questions as well as difficult questions of immigration policy and court administration. We thus respectfully urge Congress to give any new proposals in this area the most careful and deliberate consideration and to dismiss out of hand any proposals that would eliminate habeas corpus for immigrants facing deportation. No Congress—no Congress in the history of this country—has ever eliminated habeas corpus for immigrants facing deportation, and this Congress should likewise reject any proposal that would take that extraordinary step.

As the Court made clear in *St. Cyr*, immigrants are entitled by the Constitution to meaningful review.

My second point is that, in our view, the various attacks that have been leveled against *St. Cyr* decision are misplaced. Insofar as there are concerns about the increased number of cases in the Federal courts, those concerns are, in our view, more appropriately directed at the Attorney General's decision in 2002 to eliminate any meaningful administrative appellate review by the Board of Immigration Appeals, the BIA, a decision which has shifted much of the burden to the courts and left the courts with the task of providing the only real check on erroneous decisions by immigration judges.

Let me conclude with a more general point about the role of the courts in the immigration system, namely, that oversight is critical to the proper functioning of a fair system. Judicial review may seem at times like a technical abstract concept to many people, but in practice, the courts play an indispensable role in enforcing the rule of law and preventing grave instances of injustice that would

otherwise profoundly and inalterably change the lives of countless immigrant families and their children. At the end of the day, it is critical that the lives of these children and individuals not be lost in a blur of aggregate statistics and abstract policy arguments.

Jerry Arias-Agramonte, for example, is someone who benefited from having court review in his case by habeas corpus. He came lawfully to this country as a teenager in 1967. His parents were U.S. citizens. He has six U.S. citizen children, one of whom served in the military. In 1977, he pled guilty to a drug offense in the fifth degree, for which he received a sentence of probation. Nearly 20 years later, on the basis of this conviction for which he received only probation, he was placed into removal proceedings and subject to mandatory deportation. He filed a habeas petition and a court found that his deportation was, in fact, unlawful. But for the existence of habeas review, but for the existence of the courts, he would have been deported from a country in which he had lived for more than 30 years and likely been separated from his U.S. citizen family.

Significantly, for many immigrants it is the very right to go before a neutral judge that in their minds differentiates the United States from other countries that lack same commitment to the rule of law. They feel viscerally what Justice Frankfurter observed long ago—that “[t]he history of American freedom is, in no small measure, the history of procedure.” And no procedure has been more integral to preserving freedom in this country over the past 200 years than the Great Writ of Habeas Corpus.

Finally, let me say the ACLU, of course, recognizes the authority of Congress to regulate immigration and entry into the United States. Our point today is that the process for determining who is subject to removal must be fair and efficient to ensure that immigrants who have a right to remain are not deported erroneously and that the removal system is subject to checks and balances.

Thank you.

[The prepared statement of Mr. Gelernt appears as a submission for the record.]

Chairman CORNYN. Thank you very much. We will now proceed with a round of questioning.

Mr. Gelernt, let me start with you, please. As I understand it, a non-criminal alien case would originally go before an immigration judge who would determine his/her rights and would provide that initial level of judicial review. If the case went against the alien, then she/he would have a right to appeal to the Board of Immigration Appeals. And then, finally, they would have a right to appeal to the court of appeals. Is that correct, sir?

Mr. GELERNT. Yes, Senator.

Chairman CORNYN. But what the *St. Cyr* case dealt with was an additional review, and that is by virtue of a writ of habeas corpus. Is that correct? So, if I understood Mr. Cohn’s argument earlier, he said that the criminal aliens get an additional layer of review that non-criminal aliens don’t, and by that I understood him to mean that habeas corpus review, in addition to the review before an immigration judge, Board of Immigration Appeals judge, and then the court of appeals, that that would be more than a non-criminal alien

would get. Did I understand that correctly? And, if I did, do you agree with that?

Mr. GELERNT. Senator, I do not agree with that completely, but there are parts of DOJ's testimony with which we do agree, and I want to be very clear about the ACLU's position.

The habeas review that resulted after 1996 and after the *St. Cyr* decision was the result of the 1996 court-stripping provisions and the gloss DOJ put on them and the Court's decision.

What happened in *St. Cyr* is that DOJ took the position that there was no review for Mr. *St. Cyr* in any court, in the court of appeals or the district court. And just to be clear, because DOJ brought up our briefs in that case, we made it absolutely clear to the Supreme Court that we wanted one bite at the apple. We wanted one judicial determination. We were willing to take that in the court of appeals or in habeas corpus.

The Supreme Court looked at it and said, well, the 1996 court-stripping provisions have cut you out of the court of appeals; DOJ says that as well; the only thing left for you is habeas.

Chairman CORNYN. Okay. Thank you for that clarification.

Mr. GELERNT. And—

Chairman CORNYN. I am sorry. I did not mean to cut you off.

Mr. GELERNT. I just wanted to make one additional point.

So what we are saying is that we want one judicial determination. That judicial determination can be in the court of appeals, but it must be a full judicial determination and there must be a safety valve, which, as I understand DOJ's witness to say, he understands the REAL ID Act not to have that safety valve at the moment. He quibbles with where we would put the safety valve, and that may be a discussion we can have. But he does not quibble with the fact that there is no safety valve.

Chairman CORNYN. So your position—if I am clear and you please just tell me if I am wrong—is that as long as there is at least one opportunity for judicial review, the ACLU would be satisfied, whether that is in the court of appeals or by writ of habeas corpus.

Mr. GELERNT. That is right, sir, as long as it was a full bite at the apple in the court of appeals.

Chairman CORNYN. And that would be within Congress' power by writing a clear statute to provide that review. That would not be unconstitutional in your view. That would be within the protections provided under the Constitution.

Mr. GELERNT. As long as it was a full bite at the apple in the court of appeals, one judicial determination, and we do not believe that you could eliminate habeas corpus as the safety valve. But it would not—and this is the critical point here, Senator, because I want to be clear, because it is a technical, difficult issue. Habeas corpus needs to be there, in our view, as the safety valve. It does not need to be the primary avenue of review.

What happened after *St. Cyr* is that it became the primary avenue, so everyone went to habeas corpus. You can channel all review, criminal aliens and non-criminal aliens, to the court of appeals, and that is where it would go. The only thing we are saying habeas needs to be there for is as a safety valve for those rare cases in which someone cannot get into the court of appeals

through no fault of their own. For example, an unscrupulous lawyer tells them they are going to file within 30 days in the court of appeals, they do not do it, the Government does not give them notice of the decision. So those rare cases that cannot go to the court of appeals, but that will be seldom used, just like it was between 1961 and 1996. So it needs to be there as a backstop, as a safety valve, but for the most part, every case would go to the court of appeals, criminal and non-criminal, and that is okay with us.

Chairman CORNYN. Well, I understand what you would expect to be the course of legal review, judicial review, but what you are saying is you do not think under the Constitution that Congress can eliminate habeas corpus and provide the sole judicial review in the court of appeals. Is that right?

Mr. GELERNT. Not as a backstop. I think—

Chairman CORNYN. So, that sounds like two levels of review to me.

Mr. GELERNT. No, because—let me be very clear, Mr. Chairman. The alien would not get to go to habeas corpus if they got to the court of appeals, and that means that almost every alien will never get to go to habeas corpus. They will not get to use habeas corpus like they do in a criminal case where they will get review somewhere else and then go to habeas.

If they get review in the court of appeals and the court of appeals reviews their case, they cannot go to habeas after that. The only time they could use habeas is if for some reason that is not their fault they do not get in the court of appeals. For example, they never get notice of a BIA decision, so they do not file in the court of appeals within 30 days, and it was not their fault that they didn't get notice. Those rare cases where they did not get judicial review in the court of appeals, they could go to habeas. But the vast, vast majority of cases will go to the court of appeals. The court of appeals will review it. They cannot then go to habeas after that.

Chairman CORNYN. Thank you.

Senator Kyl?

Chairman KYL. Thank you, Senator Cornyn. I do appreciate that clarification.

I gather that—and you heard the testimony about what at least I would characterize as an unacceptably high number of people with pretty horrible criminal backgrounds, at least as articulated by the earlier panel. And I gather it would be your view and ACLU's view that legislation from the Congress would be appropriate to try to prevent them from continuing to at least have the opportunity to prey on American citizens. Is that correct?

Mr. GELERNT. Senator, there are proposals out there that we have seen that we believe are constitutionally deficient. There may be other proposals that the Congress wants to consider to make things more efficient, and we would be happy to give you our views on those.

We are not opposing making a system more efficient, but what we are saying is that we cannot have a system where every immigrant does not get meaningful judicial review.

Chairman KYL. What I am trying—because ACLU has been an organization over the years that has at least portrayed itself as

fighting for the little guy, making sure that people who are not otherwise protected can get protection in our system, certainly victims of crime frequently fall into that category. And I would think that ACLU would be very concerned about victims of crime. And to the extent that we have an ability here to prevent further victimization of people in our society by people who should be treated—or should be dealt with in our system, I guess what I am asking is not whether you would have any objection to it but whether you would support our trying to find a constitutional approach to accomplish the objective.

Mr. GELERNT. Senator, we would support making the system more efficient as long as it was constitutionally sound and fair on both sides.

Chairman KYL. Thank you.

Mr. Venturella, how would you characterize the security hazards to the United States of the catch-and-release practice? And how much does DHS know about those who are caught and released in terms of that kind of threat?

Mr. VENTURELLA. Well, I think very little is known about the individuals who the Border Patrol encounters. As Mr. Cerda outlined, there are record checks that are done, fingerprints are captured, but many of these individuals are not in any known databases. So I think that is a vulnerability.

Chairman KYL. That is a problem.

Mr. VENTURELLA. That is a problem.

Chairman KYL. With your background at INS and DHS, you probably have formed some views as to the likelihood that terrorists could cross our borders and be in the interior of the United States undetected, about our vulnerability to that kind of a threat. How would you characterize that?

Mr. VENTURELLA. Well, I think the vulnerability is high. Again, because individuals can come across our borders, can make many attempts and be successful on latter attempts, I think it is a real high exposure. And, again, you have to look at not the origin or the nationality of the individual, but the fact that somebody can get through your border and then blend into your society without very little difficulty is scary. And so regardless if it is a terrorist or not, individuals can come to the United States on many attempts, break in, and then live amongst ourselves. And that I think is difficult from an immigration enforcement perspective. You are trying to create deterrents, and without those in place, it is very disheartening for an individual charged with enforcing the laws.

Chairman KYL. Secretary Rumsfeld made the point—and it has been picked up by others in conjunction with the review of the 9/11 tragedy—that sometimes we do not stop to think about the fact that we do not know what we do not know. And with respect to knowing who these maybe 11 million illegal immigrants residing in our country today, maybe more, it is hard to know how many of them might be involved in terrorist cells. And what you are saying right now is it is almost impossible to know because you do not know who has gotten across the border that we have not been able to apprehend. Is that correct?

Mr. VENTURELLA. That is correct.

Chairman KYL. And that is a scary thought, and this is a problem—speaking to something Senator Coburn was talking about earlier—both at the border itself and the interior, because as our first hearing noted we have to deal with these problems of border enforcement; but as this hearing has illustrated, we have got the result of that in the interior with inadequate resources to identify people, to detain them, and to deal with them appropriately under the law.

And I would just state to everybody here, including the representatives of the ACLU, that all of us on this Committee certainly would hope that any—well, not just hope, but that we will ensure that any changes we make to the law will certainly be within the rule of law and be able to sustain constitutional challenges. That is what we are all about here, and we appreciate the testimony that both of you have provided.

Thank you.

Chairman CORNYN. Senator Sessions?

Senator SESSIONS. Mr. Venturella, the Washington Times article I referred to earlier said the Federal authorities released 11 illegal aliens. “The 11 passengers were processed and released,” said the spokesman for ICE. “It is up to them whether they come back.” And a delegate from Fairfax County said, “The officer does not have authority to detain them for a Federal offense. You get your hands on them, you have no authority to do anything.”

Well, I think that is the perception, but it is not exactly correct, is it? They do have authority to detain someone in most instances unless it is prohibited by State law. Is that correct?

Mr. VENTURELLA. That is my understanding.

Senator SESSIONS. All right. But what I am hearing from my police officers—and there are very few ICE agents in the State—is that nobody will come and pick them up if they were to detain them. They have been told, “If you don’t have more than 15,” I was told several times, “don’t bother to call us.” So they don’t even call ICE. So that is the reality of what is happening out there.

Would you walk through for the American people a little bit what happens now? Someone is apprehended by a Federal immigration officer, let’s say, or referred to them by a State, and then they process them. Do they have to be released on bail? What happens after that?

Mr. VENTURELLA. Well, I think as Mr. Cerda pointed out, basically it is determined on a couple of things. One, are they subject to mandatory detention. In most cases, if an individual has not been convicted of a crime and has been encountered by local law enforcement, the chances are they are not subject to mandatory detention.

Senator SESSIONS. Not?

Mr. VENTURELLA. Not subject to mandatory detention.

Senator SESSIONS. Okay.

Mr. VENTURELLA. So they have discretion to release.

Senator SESSIONS. All right. Now let me just follow up on that point. So if they were arrested for an armed robbery or a crime but had not been convicted, that would not be a mandatory detention under the immigration law. Is that right?

Mr. VENTURELLA. If there is no conviction. However, I think a circumstance like that would be rare. They would go through the State or local criminal justice process.

Senator SESSIONS. The State may hold them on their own bail.

Mr. VENTURELLA. Correct.

Senator SESSIONS. But let's say the offense was a little less severe. Let's say it is some sort of theft that routinely people would not be held without bail, but they were here illegally. As a matter of policy, would they still be released on the immigration charge?

Mr. VENTURELLA. They would be a high priority for release barring any other criminal convictions.

Senator SESSIONS. Now, who issues the release? Do they sign a bond or bail, or how do they get released?

Mr. VENTURELLA. There are various forms of release.

Senator SESSIONS. And who is it that they go before that issues this release order?

Mr. VENTURELLA. It is currently a field director for the detention and removal offices. They have the authority to release an individual, whether it be on a monetary bond, on their own recognizance, on orders of supervision. So there are various ways to release an individual from custody.

Senator SESSIONS. And so that is how we get 400,000-plus that have been released in some form or fashion at some stage who did not show up, right?

Mr. VENTURELLA. That is one way. The other way that has not been talked about are individuals who may apply for a benefit, an immigration benefit. They get denied that benefit, and they are issued a notice to appear before an immigration judge.

Sometimes enforcement officials never see these individuals. They never encounter these individuals. We talked about the lack of cases at NCIC. There is no biographic information on these individuals to enter into NCIC.

So, yes, some of them we do arrest, and some of them are released by our immigration authorities. But some individuals get into the system that we never see.

Senator SESSIONS. If you arrest somebody, a county judge or a U.S. Senator, for a DUI, they take your fingerprints and they get your identification before they let them go on bail. You do not do that for people that are detained who are not citizens?

Mr. VENTURELLA. People who are arrested by immigration authorities, yes, fingerprints are taken, all of the biometrics. But what I am saying is an individual can make a paper application for an immigration benefit, get denied that benefit—

Senator SESSIONS. Do you know how many, what percentage of the 400,000 that is?

Mr. VENTURELLA. A significant number. I could not give you a percentage.

Senator SESSIONS. So now if they are ordered to appear to something, what are they ordered to appear for? They are released on bail, and they are given an order to appear for some hearing. Who do they go before?

Mr. VENTURELLA. They go before an administrative immigration judge to contest the removal charges that have been lodged against them.

Senator SESSIONS. And do you have trials often? Or they just do not show up? Or do they confess? Or what routinely happens?

Mr. VENTURELLA. Well as Mr. Cerda pointed out, 30 percent of the individuals do not show up for their hearing. Many people do show up for their proceedings, but then at the end, when there is a negative result, then they do not comply with that order.

Senator SESSIONS. So that is when they—most show up for the trial or the hearing, but after they have been found here illegally and ordered deported, that is when they do not come back.

Mr. VENTURELLA. The compliance goes down.

Senator SESSIONS. So if you find somebody here and they are ordered deported, they do not go that day? So you say go on out here back into the community and we will call you back when we want you to leave? Is that basically what it is?

Mr. VENTURELLA. I would not oversimplify that process, but certainly they are allowed an opportunity to remain out of custody while the immigration service or the immigration bureau arranges for their removal. However, if they are arrested and they have a removal order, then their detention is mandatory under the INA.

Senator SESSIONS. So just an arrest after that would have a mandatory—

Mr. VENTURELLA. Yes, it would trigger that.

Senator SESSIONS. I do not want to use up too much time. I was about to finish this line of questioning.

And so the biggest problem then would appear to me to be people who abscond after they have had a hearing and after there has been an adverse finding that they are here illegally. And normally in the process of these kind of cases, it seems to me there would be a much higher likelihood and more appropriate for bail to be denied then than at the beginning. Would you agree?

Mr. VENTURELLA. I would agree, and those individuals are not subject to—or are not allowed to post bond in those cases. As I said, their detention would be mandatory.

Senator SESSIONS. Excuse me. I am just saying on all these routine cases where they have been detained, released, asked to come for the hearing, they come to the hearing, and the judge finds that they did not commit a crime but they are in violation of immigration law and must be deported, it is after that that we have the highest rate of absconders?

Mr. VENTURELLA. That is correct. When I was the Acting Director, we had initiated a pilot where we placed immigration enforcement officers in the courtroom, so when there was a negative finding, we could take them into custody at that point. I don't know the results of that pilot since I have left.

Senator SESSIONS. Did you have some numbers from that pilot program?

Mr. VENTURELLA. It was a very small pilot, but I would say that pointed to a success because individuals were taken into custody. Obviously, the absconder rate went down and the removal rate went up.

Senator SESSIONS. Well, I do not want to go on too long, but I just would say I think that is probably the weak link here. Once you have had a finding that they are here illegally by an administrative officer after some sort of hearing, that is when we need to

have some space to hold them temporarily until they can be deported. And the system needs to be—if they have got a defense that they can make, let them have it. If they do not have a defense, it ought to be quickly, because every day you detain them is a cost to the taxpayers. And the sooner the deal is done, the better for everybody, their families and everybody else.

Thank you, Mr. Chairman.

Chairman CORNYN. Senator Coburn?

Senator COBURN. Thank you, Mr. Chairman.

Mr. Gelernt, what does a “full bite of the apple” mean in terms of the appellate court? Does that mean full appellate court review or representative appellate court review?

Mr. GELERNT. Senator, in our view what it means is that—and this is where I think there is another disagreement with us and DOJ. It means that the alien will be able to raise claims that his deportation order violates the Constitution, so-called constitutional claims; that he can raise so-called pure questions of law, what exactly is the legal standard in the statute. And the third type of claim that he needs to be able to raise, under the *St. Cyr* analysis, at least, is the application of a lot of facts, so-called mixed questions of law. And let me just flesh that out a little bit because what we are really saying, I hear DOJ saying, is they would cut it off after the first two, at pure constitutional claims and pure questions of law. What that means is that the court in the first couple of cases would announce a legal standard. But then every time the administrative court applied that legal standard in a case and got it wrong, applied that standard wrong, there would be no judicial review whatsoever. So you would have torture cases, asylum cases, any number of cases where basically the administrative court could water down the statute to nothing so it did not even come close to reflecting Congressional will and there would be no review. And *St. Cyr* made absolutely clear that it has to be the interpretation or application of a statute that has been reviewable historically in habeas. So that is what we are basically saying. So it may seem like a technical point, but I think it practice it will be very important.

The other thing I would just stress about it is that if the DOJ is going to try to slice it up like this and take that position, the line between pure questions of law and mixed questions of law is not a bright one, it is blurry. It is going to engender years and years of litigation on that ancillary point and prevent the courts from simply reviewing deportation orders that may, in fact, be sound and they could rid of the case quicker. Instead, we are going to have another *St. Cyr* situation. We are going to have 5 years of unnecessary litigation. And I would just ask DOJ why they are insisting on the word “pure” qualifying questions of law in the REAL ID Act.

Senator COBURN. Well, they are trying to keep you busy on that so we can do something—

Mr. GELERNT. Right, right.

Senator COBURN. I am sure that is the case.

Mr. Venturella, first of all, thank you for your years of service to our country. I am going to ask you the same question I asked the previous panel. You know, you have got to feel like Bill Murray when you work over there when every day is the same day because

no matter what you—if you did your job perfectly, without a change in the border, you would never lessen the number, because as soon as you deport them they come back, even though they are convicted. The only ones that do not come back are the ones we end up incarcerating, correct?

Mr. VENTURELLA. Correct.

Senator COBURN. That we do not deport. And I would just say, you know, during your time, what was your experience in terms of the feedback? You know, this is not something we cannot do. It is something we have chosen politically not to do. What was the response you got?

Mr. VENTURELLA. Well, it was very frustrating. Again, as I point out in my testimony, you did not have people looking at this as continuum. It is a process. It is apprehension. It is the hearing process. It is the removal process.

But they did not look at it that way. They looked at pieces. Okay, let's put more people on the border, but not give the Department of Justice enough attorneys or us in Detention and Removal enough detention space.

And then at the tail end of it, where was the leverage to remove these people? Where was the will to remove these people from the United States?

So, yes, as I pointed out, Border Patrol agents would arrest several people that day, just to see in that afternoon sending them to the bus stop in Laredo and allowing them to go north and elsewhere, it is frustrating.

Senator COBURN. You know, it is interesting. Being from Oklahoma, a relatively small State, the compassion of the people of America is great because we all recognize we at one time, other than Native Americans in Oklahoma, who are foreigners to Oklahoma because they came from the East Coast, but we all were immigrants. And the compassion out there is tremendous. What there is no compassion for is the ineptitude of the Federal Government now to recognize the sequential order, that you have to fix all parts of this. But the first part you have to fix is to put the emphasis on where it is coming from.

You know, everybody recognizes the contributions of the Hispanics that are coming to this country today. They are making wonderful contributions. But that does not displace the fact that we are undermining our own legal system when we fail to enforce the last. I don't know how you did what you did for the number of years that you did it, and I look forward to visiting you on the side just to get some insight.

Mr. Chairman, thank you.

Chairman CORNYN. Thank you, Senator Coburn.

Mr. Venturella, I want to follow up a little bit on what Senator Sessions was asking. I believe he referred to the weak link after people have their hearings, then 85 percent do not show up after that. Did I understand that correctly?

Mr. VENTURELLA. Eighty-five percent fail to comply with a removal order.

Chairman CORNYN. A removal order, okay. Well, we have talked about the 30-percent figure of people who do not show up for their deportation hearing in the first place, and I know it gets a little

confusing because then we say once you had a hearing, 85 percent do not comply with that. But, as I tried to indicate earlier, there is a lot of variability; that that 30 percent who do not show up for the first hearing, there is a lot of variation in the country. I mentioned that in Harlingen approximately 85 percent do not even show up for the first hearing. So, we never get around to being part of that group that does not show up for the second hearing.

Senator SESSIONS. I think that would be more than 100 percent.

Chairman CORNYN. Surely it is not more than 100 percent, but I am not smart enough to figure out what the percentage is.

Anyway, I think here again, sort of responding to Senator Coburn's frustration, the purpose of this hearing I think is in large way to look at what the problem is, and hopefully in subsequent hearings we will look at some solutions.

But you talked about a holistic enforcement strategy, and in your opinion, what are some of the factors that need to be enhanced to ensure that we are not perpetuating a revolving door policy within the Department of Homeland Security's detention standards or the way we handle deportation after their final orders, they have basically exhausted all of their judicial review?

Mr. VENTURELLA. Well, I think first and foremost you have to have a strategy. You have to have an objective and say this is what we want to do. And that has not been clear. In my 18 years as a Federal law enforcement officer, I did not know what the Nation's immigration policy was, in particular in enforcement. So I think you have to start from the beginning. What is your strategy? What is your objective? And then execute that.

But, again, we do need to look at this holistically. We talk about securing our borders, but we also look beyond our borders and how can our relationships with other countries that are significant transit points, how can we improve that we lessen the flow? Because people just do not come across our borders. They come through our ports of entry at airports and seaports as well. So we do need to expand beyond just our borders. Then, of course, the resources provided to the Border Patrol, provided to our litigation assets, and to our removal assets. But we do need to look at it holistically, and it hasn't. Only bits and pieces have been resourced, while other programs in other areas or departments have suffered. And now you see 400,000 absconders, now you see a million people going through the immigration process, and you see hundreds of people being released every day because it is out of balance.

Chairman CORNYN. Well, I appreciate that comment, and I certainly would agree with you that that is something that has been missing that hopefully we will achieve in the not-too-distant future, and that relates to enforcement.

But I have also been struck, in looking at immigration, by how much there are other issues that are intertwined in that. For example, the economy of Mexico or Central America, if people could find good-paying jobs there, it just stands to reason that they would find less need, there would be less desire to leave their native country and to come to the United States and find that job so they can provide for their family. And, I think we all understand that impulse, and, frankly, that is something I think we need to address as well, perhaps even by our trade policies.

I remember in Guatemala at the Ambassador's residence we were talking about the Central American Free Trade Agreement, and one gentleman from Guatemala said, "We want CAFTA to pass because we want to be able to have markets in the United States for our goods and services that we have that come from here." He said, "We want to export goods and services and not people." That resonated with me, and it really touched on the issue that we are dealing with here as well.

So, I certainly agree we need that coherent and holistic enforcement strategy, but we also need to look at the economic issues, including international trade issues. It just seems like there is hardly an issue—certainly our international relationships with other countries—that this does not touch and that enforcement is just a part of it, but certainly not the end-all, be-all.

Let me ask you, Mr. Venturella, I had the experience recently of flying with a Border Patrol agent in Laredo, Texas, down the Rio Grande River. You could clearly see obviously both sides of the river, Mexico and Texas. And I was impressed as we flew over the international bridges how orderly and relatively smoothly we were processing people and goods that were attempting to comply with our laws, how well that was going. But I was also rather struck by what was happening between the bridges. And there were cameras on large columns. There were occasional Border Patrol agents. I asked this helicopter pilot, this Border Patrol agent, I said, "What do you need that you do not have in order to do the job?" And he expressed some of the frustration that you did and saying that, "Well, because there is so much going on in the Arizona border, we have a lot of our people and our equipment being shipped over to Arizona, leaving us even less well equipped and outmanned in terms of what we are able to do here."

In your 18 years of experience in enforcing immigration laws, what do you think we need to do to fully equip our agents so they can do the job that we ask them to do every day and to give them a reasonable chance of success?

Mr. VENTURELLA. Well, it is hard for me to speak for the Border Patrol since I was never a Border Patrol agent. But in the capacity that I served and seeing the consequences of not resourcing your apprehension assets as well as your removal assets, I would think one of the most important things to look at is ensuring that you have enough detention resources. The reason why people come across repeatedly is because there is no consequence for that action. They get through. If they get arrested, chances are they will get released if they are not a Mexican national. DHS has some priorities on specific nationalities, but others, if there is no negative information contained in databases, which nine times out of ten there is not, they are released.

And so, therefore, it is worth doing this two, three, four, five times until I am able to be released into the United States, and then I can live in society, I can get a job, and not have to worry about the consequences of a removal order or consequences of immigration officers coming after me.

Again, it is the needle in the haystack. It is just overwhelming. And the frustration that officers feel every day is something I felt very strongly at the end of my career.

Chairman CORNYN. Well, I know we could go on for a long time because this is a very interesting and important subject. But, we are not going to. We are going to bring it to a close here. I know Senator Sessions and I and others have some important meetings on other matters before the Judiciary Committee.

Senator Leahy has provided a statement that, of course, will be made part of the record. There is also a statement from MALDEF, and without objection, those will be made part of the record.

It may be that we will think of some other questions, or more likely our staff will help us think of some questions we will want to submit to you in writing. So, we would ask for you to receive those and respond. We will try not to burden you too much with that. But, on behalf of both Subcommittees, I would like to thank these two witnesses and our other two witnesses for their time and testimony.

We will leave the record open until 5:00 p.m. next Thursday, April the 21st, for members to submit additional documents for the record and to ask questions in writing of any of the panelists.

And with that, this—

Senator SESSIONS. Mr. Chairman?

Chairman CORNYN. Senator Sessions.

Senator SESSIONS. I would just congratulate you on having this hearing. You are a former Supreme Court Justice, Attorney General in Texas. You are committed to the rule of law, and I know this is frustrating to you, as it is to me as a prosecutor. But you also chair our Subcommittee on Immigration. You are looking at the entire panoply of issues. You know the human factors that are going on out there with families that are here and have been here for long periods of time, the economic issues that are at stake and all the complexities. And I thank you for your leadership. I think if people would listen to what you are saying and where you are suggesting we head, I think they would be better off in a lot of the directions that are being considered now.

As a matter of fact, as we go further in this debate—and I suspect we will—I believe the suggestions you are making are going to be more and more relied upon.

I would thank our witnesses. We are a Nation of immigrants. My remarks dealt with enforcement today because that is what this hearing was about, because I was a prosecutor myself in the Federal Government for a long time, and it does pain me to see us be so dysfunctional.

On a positive note, my mental vision is it is like we jump across a 10-foot gap and we go 9 feet and we fall in the hole. So many things we do—Mr. Venturella would, I think, probably agree—if we do just a little better and go a little further, we would close that gap, deal with that problem, and then the next one and the next one and the next one. And I will say this: If we do better on the border, better inside the border, not with huge amounts of extra effort but just some better leadership and direction and some more money, we can make more progress than people think. Would you agree, Mr. Venturella?

Mr. VENTURELLA. I would agree 100 percent.

Senator SESSIONS. This is not a hopeless deal if we all—and we have better laws to begin with on who should come in and in what circumstances.

So thank you for your leadership.

Chairman CORNYN. Well, thank you, Senator Sessions.

Ladies and gentlemen, with that, this hearing is adjourned.

[Whereupon, at 4:44 p.m., the Subcommittee was adjourned.]

[Questions and answers and submissions for the record follow.]

[Note: The responses of Mr. Cerda to questions submitted by Senators Cornyn, Kennedy, and Kyl were not available at the time of printing.]

QUESTIONS AND ANSWERS

U.S. Senate Subcommittee on Immigration, Border Security and Citizenship and
Subcommittee on Terrorism, Technology and Homeland Security
U.S. Senate Committee on the Judiciary
U.S. Senator John Cornyn (R-TX)

“Strengthening Interior Enforcement: Deportation and Related Issues”

Thursday, April 14, 2005, 2:30 p.m., Dirksen Senate Office Building Room 226

WRITTEN QUESTIONS FROM SENATOR JOHN CORNYN

Questions for Victor Cerda

Question #1)

Average Detention and Removal Operations (DRO) daily population was 22,800 during FY2004. Yet on March 28, 2005, there were only 19,700 in DRO custody—86% of last year’s average. What has led to the drop in average daily population rate?

Question #2)

It is estimated that DRO will be \$20-30 million in deficit after a proposed DHS reprogramming. What plan is in place to make up the DRO budget shortfall?

**Edward M. Kennedy Written Questions
Joint Hearing before the Senate Judiciary
Subcommittees on Immigration and Terrorism
"Strengthening Interior Enforcement:
Deportation and Related Issues"
April 14, 2005**

Questions for Victor X. Cerda (ICE/DHS)

1. Border Vigilantes

Border vigilante groups continue to scour the Southwest border to stop illegal immigrants. They recruit volunteers, provide weapons and camouflage, and organize illegal operations. Lawsuits have been filed against them, but they don't stop.

These vigilantes are getting in the way of Border Patrol agents trying to do their job. Vigilantes have been "tripping" detection devices meant for the border crossers. Agents have been wasting time responding to false alerts from vigilantes about suspicious people. It's a recipe for wild goose chases, not border security.

Question: Does the Department of Homeland Security have a policy on border vigilantes? Please provide copies of any policies or regulations regarding vigilantes and an update on the situation along the Arizona-Mexico border.

Question: We have heard reports that vigilantes at the border have been "tripping" detection devices meant for the border crossers. Can you give us an update on reports of these vigilantes interfering with the border patrol?

2. Detention of Asylum Seekers

I'm concerned about the detention of asylum seekers who are no threat of flight and no security risk. The bipartisan Commission on International Religious Freedom recently found that even though it is a violation of the Department's own detention standards, asylum seekers in detention facilities are often kept with criminal aliens, and even with inmates serving criminal sentences. The Commission's expert found that putting asylum seekers in these conditions creates serious risk of psychological harm.

Question: Why is the Broward facility the exception, and jail-like facilities the rule for asylum seekers who are awaiting or who have had a credible fear hearing? What plans do you have to contract with facilities that provide a non-criminal setting for asylum seekers?

3. Parole of Asylum Seekers

The bipartisan Commission on International Religious Freedom recently found that ICE inconsistently implements its policy on releasing asylum seekers. The policy favors the release of asylum seekers who have established credible fear, identity, community ties, and no likelihood of posing a security risk. Some districts have very low release rates, and others are high.

Question: Have you reviewed the findings of the Commission? Why is the policy not being uniformly applied nationwide? Do you have plans to implement the parole policy in a consistent manner to ensure detention for those who should be detained, and release for those who merit release?

Question: Please provide updated statistics that show release rates for asylum seekers subject to expedited removal for FY 2004.

4. Alternatives to Detention

In your testimony, you mentioned the Department's alternatives to detention programs, and I commend the Department for this mostly positive step. But, there has been criticism of the use of electronic monitoring bracelets, especially for asylum seekers. In some cases, ankle bracelets are used with persons who have never committed crimes.

Question: Do you have any plans to implement alternatives that do not use ankle bracelets, especially for asylum seekers? What about telephone reporting or supervised release programs?

Question: I understand the Intensive Supervision Appearance Program's budget is being cut from \$12 million for FY 2005, but that there are plans to spend only \$2 million on the program for FY 2006, and no funds being budgeted for FY 2007. Please give us an update.

5. Legal Orientation Program

Congress has annually appropriated \$1 million to increase the efficiency and effectiveness of immigration removal proceedings. Under the program, detainees receive information on their rights, court procedures and legal remedies. Aliens are more willing to agree to removal at their first immigration hearing when they have realized they have no other option. The program has resulted in greater judicial efficiency and less time for aliens in custody at government expense. It's saved about \$8 million dollars for the government.

Question: It seems to be a very successful program. Is it available to all persons in removal proceedings? Should it be expanded?

Question: I understand the ICE owes DOJ for the \$1 million FY 2003 appropriation for the program. Is ICE going to pay it and if so, when can DOJ expect the money to be turned over?

6. Coordination within DHS

I believe that the keys to the successful operation of the immigration bureaus in the Department are coordination and accountability. The Homeland Security Act was supposed to bring immigration functions together from other agencies, but the Act then dispersed immigration throughout the Department. The result is that immigration policy is still subjected to conflicting policies and interpretations.

Question: The bipartisan Commission on International Religious Freedom recently found that there is little or no coordination of asylum policy by the Department's entities (ICE, CBP, and CIS) involved in the process. The Commission recommended a high level official, an Asylum and Refugee coordinator, to whom the Secretary can delegate his authority to coordinate these entities on asylum policy and to ensure consistent treatment of asylum seekers. Do you have a position on this recommendation?

Question: I'm sure you are aware of the recent Heritage Foundation Report proposing the merger of Customs and Border Patrol and Immigration and Customs Enforcement. Do you have a reaction to the Heritage Foundation Report? When conflicts over new policies arise how are they resolved?

7. Unaccompanied Alien Children

It has been reported that when DHS arrests entire families as units, the children are separated from their parents and placed into the care of ORR pending removal. There are reports that indicate that children, even as young as toddlers, are being separated from their parents. These children, who are placed under the care of ORR, are now deemed "unaccompanied children," despite having been initially detained with their parents.

Question: Can you provide an update as to Department's policy of separating children from their parents when arrested by ICE? Would you agree that this type of separation can be quite traumatic and contrary to child welfare approaches? When detention of family units is necessary, would you agree to utilize appropriate detention space to house those families together or utilize alternatives to detention such as the ISAP whenever possible?

Question: Does the Department plan to reimburse ORR for the costs of caring for those children in FY 2004 through FY 2006 when these children were never "unaccompanied alien minors"?

U.S. SENATE COMMITTEE ON THE JUDICIARY

JOINT HEARING BETWEEN THE SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY, AND CITIZENSHIP AND THE SUBCOMMITTEE ON TERRORISM, TECHNOLOGY, AND HOMELAND SECURITY

HEARING – “STRENGTHENING INTERIOR ENFORCEMENT: DEPORTATION AND RELATED ISSUES”

APRIL 14, 2005

QUESTIONS FOR THE RECORD

SENATOR JON KYL

<u>Witness</u>	<u>Question</u>
Victor Cerda	Can you please describe the Institutional Removal Program? What are the benefits of the program? What is the present status of the Program?
Victor Cerda	How many illegal aliens are released on their own recognizance into the interior of the United States each year because of lack of detention space? How many more daily bed spaces would Immigration and Customs Enforcement (ICE) require to detain all illegal aliens apprehended in the United States pending their deportation? What is the estimate of the resources ICE would need in order to terminate the practice of releasing illegal aliens on their own recognizance? What is the estimate of how much those resources would cost?



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

June 21, 2005

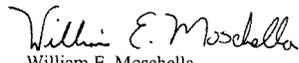
The Honorable John Cornyn
Chairman
Subcommittee on the Immigration,
Border Security, and Citizenship
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Jon L. Kyl
Chairman
Subcommittee on Terrorism, Technology,
and Homeland Security
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairmen:

Thank you for inviting Jonathan Cohn, Deputy Assistant Attorney General, Civil Division, U.S. Department of Justice, to testify at the April 14, 2005, hearing on "Strengthening Interior Enforcement: Deportation and Related Issues," before your joint hearing. Attached are the responses to follow-up questions that were submitted to the Department on April 28, 2005. Please do not hesitate to contact this office if we may be of further assistance.

Sincerely,


William E. Moschella
Assistant Attorney General

Attachment

The Honorable John Cornyn
The Honorable Jon L. Kyl
Page 2

cc: The Honorable Edward M. Kennedy
Ranking Member
Subcommittee on the Immigration,
Border Security and Citizenship

The Honorable Dianne Feinstein
Ranking Member
Subcommittee on Terrorism, Technology,
and Homeland Security

KENNEDY QUESTIONS

1. Border Vigilantes

Border vigilante groups continue to scour the Southwest border to stop illegal immigrants. They recruit volunteers, provide weapons and camouflage, and organize illegal operations. Lawsuits have been filed against them, but they don't stop.

These vigilantes are getting in the way of Border Patrol agents trying to do their job. Vigilantes have been "tripping" detection devices meant for the border crossers. Agents have been wasting time responding to false alerts from vigilantes about suspicious people. It's a recipe for wild goose chases, not border security.

Question: Does the Department of Justice have a policy on border vigilantes? Please provide copies of any policies or regulations regarding vigilantes and an update on the situation along the Arizona-Mexico border.

Answer: The Department of Justice does not have a policy on border vigilantes, and has no regulations regarding the vigilantes. The Border Patrol is now part of the Department of Homeland Security.

2. Statistics on Habeas Petitions Filed in Federal District Courts and Immigration Petitions Filed in the Circuit Courts of Appeals

Please provide the following statistics:

Question: Please provide the aggregate number of immigration habeas petitions filed in District Court from 1994 to 2004. How many are *Zadvydas* habeas cases? How many are *Benitez* habeas cases? How many are habeas cases challenging a removal order where the alien was charged with inadmissibility? How many are habeas cases challenging detention pre-final order (for example, those aliens seeking release pending the outcome of administrative removal proceedings)?

Answer: The Civil Division's database¹ shows the following totals for immigration habeas petitions filed in the District Courts:

FY 1994	587	FY 2000	2,458
FY 1995	404	FY 2001	2,403
FY 1996	533	FY 2002	2,228
FY 1997	517	FY 2003	2,387
FY 1998	796	FY 2004	2,298
FY 1999	1,874		

The database does not identify *Zadvydas* habeas cases, *Benitez* habeas cases, or pre-final order detention challenges. Nor does it indicate how many habeas cases challenge a removal order where the alien was charged with inadmissibility. Starting in the middle of 2003, the Civil Division began to track the total number of habeas cases challenging a removal order. The only full year for which we have data is 2004, and in that year, the database shows there were 994 such cases.

¹ The Civil Division database is generally maintained only for internal accounting purposes, in order to track trends in case volume. The database includes the cases handled by the United States Attorneys' Offices, but it is possible that some cases may inadvertently not be reported to the Civil Division. If so, the database would underreport total volume.

Question: Please provide the aggregate number of immigration petitions for review filed in the Circuit Courts of Appeals from 1994 to 2004.

Answer: The Civil Division's database shows the following totals for immigration petitions for review filed in the Circuit Courts of Appeals:

FY 1994	944	FY 2000	1,644
FY 1995	1,173	FY 2001	1,654
FY 1996	1,013	FY 2002	4,102
FY 1997	1,858	FY 2003	8,343
FY 1998	1,862	FY 2004	10,681
FY 1999	1,574		

3. Federal Court Caseload

We all agree that there has been an increase in immigration cases in federal appellate courts. Before 2002, 125 Board of Immigration Appeals decisions were appealed per month. Now, it's 1,200. The American Bar Association says the surge in the case load was caused by the Board of Immigration Appeals streamlining measures and procedural reforms in 2002, which cut the number of Board members from 23 to 11 and expanded the authority of single Board members to issue "affirmances without opinions." Statistics from the Administrative Office of the United States Courts demonstrate that the spike in the caseload came in March 2002 — the very time when the Attorney General's decision to streamline the BIA took effect. Further, according to a 2003 DOJ Immigration Litigation Bulletin, "much of the growth in OIL's caseload can be attributed to the increase in the total number of decisions issued by the Board during the fiscal year as a result of the recent Board reform regulations."

Question: Do you agree with the American Bar Association and your newsletter that the surge in the case load is attributable to the BIA streamlining and procedural reforms? Don't you think that we should address the root cause of the increased caseload by implementing more effective reform at the agency level?

Answer: In 2003, much of the growth in OIL's caseload could be attributed to the increase in the total number of decisions issued by the BIA as a result of the reforms. By increasing the productivity of the BIA, these reforms helped clear a sizable backlog of cases. The increased number of BIA decisions translated into an increased number of petitions for review in the courts of appeals, and thus more work for OIL.

However, that backlog has since been cleared. Thus, the continued growth in the number of petitions for review cannot be directly linked to the streamlining reforms. Instead, the growth is attributable to the rapid increase in the rate at which aliens appeal BIA decisions to the courts of appeals. The rate of appeal has increased from 5 percent to 25 percent or more. If the historic rate of appeal had held steady, the circuit courts would have expected to receive no more than 200 extra appeals per month (based on the volume of BIA decisions). But because more aliens are choosing to appeal BIA decisions, these courts now receive approximately 1,000 more immigration matters each month.

In the wake of the reform regulation, it was expected that many aliens initially would challenge the regulation on legal and procedural grounds, thereby increasing the number of immigration cases appealed to the circuit courts on a temporary basis. As those types of challenges now have been universally rejected by every circuit court (and the district court hearing the challenge to the rule's promulgation), the sustained increase in the rate of appeal must be rooted in other factors.

Some have argued that the BIA's use of affirmances without opinion (or AWOs) is the cause of the increase in the rate of appeal, because aliens are not satisfied with those decisions. However, only about one-third of the BIA's decisions are AWOs. (And we note that in issuing an AWO, the BIA specifically has endorsed the result of the

immigration judge's decision, which is an individualized finding of fact and application of law to the case. Therefore, we do not believe it is accurate to claim that aliens are left without a reasoned decision in their cases.) Other observers, including circuit court judges, have noted that there is a powerful incentive for an alien who is in this country illegally to file an appeal with a circuit court: namely, delay of his removal. It would stand to reason that the elimination of administrative delays would invite aliens to pursue other avenues of postponing their removal from the United States.

Question: Given the heavy demands on the Circuit Courts of Appeal, and the difficulty and expense of litigating appeals – both to the government and to the alien – what should be the BIA's role in addressing immigration judge errors and exploring issues for the federal courts? Could a more vigorous assertion by the BIA of its appellate role promote greater confidence in the system and relieve some of the pressures which have now been shifted to the Circuit Courts of Appeal?

Answer: The Department of Justice does not believe that the streamlining reforms have meaningfully changed the role of the BIA in any way – all appeals are reviewed thoroughly by a BIA staff attorney and at least one Board Member. Affirming an accurate Immigration Judge's decision with an AWO allows the BIA to focus on complicated cases in which a longer written decision is necessary, including those precedent decisions which remain binding on the Immigration Judges and DHS.

Furthermore, there is no guarantee that a longer decision by the Board would be a disincentive in any way to an alien seeking judicial review in the circuit courts given that a minority of the decisions appealed are AWOs. Finally, even those courts that have voiced some criticism of Board and immigration judge decisions continue to sustain an overwhelming majority of those decisions. In FY 2004, for example, the agency's determinations were sustained by the courts in over 90% of the cases decided, and this rate has actually increased since the Board adopted its "streamlining" reforms. These statistics refute the notion that the agency's decisions are of poor or declining quality, or that the BIA has abdicated its appellate role in any way.

KYL QUESTIONS

Question: Is it the policy preference of the Department of Justice (DOJ) that the Office of Immigration Litigation (OIL) function as the primary appellate immigration litigator for DOJ in the United States Courts of Appeal? Would, or does, centralizing appellate litigation with OIL ensure uniformity of legal positions on emerging immigration issues in the various United States Courts of Appeal? Are there any other benefits to centralizing appellate immigration litigation duties in OIL?

Answer: It is the Department's policy preference to have OIL coordinate for the Department all federal court immigration litigation, the most significant portion of which is the defense of petitions for review filed in the Circuit Courts of Appeals. The proper handling of immigration cases is vital to our national security and our immigrant heritage, and the consolidation of immigration litigation in a single office ensures that such cases will be handled with the expertise and nationwide uniformity they deserve. OIL's coordination is particularly important in light of the high volume of immigration cases being filed in our federal courts, and the growing tendency of the different Circuits to develop distinctive, if not disharmonious, immigration jurisprudence. With 22 years of experience, OIL brings efficiency as well as expertise to immigration litigation, significantly reducing the attorney time required for each case while continuing to achieve success in over 90% of the cases decided by the courts. OIL also plays a substantial role as a source of training and liaison for the government's immigration community.

Question: On monthly average, how many appellate briefs are filed by aliens or foreign nationals appealing decisions from the Executive Office for Immigration Review in the United States Courts of Appeal? Does OIL have adequate staff to answer all of the appellate briefs that it is required to answer each month? If not, how many more attorneys are needed to fully staff OIL?

Answer: Aliens appeal decisions from the Executive Office of Immigration Review to the United States Courts of Appeal by filing a petition for review. For Fiscal 2004, aliens filed on average 890 new petitions for review each month. By comparison, aliens filed only 138 petitions per month in 2001. OIL does not have adequate staff to handle this volume of petitions for review, and has had to rely on other Department attorneys to handle a significant portion of the appellate workload. Additionally, the high volume of review petitions has severely compromised OIL's other principal responsibility – handling significant district court immigration litigation – as OIL has been forced to commit its available resources to its growing appellate docket. The district court cases are generally handled by the 94 United States Attorneys offices around the country. The Civil Division has estimated that OIL would need over 200 additional positions if OIL were to handle every immigration case itself, and if the workload per attorney were to return to historic averages. Recently, the Department has requested a reprogramming of 27 attorneys to be detailed to OIL from elsewhere within the Department for a period of

nine months beginning July 1, 2005. In addition, for the FY 2006 budget, the President has requested a program increase of 58 positions, 29 FTEs and \$5.795 million for OIL.

Question: What is the practical effect of DOJ having to litigate the nearly 1,000 new habeas cases that were filed in Fiscal Year 2004? How many full-time attorneys are needed to staff that portion of DOJ's immigration practice?

Answer: Generally, these habeas cases have been handled by the various United States Attorneys offices, because the Office of Immigration Litigation does not have the resource to handle them. As a result, the Department has faced a sizable challenge in attempting to coordinate litigation strategy across the country.

The Civil Division has estimated that a reasonable attorney caseload is 65 new cases per year (but OIL's case receipts reached 149 per attorney last fiscal year, and are projected to reach 169 per attorney this year). While the number of attorneys required to handle 1,000 habeas petitions depends upon the nature of the petitions, the Civil Division's proposed ratio suggests that 15 to 16 full-time attorneys were needed to staff these habeas cases. It is worth noting that the 1,000 figure does not even include the habeas petitions challenging detention. Those habeas cases require additional attorneys. All told, in 2004, the Civil Division database shows that 2,298 immigration habeas petitions were filed.

In any event, on May 11, 2005, the President signed into law the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231 (2005). Section 106 of this Act eliminates habeas review of removal orders, and transfers all pending habeas petitions challenging removal orders to the Courts of Appeals. This provision could ultimately reduce the Department's overall immigration litigation workload, but it is too early to determine what the impact will be.

SUBMISSIONS FOR THE RECORD

Submission for the record:

Randy A. Callahan
Executive Vice President
National Homeland Security Council, AFGE

Before:

United States Committee on the Judiciary
Subcommittee on Terrorism, Technology and Homeland Security
Strengthening Interior Enforcement: Deportation and Related Issues

April 20, 2005

Chairman Cornyn, Chairman Kyl, Ranking Member Feinstein, Ranking Member Kennedy, distinguished Members of the subcommittee, I want to thank you for allowing me the opportunity to provide this statement in response to the written statements of panel members Victor Cerda, David Venturella, and Lee Gelernt. It is an honor for me to provide this information, as well as answer any questions you may have.

I have served the United States government in either a military or civilian capacity since I was seventeen years old, when I joined the Army after graduating from High School. I was stationed in Germany when the "Iron Curtain" fell and later served in Operation Desert Storm. I left active duty in 1992, but spent the next ten years in the Army Reserves.

In May of 1996, I accepted the position of Immigration Inspector with the Immigration & Naturalization Service and was assigned to the land border port of entry in Calexico, CA. In August of 1997, I accepted a transfer to San Diego, CA and became a Detention Enforcement Officer, which was reclassified to the current position of Immigration Enforcement Agent in August of 2003.

As Executive Vice President of the National Homeland Security Council of AFGE, I represent approximately fifteen thousand employees of the former Immigration & Naturalization Service (INS), which was split into three bureaus under the Border and Transportation Security directorate of the Department of Homeland Security: Citizenship and Immigration Services (CIS), Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE).

I have read the written submissions of Messrs. Cerda, Venturella, and Gelernt and I must say that I agree in part with each of them. I agree with Mr. Gelernt that a nation of laws must allow for judicial review of erroneous decisions at the administrative level. Such appeals are and should be the exception rather than the rule, which is where I believe I differ from Mr. Gelernt.

I agree with Mr. Venturella that immigration enforcement is a continuum, whereby each component should have sufficient resources, exceptional leadership, proper authority, and adequate cooperation from the other components to accomplish their core missions. The problem is that we do not have adequate resources to get the job done. Many of our managers and supervisors are clueless when it comes to leadership. Front line employees are not given the authority to seek and put into removal proceedings, the millions of illegal aliens at large in the country. There is a serious lack of cooperation among the immigration enforcement components, as the leadership of each component fights for a greater section of the budget pie. Until these issues are resolved, the core mission of the immigration enforcement components to identify, arrest, detain, and exclude or remove illegal aliens from the country will not be accomplished.

I agree with Mr. Cerda that ICE and DRO have greatly improved our numbers of removals over previous years, but I do not wear the same rose-colored glasses that Mr. Cerda must be wearing.

The Alien Criminal Apprehension Program (ACAP) is not yet part of the Criminal Alien Program (CAP). The reason for this is due to the fact that the Office of Investigations (OI) still has responsibility for the ACAP program. OI wants DRO to take over the program, but is unwilling to transfer to DRO the positions, funds, and other resources that have been appropriated over the years to operate the program. OI is unwilling to hand over the resources, because they've been using those resources to support other investigation operations.

The Justice Prisoner Alien Transportation System (JPATS) is an incredibly expensive failure. Many man-hours are wasted preparing a group of people to be sent out via JPATS, only to discover that the flight was canceled and the DRO office must detain the aliens for an extra couple of days waiting for the next flight. Several years ago, the Atlanta District Office of the INS determined that it would be cheaper and faster for the government to charter a flight separately from JPATS in order to affect the removal of a large number of aliens from the country. The Assistant District Director received a reprimand for bypassing the JPATS, even though the end result saved money for the government. JPATS should be scrapped, unless the program is given a completely new fleet of aircraft, and sufficient resources to operate and maintain the airline. Another option, is to contract with the airline industry we recently bailed out to provide additional flights to countries we send large numbers of aliens subject to removal from the country.

Mr. Cerda claims that DRO has been more effective at detention management. What he really means is that we are only holding in custody those aliens who are mandatory detention and those who cannot afford to post a bond. In many cases, aliens are released without posting a bond and end up on the list of nearly 500, 000 alien fugitives at large across the country, because they fail to show up to their removal proceedings. Is this more effective? I submit to you that it is not.

What is happening in many, if not most, ICE offices nationwide is that Agents are granting voluntary departure as opposed to issuing a notice to appear and placing aliens in removal proceedings. This is happening most frequently with Mexican Nationals, because of the close proximity to the border, though aliens from countries other than Mexico are sometimes granted voluntary departure if they can pay for their travel home. This sends a negative message to the alien, who now knows that he or she can reenter the country illegally and will face no consequences if caught again, because there is not enough bed space to hold them in custody and they will simply be given another voluntary departure, which is not considered a formal removal from the country. It is akin to having the cookie jar within reach of your child, but moving him away from the cookie jar when you catch him with one hand in the jar, while the other hand is shoving a cookie in his mouth. The child is not punished for stealing a cookie, and knows he might be able to eat one or two more cookies before he is caught again.

DRO could have higher numbers of fugitive aliens apprehended. While it is true that DRO needs additional positions and resources, it is also true that they could better utilize the resources they have right now. For example, Mr. Cerda recently issued a memorandum to the field, telling them not to use Immigration Enforcement Agents (IEA) to handle dockets of fugitive alien files. In addition, Mr. Cerda said that IEAs are not allowed to affect arrests on their own. They must work with either a Deportation Officer, or the fugitive operations team Supervisor. This makes no sense whatsoever.

What DRO should do, and I understand that some managers in Headquarters are making this proposal, is combine the Immigration Enforcement Agent and Deportation Officer into one position that covers all duties and responsibilities of the two positions. This makes sense, in that management would then have the "flexibility" to instantly increase the number of agents assigned to fugitive operations, if that truly is a priority, and gives employees retention incentives, as the only fair way to combine the positions is to make the combined position the same career ladder as the highest graded position. Currently, that is the GS-12 level Deportation Officer position.

Worksite enforcement- I believe ICE isn't doing enough in the area of worksite enforcement. Currently, worksite enforcement is assigned to OI, which is more focused on "sexier" cases like wiretaps, money laundering, and drug/alien/counterfeit merchandise smuggling. If it is a priority to ensure illegal aliens are not being hired in the country, the Congress needs to make it a priority by appropriating additional resources, backing up ICE when it issues fines to employers of illegal aliens, and/or use the IEAs and Deportation Officers in DRO to conduct worksite enforcement operations.

Mr. Cerda pointed out that he is happy that law enforcement officers in Florida and Alabama are going through training at the Federal Law Enforcement Training Center (FLETC) to become familiarized with immigration law, in order to make them a "force multiplier" for DRO. It appears Mr. Cerda forgets that he has approximately 900 IEAs awaiting similar training, which has been canceled since November of 2004. This

training is mission critical, but it was one of the first things cut when the budget crisis hit ICE.

I hope that I have provided some food for thought, as well as a different perspective from that of ICE management on the current status of ICE enforcement operations and the direction we need to go. I will make myself available to answer any questions you may have. In addition, if the subcommittee has similar hearings with regard to the current operations and status of DHS components, please consider inviting the National Homeland Security Council, AFGE to present the views of the employees on the front lines in the war on terror. Thank you.



U.S. Immigration and Customs Enforcement

STATEMENT

OF

VICTOR X. CERDA,
ACTING DIRECTOR OF DETENTION AND REMOVAL OPERATIONS

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT
DEPARTMENT OF HOMELAND SECURITY

BEFORE

SENATE COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON IMMIGRATION,
BORDER SECURITY, AND CITIZENSHIP

AND

SUBCOMMITTEE ON TERRORISM,
TECHNOLOGY AND HOMELAND SECURITY

“STRENGTHENING INTERIOR ENFORCEMENT:
DEPORTATION AND RELATED ISSUES”

April 14 2005
2:30 p.m.
WASHINGTON, D.C.

INTRODUCTION

Good morning, Chairman Cornyn and Chairman Kyl and distinguished Members of the Subcommittee. My name is Victor Cerda, and I am the Acting Director of Detention and Removal Operations at Bureau of Immigration and Customs Enforcement (ICE) of the Department of Homeland Security (DHS). It is my privilege to appear before you to discuss Detention and Removal Operations' (DRO) enforcement mission. The DRO mission is to promote public safety and national security by ensuring the departure from the United States of all removable aliens through the fair enforcement of the nation's immigration laws.

The role that DRO plays is recognized throughout our strategic plan, "Endgame," which seeks to reach a point where for every order of removal issued, a removal is effectuated. While we have a significant road ahead to achieve the results envisioned in Endgame, our recent efforts and results indicate that we are moving in the right direction.

DRO has benefited from the exclusive focus on enforcement as well as organizational changes that have occurred since its transfer to DHS. Previously, DRO officers at times would be tasked with immigration benefit duties, to include issuing employment authorization cards. That is no longer the case. Now, DRO as a law enforcement division in ICE dedicated exclusively to enforcing our laws and meeting the strategic goals of Endgame. Organizationally DRO is a distinct division within ICE that reports directly to the Assistant Secretary. The DRO field chain of command was also improved

with the creation of direct reporting lines from the field to headquarter management. These changes recognize the importance of the DRO role in enhancing the integrity of our immigration system and supporting the Department's National Security mission and have also been critical to the recent success DRO has achieved.

DRO's core mission is the apprehension, detention and removal of removable aliens, the management of non-detained aliens as their cases go through immigration proceedings, and the enforcement of orders of removal. DRO has implemented an aggressive national fugitive operations program that targets fugitive aliens who have flouted the law and ignored judicial orders of removal. Another part of the enhanced DRO role in interior immigration enforcement is the transition to DRO from the Office of Investigations of the Criminal Alien Program (CAP), formerly called the Institutional Removal Program, the Institutional Hearing Program, and the Alien Criminal Apprehension Program. Aside from eliminating some confusing acronyms, the transition of this program to DRO will permit the creation of a strategic approach that targets criminal aliens regardless of their location or stage of prosecution. DRO will be the lead for ICE in identifying criminal aliens subject to removal. The CAP plan will, over time, bring under control our Nation's criminal alien population, a population that poses known community safety issues. By utilizing DRO resources and oversight, this transition will allow ICE Special Agents to focus on complex investigations including cases involving national security threats, money laundering, human smuggling organizations, and human trafficking organizations.

I would like to share with you some benchmark numbers that show the direction in which we are moving and examples of initiatives we have implemented to achieve better enforcement results.

Record Removal Numbers – ICE Detention and Removal officers removed 160,000 aliens in fiscal year 2004. Since the founding of the Department two years ago, ICE has removed approximately 302,440 aliens.

Record Number of Criminal Aliens Removed – In Fiscal Year 2004, ICE removed over 84,000 criminal aliens from the United States. Through a realignment of functions and an enhanced focus on the Criminal Alien Program (CAP), we are more effective in removing criminal aliens who have finished their sentence in prison, thus preventing their release back into our communities. This program is realizing tremendous public safety benefits. During the five months of Fiscal Year 2005, DRO officers from the New York City CAP have identified approximately 1,200 criminal aliens amenable to removal.

62 Percent Increase in Fugitive Apprehensions - In Fiscal Year 2004, ICE had 16 Fugitive Operations teams deployed across the country. These teams apprehended 11,063 fugitive aliens with final orders of removal, a 62 percent increase from the prior fiscal year. This represents an increase of 112 percent in comparison to the same period in FY 2003. 458 aliens of these fugitives were aliens with records of sexual offenses against children—a high priority target for ICE under Operation Predator.

More Effective Detention Management – As part of our law enforcement mission, ICE DRO is responsible for managing the DHS bed space resources for detaining aliens. At the end of FY 2004, DRO maintained an average daily population of over 21,000 detainees per day. During the same year, DRO processed a record 213,000 initial intakes. This was accomplished by focusing on more efficient processing, reducing the average length of custody, and the careful setting of priorities, which resulted in our providing greater enforcement support to the arresting officers.

Innovative Alternatives to Detention – As our arresting officers continue to become more effective in their mission, the demand for bed space and detainee management will continue to grow. Recognizing this, and with the support of Congress, we have begun to explore potential alternatives to detention – innovative approaches that may allow us to release those aliens who do not pose a national security or public safety risk – while at the same time ensuring that they comply with court hearing dates and removal orders. We have already begun implementing these programs, which we believe will help to reverse the historically abysmal rates of compliance with hearing dates and removal orders. Just in the last year, we have nationally deployed electronic bracelet capabilities and telephonic voice recognition to all of our field offices to be applied to aliens on the non-detained docket. These technologies free up officer resources that normally are tied up with docket interviews, while at the same time providing automated notification of violators and enhanced conditions of release for those who may pose a greater risk of flight or threat to the community safety. We have also implemented an Intensive Supervision Appearance Program Pilot (ISAP) in eight cities. The ISAP makes use of

electronic bracelets in the initial phase of the program, but then also provides home and work visits, weekly reporting, and legal and social support information to the aliens designed to increase appearance rates for hearings and removal dates. ICE currently has a total 1339 participants in ISAP. From this pilot program we will be able to determine the effectiveness of ISAP in decreasing the absconder rate. Initial feedback from the field is that this is a promising solution that may help us to maximize resources.

When we consider the improvements we have seen in the apprehension, detention and removal of aliens, the accomplishments we have realized over the past two years have been management-driven as much as budget-driven. By improving the management of our resources and the processes employed, we have greatly improved our performance. For example, one of the biggest delays we face in removing an alien who has been ordered removed is the timely issuance of travel documents from the foreign embassy. Therefore, we have worked with the Department of State and the foreign embassies to identify ways to facilitate the issuance of travel documents. Similarly, we have centralized the process for arranging country clearances for escort removals, work closely with the Justice Prisoner Alien Transportation Systems (JPATS) on larger-scale removals, and have worked with charter and commercial airline companies to facilitate removal scheduling. These process enhancements reduce the amount of time an alien spends in detention, thereby increasing the impact each additional bed will have in support of our enforcement goals.

ICE has implemented a number of investigative initiatives. Each initiative is targeted at specific, differing categories of immigration violators, but each is designed to effectively enforce our nation's immigration laws.

Targeting Child Sex Predators – Under Operation Predator, ICE has arrested more than 5,100 sexual predators since the program was launched in 2003. ICE has already removed over 2,100 of these predators from the United States.

National Security-The protection of our National Security is a fundamental facet of ICE's mission. In terms of immigration enforcement, ICE has several programs in place to address vulnerabilities in this area. ICE has permanent personnel assigned to 77 of the 100 Joint Terrorism Task Force (JTTF) locations with a permanent point of contact available for the remaining 23. Their participation provides critical immigration enforcement expertise to counter-terrorism investigations. ICE field offices support these counter-terrorism efforts by providing actionable proactive counter-terrorism lead information and investigations in furtherance of preventing and disrupting alien terrorist cells domestically and abroad. ICE also has responsibility for compliance and enforcement of various programs aimed at protecting our Homeland by identifying and apprehending those individuals who have violated the purpose and terms of their admission into the United States, as well as identifying individuals and organizations using our immigration system who may be threats to our national security. These programs include the National Security Entry/Exit Registration System (NSEERS) 248 arrests and 2420 completed cases, Student and Exchange Visitor Information System

(SEVIS) 672 arrests and 2675 completed cases, and the United States Visitor and Immigrant Status Indication Technology (US VISIT) 30 arrests and 326 completed cases.

Targeting Human Smuggling and Trafficking – ICE special agents have new tools under the Department of Homeland Security to effectively dismantle criminal organizations that smuggle and traffic human beings for profit. By successfully investigating these organizations from both the financial aspect (following the money trail) and the human smuggling aspect, ICE arrested more than 1,630 human smugglers in FY 2004. Under Operation ICE Storm, an ICE initiative launched in 2003 to target violent human smuggling networks in Arizona, the Federal Government has brought charges against more than 300 defendants and resulted in the seizure of more than \$7 million. This unprecedented seizure of alien smuggling proceeds is a direct result of the merger of our immigration and customs authorities. These are powerful tools that did not reside within one agency prior to the creation of DHS, and these tools have been effectively used by ICE agents over the past two years. Law enforcement authorities in Arizona have credited Operation ICE Storm with a dramatic decrease in alien-related kidnappings and other violent crime in the Phoenix metropolitan area. Homicides dropped 19% and alien –related kidnappings dropped 82%. Less than two weeks ago, on March 4, 2005, ICE agents arrested three leaders of the Franco Human Smuggling Organization. All three individuals have been indicted by a grand jury in Phoenix and are charged with human smuggling violations and conspiracy. These arrests begin the disruption of one of the largest and the most violent criminal smuggling organizations operating along the United States / Mexican border.

Cracking Down on Identity and Benefit Fraud—ICE targets the fraudulent schemes that terrorist and other criminal organizations can use to gain entry to the United States. One example is Operation Card Shark, which targets fraudulent document-vending enterprises that operate in the Adams Morgan section of Washington, D.C. ICE enforcement efforts are aimed at disrupting the illegal activity, dismantling the organizations and apprehending the individuals involved in the trade. So far over 9,500 fraudulent documents have been seized and six document mills have been closed down. 29 aliens have been Federally prosecuted, 30 have been removed from the U.S. and an additional 100 aliens have been arrested on criminal and/or administrative charges. The ICE Forensic Document Laboratory (FDL) is a critical investigative tool in fighting immigration fraud and making cases like Card Shark. The FDL is the only federal crime lab devoted almost entirely to the forensic examination of documents and analysis for law enforcement agencies nationwide.

Providing Timely Information to State and Local Law Enforcement—The ICE Law Enforcement Support Center (LESC) provides local, state and federal law enforcement agencies with timely immigration status and identity information on aliens suspected, arrested, or convicted of criminal activity. The LESL operates 24 hours a day, seven days a week, to provide real-time assistance to law enforcement officers who are investigating or have arrested foreign-born individuals. In FY 2004, the LESL responded to more than 667,000 requests for immigration-related information to law enforcement across the country.

287 (g) -Under section 287(g) of the Immigration and Nationality Act (INA), the Secretary of Homeland Security has the authority to enter into formal written agreements with state and local political jurisdictions to for the training and certification of expertise in immigration enforcement functions for state and local enforcement officers. All selected local or state law enforcement officers must receive the appropriate training in immigration law and procedure and must be individually certified. ICE must supervise all selected officers when they are using their delegated immigration authority.

The use of Section 287(g) is a flexible and controlled force multiplier for ICE in its effort to protect the Nation. In 2002, the Florida Department of Law Enforcement requested to participate with the Federal government under Section 287(g). Florida officials were concerned about the number of terrorist related cases in Florida involving foreign nationals. ICE and the Florida Department of Law Enforcement have investigated over 170 cases with numerous arrests.

Building on the success of the Florida agreement, on September 10, 2003, ICE and the State of Alabama signed an agreement to provide immigration authority to a group Alabama State Troopers. These State Troopers received extensive training in nationality and immigration law and procedures. These officers will have the authority to determine alienage and deportability incident to their normal duties as patrol officers or at driver licensing stations. They will also be trained to process, transport and detain illegal aliens.

Worksite Enforcement—ICE worksite enforcement efforts focus on promoting national security, protecting critical infrastructure and ensuring that employment is authorized. ICE worksite enforcement efforts include focusing on investigations that target unauthorized workers employed in sensitive security sites such as airports, nuclear and chemical power plants and defense contractors. Operation Tarmac specifically targets employers who hire unauthorized workers and give them access to sensitive areas of airports. ICE agents have conducted investigations at 196 airports nationwide, audited nearly 6,000 businesses, obtained 775 criminal indictments, and arrested 1,058 unauthorized alien workers as part of this operation. ICE is conducting similar worksite enforcement operations for nuclear facilities, defense facilities, shipyards and transportation sites and other vulnerable industries.

As part of the President's proposed temporary worker program (TWP) to match willing foreign workers with willing U.S. employers, enforcement of immigration laws to ensure compliance is required. The FY 2006 President's budget would fund 143 positions and the required training to conduct employer audits, investigate possible violations, and prepare criminal employer case presentations. This funding more than doubles the resources dedicated to the worksite enforcement effort.

Better Compliance Enforcement for Students and Exchange Visitors—The Student and Exchange Visitor Information System (SEVIS) allows DHS to collect and manage information on international students and exchange visitors and their dependents by maintaining up-to-date data on a student's status that can be accessed electronically. SEVIS

has simplified what was once a manual process, resulting in more accurate and timely data, faster processing and fewer delays at ports of entry. It is also an effective enforcement tool for ICE special agents.

CONCLUSION

Mr. Chairman, today I have focused on just a few of the immigration enforcement initiatives. The United States has a strong tradition of respect for the rule of law and the integrity of our legal system and respect for immigration laws should not be the exception. At the same time we should be proud of our rich tradition of being a Nation of immigrants. I personally am a product of that tradition. By aggressively enforcing our immigration laws, we seek to deter criminal and terrorist organizations who threaten our way of life, and we seek to strengthen the legal immigration process for worthy applicants.

DRO is committed to aggressively enforcing our laws and seeking new ways to enhance our capabilities to contribute to our Nation's security. I would like to thank you, Mr. Chairman and Members of the Subcommittee, for the opportunity to testify today and I look forward to answering any questions you may have.



Department of Justice

STATEMENT

OF

JONATHAN COHN
DEPUTY ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

BEFORE THE

SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY AND CITIZENSHIP

AND THE

SUBCOMMITTEE ON TERRORISM, TECHNOLOGY
AND HOMELAND SECURITY

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

CONCERNING

STRENGTHENING IMMIGRATION ENFORCEMENT

PRESENTED ON

APRIL 14, 2005

STATEMENT OF JONATHAN COHN
DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY AND CITIZENSHIP
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UNITED STATES SENATE
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Thank you Chairman Cornyn, Chairman Kyl, and members of the subcommittees for allowing me to address two significant flaws in our Nation's immigration laws. One of these flaws permits criminal aliens to delay their removal by seeking superfluous levels of judicial review that are generally unavailable to non-criminal aliens. And the other requires the government to release violent criminal aliens into the American public irrespective of the dangers they pose to the community. Both of these flaws can be fixed legislatively, and we respectfully urge Congress to enact the much-needed reforms.

I. INTRODUCTION

In 1996, Congress took action to protect the American people by enacting the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"), and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Division C, Title III-A, 110 Stat. 3009-546 (Sept. 30, 1996) ("IIRIRA"). At the time, this legislation appeared to be sufficient to satisfy Congress's interest in expediting the removal of criminal aliens and expanding the government's authority to detain such aliens. But

in a series of decisions beginning in 2001, the Supreme Court held that Congress did not speak clearly enough. As a result, there are two holes in our country's immigration laws, which call out for a swift congressional response.

First, criminal aliens have the right to seek superfluous levels of judicial review that are generally unavailable to non-criminal aliens. Although Congress attempted to streamline judicial review for criminal aliens in 1996, the Court interpreted Congress's reforms as permitting such aliens to challenge their removal orders through habeas petitions in district court. *See in INS v. St. Cyr*, 533 U.S. 289 (2001). The result is that violent criminal aliens generally receive *more* layers of judicial review than they had before and *more* review than non-criminal aliens receive. Criminal aliens are thus able to stay in the United States for *longer* periods of time.

Second, the government is required to release numerous rapists, child molesters, murderers, and other dangerous illegal aliens onto our streets. In 1996, Congress removed the six-month limit on the detention of deportable aliens who present a danger to the community or national security. *See* Immigration and Nationality Act ("INA") § 241(a)(6); 8 U.S.C. § 1231(a)(6); *see also* 8 U.S.C. § 1252(c), (d) (1994). In *Zadvydas v. Davis*, however, the Supreme Court presumed that this six-month period still remained in effect, and in *Clark v. Suarez-Martinez*, the Court made clear that the limit generally applies to all aliens, even those who were stopped at the border and never admitted. *See Zadvydas v. Davis*, 533 U.S. 678 (2001); *Clark v. Suarez-Martinez*, 125 S. Ct. 716 (2005). Consequently, vicious criminal aliens are now being set free within the United States.

Because these decisions were based on statutory, not constitutional, grounds, Congress has the power to fix the resulting problems. Indeed, the Supreme Court has already invited it to

do so, and the solutions are readily available. Section 105 of H.R. 418, which has been passed by the House, would eliminate the duplicative judicial review that criminal aliens currently enjoy. Additionally, Congress has already established procedures governing the detention of particular aliens who endanger our national security – procedures that include hearings, judicial review, and opportunities for aliens to periodically challenge their detention. By extending these procedures to other dangerous aliens, Congress can ensure fair treatment while protecting the American people.

II. THE ST. CYR FIX: ELIMINATING DUPLICATIVE AND BURDENSOME LITIGATION BY DANGEROUS CRIMINAL ALIENS

A. Historical Background and the Supreme Court's Decision in *INS v. St. Cyr*

Since 1961, Congress has consistently provided that only the courts of appeals may review removal orders. From 1961 through 1996, the Immigration and Nationality Act ("INA") provided that review in the courts of appeals "shall be the sole and exclusive procedure" for judicial review of deportation orders. See INA § 106(a), 8 U.S.C. § 1105a(a) (1994) (entitled "Exclusiveness of procedure"). As the legislative history behind this provision reveals, Congress aimed to "create a single, separate, statutory form of judicial review of administrative orders for the deportation and exclusion of aliens from the United States." H.R. REP. NO. 1086, 87th Cong., 1st Sess., reprinted in 1961 U.S.C.C.A.N. 2950, 2966 (1961). Congress's "fundamental purpose" was "to abbreviate the process of judicial review of deportation orders" and to "eliminat[e] the previous initial step in obtaining judicial review -- a suit in a District Court." *Foti v. INS*, 375 U.S. 217, 224 (1963); accord *Agosto v. INS*, 436 U.S. 748, 752-53 (1978);

Giova v. Rosenberg, 379 U.S. 18 (1964) (per curiam). Thus, a final order of deportation could be challenged only in the appropriate court of appeals upon a timely filed petition for review.

The order could not be challenged in district court by way of habeas corpus. Although the INA contained another provision permitting habeas review, *see* INA § 106(a)(10); 8 U.S.C. § 1105a(a)(10) (1994), several Circuits interpreted that provision as *not* providing habeas review over deportation orders, but only review over collateral issues, such as whether the alien should be released from custody or granted a stay of deportation pending a petition for review.¹⁷ These courts correctly reasoned that the "sole and exclusive" procedure that Congress set forth was indeed sole and exclusive.

¹⁷ *See Turkhan v. INS*, 123 F.3d 487, 488 (7th Cir. 1997) ("Although § 106(a)(10) authorized district courts to hear habeas petitions regarding certain BIA actions, *see Bothyo v. Moyer*, 772 F.2d 353, 355 (7th Cir.1985), § 106(a) made the federal courts of appeals the exclusive place for judicial review of final orders of deportation."); *Garay v. Slattery*, 23 F.3d 744, 745 (2d Cir. 1994) ("there was no jurisdiction in the district court to consider an appeal from a final order of deportation"); *Daneshvar v. Chauvin*, 644 F.2d 1248, 1250-51 (8th Cir. 1981). Moreover, although other Circuits permitted habeas review of certain deportation orders when the alien was in custody, such review was limited. *See Nakaranurack v. United States*, 68 F.3d 290, 294 (9th Cir. 1995); *Marcello v. District Director*, 634 F.2d 964, 968 (5th Cir.) ("a mere failure to appeal at all within the six-month period provided would raise immediate questions of deliberate bypass of statutory remedies, and . . . habeas relief would likely be held unavailable . . ."), *cert. denied*, 452 U.S. 917 (1981); *see also Galaviz-Medina v. Wooten*, 27 F.3d 487, 491-92 (10th Cir. 1994) (habeas review under INA § 106(a)(10) is limited to constitutional or other claims traditionally cognizable under habeas). As the Ninth Circuit held, habeas review was not to be an option when direct review in the courts of appeals was available. *Nakaranurack, supra* (finding that generally habeas jurisdiction is not available to review issues that could have been raised in a petition for review; allowing habeas review in district court where alien could not seek judicial review in court of appeals because he did not receive timely notice of agency's decision); *Singh v. INS*, 825 F. Supp. 143, 145 (S.D. Tex. 1993) ("To permit petitioners to knowingly bypass the statutorily afforded methods of judicial review would introduce an added level of review, and hence delay, and thereby undermine the efficiency and expediency Congress sought to achieve.").

Moreover, to the extent that habeas review of deportation orders had been available before 1996, Congress attempted to eliminate it in enacting AEDPA. One of the statute's provisions, entitled "ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS," expressly repealed the old habeas provision. See § 401(e), 110 Stat. 1268, repealing INA § 106(a)(10) (1995), 8 U.S.C.

§ 1105a(a)(10) (1994). This was part of Congress's broad efforts to streamline immigration proceedings. Indeed, to expedite removal, section 440(a) of AEDPA precluded *all* judicial review of deportation orders for certain classes of criminal aliens. 110 Stat. 1276-77 (providing that such orders "shall not be subject to review by any court").

Congress continued these streamlining reforms when it enacted IIRIRA. In IIRIRA, Congress reestablished that only courts of appeals – and not district courts – can review a final removal order (or, to use the pre-1996 nomenclature, deportation order or exclusion order). See 8 U.S.C. § 1252(a)(1) (incorporating Hobbs Act, 28 U.S.C. § 2347). In addition, Congress made clear that review of a final removal order is the only mechanism for reviewing any issue raised in a removal proceeding. 8 U.S.C. § 1252(b)(9) (2000); *see also* IIRIRA § 309(c)(4)(A) (transition rules). Together, these provisions were intended to preclude all district court review of any issue raised in a removal proceeding. Finally, as it did in AEDPA, Congress confirmed that criminal aliens cannot obtain *any* judicial review. IIRIRA expressly provided that, "[n]otwithstanding any other provision of law, *no* court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" one of various criminal offenses, including aggravated felonies. See 8 U.S.C. § 1252(a)(2)(C) (2000) (emphasis added);

see also S. Rep. No. 104-249, 104th Cong, 2d Sess. at 7 ("Aliens who violate U.S. immigration law should be removed from this country as soon as possible.").

Nonetheless, despite Congress's efforts to limit judicial review, the Supreme Court expanded it just five years later. In *St. Cyr*, the Supreme Court held that criminal aliens -- whom Congress decided should have *no* judicial review -- are actually entitled to *more* review than they had before, and more review than non-criminal aliens. *St. Cyr*, 533 U.S. 289 (2001). Specifically, the Court held that criminal aliens could seek habeas review of their removal orders under 28 U.S.C. § 2241. With habeas review, the criminal alien gets review in district court *and*, on appeal, in the court of appeals.

The basis for the Court's decision was that Congress never "explicitly mention[ed]" section 2241 or habeas when it eliminated all judicial review over criminal aliens' removal orders. *Id.* at 312-13. According to the Court, an explicit reference to section 2241 or habeas was necessary because Congress did not provide for "another judicial forum" for criminal aliens to raise pure questions of law. *Id.* at 298-300, 312-14; *see also id.* at 312 n.36 ("Congress' failure to refer specifically to § 2241 is particularly significant."). (As noted, whereas non-criminal aliens could challenge their removal orders in the courts of appeals, under AEDPA and IIRIRA, criminal aliens could not.) Thus, as a matter of statutory interpretation, the Court held that criminal aliens could bring habeas actions under section 2241.

The Court recognized that, as a result of its decision, criminal aliens would be able to seek review in district court and, on appeal, in the courts of appeals, whereas non-criminal aliens could obtain review *only* in the courts of appeals. But the Court noted that Congress could fix

this anomaly. As the Court stated, "Congress could without raising any constitutional questions, provide an adequate substitute [to section 2241] through the courts of appeals." *Id.* at 314. n.38.

B. Consequences of *St. Cyr*

1. Delay in the Removal of Criminal Aliens

Among the many problems caused by *St. Cyr*, the most significant is that criminal aliens can now delay their expulsion from the United States for years. Contrary to Congress's intent that criminal aliens be given no judicial review of their removal orders, criminal aliens are afforded *two* levels of judicial review, in addition to the multiple levels of review they receive before the administrative agency. The beneficiaries of this delay include child molesters like Oswaldo Calderon-Terrazas, who was convicted of two counts of sexual abuse for drugging and then raping a 15-year old girl. Calderon-Terrazas was ordered deported in June of 2002, but was able to stretch out judicial review in the federal courts over the next two years by filing a habeas action in district court and an appeal to the Fifth Circuit Court of Appeals. *See Calderon-Terrazas v. Ashcroft*, 117 Fed. Appx. 903, 2004 WL 2476500 (5th Cir. 2004); *Pequeno-Martinez v. Trominski*, 281 F. Supp.2d 902, 914-15 (S.D. Tex. 2003). As both courts found, his case lacked merit, but he was able to stay in the country longer simply because he was convicted of raping a child, and thus had access to habeas review.

St. Cyr has also allowed convicted murderers like Lennox Thom, Luis Rey Garcia, and George Padmore to extend their stay in the United States. After being convicted and after receiving full immigration proceedings before an immigration judge and the Board of Immigration Appeals, each alien was granted two more hearings before a district court and a court of appeals to decide his habeas petition. *See Thom v. Ashcroft*, 369 F.3d 158 (2d Cir.

2004); *Garcia v. Fasano*, 62 Fed. Appx. 816, 2003 WL 21054722 (9th Cir. 2003); *Padmore v. Reno*, 81 Fed. Appx. 745, 2003 WL 22429056 (2d Cir. 2003). Had they not murdered people, they would have received less review of their meritless immigration claims.

Moreover, the Supreme Court's decision in *St. Cyr* also creates an opportunity for delay because it eviscerates Congress's 30-day time limit for judicial review of removal orders found in 8 U.S.C. § 1252(b)(1) (2000). There is no analogous time limitation in habeas corpus. Thus, a criminal alien can entirely ignore his removal order, fail to report for removal, and years later, when the Department of Homeland Security finds and detains him (at the taxpayers' expense), file a last-minute habeas action seeking a stay of removal and review of his immigration order. Clearly, this loophole undermines the finality of immigration proceedings. Indeed, the House Report that accompanied the 1961 immigration legislation warned of precisely this type of danger. It stated that permitting aliens to raise all challenges to deportation orders for the first time after being taken into INS custody would invite "the sorry spectacle of having deportable aliens wait until they are being led to the ship or plane, years after the deportation proceedings have been concluded, before they deign to seek legal redress in the courts." H.R. REP. NO. 1086, at 30, reprinted in 1961 U.S.C.C.A.N. 2950, 2974. Yet, that is exactly the state of affairs under *St. Cyr*.

2. Illogical and Unfair Result

Furthermore, because of *St. Cyr*, aliens who have committed serious crimes in the United States are generally able to obtain *more* judicial review than non-criminal aliens. As the dissent in *St. Cyr* pointed out, allowing criminal aliens to obtain habeas review of their immigration orders in the district court "brings forth a version of the statute that affords criminal aliens more

opportunities for delay-inducing judicial review than are afforded to non-criminal aliens, or even than were afforded to criminal aliens prior to the legislation concededly designed to *expedite* their removal." 533 U.S. at 327 (Scalia, J. dissenting). This is because, under *St. Cyr*, criminal aliens are able to begin the judicial review process in the district court, and then appeal to the circuit court of appeals. Criminal aliens thus can obtain review in two judicial forums, whereas non-criminal aliens may generally seek review only in the courts of appeals.^{2/} Not only is this result unfair and illogical, but it also wastes scarce judicial and executive resources.

^{2/} This point may not apply in the minority of circuits that have held that district courts have jurisdiction under section 2241 to review claims of non-criminals. See *Riley v. Greene*, 310 F.3d 1253 (10th Cir. 2002); *Liu v. INS*, 293 F.3d 36, 38-41 (2d Cir. 2002); *Chmakov v. Blackman*, 266 F.3d 210, 213-16 (3d Cir. 2001). But that only exacerbates the problem. Although the fairness issue may not be present in these circuits, it is certainly illogical to conclude that the immigration reforms were designed to give *all* aliens at least double the amount of judicial review they received prior to the reforms, and some aliens triple the review (review in the court of appeals, habeas in district court, and an appeal to the court of appeals).

For example, Oleg Kanivets was ordered deported by the Board on October 28, 2002. A non-criminal alien, Mr. Kanivets could have filed a petition for review with the Third Circuit Court of Appeals to seek review of the denial of his claim for asylum. However, he completely ignored the INA's judicial review requirements and filed a habeas action in district court. The district court found that it had habeas jurisdiction even though Mr. Kanivets filed a review petition directly with the Third Circuit raising other issues in the case. *Kanivets v. Riley*, 320 F. Supp.2d 297 (E.D. Pa. 2004). The Government has appealed the decision to the Third Circuit.

Unwilling to let non-criminal aliens circumvent the INA's judicial-review procedures, other circuits have required the filing of a petition for review in the court of appeals. See *Rivera-Martinez v. Ashcroft*, 389 F.3d 207, 210 (1st Cir. 2004); *Gomez-Chavez v. Ashcroft*, 308 F.3d 796, 800 (7th Cir. 2002); *Lopez v. Ashcroft*, 332 F.3d 507, 510 (8th Cir. 2003); *Castro-Cortez v. INS*, 239 F.3d 1037, 1046-47 (9th Cir. 2001). Indeed, even the Tenth Circuit has recognized this prudential exhaustion requirement, notwithstanding *Riley*. See *Tyson v. Jeffers*, 115 Fed. Appx. 34, 2004 WL 2492886, *3 (10th Cir. 2004), *petition for certiorari filed* (Feb. 8, 2005) (No. 04-8606) (unpublished) ("Two recent cases from this court have pointed out that petitioners err when they file habeas petitions in district court without first filing for direct appellate review of removal orders in the courts of appeals."); *id.* at *4 ("This exhaustion requirement, and the procedural default rule accompanying it, are motivated by the same general principles that support the procedural default rule applied to § 2255 petitions.").

3. Confusion, Piecemeal Judicial Review, and Burden on Government Resources

Finally, the result in *St. Cyr* has created confusion in the federal courts as to what immigration issues can be reviewed, and which courts can review them. The decision in *St. Cyr* itself held that district courts, and not the courts of appeals, have habeas corpus review authority over statutory claims involving discretionary immigration relief. *See also Calcano-Martinez v. INS*, 533 U.S. 348, 351-52 (2001). On the other hand, after *St. Cyr*, every circuit court has held that courts of appeals retain jurisdiction to review limited threshold "jurisdiction to determine jurisdiction" questions raised by criminal aliens in petitions for review. Therefore, following *St. Cyr*, some issues are still reviewable in the circuit courts while others are reviewable only in the district courts, resulting in bifurcated and inefficient review. Additionally, the circuits have split on the question of which court may entertain constitutional challenges to criminal aliens' removal orders (a question left open in *St. Cyr*).^{3/} All of this has resulted in piecemeal review,

^{3/} Compare *Balogun v. Ashcroft*, 270 F.3d 274, 278 n.11 (5th Cir. 2001) (observing that courts "retain jurisdiction to consider . . . substantial constitutional claims," even when the jurisdiction-stripping provisions of immigration law purport to deprive the courts of jurisdiction); *Robledo-Gonzalez v. Ashcroft*, 342 F.3d 667, 690 (7th Cir. 2003) ("[T]his court has continued to assert its jurisdiction to review substantial constitutional questions even after the Supreme Court's decision in *St. Cyr*."); *Patel v. INS*, 334 F.3d 1259, 1263 (11th Cir. 2003) ("The parties before us agree, however, that under the case law of our court, § 1252(a)(2)(C) does not strip us of jurisdiction to hear and determine substantial constitutional issues.") (citing cases); *Vasquez-Velezmore v. U.S. INS*, 281 F.3d 693, 696 (8th Cir. 2002) ("This Court has jurisdiction to consider substantial constitutional challenges to the Immigration and Nationality Act."), with *Kuhali v. Reno*, 266 F.3d 93, 101 (2d Cir. 2001) ("Finally, because we conclude in the discussion that follows that Kuhali's conviction falls under INA § 242(a)(2)(C), his habeas petition would still be proper with respect to his constitutional claims even if his other claims were defaulted"); *Olatunji v. Ashcroft*, 387 F.3d 383, 388 (4th Cir. 2004) ("In sum, the mandate of section 1252(a)(2)(C) that 'no court shall have jurisdiction to review any final order of removal' plainly extends to all claims on direct review, including constitutional claims."); *Adekoya v. Ashcroft*, 121 Fed. Appx. 593, 2005 WL 106799, *4 (6th Cir. 2005) (unpublished) ("To the extent that Adekoya wishes to challenge the district court's ruling that Section 212(c) relief was unavailable

uncertainty, lack of uniformity, and a waste of resources both for the judicial branch and Government lawyers – the very opposite of what Congress tried to accomplish in 1996.

Consider, for example, the Seventh Circuit's recent decision in *Yanez-Garcia v. Ashcroft*, 388 F.3d 280 (7th Cir. 2004), in which the court dismissed the petition for review after determining that the aliens' controlled substance offenses deprived it of jurisdiction over their petitions. Lacking jurisdiction, the court transferred the cases to the district court under *St. Cyr* to resolve the merits of petitioners' statutory claims. *Id.* at 284. Both parties had extensively briefed the statutory question before the Seventh Circuit, and several government attorneys spent significant time working on the cases. Yet, over one year after oral argument, and almost two and half years after the cases had commenced, the Seventh Circuit transferred the petitions to the district court to start the process anew in habeas. These criminal aliens will now be able to remain in the United States for years as their cases wind through the district court and ultimately, *again*, to the Seventh Circuit.

The case of Luis Suarez further illustrates this problem. Mr. Suarez, an alien convicted of attempted car hijacking (an aggravated felony), filed a habeas corpus petition in March of 2001 arguing that he was a citizen. The district court dismissed the petition and Mr. Suarez filed

to him on constitutional grounds or otherwise, the Supreme Court has been very clear that such a challenge must take place in a habeas proceeding rather than on direct review by federal courts of appeal."); *Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1067 (9th Cir. 2003) ("However, we have already held that an appellate court does not retain jurisdiction to consider even substantial constitutional claims regarding removal orders covered by INA § 242(a)(2)(C)"); *Latu v. Ashcroft*, 375 F.3d 1012, 1018-19 (10th Cir. 2004) ("Thus, we disagree with the government's argument that Mr. Latu could have raised all the issues in his habeas corpus petition in a petition for direct review. We conclude that Mr. Latu properly filed a timely habeas petition to bring his constitutional claims that were not reviewable on direct review under § 1252(a)(2)(C).").

an appeal to the Fourth Circuit. Meanwhile, Mr. Suarez also filed a petition for review directly with the Fourth Circuit in July of 2002. In January of 2003, the Fourth Circuit dismissed Mr. Suarez's appeal of the district court's decision and in July 2003 dismissed the review petition. *Suarez v. Ashcroft*, 69 Fed. Appx. 184, 2003 WL 21546009 (4th Cir. 2003); *Suarez v. Rooney*, 53 Fed. Appx. 703, 2003 WL 40772 (4th Cir. 2003). This one alien's lawsuits required substantial resources both from the U.S. Attorney's Office and the Office of Immigration Litigation in the Department of Justice, as well as from the Fourth Circuit which had to consider two separate petitions, and the district court which adjudicated the habeas action. And all of this was *after* Mr. Suarez had received administrative review before an immigration judge and the Board of Immigration Appeals.

In 2004 alone, the government had to defend against almost 1,000 new habeas cases that could not have been filed if the circuit courts had remained the "sole and exclusive" forum for judicial review of removal orders, as Congress intended. The result is not better review – just more work for the overburdened courts and government attorneys struggling to keep pace with the recent surge in immigration litigation.

C. Congressional Reform – H.R. 418

Fortunately, the legislative fix is simple and has already been approved by the House. Section 105 of H.R. 418 would amend the INA to clarify that judicial review for final orders of removal is available solely in the courts of appeals and not by habeas corpus in the district courts. This bill does not eliminate judicial review, but simply restores such review to its former settled forum prior to 1996. Under the proposed statutory scheme, *all* aliens who are ordered removed by an immigration judge will be able to appeal to the Board of Immigration Appeals and then

raise constitutional and legal challenges in the courts of appeals. *No alien, not even criminal aliens, will be deprived of judicial review of such claims.* Unlike AEDPA and IIRIRA, which attempted to eliminate judicial review of criminal aliens' removal orders, the proposed bill would give every alien one day in an Article III court – the court of appeals. Accordingly, there should be no question at all as to the constitutionality of the proposed reforms. In supplanting the writ of habeas corpus with an alternative scheme, Congress need only provide a scheme which is an "adequate and effective" substitute for habeas corpus. *See Swain v. Pressley*, 430 U.S. 372, 381 (1977). Indeed, in *St. Cyr* itself, the Supreme Court recognized that "Congress could, without raising *any* constitutional questions, provide an adequate substitute through the courts of appeals." *St. Cyr*, 533 U.S. at 314 n.38 (emphasis added). By placing all review in the courts of appeals, the House bill would provide an "adequate and effective" alternative to habeas corpus. *Id.*⁴¹

Moreover, these reforms address the problems created by *St. Cyr* by restoring uniformity and order to the law. First, criminal aliens will have fewer opportunities to delay their removal,

⁴¹ The proposed reforms would preclude criminals from obtaining review over non-constitutional, non-legal claims. But this would effect no change in the scope of review that criminal aliens receive, because habeas review does not cover discretionary determinations or factual issues that do not implicate constitutional due process. *See, e.g., St. Cyr*, 533 U.S. at 306-07 & n.27 (recognizing that habeas courts do not review "exercise[s] of discretion" or "factual determinations" that do not implicate due process); *Fong Yue Ting v. INS*, 149 U.S. 698, 713-14 (1893) ("Congress might intrust the final determination of . . . facts to an executive officer"); *Heikkila v. Barber*, 345 U.S. 229, 236 (1953) ("the function of the courts has always been limited to the enforcement of due process requirements"); *Ter Yang v. INS*, 109 F.3d 1185, 1195 (7th Cir. 1997) ("the Supreme Court long ago made it clear that this writ does not offer what our petitioners desire: review of discretionary decisions by the political branches of government"); *see also Sol v. INS*, 274 F.3d 648, 651 (2d Cir. 2001) (habeas jurisdiction under § 2241 does not extend to factual or discretionary determinations). Moreover, the bill would not preclude habeas review over challenges to detention; the bill would eliminate habeas review only over challenges to a removal order.

because they will not be able to obtain district court review in addition to circuit court review, and they will not be able to ignore the thirty-day time limit on seeking review. Second, criminal aliens will not receive more judicial review than non-criminals. All aliens get review in the same forum – the courts of appeals. Third, by channeling review to the courts of appeals, the bill eliminates the problems of bifurcated and piecemeal litigation, which only serve to increase the burdens on courts and government attorneys. Thus, the overall effect of the proposed reforms is to give every alien a fair opportunity to obtain judicial review while restoring order and common sense to the judicial review process.

III. THE ZADVYDAS /SUAREZ-MARTINEZ FIX: PREVENTING THE RELEASE OF VIOLENT CRIMINAL ALIENS

A. Historical Background and the Supreme Court's Decisions Limiting the Detention of Aliens Ordered Removed

1. *Zadvydas v. Davis*

In 1996, Congress recognized that it is sometimes difficult for the Executive Branch to remove aliens who present a danger to the community. Accordingly, Congress eliminated the pre-existing six-month limit on the detention of deportable aliens who have been ordered removed. See INA § 241(a)(6), 8 U.S.C. §1231(a)(6). Just five years later, however, the Supreme Court held, as a matter of statutory construction, that the six-month limit still generally remained. *Zadvydas v. Davis*, 533 U.S. 678 (2001).

Zadvydas involved two dangerous aliens who were admitted into the United States but later ordered removed after being convicted of crimes: Kestutis Zadvydas, who had a "long criminal record [of] drug crimes, attempted robbery, attempted burglary, and theft," and Kim Ho Ma, who was convicted of manslaughter for his role in a gang-related shooting. *Id.* at 684-85.

Because of the danger they presented and their risk of flight, the government held them both in custody while trying to remove them. *Id.* at 684-86. The government made multiple attempts to find countries willing to accept these aliens, but received only refusals. *Id.* at 684, 686.

Before long, Zadvydas and Ma filed petitions for writs of habeas corpus, complaining that they had been detained for an impermissible period of time. *Id.* at 684-85, 686. Although they conceded that they were illegal aliens who were ordered removed, they asserted that they had a right to be released into the United States. *Id.* at 685, 686. In a 5-4 decision, the Supreme Court agreed on statutory grounds. Although the Court acknowledged that the INA included no time limit on detentions, and, if read literally, allowed the Attorney General to decide how long to detain an alien, *id.* at 689, 697, the Court inferred a time limit in the statute. According to the Court, even though Congress expressly eliminated the six-month restriction, the INA still implicitly limits the detention of criminal aliens ordered removed to six months. *Id.* at 689, 699. The Supreme Court reasoned that once an alien receives a final removal order, detention is permissible only so long as it is "reasonable." *Id.* at 699. In order to promote "uniform administration in the federal courts," the Court ruled that detention for six months is "presumptively reasonable." *Id.* at 701. After six months, if a criminal alien "provides good reason to believe that there is no significant likelihood" that he can be removed "in the reasonably foreseeable future," the government must either demonstrate that the alien is wrong or release him into the United States. *Id.*

Significantly, the Supreme Court did not address the constitutional questions the aliens presented. Indeed, the Court emphasized that its holding was based solely on its interpretation of

the INA, and left open the possibility that Congress could change the result by amending the INA. *See id.* at 697.

2. *Clark v. Suarez-Martinez*

Earlier this year, the Supreme Court extended the holding of *Zadvydas* in *Clark v. Suarez-Martinez*, 125 S. Ct. 716 (2005). *Suarez-Martinez*, like *Zadvydas*, involved two aliens who had filed habeas petitions challenging their detentions: Sergio Suarez-Martinez and Daniel Benitez. In contrast to the aliens in *Zadvydas*, however, Suarez-Martinez and Benitez were never admitted into the United States and they never had any right to be here. Instead, they were stopped at the border and determined to be excludable aliens. *Suarez-Martinez*, 125 S. Ct. at 720.

The government granted Suarez-Martinez and Benitez parole from detention, a privilege both aliens abused by committing a string of crimes. *Id.* at 720-21. While paroled, Suarez-Martinez was convicted of attempted oral copulation by force, two instances of assault with a deadly weapon, burglary, and petty theft with a prior conviction; and Benitez was convicted of grand theft, two counts of armed robbery, two counts of armed burglary, aggravated battery, carrying a concealed firearm, unlawful possession of a firearm while engaged in a criminal offense, and unlawful possession, sale, or delivery of a firearm with an altered serial number. *Id.* Accordingly, the government revoked their paroles and placed them in custody, which lasted for several months. *Id.* at 721.

The two aliens filed habeas petitions. *Id.* They argued that because they had been detained for over six months and it was not "reasonably foreseeable" that they could be removed, their continued detentions were unreasonable under *Zadvydas*. *Id.* In response, the government argued that the rule established in *Zadvydas*, which involved aliens who had been admitted into

the United States, did not apply to Suarez-Martinez and Benitez, who were stopped at the border, excluded, and never admitted to the United States. *Id.* at 725. The government noted the well-settled principle that excluded aliens are entitled to far fewer protections than aliens who have been admitted. *Id.* at 723, 726. Indeed, the Supreme Court had acknowledged this distinction in *Zadvydas*, stating that "[a]liens not yet admitted to this country would present a very different question." *Zadvydas*, 533 U.S. at 682.

But the *Suarez-Martinez* Court nevertheless rejected the government's construction and ruled that *Zadvydas*'s holding applied to excluded aliens, as well. *Suarez-Martinez*, 125 S. Ct. at 722. According to the Court, "it is not a plausible construction of [the INA] to imply a time limit as to one class [of aliens] but not to another." *Id.* at 723 (citation and internal quotation marks omitted). The Court explained that it would not apply different rules for different categories of aliens, and that all criminal aliens detained pursuant to INA § 241(a)(6) could challenge post-removal detentions lasting longer than six months.

The Court clarified, however, that it had not decided any constitutional questions, and that it based its holding solely on its interpretation of the INA. Indeed, the Court invited Congress to amend the INA to eliminate any threats to the community or "the security of the borders" that dangerous criminal aliens may present. *Id.* at 727 & n.8. The Court pointed to the statute governing aliens who present national security concerns as an example of one route Congress could take. *Id.* at 727 n.8 (citing 8 U.S.C. § 1226a).

B. Consequences of *Suarez-Martinez* and *Zadvydas*

1. Release of Hundreds of Excluded Criminal Aliens

As a result of *Suarez-Martinez*, hundreds of excluded aliens, who never had any legal right to enter the United States, are now being released into the country indefinitely. Among these aliens are hardened criminals from the 1980 Mariel boatlift, some of whom were sent directly from Cuban jails by the government of Cuba. It is well documented that many of these aliens engaged in serious criminal conduct after their arrival in this country, and that, with limited exceptions, Cuba has frustrated their repatriation. *See, e.g.*, 52 Fed. Reg. 48799 (Dec. 1987); *Palma v. Verdeyen*, 676 F.2d 100, 101-02 (4th Cir. 1982); *Matter of Barrera*, 19 I & N Dec. 837 (BIA 1989).

All Mariel Cubans who could not be repatriated were eventually paroled into communities, some two or more times. Parole was revoked, however, in numerous instances after the parolees were convicted and incarcerated for new crimes committed in the United States. By requiring the release of these dangerous criminal aliens, the Supreme Court's decision in *Suarez-Martinez* threatens the safety of the American people and displaces the historical, judicially approved use of the government's parole authority. *See, e.g.*, *Gisbert v. Attorney General*, 988 F.2d 1437 (5th Cir. 1993); *Barrera-Echavarría v. Rison*, 44 F.3d 1441 (9th Cir.) (*en banc*), *cert. denied*, 516 U.S. 976 (1995).

Indeed, at the time of the Supreme Court's decision, approximately 920 excluded criminal aliens were subject to release in accordance with the Court's ruling, including over 700 Mariel Cubans. By mid-February, roughly 150 of these aliens had been released in order to

comply with *Suarez-Martinez*. See *Freed Detainees Are Left Homeless*, MIAMI HERALD (Feb. 17, 2005). And many more have been released since or are due for release in the near future.

Among them are vicious criminals who have murdered their wives, molested young children, and brutally attacked their enemies. One such alien is Antonio Valenti-Cordova, who has had an extensive history of mental illness, a conviction for second-degree murder, and a delusional notion that the FBI instructed him to strangle his wife because she was a communist. Another is Angel Mayo-Boffil, a schizophrenic sex offender who has been deemed an "extreme violator" despite earlier treatment in a sex offender program. Other examples include Carlos Rojas-Fritze, who sodomized, raped, beat, and robbed a stranger in a public restroom and called it an "act of love"; Guillermo Perez-Aquillar, who repeatedly committed sexual crimes against children and was arrested for possession of a controlled substance; Elio Riveron-Aguilera, who committed aggravated criminal sexual assault, rape with a gun, robbery, kidnaping, and possession of controlled substances while on parole; and Roberto Barz-Tellez, who was arrested 14 times in the United States and was convicted of burglary, drug, and firearm offenses before his immigration parole was revoked in 2002.

Similarly, the United States is now required to release Francisco Guilarte-Felipe, a violent alien who has admitted to being imprisoned in Cuba for eight months for "disfiguring" another during an argument. He has been in some form of custody since 1983, when he was sentenced to 8 to 16 years for first degree manslaughter after he shot his wife, whom "voices" told him to kill. While in detention, Guilarte-Felipe has been involved in 14 disciplinary incidents between 1995-2001 (most of which involved assault). The government has also begun processing Lourdes Gallo-Labrada for release, even though she has a frightening criminal record. In 1984, she was

convicted for attempted first degree murder and arson after she literally set her boyfriend on fire. And in 1992, she was convicted again for assault. All told, since entering immigration custody in 1991, she has received 64 disciplinary reports, the majority of which were for assault.

2. Release of Deportable Criminal Aliens

The Supreme Court's decisions will also likely result in the release of several vicious criminal aliens who at one time had a right to be here but no longer do. Before *Suarez-Martinez*, the government thought it could detain at least some of these aliens. Indeed, in *Zadvydas*, the Court recognized that a case may present "special circumstances" warranting continued detention. The Court suggested that such special circumstances could include cases involving aliens who have terrorist ties or are especially dangerous. This led the Department of Justice to conclude that the Court would interpret the INA differently in these cases. 66 Fed. Reg. 56, 968. Accordingly, the Department issued regulations designed to permit the continued detention of aliens who are mentally ill and especially dangerous, who present national security or terrorism concerns, whose release would compromise the Nation's foreign policy, or who carry a highly contagious disease. 8 C.F.R. § 241.14(b), (c), (d), (f). Specifically, the regulations established procedures and substantive standards for detaining aliens who fall into one of these categories. The regulations were narrowly drawn to allow continued detention only when the risk to the public is particularly strong and only when no conditions of release can avoid such risk.

Unfortunately, in light of *Suarez-Martinez*, the dangerous aliens that are subject to these regulations will argue that they are invalid. As discussed, under the logic of *Suarez-Martinez*, one "cannot justify giving the *same* detention provision a different meaning" simply because a different class of aliens is involved. *Id.* at 724. As the Supreme Court explained, "it is not a

plausible construction of [the INA] to imply a time limit as to one class [of aliens] but not to another." *Id.* at 723. Consequently, some courts may conclude that the government is barred from considering *any* individual characteristics when deciding whether to release an alien, even strong signs that the alien is physically dangerous. *All* aliens would be subject to the six-month limit on detention. Thus, although the Department will continue to defend the regulations in court, they will be subject to challenge.

In fact, even before *Suarez-Martinez*, one court struck down the government's regulation on detaining aliens who are mentally ill and dangerous. In *Thai v. Ashcroft*, the Ninth Circuit Court of Appeals ordered the release of a mentally deranged rapist who vowed that he would repeat his crimes if released. *Thai v. Ashcroft*, 366 F.3d 790, 798-99 (9th Cir. 2004). According to the court, even when an illegal alien ordered removed is mentally ill and violent, the government must release the alien after six months unless it can show that another country will accept him in the near future. *Id.* at 798.

Tuan Thai's crimes speak for themselves. Thai was convicted of third degree assault for a vicious battery on his girlfriend. *Thai v. Ashcroft*, 389 F.3d 967, 971 (9th Cir. 2004) (Kozinski, J., dissenting from denial of rehearing en banc). "He knocked her down and punched her 10 to 20 times. He pushed a chair down on her and choked her with both hands, then bound her up with a cable around her wrists and ankles. He also stuffed a microphone into her mouth and turned up the radio," *id.*, and threatened to beat her slowly until she died. Later, Thai was convicted of third-degree rape. "While his friend was out fishing in Alaska, he raped his friend's girlfriend repeatedly over the course of several months, beginning while she was six months pregnant. He monitored her phone calls with her boyfriend, threatened to put cocaine in her

vagina and harm her other children if she tried to kick him out, and threatened to kill her more times than she could remember." *Id.* Far from showing remorse, Thai "called his rape victim from jail and threatened to find her and burn her house down when he got out"; "threatened her with 'payback'" at a court hearing for a protective order; "became abusive to his interpreter, whom he almost hit, as well as to an officer and an immigration judge" at his reasonable cause hearing; "threatened to kill his [immigration] judge and prosecutor after he was released"; and vowed that "once he is released, even the judge could not do anything to him." *Id.* at 971-72. While in custody, Thai refused to participate in treatment programs for sex offenders. Two psychiatrists concluded that Thai was mentally ill and predicted that Thai "will repeat his actions if released." *Id.* at 971.

Not surprisingly, the United States was unable to remove Thai without creating an international incident. *Thai v. Ashcroft*, 366 F.3d 790, 792 (9th Cir. 2004). Thus, the only two options were to continue to detain him or to release him into the United States, where he promised he would commit more crimes. Recognizing that no conditions of release would adequately prevent such crimes, the government argued that Thai should be kept in detention. But the Ninth Circuit disregarded Thai's promises that he would repeat his grisly acts and held that it was irrelevant that Thai was clearly dangerousness and mentally ill. *Id.* at 798. According to the Ninth Circuit, it did not matter how dangerous he was, how many women he would rape, or what other unspeakable crimes he would commit. The court ordered Thai released. *Id.* at 798-99; *id.* at 799 & n.6.

Unfortunately, Tuan Thai is not an isolated case. As Judge Kozinski noted in his dissent from the court's decision to deny rehearing en banc, there are at least four other dangerous,

mentally ill deportable aliens detained in the Ninth Circuit alone. These "include[] a pedophile who was sentenced to over 13 years in prison for continuous sexual assault of a minor under age 14 and for a lewd act on a child under age 15; a pedophile convicted of sexual abuse of a 12-year old girl and sexual contact with an 8-year old girl; a schizoaffective/bi-polar arsonist who set fire to an occupied building and who has convictions for simple assault, aggravated assault, and criminal possession of a weapon; and a murderer who was diagnosed as a malingerer (faking mental illness) and with antisocial personality disorder." *Thai*, 389 F.3d at 972 & n.4 (Kozinski, J., dissenting from denial of rehearing en banc). In fact, one of the pedophiles violated his parole only two weeks after the district court granted his habeas petition. *Id.* Without a legislative fix, even more pedophiles, serial rapists, and psychopaths could be released into the American public.

Moreover, considering these criminals' prior records, the chances of future offenses are substantial. As one of IIRIRA's sponsors stressed, "[r]ecidivism rates for criminal aliens are high." 142 Cong. Rec. 7972 (1996). Indeed, according to a GAO study, "77 percent of noncitizens convicted of felonies are arrested at least one more time." *Id.*; see also *Demore v. Kim*, 538 U.S. 510, 518-19 (2003) (noting evidence before Congress of high rates of recidivism, including that 45% of deportable criminal aliens were arrested multiple times); GAO, *Criminal Aliens: INS' Efforts to Identify and Remove Imprisoned Aliens Need to Be Improved* 7 (July 15, 1997) (in one study, 23% of released aliens had been rearrested for crimes, including 184 felonies). Congress can help prevent these crimes by enacting a legislative fix to *Zadvydas* and *Suarez-Martinez*.

3. Release of Aliens Who Pose National Security Threats

Furthermore, under the logic of *Suarez-Martinez*, aliens will also argue that the government is limited in its ability to detain terrorists and other aliens who present a national security threat. If, in fact, the government's detention regulations are invalid, the only authority for detaining such aliens would be another statute. Currently, there are two statutory provisions on which the government may rely: 8 U.S.C. § 1537 and 8 U.S.C. § 1226a. Neither is sufficient. Accordingly, without a legislative fix, the United States may not be able to detain aliens who present national security threats.

Section 1537 is limited in three significant ways. First, the section applies only to aliens who have gained admission into the United States and does not cover arriving aliens. INA § 501, 8 U.S.C. § 1531. Second, the statute covers only those aliens who have actually engaged in terrorist activity and does not apply to aliens who have other connections to terrorist activities or who pose other national security risks, such as espionage. INA §§ 501, 237(a)(4)(b), 8 U.S.C. §§ 1531, 1227(a)(4)(B). Third, section 1537 applies only if the alien is placed in proceedings before the Alien Terrorist Removal Court (ATRC), as opposed to conventional proceedings before an immigration judge. This has never been done before. An alien can be placed in ATRC proceedings only if there is probable cause to believe that removal under conventional proceedings "would pose a risk to the national security of the United States." INA § 503(a)(1)(D), 8 U.S.C. § 1533(a)(1)(D). Ordinarily, placing terrorists in conventional removal proceedings does not present a risk to national security. If, for example, the terrorist overstayed his visa, he can be ordered removed through conventional proceedings based solely on the visa violation. Consequently, the ATRC might not be available, and the government might lack

authority under section 1537 to detain the alien, even though the terrorist's home country might eventually refuse repatriation and create a national security concern. Alternatively, the government might choose not to initiate ATRC proceedings even when they are available. Because of the difficulties in proving that an alien has engaged in terrorist activities and because of the sensitivities in using classified information, the government may, at times, simply find it more expedient to remove an individual based on conventional factors than to attempt to prove his status as a terrorist in ATRC proceedings. If the alien ultimately cannot be physically removed from the United States, the United States might have no choice but to release the terrorist back into the American public.

Section 1226a is likewise inadequate. First, the statute does not expressly authorize post-order detention. Second, an alien could argue that detention is impermissible unless the Attorney General certifies that the alien is a danger before the alien is taken into custody, 8 U.S.C. § 1226a(a)(1), and before removal proceedings begin, 8 U.S.C. § 1226a(a)(5). Third, one could contend that classified information may not be used in these proceedings. Although the Department does not find these arguments convincing, there is no reason to run the risk that a court might be persuaded. When an alien is a terrorist or presents other national security concerns, the statute should eliminate any doubt that the government is equipped to protect the American people.

4. Release Of Aliens In Violation of United States Foreign Policy

Furthermore, even if an alien does not pose a danger to the community or security of the United States, the government may have serious foreign policy reasons for keeping that alien in custody until he can be removed. Recognizing this, the Department of Justice's regulations allow

the government to detain an alien if the Secretary of State determines that the alien's release would cause "serious adverse foreign policy consequences," even if detention lasts over six months and removal is not reasonably foreseeable. 8 C.F.R. § 241.14(c). Due to the confusion wrought by the Supreme Court's decisions in *Zadvydas* and *Suarez-Martinez*, however, the government has been required to defend against challenges to this basic, Executive power.

Abdi Alinur Mohamed provides a case in point. Mohamed, or Judge Nur, is a native of Somalia, where he committed numerous acts of political persecution, war crimes, and human rights atrocities. From 1987 to 1988, Judge Nur served as Chief Judge of the Military Court, a "slaughterhouse" in which citizens who spoke out against the Barre dictatorship were tried and convicted in single-day, sham trials. Many of Judge Nur's victims were executed the same day as their trial, some within an hour of his verdict. Judge Nur imposed these death sentences as part of a program to exterminate members of the political opposition, many of whom were members of the Isaaq clan. His victims were buried in mass graves. As explained by one witness, whose father was among thirteen prisoners tried in Mohamed's military court and executed by a firing squad that same day: Judge Nur was "the Hitler of Northern Somalia." "Judge Nur did to the Somali people what Hitler did to the Jews. . . . He did everything possible to eliminate a[] whole ethnic group." Statement of Somali witness.

The United States made three attempts to remove Judge Nur, but to no avail, and he filed a habeas petition, asserting that he was entitled to be released under *Zadvydas*. The government argued that the regulations permitted Judge Nur's continued detention, because Judge Nur's release would have serious adverse foreign policy consequences. 8 C.F.R. § 241.14(c). As then-Secretary of State Powell explained, releasing Judge Nur could lead other countries and

perpetrators of human rights abuses to "conclude that the United States is not serious about taking aggressive steps to bar human rights violators from residing freely in the United States," a result that would undercut the United States' "central" foreign policy objective of promoting "human rights, the rule of law, and holding answerable those who have committed serious human rights abuses, genocide, war crimes or crimes against humanity." Secretary of State Colin Powell, Letter to Secretary of Homeland Security Thomas J. Ridge, at 4 (April 24, 2004). Secretary Powell additionally concluded that releasing Judge Nur would contradict U.S. efforts to promote "peace, good governance, and stability" and to "re-establish functional judicial services" in Somalia. *Id.* at 5. Lastly, Secretary Powell found that releasing Judge Nur into the United States would be inconsistent with the United States government's Somali-refugee-resettlement program, which requires Somalis to undergo time-consuming security clearances and excludes Somalis who have committed crimes. *Id.* Judge Nur countered that, after *Zadvydas*, the regulations were not valid.

The court never decided Judge Nur's claim. Just days before the scheduled hearing on Judge Nur's habeas petition, the United States was able to remove Judge Nur to a third country, and his petition was dismissed as moot. Nonetheless, this case demonstrates why clear detention authority is necessary. It is not always possible to remove an alien to a third country. Next time, the United States might be required to release the human rights abuser into the American public.

5. Encouraging Illegal Immigration

Finally, the Supreme Court's decisions in *Zadvydas* and *Suarez-Martinez* may encourage illegal immigration. In the past, aliens knew that if they entered the United States, they could be caught and detained. Now, these aliens might speculate that, once they arrive in the United

States, they will not be removed (because the United States will be unable to remove them) and if caught, they will eventually be released into the country (under the six-month rule of *Zadvydas* and *Suarez-Martinez*). Additionally, hostile countries may have a greater incentive to encourage illegal immigration and even to send criminals to the United States. "[B]y refusing to accept repatriation of their own nationals, other countries can effect the release of these individuals back into the American community." *Zadvydas*, 533 U.S. 678, 711 (Kennedy, J., dissenting).

Cuba provides a case in point. Fidel Castro has used his own people as "bargaining chips" in his efforts to pressure the United States to modify its policies. Human Rights Watch/Americas, *Cuba: Repression, the Exodus of August 1994, and the U.S. Response 2* (Oct. 1994). In 1965, Castro sent 5000 migrants to the United States, on the assumption that "the appearance of loss of control over U.S. borders – coupled with the perception inside the U.S. that Florida might be overrun – would be viewed by U.S. leaders as politically costlier than the alternative of dealing with him." Kelly M. Greenhill, *Engineered Migration As a Coercive Instrument: The 1994 Cuban Balseros Crisis* 13 (Feb. 2002). In 1980, Castro expressed his anger over United States immigration policies toward Cubans, United States government statements labeling Cuba a Soviet puppet state, and the Peruvian and Costa Rican governments' handling of 10,000 asylum seekers, by flooding the United States with more than 100,000 migrants. Wayne S. Smith, *The Closest of Enemies: A Personal and Diplomatic Account of U.S.-Cuban Relations Since 1957*, at 200-10 (1987). This included thousands of criminals whom Castro forced onto the departing boats. 52 Fed. Reg. 48,799. In 1994, Castro again released tens of thousands of Cubans in an attempt to pressure the United States to lift its economic embargo, alter its immigration policies, and engage in bilateral talks with Cuba. Greenhill, *supra*, at 17-25.

And in April 1995, Castro threatened yet another boatlift in an effort to derail the proposed Helms-Burton legislation, *see* 22 U.S.C. §§ 6021-6091.

To be sure, most of the aliens that Castro sent to the United States are law-abiding and productive members of society. Moreover, the United States should remain faithful to its immigrant heritage and continue serve as a haven for those in need. But this interest in compassion must be balanced with our interest in national security. And for dictators like Castro, the knowledge that any criminals they send will eventually be freed into the United States only increases the power of illegal immigration as a bargaining tool. It is all too easy to imagine that other countries, or Al Qaeda cells, will follow Castro's lead and help criminals and terrorists enter the United States.

Lastly, the Supreme Court's decision in *Suarez-Martinez* may encourage migrants to undertake treacherous voyages to the United States in ramshackle boats. Prior to *Suarez-Martinez*, these aliens faced the possibility of long-term detention. But now that they are guaranteed eventual freedom into the United States, they have an added incentive to attempt the dangerous trip. Even worse, the United States may now have a strong incentive not to help migrants in trouble on the high seas reach United States soil – for when they do, we will be limited in our ability to detain them, even if they turn out to be criminals or national security threats. Thus, *Suarez-Martinez* could adversely affect this country's ability to manage migration crises from Cuba, Haiti, or any number of countries.

C. Congressional Reform

Congress has the power to solve this problem. Indeed, the Supreme Court has invited it to do so, stating that if the "Government fears that the security of our borders will be

compromised . . . Congress can attend to it." *Suárez-Martínez*, 125 S. Ct. at 727. Additionally, a solution is readily available. As noted, Congress has already established procedures governing the detention of certain aliens who present national security concerns. INA § 236A, 8 U.S.C. § 1226a. These procedures provide ample due process protections, including hearings, periodic review, recurring opportunities for the alien to submit evidence, and judicial review in the federal courts. Indeed, the Supreme Court specifically pointed to these procedures as one way Congress could change the result in *Suárez-Martínez*. *Suárez-Martínez*, 125 S. Ct. at 727 & n.8. Congress should accept the Supreme Court's invitation and extend these procedures (minus the infirmities discussed above) to other illegal aliens who present an unwarranted danger to the community, our national security, or our foreign policy. Such a solution will ensure fair treatment of illegal aliens while protecting our Nation's immigration interests.

IV. ADDITIONAL REFORMS

Although eliminating *St. Cyr* habeas review and granting the government the authority to detain dangerous criminal aliens will significantly improve the immigration system, other reforms are needed to expedite removal proceedings and reduce burdensome and unproductive litigation of immigration cases. For instance, Congress can clarify the authority for reinstatement orders. Despite the provisions authorizing the government to reinstate removal orders against aliens who unlawfully re-enter the United States, one court has concluded that illegal aliens who violate their removal orders and sneak back into the country are entitled to yet another round of full proceedings before an immigration judge. *E.g., Morales-Izquierdo v. Ashcroft*, 388 F.3d 1299 (9th Cir. 2004). To reduce duplicative litigation and delay, Congress should clarify that reinstatement orders do not require immigration court proceedings.

U.S. Senate Judiciary Subcommittee on Immigration, Border Security and Citizenship
U.S. Senator John Cornyn (R-TX), Chairman

"Strengthening Interior Enforcement: Deportation and Related Issues"

Wednesday, April 14, 2005, 2:30 p.m., Dirksen Senate Office Building Room 226

I want to thank Chairman Specter for scheduling today's hearing.

I want to again say that I am pleased that today's hearing, like our last hearing, is a joint hearing of the Immigration and Border Security subcommittee, which I chair, and the Terrorism and Homeland Security subcommittee, chaired by Senator Kyl. As we noted this week, we plan to work together through these hearings and in negotiations to address the problems facing our immigration system.

I want to also thank the ranking member of this subcommittee, Senator Kennedy, and Senator Feinstein, the ranking member of the Terrorism subcommittee, along with their respective staffs for working with my office to make this hearing possible.

While traditional immigration issues do not always involve terrorism issues, we need to remember that terrorists desiring to enter this country explore illegal entry, alien smuggling and other ways to exploit our immigration laws to facilitate their entry into the country.

That is why I believe that having these two sub-committees jointly participate in these enforcement hearings bring important perspectives and depth to our review of these issues.

No serious discussion of comprehensive immigration reform is possible without a review of our nation's ability to effectively secure its borders and enforce its immigration laws. These discussions must necessarily include providing sufficient tools and resources to keep out of our country those who should be kept out, to identify those in our country who should be apprehended, and to remove from this country those the government orders deported.

These issues continue to dominate public discussions across the country and are among the most significant topics facing our country.

Just last month, President Bush met with the leaders of Canada and Mexico in my home state to discuss, among other things, border security. I hope today's hearing will build on that discussion.

INTRODUCING THE HEARING

This hearing is the second in a series of hearings planned on "Strengthening Enforcement." In our first hearing, we examined the challenges facing our inspectors at the ports of entry, including the need for adequate training, the need to provide them sufficient relevant information, and the need for document integrity. Beyond today's hearing, I hope to continue this series later this month by examining the tools and resources needed to protect our borders along the perimeter of the country in between the authorized ports of entry and other issues important to this discussion.

Today we will examine the challenges to adequate enforcement of our immigration laws in the interior of our country, away from the borders. Generally when people discuss immigration enforcement they naturally refer to border patrol agents. And, border patrol agents are critical to the enforcement process. However, illegal immigration issues are not limited to the border or to border states. Therefore, equally important are those immigration investigators, detention officers, and other professionals responsible for locating, detaining and removing those who are in this country in violation of our laws.

Recent events have highlighted the importance of these interior enforcement officials. First, intelligence professionals have expressed concerns that terrorists intend to surreptitiously enter the country. These concerns are striking given two significant events recently reported by the Homeland Security department.

First, DHS discovered an elaborate tunnel under the California/Mexico border complete with a cement floor and intercom connecting a house in Mexico to a home in California. Additionally, ICE agents recently rounded up more than 100 gang members from the violent Central American gang MS-13, all of whom were in this country illegally. Both of these examples illustrate the emerging national security threat that worry intelligence officials as established smuggling routes and violent gangs can easily be made available to terrorists to facilitate entry into the country, for the right price.

Today's hearing addresses this critical portion of our immigration system. Because no country can effectively carry out its sovereign function to enforce its laws unless it can effectively apprehend those who should be arrested and efficiently remove them from the country, we must scrutinize these issues. Unfortunately, I fear that recent rulings from the Supreme Court require the government to release dangerous aliens, who have been ordered removed, onto our streets. I intend to ask our witnesses today about the types of aliens ordered removed who have been released onto our streets.

Also I fear that today's hearing will amply demonstrate that we face serious problems within our deportation system that impede the enforcement of our final orders of deportation, particularly as it relates to those who have committed crimes against our country while guests of our country. Simply put, our nation's process for deporting individuals who are not lawfully entitled to be in the United States is over-litigated and under-resourced – over-lawyered and under-equipped. We must find a better way of removal-because if we are not serious about deporting those ordered deported, we can never be serious about reform.

Additionally, we will examine various related issues associated with the detention of those here illegally.

Specifically, today's witnesses will address detention bed space limitations, alternatives to detention, the difficulty locating those who abscond, and other alternatives such as using Memorandum of Understandings with state and local law enforcement like those used in Alabama and Florida. We will also discuss the investigative priorities of interior Immigration agents. I hope to hear how they intend to meet their priorities and how they intend to balance them with the approximately 6,000 ICE agents available to address the approximately 10-12 million people here illegally. This obvious disparity in numbers is something we must address.

Our interior enforcement personnel are highly dedicated and loyal public servants. They face monumental tasks and carry out their assignments professionally and diligently. I hope to hear today how Homeland Security plans to enhance their enforcement efforts and what impediments the Justice Department has identified to effectively deporting those ordered removed.

And with that, I will turn the floor over to Senator Kyl, and then to Senator Kennedy and Senator Feinstein, for any introductory remarks that they each may have.



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TESTIMONY

Submitted to the Senate Judiciary Committee

Immigration, Border Security and Citizenship Subcommittee

Hearing

On

**“Strengthening Enforcement: Interior Enforcement and Deportation
Proceedings”**

By

KATHERINE CULLITON

Legislative Staff Attorney

Mexican American Legal Defense and Educational Fund

April 14, 2005

MALDEF Urges Protection of Fundamental Rights in Immigration Proceedings—A Narrowly-Tailored Approach is Recommended

1. Introduction

MALDEF (Mexican American Legal Defense and Educational Fund) is a national, non-profit, non-partisan organization dedicated to protecting the civil rights and serving the nation's 40 million Latinos in the United States through community education, advocacy and when necessary, litigation.

The Latino community acknowledges the reality of living in a post-9/11 world, and encourages Congress to seek appropriate, narrowly tailored approaches to addressing national security concerns. As such, we specifically caution against practices and resulting outcomes that unnecessarily and unfairly target immigrants and immigrant communities when Congress intends to target terrorists. Over-inclusive enforcement policies tread on the rights of those who currently reside in the United States and exacerbate the overall situation for immigrants who are also subject to our current broken immigration system. Specifically, we know that current enforcement strategies and practices have resulted in unfair, abusive and unconstitutional treatment of immigrants and immigrant communities, while at the same time avoiding the larger discussion on comprehensive immigration reform. For these reasons, we urge Congress to ensure constitutional and civil rights protections in enforcement strategies and immigration proceedings, and respectfully request that the comprehensive immigration reform discussion continue.

Specifically, a June 2004 National Hispanic Leadership Agenda (NHLA) special report on immigration documented systemic rights violations against Latinos through post-9/11 immigration enforcement measures. NHLA is the nonprofit, nonpartisan association of 40 national Latino groups from across the spectrum. The NHLA report documents increasing racial profiling, misuse of untrained state and local officials as civil immigration enforcers, unconstitutional sweeps and raids of Latino communities, deprivation of due process rights, inhumane immigration detention conditions, and grave human rights violations at the Southwestern border.¹ Some of these issues were discussed in our testimony of March 14, 2005 presented to this Subcommittee.² Our law enforcement resources should be used to protect and serve communities --- not unlawfully enforce civil immigration laws, or to engage in unlawful or harassing activities. These abusive and unconstitutional practices and outcomes are a symptom of a

¹ NHLA, *How the Latino Community's Agenda on Immigration Enforcement and Reform Has Suffered Since 9/11* (June 2004)(documenting post-9/11 civil rights violations of the Latino community in the context of immigration enforcement).

² *MALDEF Supports National Security But Cautions Against Congress Unnecessarily Infringing Latino Immigrants' and Citizens' Rights*, Testimony Submitted to the Immigration, Border Security and Citizenship Subcommittee Hearing on "Strengthening Enforcement and Border Security: 9/11 Commission Report on Terrorist Travel" (March 14, 2005).

larger issue that can only be completely resolved with narrowly tailored approaches, and through addressing comprehensive immigration reform.³

A narrowly tailored approach is further justified by specific findings on national security concerns. In particular, former Secretary of Homeland Security found that undocumented immigrants did not pose any national security concerns,⁴ and that there were no sign of terrorists operating at the Southwestern border.⁵ Of the numerous over-inclusive enforcement measures taken by the U.S. Government in the name of national security since 9/11, not one has lead to any terrorist convictions.⁶ Moreover, the 9/11 Commission found that, rather than targeting immigrants, better intelligence is needed to make America safer.⁷

In addition, Congress must consider immigration reform measures that take into account the current backlogs. For example, many hard-working, deserving immigrants upon whom our economy depends are “out-of-status” due to unreasonable backlogs. For example, the current “first-priority” backlogs for Mexican American families, under which U.S. citizens may sponsor their spouses or children, are now 11 years (an increase since last year). The current “other worker” backlogs for U.S. employers to hire needed Mexican “other” workers are over four years (also an increase since last year).⁸ Employers cannot wait over four years to hire a needed employee, and close family members should not be separated for decades.

This situation is very different from the situation of previous generations of American immigrants. Under these circumstances, comprehensive immigration reform is needed to provide a safe and legal way for deserving immigrants to enter the U.S.

We understand that the current hearing will focus on interior enforcement and deportation proceedings. We understand that the Senate is concerned about interior enforcement and deportation proceedings in general. The following testimony will provide legal and factual analyses of these issues, and then provide recommendations for immigration policies designed to protect America’s interests while also ensuring protections of

³ Migration Policy Institute, *America’s Challenge: Domestic Security, Civil Liberties and National Unity After September 11th* (June 2003)(available at www.migrationpolicy.org) (citing national security experts such as Vincent Cannistraro, former head of counter-terrorism for the Central Intelligence Agency).

⁴ “U.S. Official Upbeat on Migration Pact with Mexico,” *Reuters* (July 1, 2003); Rebeca Logan, “Ridge dice que indocumentados no son amenaza a la seguridad interna,” *EFE América* (July 1, 2003).

⁵ See Arthur H. Rotstein, “Ridge: No Sign of Terrorists Trying to Cross Border,” *Associated Press* (Sept. 27, 2004).

⁶ See, e.g., Rachel Swarns, “Program’s Value in Dispute as a Tool to fight Terrorism,” *New York Times* (Dec. 21, 2004); Migration Policy Institute, *America’s Challenge: Domestic Security, Civil Liberties and National Unity after September 11* (June 2003), www.migrationpolicy.org.

⁷ *9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks on the United States, Official Government Edition*, Ch. 13 (July 22, 2004)(hereinafter *9/11 Commission Report*).

⁸ U.S. Dept. of State, *Visa Bulletin*, Number 80, Vol.III, (April 2005).

fundamental rights. Part 2 provides facts regarding immigration enforcement proceedings, and demonstrates that due process and civil rights protections are essential. Part 3 provides updated facts about the situation of “absconders” from Southwestern border proceedings, and sets forth recommendations about reforms designed to ensure appearance at removal proceedings as well as improve security. Part 4 provides an update about the current situation of vigilantism at the Southwestern border, and urges Congress to take measures to ensure against rights violations. Part 5 provides conclusions and recommendations designed to make our immigration enforcement system more transparent and efficient, in order to protect fundamental rights and American national interests.

2. Facts and Recommendations Regarding Immigration Enforcement Proceedings—Civil Rights Protections Are Essential

Once comprehensive immigration reform is enacted, fair and just immigration enforcement measures must include constitutional protections such as due process protections and access to a fair trial, so that we can be certain that each applicant for immigration relief is treated objectively and according to the merits of his or her individual case. Increasing fairness and transparency in the immigration enforcement system will help ensure that people come forward out of the shadows, and that each individual is accurately identified and the merits of their case evaluated on the basis of objective criteria. Protection of the most vulnerable, such as unaccompanied minors, asylum seekers, and trafficking victims, is also essential in the immigration reform process.

Currently, due to lack of effective access to counsel and other due process protections, many individuals deserving immigration relief are sometimes unable to access such relief and are subject to detention and removal. For example, our litigation in *Padilla v. Ridge* concerns individuals who have been granted LPR status by an immigration judge, but who have to wait for unduly lengthy periods for the DHS to process and issue their “green cards.”⁹ During such waiting periods of over one year, those who have been granted legal status remain “out-of-status,” unable to work legally, unable to travel, and subject to further enforcement proceedings. This raises serious procedural and substantive due process concerns, and it points to the lack of efficiency and objectivity in the current immigration system.¹⁰ Furthermore, even after the government’s Backlog

⁹ See *Padilla v. Ridge*, Complaint No. M-03-126 (S.D. Tex. 2003)(class action of persons with valid immigration rights approved by the judiciary unable to receive documentation from the DHS due to backlogs and other breaches of due process rights under the 4th Amendment of the U.S. Constitution).

¹⁰ See, e.g., United States General Accounting Office (GAO), *Immigration Benefits: Several Factors Impede Timeliness of Application Processing*, GAO-01-488 (May 2001); GAO-04-309R (Jan. 2004)(despite President Bush’s mandate for backlog reduction, problem continues and backlogs are actually increasing).

Elimination Plan, as of September 30, 2004, the backlog was at 1.5 million applicants.¹¹ This means that at the very least 1.5 million immigrants who believe they are qualified for legal status are waiting to receive the results of their application from the Department of Homeland Security.

Other individuals who are subject to immigration enforcement and wrongful deportation include young children without access to counsel, trafficking victims, individuals fleeing persecution who have valid asylum claims, and family members of U.S. citizens and Legal Permanent Residents (LPRs) who may be entitled to waivers for humanitarian reasons. For example, the new T-visa nonimmigrant status for protection of trafficking victims who cooperate with prosecution of traffickers has been underutilized—while worldwide the U.S. is the #1 destination for human beings who are trafficked into slavery, including sexual slavery, and forced/indentured servitude, with approximately 45,000-50,000 trafficking victims entering every year,¹² only 297 T-visas were issued in 2003.¹³ The U.S. Government is increasing outreach and services to trafficking victims, but it has fallen short in helping them get access to T-visas. The T-visa nonimmigrant status program provided for under the *Trafficking Victims Protection Act of 2000*, as amended in 2003, should be fully utilized, to stop the detention and deportation (or undocumented immigration) of trafficking victims who U.S. law intends to protect through the provision of legal status.¹⁴

The due process rights of the most vulnerable deserve the greatest protection; otherwise, the fundamental right to a meaningful hearing is not possible under the circumstances.¹⁵ MALDEF urges enactment of legislation similar to the *Unaccompanied Alien Child Protection Act of 2004* (S.1129), with amendments to ensure that every unaccompanied minor has access to a *guardian ad litem* and competent counsel. Without these protections, unaccompanied minors who deserve immigration relief under U.S. law are often deported. As the *United Nations High Commissioner for Refugees* (UNHCR) Goodwill Ambassador summarized:

“Over 6,000 children arrive alone in the United States every year. Some are fleeing persecution, many are fleeing abuse. Some are trafficked to work as prostitutes or in sweatshops. Many are eligible for asylum or other

¹¹ DHS, U.S. Citizenship and Immigration Services (USCIS) News Release, *USCIS Announces Backlog Elimination Update* (March 22, 2005).

¹² Approximately 3,500/year are trafficked into the U.S. from Latin America. U.S. Depts. of Justice, Health & Human Services, State, Labor, Homeland Security, Agriculture, and U.S. Agency for Int'l. Development, *Assessment of U.S. Government Activities to Combat Trafficking in Persons* 7, 10 (June 2004). Statistics reveal that the number of men, women, and children being trafficked in from Latin America is increasing. *Id.*

¹³ *Id.* at 20.

¹⁴ See Sources cited at note 12, *supra*. See also Human Rights Center, Int'l. Human Rights Law Clinic, Univ. California at Berkeley, *Safety After Slavery: Protecting Victims of Human Trafficking, Transnational Frameworks for Prosecuting Traffickers and Protecting Survivors* (Working Group Meeting, April 22-24, 2004)(discussing Mexican-U.S. human trafficking and legal mechanisms to protect survivors of forced labor).

¹⁵ See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

humanitarian status in the United States, but U.S. laws do not give them the legal assistance they need to apply.”¹⁶

This must be changed during the 109th Congress. MALDEF also recommends that DHS must substantially improve its policies regarding investigation, detention and treatment of juveniles’ immigration matters.

Similarly, despite pressures from anti-immigrant groups, asylum seekers and refugees should not have their due process rights reduced whatsoever as mistaken deportations are already widespread.¹⁷ DHS Immigration and Customs Enforcement (ICE) and Border Patrol (BP) agents should take every measure necessary to identify asylum seekers and refugees and, once identified, provide them with access to counsel. Asylum seekers, refugees, trafficking victims, and unaccompanied minors should not be kept in immigration detention if they are not a true flight risk. Whether or not a detainee poses a true flight risk is a determination that should be made speedily, and on an individualized basis. Alternative detention procedures should only be used for those who have applied for these forms of immigration relief as a true alternative, e.g., not as an extension of detention but *instead of* detention.¹⁸ These measures will help deserving immigrants have better access to counsel and other much-needed services, so that they can rebuild their lives here in America, as intended under the humanitarian provision of U.S. immigration law.

Immigrants’ due process rights have already been drastically reduced under the *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, codified at 8 U.S.C.A. §1226. The results are not what one would expect from American democracy, nor are they furthering our national interests. In an August 2004 report entitled *American Justice Through Immigrants’ Eyes*, the American Bar Association (ABA) and the Leadership Conference on Civil Rights Education Fund (LCCR) summarized that:

In recent years, low-level immigration officers have acquired unprecedented and unparalleled authority to determine who is admitted to the United States and who is deported. They have the power to separate immigrants from their closest relatives for many years, disrupt their work or businesses, or return them to the hands of a persecutor. They now make hundreds of these decisions every

¹⁶ UNHCR, *How UNHCR Goodwill Ambassador Angelina Jolie Helps Unaccompanied Children Arriving in the United States* (2004), www.unhcr.org.

¹⁷ See, e.g., Lawyers’ Committee for Human Rights, *Is This America? The Denial of Due Process to Asylum Seekers in America* (May 2000)(documenting mistaken deportations, including *refoulement* of asylum seekers to the dangerous country conditions they fled, through the use of “expedited removal” or speedy deportation by low-level immigration officials without a trial or access to counsel).

¹⁸ DHS Bureau of Immigration and Customs Enforcement (BICE), “Public Security: ICE Unveils New Alternative to Detention,” *Inside ICE*, Vol. 1, Issue 5 (June 21, 2005).

day without involving an independent immigration judge or observing any minimal standards of due process.¹⁹

In sum, if the due process rights of immigrants are diminished any further, more young children, trafficking victims, and others with valid claims to immigration relief will be deported mistakenly. Furthermore, immigrants will fear coming forward and helping the U.S. Government identify criminals, traffickers, and perhaps even terrorists. For all these reasons, rather than considering any further dilution of immigrants' due process rights, Congress should instead take measures to increase fundamental due process protections, thereby increasing transparency and efficiency in immigration proceedings, which will in turn convey additional security benefits.

Furthermore, Congress and DHS must take measures to dramatically improve immigration detention conditions. In December 2004, abuses in immigration detention, including the use of attack dogs in New Jersey, made the national news and got the DHS' attention.²⁰ In June 2003, the Office of Inspector General (OIG) of the DOJ issued a report about abuse and mistreatment of the "September 11th Detainees."²¹ Although the abuses seemed shocking to the American public, immigrants' rights advocates had known of similar scenarios for many years. It seemed that 9/11 had only exacerbated already abysmal immigration detention conditions, and that the immigration system was chosen because the former Attorney General was exercising his discretion to interpret its rules as requiring less due process, access to counsel, and protection from abuse, than required under the U.S.A. PATRIOT Act. To guard against abuse and mistreatment, firm internal rules must be issued and detention conditions must be constantly monitored. These rules must include provisions for access to medical treatment and counseling, as appropriate to the circumstances of the individual.

Finally, with regard to civil rights concerns, as the majority of immigrants targeted for enforcement are Latino, MALDEF is concerned about increasing selective enforcement and racial profiling.²² Our recommendations on these matters are detailed in the NHLA report as well as in our testimony of March 14, 2005, and we will be glad to provide further information and analysis to Congress. We also re-emphasize that the current DOJ and DHS policy that would permit racial profiling in immigration proceedings is faulty and must be amended in order to ensure fairness in immigration enforcement.²³

¹⁹ See ABA/LCCR, *American Justice Through Immigrants' Eyes* 7 (2004).

²⁰ Wade Parry, *Jails Must Stop Using Dogs Near Immigration Detainees*, Association Press (Dec. 7, 2004); Eman Varoquia, *Detainee Rights Battle*, The Bergen Record (Dec. 7, 2004)

²¹ U.S. DOJ, Office of the Inspector General, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (June 3, 2003).

²² NHLA Report, *supra*. n. 1.

²³ See, e.g., *Testimony of March 14, 2005*, *supra*. n. 2, at 8-9 (discussing DOJ Guidance recently adopted by the DHS, which would permit racial profiling in immigration proceedings).

3. Facts And Recommendations Regarding “Absconders”

Contrary to certain data being discussed in the Senate about the number of “absconders,” in fact the number of “absconders” may be significantly lessened through alternatives to detention. Moreover, the practice of expedited removal in the border region, although problematic, has resulted in lower numbers of absconders. As discussed herein, MALDEF urges Congress to procure accurate numbers from the DHS and to consider that comprehensive immigration reform combined with alternatives to detention will significantly reduce the “absconder” problem.

First, the issue of accurate information should be resolved. It was noted during the last hearing that, in 2004 former Under Secretary of Border and Transportation Security Asa Hutchinson discussed that there were 42,000 apprehensions of non-Mexicans at the Southwestern border during a 16-month period.²⁴ Due to limited detention space, 28,000 were given notice to appear in immigration court, and over 90 percent failed to show.²⁵ During the last hearing, concern was expressed that non-Mexicans from countries listed by the State Department as sponsoring or failing to adequately prosecute terrorism, were being “caught and released” into the United States.

However, since August 2004, expedited removal has been expanded to the Southwestern border region, and it is our understanding that by February 2005 at least 7,000 were removed rather than being “caught and released.”²⁶ Moreover, we believe that these individuals have not been from “terrorist-producing countries,” but instead Central American nationals or certain Mexicans ineligible for voluntary removal.

MALDEF is not in favor of expedited removal as it produces mistaken deportations as well as severe due process violations. As we discussed in our March 14, 2005 submission:

“Elimination of deportation hearings for any group of individuals who are present in the United States raises serious constitutional questions. The Supreme Court has long held that all persons within the United States are entitled to due process of law under the Fifth Amendment, even if their presence in the country is unlawful.²⁷ This was recently confirmed by the Supreme Court in its 2001 decision in the *Zadvydas* case, in which the Court reiterated the rule that ‘all persons within the territory of the United States are entitled to the protection of the Constitution.’²⁸”

²⁴ DHS Press Release, *Media Roundtable with Under Secretary Hutchinson on Immigration Policy Changes* (Aug. 10, 2004) at 2.

²⁵ *Id.*

²⁶ National Immigration Forum, *Meeting with Border Patrol* (Jan. 31, 2005)(notes on file).

²⁷ See *Wong Wing v. United States*, 163 U.S. 228, 238 (1896); *Yamataya v. Fisher*, 189 U.S. 86, 100 (1903); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950).

²⁸ See *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

Despite our reservations about expedited removal, the practice has rendered the numbers cited during the last hearing outdated. We urge this Subcommittee to get updated, accurate numbers from the DHS about how many are actually “caught and released” at the Southwestern border and to procure accurate information about their national origin. It is critical for Congress to have correct facts, in order to analyze how to properly enforce immigration laws and fix our broken immigration system.

Secondly, MALDEF urges Congress to consider alternative methods for ensuring that defendants arrive for their immigration proceedings. Expedited removal procedures are likely to impact about 42,000 persons of Latin American origin each year. Expansion of expedited removal could also seriously impact entire Latino communities in the border region, where civil rights violations of Latino citizens and immigrants are predictable. Considering the foreseeable risk of widespread civil rights violations, the risk of mistaken removals of deserving Latin American immigrants, as well as the potential for havoc and negative economic impact in border communities,²⁹ the DHS should immediately halt implementation of the expansion of expedited removal to the border.

Expedited removal is not the most effective way to meet the DHS’ policy goals. The DHS should consider using other measures, which provide for access to counsel and the right to a hearing before an immigration judge, currently available under U.S. immigration law, to meet its immigration enforcement goals. For example, potential absconders who are found to pose a flight risk could be held in detention, or alternatives to detention could be utilized to ensure appearances at the required deportation hearings. Congress should also keep in mind that persons who are arrested by the border patrol are already fingerprinted, and their fingerprints are checked against terrorist and criminal watch lists. National security could be improved by improving these procedures.

In sum, the DHS should concentrate its resources on using focused investigative measures targeting criminals and those who would do America harm. Congress should enact comprehensive immigration reform, which would help meet security goals by providing for access to legal documentation of deserving immigrants and new entrants who pass a security check.

4. Update on the Situation at the Arizona Border

Border vigilantes continue to engage in unlawful conduct including harassment, excessive use of force, and racial profiling along our Southwestern border. The vigilantes recruit volunteers, provide arms, training and camouflage uniforms, and organize “operations” against Latino migrants. MALDEF urges Congress to monitor the situation and ensure that the DOJ and DHS take all measures necessary to protect against abuses as well as to protect against unlawful detentions.

²⁹ See, e.g., Deborah Waller Meyers, Migration Policy Institute, *Does Smarter Lead to Safer? An Assessment of Border Accords With Canada and Mexico* 10 (June 2003).

In June, 2003, MALDEF along with the Southern Poverty Law Center filed a civil lawsuit against a paramilitary vigilante group named Ranch Rescue and the rancher who allowed them to come onto his property. The vigilantes attacked two Latino immigrants 60 miles north of the border, by firing shots in the air, pistol whipping one of them, making threats against their lives, chasing them with a Rottweiler dog, interrogating them, and humiliating them.³⁰ The case was settled in the fall of 2004 for \$100,000.

On March 4, 2005, MALDEF filed a civil lawsuit in federal court in Tucson, Arizona on behalf of a group of immigrants, five women and eleven men, who were resting at a wash when they were violently accosted by a man armed with a gun and accompanied by a large dog. The man held the group of immigrant men and women captive at gunpoint, kicking one of the women as she was lying, unarmed, on the ground, and threatened that his dog would attack or that he would shoot anyone who tried to leave.³¹

This lawsuit recently filed in Arizona is one of many instances of violent vigilante activity along the Arizona-Mexico border. In fact, it is believed that dozens of similar unlawful incidents have been reported to local law enforcement agencies in one Arizona border county, but action has not been taken. As such, the local law enforcement agency was similarly charged, as a co-conspirator, under 42 U.S.C. §1986, which provides:

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured . . . for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented.³²

Despite these legal issues, a vigilante group named the “Minutemen” organized a “hunt” of migrants in Arizona, which started April 1st and is expected to last for one month. MALDEF urges Congress to recall that immigration enforcement is the exclusive jurisdiction of the federal government, and not the purview of private citizens.³³

5. Recommendations and Conclusions:

As Congress is considering reforming our broken immigration system, it must take into account the fundamental rights of every person in the United States, as guaranteed by the Bill of Rights.³⁴ America is a nation of immigrants, and our economy is increasingly dependent upon new immigrant labor.³⁵ While MALDEF is not opposed

³⁰ *Vicente et. al. v. Barnett et. al.*, No. CIV 05-157TUC-JMR (D. Ariz., March 4, 2005).

³¹ *Leiva et. al. v. Ranch Rescue et. al.*, No. CC-03-077 (229th Dist. Ct. of Jim Hogg Co., Texas, June 26, 2003).

³² *Id.*

³³ *Mathews v. Diaz*, 426 U.S. 67 (1976).

³⁴ David Cole, *Enemy Aliens*, Ch. 14 (2003).

³⁵ Rob Paral, Immigration Policy Center, *Essential Workers: Immigrants are Needed to Supplement the Native-Born Labor Force* (March 30, 2005) (“Employment in about one-third of

to addressing national security concerns through narrowly tailored immigration enforcement measures, we urge Congress to ensure that the fundamental rights of immigrants are protected in the process. Moreover, comprehensive immigration reform should take place this year.

MALDEF strongly recommends that Congress take the above-discussed measures to protect fundamental rights. Respect for the due process rights of all immigrants is necessary to safeguard against removal or deportation of those legally qualified to stay in the U.S. For these reasons, as well as for the humanitarian purposes found under U.S. immigration law, MALDEF urges Congress to dramatically improve immigration services, and to ensure that every person encountered by immigration enforcement is provided with proper due process and the opportunity to present their case for immigration relief.

Respect for civil rights, including amending the faulty DOJ/DHS racial profiling policies, is also fundamental to American ideals of equality and individual rights. This will also free law enforcement resources to target criminals and terrorists. Finally, Congress and the Administration should take all measures needed to protect against abuses of immigrants' rights, especially considering the current situation at the Arizona border.

MALDEF bases our recommendations over 35 years' of experience in defending immigrants' rights in cases of the most egregious violations, and based upon our in-depth legal experience with the Latino immigrant community. MALDEF believes that the above measures will strengthen our immigration enforcement system. All of the measures we recommend will help ensure transparency and efficiency in our immigration system, which will in turn protect American national interests, including addressing national security concerns.

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all U.S. job categories would have contracted during the 1990s in the absence of recently arrived, noncitizen immigrant workers, even if all unemployed U.S.-born workers with recent job experience in those categories had been re-employed.”)

AMERICAN CIVIL LIBERTIES UNION

Testimony at Hearing on

**“Strengthening Interior Enforcement:
Deportation and Related Issues”**

**Before the Subcommittee on Immigration, Border Security and
Citizenship**

and

**the Subcommittee on Terrorism, Technology and Homeland
Security**

of the Senate Committee on the Judiciary

Submitted by

**Lee Gelernt
Senior Staff Counsel, ACLU Immigrants’ Rights Project**

and

**Lucas Guttentag
Director, ACLU Immigrants’ Rights Project**

April 14, 2005

Chairman Cornyn and Kyl, Ranking Members Kennedy and Feinstein and Members of the Subcommittees of the Senate Judiciary Committee:

On behalf of the American Civil Liberties Union and more than 400,000 members dedicated to defending the Constitution and its promise of fair process for all persons, including immigrants, we welcome this opportunity to present the ACLU's views at this important hearing.

The hearing covers a number of critical issues. We will not attempt to address all of them in our testimony today. Instead, our testimony will focus on the role of the courts in immigration cases, and in particular, on the issues raised by the Supreme Court's decision in *St. Cyr*, which rejected the Justice Department's sweeping claim that the Writ of Habeas Corpus had been repealed in 1996 and was therefore no longer available to immigrants challenging their deportation.¹

Our testimony makes two points. *First*, we hope to convey a sense of the complexity and far-reaching importance of the issues raised by the *St. Cyr* decision. Indeed, as we explain, the issues in *St. Cyr* transcend the immigration field and go to the very heart of who we are as a country, a country which can now count more than two centuries of unwavering commitment to the rule of law and to the Great Writ of Habeas Corpus.

In light of the complexity and historic importance of the issues, any

legislation by the Congress in this area will necessarily raise profound constitutional questions, as well as difficult issues of immigration policy and court administration. We thus respectfully urge Congress to give any new proposals in this area the most careful and deliberate consideration and to dismiss out of hand any proposals that would eliminate habeas corpus for immigrants facing detention or deportation. No Congress *in the history of this country* has ever eliminated habeas corpus for immigrants facing deportation, and this Congress should likewise reject any proposal that would take that extraordinary step.

Secondly, we will explain why the attacks that have been leveled against the *St. Cyr* decision are misplaced. Insofar as there are concerns about the increased number of immigration cases in the courts, those concerns are, in our view, more appropriately directed at the Attorney General's 2002 decision to eliminate any meaningful oversight role by the Board of Immigration Appeals (BIA), a decision which has shifted much of the burden to the courts and left the Judiciary with the task of providing the only real check on erroneous decisions made by immigration judges.

I. *St. Cyr* and The Historic Role of Habeas Corpus in Deportation Cases.

At one level, the *St. Cyr* decision was about immigrants and immigration law. But that narrow characterization would not fully capture what was at stake in *St. Cyr*. Fundamentally, *St. Cyr* was about the history of judicial review in the United States and the indispensable role played by the federal courts in safeguarding the rights of all persons, including the most vulnerable and politically powerless among us. In particular, *St. Cyr* explained the history of the Great Writ of Habeas Corpus, which has, from its English origins to modern times, guaranteed the right to go to court to test the legality of the government's actions for any individual threatened with a deprivation of his or her liberty.

The Great Writ has been described as “the most important human right in the Constitution.”ⁱⁱ Indeed the Framers of the Constitution included few protections in the original document that specifically protected individual rights, but they did include the right to habeas corpus.ⁱⁱⁱ

The *St. Cyr* case itself involved a longtime, lawful permanent resident who was ordered removed on the basis of a criminal conviction. It was undisputed that prior to the passage of the 1996 amendments to the Immigration Act, an immigration judge could have granted Mr. St. Cyr a waiver of deportation based on his significant ties to this country. At the urging of the Justice Department, however, the BIA took the position that the 1996 amendments should be construed

to have *retroactively* eliminated the possibility of a waiver for Mr. St. Cyr, making his removal mandatory.

According to the BIA, deportation was now mandatory in hundreds of cases like Mr. St. Cyr's — regardless of how long ago the conviction occurred or any of the immigrant's other equities. Even relatively minor crimes would trigger mandatory deportation. As a result, an immigrant with a decades-old, non-violent conviction would be subject to automatic deportation — even if, for example, the immigrant had a U.S. Citizen spouse and child, had come to this country at a very young age, and had never again had any involvement with the law.

Even more fundamentally, the Justice Department took the remarkable position that no court could review whether the BIA had properly construed the 1996 amendments to apply retroactively. In the Justice Department's view, Congress had stripped the federal courts of their power — including by Habeas Corpus — to review whether the BIA's legal rulings were consistent with the governing statutes enacted by Congress.

Thus, even if the BIA had incorrectly concluded that Congress never intended to retroactively institute a mandatory deportation scheme, no court had the power to enforce the law and stop Mr. St. Cyr's deportation or any of the hundreds of other illegal mandatory deportations. The only review that would be available

was by administrative judges — immigration judges and the BIA. Yet a process confined to the Executive Branch has never satisfied the fundamental tenets of judicial review and plainly cannot displace the guarantee of habeas corpus.

The issues before the Supreme Court in *St. Cyr* were thus grave, with far-reaching practical and symbolic importance. Had the Justice Department's jurisdictional position prevailed, it would have been the first time in which an immigrant could be deported without any court reviewing the legal validity of the deportation order, even by habeas corpus.

The Supreme Court ultimately held in June 2001 that (1) the courts retained their historic habeas jurisdiction to review deportation orders, and (2) the Justice Department and BIA were wrong in interpreting the 1996 amendments to apply retroactively.

There are at least three overarching points about the Supreme Court's decision that are worth emphasizing. *First*, the Court left no doubt that review of deportation orders is *constitutionally* required, and in particular, that the Suspension Clause of the Constitution guarantees the right to habeas corpus review. Thus, the Court put to rest any notion that immigrants in general, or immigrants with criminal convictions in particular, had no right to habeas corpus.^{iv}

Second, the Court emphasized that the right to habeas corpus was grounded

in hundreds of years of unbroken practice and tradition in the United States and England, and that this practice and tradition applied equally to citizens and non-citizens. In particular, the Court traced the history of immigration law in this country and showed that there has never been a time when an immigrant could be deported based solely on the say-so of an administrative official. As the Court made clear, habeas corpus has always been available for immigrants as the ultimate safeguard against an unlawful deprivation of liberty.^v

Indeed, the Court stressed that the use of habeas corpus to test the legality of a deportation order fell within the original “core” purpose of the Writ because it involved a challenge to *Executive* detention. In contrast, the Court noted that the use of habeas corpus in post-conviction criminal cases involves detention ordered by a court after a full trial, where habeas would not be the *only* review a defendant received.^{vi}

Finally, St. Cyr illustrates a more general point about judicial review and the role played by courts in the immigration system, namely that oversight is critical to the proper functioning of a fair system. Judicial review may seem at times like a technical, abstract concept. But, in practice, the courts play an indispensable role in enforcing the rule of law and preventing grave instances of injustice that would otherwise profoundly and inalterably change the lives of countless immigrant

families.

Indeed, but for the Court's decision to review Mr. St. Cyr's case, he and hundreds of other longtime residents would have been deported pursuant to unlawful deportation orders, banishing them and their families from the United States, where they may have lived since they were small children. At the end of the day, it is critical that the lives of these individuals not be lost in a blur of aggregate statistics and policy arguments.

Jerry Arias-Agramonte is one of the people who would have been erroneously deported in the absence of habeas. He came to this country as a teenager in 1967, as a lawful permanent resident. He has United States citizen parents and siblings, and six United States citizen children, one of whom served in the military. In 1977, Mr. Arias-Agramonte pled guilty to a New York State controlled substance offense in the fifth degree, for which he received a sentence of probation. On the basis of this nearly 20-year old conviction he was placed into removal proceedings and subject to mandatory deportation under the BIA's retroactivity ruling. The district court reversed the retroactivity ruling and granted him the right to seek a waiver of deportation before an immigration judge based on his family ties, long residence and gainful employment. An Immigration Judge subsequently granted the waiver. In the absence of habeas, Mr. Arias-Agramonte

would have been mandatorily and unlawfully deported from a country in which he had lived since 1967.^{vii}

Ironically, it is often immigrants who most appreciate the true meaning of judicial review. For many immigrants, it is the very right to go before a neutral judge that, in their minds, differentiates the United States from other countries that lack the same commitment to the rule of law. They feel viscerally what Justice Frankfurter observed long ago--that "[t]he history of American freedom is, in no small measure, the history of procedure."^{viii} And no procedure has been more integral to preserving freedom in this country over the past two hundred years than the Great Writ of Habeas Corpus.

In short, *St. Cyr* makes clear that immigrants may not be deported without access to the courts, based solely on the word of an administrative judge. At a minimum, habeas corpus must be available to test the legal validity of the deportation order — a right that no Congress has ever taken away.

II. The Attacks on *St. Cyr* and Habeas Corpus Are Misplaced.

Some have suggested that the current judicial review scheme must be revised.

Two particular objections are commonly heard.

First, some have suggested that the federal courts are being overloaded with immigration cases and that *St. Cyr* and habeas review are to blame. But habeas cases challenging removal orders are not the problem.

The real increase in immigration cases is due to the greatly increased number of “petitions for review” filed directly in the courts of appeals.^{ix} And, critically, that increase has coincided with the BIA “streamlining” reforms put into place by the Attorney General in 2002 — reforms that have resulted in a manifold increase in the number of orders issued by the BIA by effectively gutting the administrative review process and thereby shifting the burden to the circuit courts to undertake the only meaningful appellate review of immigration judge decisions.^x

Among other things, the Attorney General’s reforms (1) cut by almost one-half the total number of Board members; (2) expanded the number of cases that will now be reviewed by a single Board member, rather than a three-judge panel; and (3) expanded the number of cases that will be decided on the basis of one-line “AWO” orders, which state only that the immigration judge’s decision has been Affirmed Without Opinion. As a result, there is no longer meaningful administrative appellate review, with reasoned decisions from appellate panels. Rather, the BIA now simply churns out unexplained, one-line decisions at an

unprecedented rate, with the circuit courts getting thousands of new cases each year.^{xi}

Thus, insofar as the aggregate number of immigration cases is perceived as a problem, the solution is not to attack the *St. Cyr* decision. Congress should mandate, among other things, that the Attorney General re-institute a meaningful administrative appellate process before the BIA. Doing so will prevent the BIA from simply shifting the responsibility to the courts to provide the only meaningful review of immigration judge decisions.

The *second* commonly heard objection to *St. Cyr* is that immigrants with criminal convictions are now getting “two bites at the apple,” while non-criminals receive only one bite. By this, detractors apparently mean that non-criminals must begin the review process in the court of appeals, but immigrants with criminal convictions get two bites because they start in the district court in habeas and can then appeal an adverse habeas decision to the circuit (the so-called extra bite at the apple, which, incidentally, the government gets as well).

But it is misleading to suggest that immigrants with criminal convictions get more review than non-criminals. In fact, they get *less* review. The reason is that the 1996 court-stripping provisions significantly restrict the types of claims that they can bring to the courts – in habeas or otherwise. Thus, the review they receive

in federal court, from both the district and circuit courts, is not as searching as that received by non-criminals.^{xii}

In any event, Congress is free to return to the pre-1996 scheme and make the courts of appeals the primary forum for review for all immigrants, criminal and non-criminal. *But* if Congress chooses to return to the pre-1996 scheme and make the circuits the primary forum for review, it *must* also do *both* of the following:

(I) ensure that all immigrants, including those with criminal convictions, receive *the constitutionally-required* one bite at the apple in the circuit court, which cannot happen under the current system due to the 1996 court-stripping amendments. This means that the circuit courts must be able to meaningful review the *legal validity* of the deportation order for consistency with the Constitution and governing statutes and regulations. In other words, the circuit courts must be able to review constitutional claims and *all* questions of law, including the application of law to fact (so-called “mixed” questions of law).^{xiii}

(ii) *retain habeas corpus* review as the ultimate safeguard for cases where the immigrant cannot obtain review in the circuit court and manifest injustice would occur in the absence of habeas review, such as in cases where an unscrupulous or negligent lawyer fails to file a petition for review in the circuit court within the required 30 days, or the immigrant does not receive proper notice of the BIA’s

decision. In other words, habeas corpus in the district courts need not be the *primary* avenue of review to challenge a deportation order, but it must remain as a backstop to prevent miscarriages of justice — as it has always done at every point in our Nation’s history.

Insofar as there are proposals to respond to *St. Cyr* that do not contain *both* of these features, they are deficient. Habeas review must be retained and all immigrants must receive one full bite at the apple (*i.e.*, review of constitutional claims and all other legal claims, not just “pure” questions of law).^{xiv}

In short, Congress has options. We stand ready to work with Congress on preserving full court review while accommodating the government’s interest in channeling more immigration appeals directly to the circuit courts of appeals, if that is thought desirable. But one option that is not available is the repeal of habeas corpus and no option should be considered without careful and deliberate review in light of the enormous stakes.

Of course, the ACLU recognizes the authority of Congress to regulate immigration and entry into the United States. That is not the issue. Our point today is that the process for determining who is subject to removal must be fair and efficient to ensure that immigrants who have a right to remain are not deported erroneously and that the removal system is subject to judicial scrutiny.

CONCLUSION

The history of immigration in the United States is a long and complicated one. What is striking is that at no time did any Congress ever take the extraordinary step of repealing habeas corpus for immigrants facing deportation. This unbroken tradition must be preserved. It is a tradition that powerfully demonstrates our Nation's historic and unwavering commitment to the rule of law.

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- i. *INS v. St. Cyr*, 533 U.S. 289 (2001).
 - ii. Zechariah Chafee, Jr., *The Most Important Human Right in the Constitution*, 32 B.U. L. Rev. 143 (1952).
 - iii. *See* U.S. CONST., Art. I, § 9, cl. 2 (the “Suspension Clause”).
 - iv. *See, e.g., St. Cyr*, 533 U.S. at 300 (noting that review in deportation cases “is unquestionably required by the Constitution” because of the Suspension Clause) (internal quotes and citations omitted). The Court concluded that Congress had not repealed habeas corpus and that there was therefore no need for it to address the grave and far-reaching constitutional problems that would have been triggered by the elimination of all review, including habeas review. *Id.* at 304-05.
 - v. *St. Cyr*, 533 U.S. at 305-07 (noting that if habeas is no longer available it “would represent a departure from historical practice in immigration law”).
 - vi. *St. Cyr*, 533 U.S. at 300-02.
 - vii. *Arias-Agramonte v. INS*, 2000 WL 1059678 (S.D.N.Y. 2000).
 - viii. *Malinski v. New York*, 324 U.S. 401, 414 (1945).
 - ix. Prior to the implementation of the streamlining regulations, federal appeals courts were receiving approximately 1,500 BIA appeals per year. U.S. Department of Justice, Fact Sheet, “BIA Restructuring and Streamlining Procedures,” (Dec. 8, 2004). *See also* Association of the Bar of the City of New York, “The Surge of Immigration Appeals and its Impact on the Second Circuit Court of Appeals,” at 4 (noting that there were more than 8,500 BIA appeals filed in the circuit courts in 2003, up from approximately 1,600 in 2001, before the BIA reforms went into place).
 - x. A number of detailed reports on the BIA reforms have documented that the increase in appeals to the circuits has coincided with the BIA reforms, a point even the government has acknowledged. *See, supra*, U.S. Department of Justice, Fact Sheet; Association of the Bar of the City of New York, “The Surge of Immigration Appeals and its Impact on the Second Circuit Court of Appeals”; *see also* Dorsey &

Whitney LLP, Study Conducted for The American Bar Association, “Board of Immigration Appeals: Procedural Reforms to Improve Case Management,” July 22, 2003.

xi. The reforms have resulted in the BIA deciding thousands more cases each year, meaning that there are that many more cases each year that can be appealed to the circuits. *See, e.g.*, U.S. Department of Justice, Executive Office for Immigration Review, FY 2004 Statistical Yearbook at S2 (showing that in 2001 the BIA decided approximately 27,000 cases on appeal from Immigration Judges, but more than 46,000 cases in 2003, after the 2002 BIA reforms went into place). Moreover, not only did the aggregate number of BIA decisions increase dramatically in light of the 2002 reforms, but the rate at which immigrants appeal BIA decisions to the circuit courts has increased, *see, e.g.*, DOJ Fact Sheet, *supra*, suggesting that the increased number of appeals to the circuits is likely also due to dissatisfaction by immigrants with the lack of a reasoned, considered decision by the BIA. *See also* Dorsey & Whitney ABA Report, *supra* n. 9, at 39 (“because the BIA backlog reduction is achieved by depriving aliens of meaningful agency review, aliens are seeking meaningful review in the federal circuit courts”); *see also id.* at 40.

xii. *St. Cyr*, 533 U.S. at 314 n.38 (noting limitations on “scope” of habeas review for immigrants with criminal convictions).

xiii. *St. Cyr*, 533 U.S. at 302 (noting that historically habeas covered all questions of law including the “erroneous *application* or interpretation of statutes”) (emphasis added). There is no basis in the Constitution or in historical habeas practice for limiting review to “pure” questions of law. Moreover, any attempt to differentiate between types of legal questions (*i.e.*, “pure” as opposed to “mixed” legal questions) will inevitably create years of unnecessary litigation over the elusive line separating the various categories.

xiv. There are many ways in which Congress can restore meaningful direct review in the courts of appeals for all immigrants, including by repealing the jurisdictional bar added to the Immigration Act in INA § 242 (a)(2)(C), 8 U.S.C. § 1252 (a)(2)(C). Insofar as there are proposals to amend INA § 242 (a)(2)(C) to restore review of only “constitutional” claims and “pure” questions of law, those proposals are deficient because they fail to restore review of mixed questions of law and fact (*i.e.*, the application of law to fact); they are also deficient if they fail to protect habeas as a safety net. *See, supra*, n.12.

Statement of Senator Patrick Leahy
Joint Hearing on “Strengthening Interior Enforcement:
Deportation and Related Issues”
April 14, 2005

Today’s hearing attempts to focus on a wide range of issues. It is also the second joint hearing of the immigration and terrorism subcommittees this year. There is certainly a relationship between the control of our borders and anti-terrorism efforts, but I hope that the Judiciary Committee will not see immigration solely through the lens of terrorism during this Congress.

I know that the Chairman of the immigration subcommittee is concerned that the Department of Homeland Security does not have the resources it needs to enforce our immigration laws within the United States. I share many of his concerns, and I have supported proposals to increase DHS funding on many occasions since September 11. Unfortunately, some of those proposals were opposed by the Bush Administration and defeated by Republican majorities in the Senate. Our current fiscal situation requires us to make hard choices about how to allocate our resources. I believe that enforcement of our immigration laws should take precedence over tax cuts, and I hope that the White House will embrace that view.

Immigration and Customs Enforcement (ICE), the DHS branch charged with enforcing our immigration laws in the interior, has such budgetary problems that it has instituted a hiring freeze. This is a serious problem. I also sit on the Appropriations Committee, and have expressed my deep concern about these budget woes to Michael Garcia, the head of ICE, and to other DHS officials. They have said they anticipate the hiring freeze will be lifted this year, and we should all monitor their progress closely.

I would like to note a matter of great concern at our borders. We have seen in recent weeks the launching of citizen border patrols in Arizona, where some residents and visitors from other States have suggested they might take policing of our Southwest border into their own hands. Although these individuals may have understandable frustrations about the staffing levels and effectiveness of the Border Patrol, I think we would all agree that a civilian enforcement of our immigration laws is not what any of us want to rely on, and can raise many problems and dangers.

I cannot help but think we could forestall some of this threatened vigilante activity if the President agreed to fully fund the intelligence reform legislation we passed last December. That law mandated an increase of 2,000 Border Patrol agents annually for the next five years, beginning in FY 2006. The President proposed funding only 10 percent

of those positions in his budget. Apparently border security is another priority the White House will sacrifice to protect the President's reckless tax cuts. Thankfully, the Senate in its budget provided the funds for the additional agents. The conference committee should retain that funding.

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STATEMENT
OF
PROFESSOR NANCY MORAWETZ
NEW YORK UNIVERSITY SCHOOL OF LAW
IMMIGRANT RIGHTS CLINIC

WRITTEN TESTIMONY
FOR HEARING ON
“STRENGTHENING INTERIOR ENFORCEMENT: DEPORTATION AND
RELATED ISSUES”

BEFORE THE

SUBCOMMITTEE ON IMMIGRATION,
BORDER SECURITY AND CITIZENSHIP

AND THE

SUBCOMMITTEE ON TERRORISM, TECHNOLOGY AND HOMELAND
SECURITY

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
APRIL 21, 2005

Chairman Cornyn and Chairman Kyl, Ranking Members Kennedy and Feinstein and Members of the Subcommittees of the Senate Judiciary Committee:

Thank you for this opportunity to submit testimony about immigration law enforcement. I would like to direct my comments to the issues that underlie enforcement with respect to the so-called “criminal alien” population. Often, discussion of these issues begins with the assumption that everyone who can be labeled a “criminal alien” should be deported and that the ultimate goal should be the “removal of all removable aliens.” These assumptions are wrong and ignore the origins of the laws governing noncitizens convicted of crimes.

Eight and a half years ago, a multitude of last minute conference report changes to proposed immigration legislation led to massive changes in the rights of noncitizens including the rights of those who have lived as lawful permanent residents of the United States for most of their lives.¹ Within a few years, the unintended consequences of the legislation had become clear. Members of Congress from both sides of the aisle spoke out about these unintended consequences; members of Congress called on the Attorney

¹ Illegal Immigration and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996). See generally Nancy Morawetz, *Understanding the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000).

General to exercise greater prosecutorial discretion; reform measures were twice reported out of the House Judiciary Committee under Republican leadership and one set of proposed reforms passed the House by a unanimous vote. Meanwhile, some noncitizens exercised their right to go to court when overzealous enforcement went further than what Congress had required. The Justice Department fought judicial oversight of many of its broad interpretations of the new law, including the basic question whether Congress had intended for sweeping legal changes to reach back retroactively and change the rights of noncitizens who had been convicted of crimes years earlier and had since shown a record of rehabilitation.

The record over the last eight and a half years shows that immigration enforcement authorities have often applied the new law even more harshly than it was written. Just last Fall, for example, Chief Justice Rehnquist issued a decision for a unanimous Supreme Court invalidating a removal order where the government has relied on an overbroad interpretation of the law.² Four years ago, the Supreme Court ruled that Congress had not demonstrated an intention to apply certain changes to the 1996 laws retroactively.³ The lower courts are continuing to face a variety of similar questions. Judge Luttig of the Fourth Circuit, for example, recently ruled that there is no evidence that Congress meant to retroactively impose a dual system of deportability under which a lawful permanent resident is not allowed to travel to see a relative without facing the risk of mandatory deportation.⁴ Indeed, the very idea that travel changes deportability rules for lawful permanent residents is itself a bizarre stance that the government has adopted based on its reading of hastily written language that appeared for the first time in a conference committee report in 1996.⁵ In other cases, courts have found that some individuals facing deportation are United States citizens, or that deportation is illegal because the individual would face persecution or torture.⁶

This is not to say that the Justice Department does not sometimes prevail in the courts. But regardless of the ultimate outcome, the issues the courts are considering are extremely important. For example, in *Auguste v. Ridge*,⁷ the Third Circuit considered whether deporting a lawful permanent resident to Haiti, where he would be imprisoned under what the court called “slave ship” conditions, would constitute a violation of the Convention Against Torture. Although the court upheld the removal order, the underlying question was surely serious and worthy of careful review.

² *Leocal v. Ashcroft*, 125 S.Ct. 377 (U.S. Nov. 9, 2004).

³ *INS v. St. Cyr*, 533 U.S. 289 (2001)

⁴ *Olatunji v. Ashcroft*, 387 F.3d 383 (4th Cir. 2004).

⁵ The 1996 law changed INA §101(a)(13) which provides guidelines under which a lawful permanent resident’s trip should not be treated as leading to a new admission, and therefore scrutiny under “inadmissibility” rules. The language of this section was altered in conference with no explanation. See H.R. CONF. REP. NO. 104-828, at 29 (1996).

⁶ See, e.g., *Moussa v. INS*, 302 F.3d 823 (8th Cir. 2002) (holding that petitioner had derived citizenship from his father and could not be deported); *Sackie v. Ashcroft*, 270 F. Supp. 2d 595 (E.D. Pa. 2003) (granting the *habeas* petition under the Convention Against Torture for an immigrant from Liberia, who was forced to be a child soldier and was abused and threatened with death).

⁷ 395 F.3d 123 (3d Cir. 2005).

When courts have ruled against the government, the government reads its obligations to correct erroneous decisions narrowly. Those people who had already been deported -- either because the courts would not hear their cases or because they had simply assumed that there was nothing they could do -- have been out of luck.⁸ The Justice Department will only correct its past error in executing a deportation order when an individual went to court, even if the legal issues are identical to those in the case the government lost. Indeed, in some cases, it refuses to allow those who were erroneously deported to return, even where they did file a court proceeding. This inaction and misapplication of the law continues the unjustified separation of families.

There are several basic lessons from this experience. **First, immigration law is highly technical, making it dangerous to legislate without careful deliberation based on hearings and committee deliberation.** In 1996, both houses of Congress proposed restrictions on relief from removal for lawful permanent residents who were sentenced to five year prison sentences for crimes included in what was then a relatively short list of "aggravated felonies." In conference, however, the five year sentence provision was dropped so that any "aggravated felony" conviction barred relief. The result might not have been so bad if the listed crimes were in fact "aggravated felonies." But the term was never carefully defined, and the conference report compounded the problem by expanding the definition of an "aggravated felony" to the point that it included many crimes that could not reasonably be called either "aggravated" or "felonies." In the years since 1996, the Justice Department has not only argued that the new laws apply retroactively, but it has also sought the broadest possible interpretation of the laws. For example, it has argued that convictions for nonviolent crimes, including misdemeanors, are "aggravated felonies." The Justice Department has successfully argued to courts that a conviction for theft of a ten dollar video game, with a one year suspended sentence, meets this definition. As former Representative Bill McCollum stated, "Mr. Speaker, it is wrong to retroactively deport a hard working immigrant for stealing \$14.99 worth of baby clothes and to equate shoplifting with murder, rape, and armed robbery. This Congress, with the best of intentions, went too far."⁹ While supporters of the 1996 laws can cite extreme counter-examples, the undeniably expansive category of people who fall under these harsh laws demonstrates that Congress should not legislate in the immigration area with a one-size-fits-all approach. Discretion must be restored, and the courts should remain able to review immigrants' claims.

One result of the 1996 change in law is that the central issue in deportation cases now is whether a person's state conviction -- which was often entered into with little idea of immigration consequences -- meets the new categories of "aggravated felonies." In contrast, if the provisions passed by the two houses based on full committee deliberations had become law, the central issue would have remained what it should be -- namely whether deportation is an appropriate consequence in light of the person's overall

⁸ The regulations implementing the Supreme Court's decision in *St. Cyr*, for example, 8 CFR § 1003.44(k)(1)(2005), exclude any person who departed the United States. The BIA treats a person who has been deported as one who "departed."

⁹ 146 CONG. REC. H7770 (Sept. 19, 2000).

rehabilitation, the seriousness of the crime, the person's work record, community contributions, family ties and other equities.

Second, the drive to show high numbers of "criminal alien removals" leads to bad enforcement decisions and is highly misleading. For over a decade, immigration enforcement authorities have focused on the sheer number of "criminal alien removals" that they can report to Congress. These statistics, however, include people removed based on erroneous removal orders. They also include people who should not be at the top of enforcement priorities due to the inappropriate harshness of the 1996 law.

Statistics of "criminal alien" removals include many who should have benefited from court decisions but were deported long before the courts ruled. For example, prior to the decision of the Supreme Court in *St. Cyr*, many longtime legal permanent residents with families in the United States were deported without access to a discretionary hearing, in violation of the law. In 1999, Gabriel Delgadillo, a Vietnam veteran who was awarded three medals for his service, was placed in deportation proceedings for a decade-old conviction.¹⁰ The immigration enforcement agency told him that he had no right to remain in this country, and he was deported later that year without any opportunity to introduce testimony from his wife and seven children, all of whom were United States citizens. Although he was actually entitled to a waiver hearing, as the Supreme Court ruled in *St. Cyr*, it was too late. He and others like him are included in the immigration enforcement agency's statistics.

Similarly, prior to the Supreme Court's decision in *Leocal*,¹¹ many immigrants with DWI convictions were deported as "aggravated felons," also in violation of the law. According to the Wall Street Journal, the INS rounded up 530 noncitizens in Texas with old DWI convictions, many of whom were later deported.¹² Mr. Leocal himself was deported to Haiti, where deportees with criminal convictions are imprisoned in dangerous conditions, until the Supreme Court issued its unanimous decision vacating his deportation order. Mr. Leocal was relatively lucky. He garnered the support of pro bono counsel who knew the relevant deadlines and pursued his case all the way to the Supreme Court.

But most noncitizens charged with deportability have no counsel. They are often in facilities with little access to the kinds of legal resources needed to present claims of citizenship or to show that the law is being applied in ways that Congress did not intend. Indeed, they are not even notified by the agency of how and when to file a court appeal. As a result, hundreds with similar claims to those that prevailed in *St. Cyr* and *Leocal* were probably deported in violation of the law. These immigrants are nonetheless included in the statistics of successful removals.

¹⁰ See Commission on Immigration, American Bar Association, and Leadership Conference on Civil Rights Education Fund, AMERICAN JUSTICE THROUGH IMMIGRANTS' EYES (2004) at 45[hereinafter "AMERICAN JUSTICE"].

¹¹ *Leocal v. Ashcroft*, 125 S.Ct. 377 (U.S. Nov. 9, 2004).

¹² Bob Ortega, *Last Call: Texas Agents Spark Outcry in Roundup of Legal Immigrants – INS Uses Broader Definition of Felons to Target Old DWI Convictions- Case of Model Noncitizen*, WALL ST. J., Oct. 12, 1998, A1.

Finally, the label “criminal alien” ignores whether someone is a lawful resident of the United States, the length of time since the conviction, the record of rehabilitation, or important equities, such as whether the individual came to the United States at a young age, is a veteran of the U.S. military, or is a person whose entire family is made up of Americans. Before celebrating high statistics of “criminal alien” removals, Congress should take a close look at who is being deported and the fairness of a system in which relatively minor convictions can lead to deportation.¹³ The Supreme Court has long recognized that “deportation may result in the loss ‘of all that makes life worth living.’”¹⁴ For some, the results go beyond even the terrible separation from family and home. The immigration enforcement agency deported Claudette Etienne¹⁵ in 2000, based on two convictions for which she received no jail time. The mother of two young sons in the United States, Ms. Etienne was deported to Haiti, where she was jailed in terrible prison conditions along with other deportees. After drinking the unsanitary tap water and being deprived of medical treatment, Ms. Etienne died. She is presumably included in the immigration enforcement agency’s statistics for the successful removal of criminal aliens.

Third, the courts play a crucial role in preventing the law from being applied improperly. Without the courts, there would be retroactive application of laws that Congress never intended to operate retroactively and that members of Congress from both sides of the aisle recognized as wrong as soon as the consequences became evident. Without the courts, there would be no evaluation of whether deportation would violate the Convention Against Torture; there would be no recourse when the government deports someone without having provided a chance to appear before an immigration judge; there would be no recourse when the detained individual’s lawyer delivers grossly incompetent assistance. In addition, there would be no scrutiny of whether a state conviction, often obtained in ignorance of immigration consequences, falls into the category of deportable offenses or offenses that bar applications for relief.

Were it not for the courts, Joe Velasquez, a lawful permanent resident of the United States since 1960 and the husband, father and grandfather of United States citizens, would have become one more statistic as a deported “criminal alien.” Mr. Velasquez currently lives outside Philadelphia, where he runs a sandwich shop as part of a franchise. He is a strong member of his community. Recently, the local Army National Guard unit awarded him the Commander’s Award in recognition of his assistance to troops returning

¹³ See Susan Levine, *On the Verge of Exile: For Children Adopted from Abroad, Lawbreaking Brings Deportation*, WASH. POST, Mar. 5, 2000, at A1 (describing deportation of lawful permanent residents who first arrived as children adopted by United States citizens); Deborah Sontag, *The Banishment of Loeum Lun*, THE NEW YORK TIMES MAGAZINE (Nov. 16, 2003)(describing deportation of lawful permanent residents who first arrived as refugee children from the Killing Fields in Cambodia); Pamela Hartman, *Law Ships Vietnam Vet Back to Mexica*, TUSCON CITIZEN, Apr. 24, 1999, at A1 (describing deportation of Vietnam veteran). Children who were adopted by United States citizens and who turned eighteen after the effective date of the Child Citizenship Act of 2000, Pub. L. No. 106-395 (2000) and who meet other criteria are now considered citizens. But court decisions have held that those who turned eighteen a day earlier are subject to the same mandatory deportation rules as any other noncitizen.

¹⁴ *Bridges v. Wixon*, 326 U.S. 135, 147 (1945) (citing *Ng Fung Ho v. White*, 259 U.S. 276 (1922)).

¹⁵ AMERICAN JUSTICE, *supra* note 10, at 36.

from abroad.¹⁶ But not that long ago, Mr. Velasquez faced the threat of mandatory deportation. In 1998, after Mr. Velasquez returned from a trip to Panama to visit his ailing mother, immigration authorities placed him in detention without bond. They charged him as removable for a conviction he had received nearly twenty years ago and for which he was only sentenced to probation. Through a *habeas* petition, however, a court held that the agency's retroactive application of rules preventing release from detention was unlawful.¹⁷ But Mr. Velasquez's ordeal was not over. The Justice Department insisted that mandatory deportation provisions of the 1996 laws should be applied retroactively and that no facts – including Mr. Velasquez's role as a father, grandfather and husband of United States citizens, his community service, or his clear record of rehabilitation – could be considered. Mr. Velasquez was not able to obtain a hearing on the equities of deportation until after the Supreme Court's ruling in *St. Cyr* that Congress had not intended that the 1996 laws be applied retroactively. In July 2002, following a hearing attended by numerous witnesses, including a lieutenant of the Philadelphia Fire Department, Mr. Velasquez finally received a waiver of deportation. Now Mr. Velasquez is back with his family, and, as evidenced by his recent medal from the Army National Guard, is once again able to serve his community.

Fourth, Congress needs to resume its efforts to correct the extraordinarily disproportionate and unfair laws governing noncitizens who have been convicted of crimes. From 1999 through 2002, Congress engaged in serious efforts to fix immigration rules that were written hastily during the 1996 conference. Rep. Bill McCullom, who had been a major proponent of much of the 1996 law, led an effort in the 106th Congress to fix retroactive aspects of the law and allow longterm residents to receive consideration for discretionary relief.¹⁸ Later in that session, the House Judiciary Committee, under the leadership of Rep. Henry Hyde, reported out another measure which would have substantially restored relief from deportation.¹⁹ That measure passed the House by a unanimous vote but was too late for full committee consideration in the Senate before the

¹⁶ See Christopher Vito, *Slack's honored for donations of hoagies to military*, NORTHEAST NEWS GLEANER, July 7, 2004, at B6 ("Joe Velasquez has been preparing hoagies for over 25 years. But his quarter century of sandwich making is not what is catching local attention; his generosity is."); Elizabeth Steider, *No Slackers at Slack's*, FAR NORTHEAST TIMES, Feb. 19 2004, at 22. Mr. Velasquez has also been recognized for his assistance to the Spina Bifida Association, *id.*, and his Christmas toy drives for children. See Tom Waring, *Call it 'Toy Story II'*, FAR NORTHEAST TIMES, Dec. 4, 2002, at 22; Christopher Vito, *Slacks to help Army. Marines during Christmas season with Toys for Tots*, NORTHEAST NEWS GLEANER, Oct. 27, 2004, at A13.

¹⁷ *Velasquez v. Reno*, 37 F. Supp. 2d 663 (D.N.J. 1999); Matthew Futterman, *Nightmare eases for immigrant; Judge releases Pa man jailed for four months*, NEWARK STAR LEDGER (April 6, 1999).

¹⁸ H.R. 2999, 106th Cong. (1999). In introducing this measure, Rep. McCullom described letters that he and Representative Lincoln Diaz-Belart had received from constituents. He concluded: "Our bill returns balance to our existing laws by allowing people with compelling or unusual circumstances to argue their cases for reconsideration. The legislation does not automatically waive the deportation order, it simply grants a permanent resident alien the right to have the Attorney General review the merits of his or her case. The 1996 law went too far, and as the Miami Herald recently editorialized, 'it hurts more than just the foreign born. Its victims include families with U.S. citizen children, communities that lose businesses, and businesses that lost employees. Most of all it hurts the spirit of a nation that prides itself on its immigrant heritage and just laws.'" 145 CONG. REC. E2020 (Oct. 4, 1999).

¹⁹ H.R. 5062, 106th Cong. (2000).

session ended.²⁰ Throughout the discussion of these bills, there was widespread recognition of the unfairness of aspects of the 1996 laws, many of which continue to be problems today.²¹ Similarly, in debates over the enactment of the Child Citizenship Act of 2000, representatives noted the effect on the children of American citizens, who as adults were facing deportation under the expanded “aggravated felony” definitions in the 1996 laws. As former Representative Sam Gejdenson stated, “While these children must face their punishment, to deport them to countries with which they have no contact, no ability to speak the language, and no family known to them is needlessly cruel.”²² Once again, in 2002, the House Judiciary Committee, under the leadership of Rep. James Sensenbrenner, reported out a measure that would have fixed several aspects of the 1996 laws that unfairly required detention and deportation of long term legal residents.²³ On the Senate side, although there have been several bills introduced to fix aspects of the 1996 laws, there have been no committee hearings addressing these issues or serious consideration of reforms that would restore fairness to the deportation system. Congress should resume its work to fix these laws so that immigration enforcement resources can be directed intelligently to those matters that are a priority.

Fifth, Congress should revisit the wisdom of preventing class litigation as an efficient mechanism for addressing common questions of law and fact that affect many individuals. Litigation about the proper scope of the 1996 laws would have been far more efficient had it been conducted on a class action basis. Indeed, these cases provide a classic example of when class recognition would be appropriate since common issues crop up in numerous cases around the country. Each individual is required to file a separate case, and no relief is provided for those who did not file their own cases and are deported. Class litigation of some issues would be more efficient for the government and the courts, while at the same time yielding fairer outcomes to the many individuals who do not have access to counsel to pursue their legitimate legal claims.

* * *

In sum, there is much work to be done to improve the system for deciding who should be labeled a “criminal alien” and when such a person should be deported. Congress should direct its attention to fixing the one-size-fits-all approach adopted in 1996, which places too much emphasis on how crimes are categorized and too little emphasis on whether the equities disfavor deportation. Meanwhile, the last place to begin reform efforts is the courts, which have provided a modest brake on overly aggressive enforcement practices. Even if the Committee chooses to focus solely on the role of the courts, any reform should consider the full range of issues, including the lack of counsel, the lack of notice of time limits, and the bar on forms of judicial action that would ensure that similar claims are treated similarly.

²⁰ 146 CONG. REC. H7765-7766 (Sept. 19, 2000).

²¹ Although the *St. Cyr* decision provided relief for some retroactive aspects of the law, other retroactive features have not been remedied by the courts.

²² 146 CONG. REC. H7776 (Sept. 19, 2000).

²³ H.R. REP. NO. 107-785 (2002).

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Testimony

Of

David Venturella

**Former acting Director of the Office of Detention and Removal
Operations**

Before the

Senate Judiciary Committee

**Subcommittee on Immigration, Border Security and Citizenship and
the Subcommittee on Terrorism, Technology and Homeland Security**

A hearing regarding:

Strengthening Interior Enforcement: Deportation and Related Issues

April 14, 2005

Mr. Chairman, I would like to first thank you and the other members of the subcommittee for the opportunity to testify today. I am honored to appear before you to discuss the matter at hand.

Prior to leaving my federal post last year, I was responsible for enforcing the immigration and naturalization laws of this country for eighteen years. I began my law enforcement career as an entry-level deportation officer with the former Immigration and Naturalization Service (INS) and ended my career as the acting Director of Detention and Removal Operations within U.S. Immigration and Customs Enforcement, or ICE. I was in charge of overseeing the detention and removal efforts of criminal and illegal aliens who were in the United States.

On a personal note, I am also the son of an immigrant, and I understand why so many people have risked their lives, leaving their families, homes, and everything they know to come to the United States, all with a dream... their version of the American dream. For nearly 230 years, this country has welcomed immigrants from all walks of life and the contributions of these immigrants have built this great nation to be what it is today – a free nation.

However, while we are known worldwide as a shining beacon of light for the countless immigrants who come to our shores, we are also known as a nation where law and justice prevail. Without strict and fair enforcement of our immigration statutes, our country will remain vulnerable to the threats that arise from individuals who willingly exploit gaps in our immigration system.

The accomplishments of the men and women responsible for enforcing our nation's laws in the legacy INS and now in the Department of Homeland Security (DHS) are extraordinary. Yet, despite their patriotic efforts, the number of illegal immigrants living in the United States and coming across our borders continues to grow.

So why have our country's efforts in enforcing immigration laws fallen short of expectations after 9-11, even though Congress has provided significant increases to the budgets of the agencies responsible for carrying out this important function? The answer is simple...our law enforcement agencies dedicated to this mission have done little to develop a cohesive and comprehensive immigration enforcement strategy.

Instead of viewing the issue holistically, what you see are a number of independent programs and independent efforts competing for resources and delivering mixed results. While immigration is a complex, emotional and political issue, the inability to understand the importance of linking the enforcement functions of the immigration bureaus to carryout a common mission and strategy is baffling.

Immigration enforcement MUST be viewed as a continuum. Effective enforcement of our immigration laws WILL NOT be achieved until all parts of the continuum are balanced and are in sync with one another.

U.S. Border Patrol Agents risk their lives every day, only to see their efforts wasted because of a lack of detention space to hold those they have arrested for crossing our borders illegally.

Moreover, less than one thousand deportation officers are asked to manage and supervise hundreds of thousands of aliens every year who are in removal proceedings, and then, these same dedicated officers are asked to locate the same aliens after many years of lengthy appeals and stays resulting in a removal rate of 60% and a growing fugitive population of 400,000 and counting.

These are very real examples of when the enforcement continuum is out of sync or imbalanced. If the goal is to deter individuals from violating our immigration laws, we are not achieving that goal because the individuals suffer no consequence for their unlawful actions.

This is not just a DHS problem. DHS is not the only department that bears the responsibility for immigration enforcement. The Department of State and the Department of Justice have significant, vital roles in immigration enforcement. The removal of an alien from the United States is the “endgame” of immigration enforcement.

Daily, our foreign neighbors and allies are refusing to accept their citizens or nationals for deportation. Although, in the past couple of years there has been some success in negotiating with countries on individual cases, the State Department is reluctant to leverage the offending country’s foreign or economic interest with the U.S. to resolve the repatriation stalemate. Nothing has been accomplished when repatriation of foreign nationals is handled as an isolated issue. Eventually, thousands of aliens, in particular, criminal aliens have been released back into our communities because of their countries unwillingness to accept them, and our countries unwillingness to sanction the offending countries. In order for the federal government to achieve effective immigration enforcement, the State Department must change their position on how to deal with this issue.

The Department of Justice, which oversees the Executive Office of Immigration Review (EOIR), has looked to improve their performance in regards to the court dockets. While I applaud their effort to improve the efficiency of the hearing process, I recall significant delays imposed by immigration judges in relation to adjudicating a case, as well as a case sitting before the Board of Immigration Appeals before they issue a decision against a defendant...often in this time, the illegal alien has fled and are now added to the more than 400,000 absconders who are currently being sought after for deportation.

Any improvement to reduce unnecessary delays in the courts and in the deportation process will-without infringing on the due process of individuals-only serve to enhance the government’s ability to achieve effective and efficient enforcement of our immigration laws.

I am very appreciative of the Committee's effort to highlight this important issue. While much remains to be done in the immigration enforcement arena, I wish to applaud the men and women of law enforcement who daily must deal with this issue, led only by perseverance and the dedication to public service.

Thank you for the opportunity to testify before you today regarding this important issue. I welcome the opportunity to answer any questions that you may have at this time.