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# KEEP OUR COMMUNITIES SAFE ACT

## HEARING

BEFORE THE

SUBCOMMITTEE ON
IMMIGRATION POLICY AND ENFORCEMENT

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

ON

**H.R. 1932**

MAY 24, 2011

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# KEEP OUR COMMUNITIES SAFE ACT

**TUESDAY, MAY 24, 2011**

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON IMMIGRATION
POLICY AND ENFORCEMENT,
COMMITTEE ON THE JUDICIARY,
*Washington, DC.*

The Subcommittee met, pursuant to call, at 10:07 a.m., in room 2141, Rayburn Office Building, the Honorable Elton Gallegly, (Chairman of the Subcommittee) presiding.

Present: Representatives Gallegly, Smith, King, Poe, Gowdy, Ross, Lofgren, Conyers, and Jackson Lee.

Staff present: (Majority) Dimple Shah, Counsel; Marian White, Clerk; Tom Jawetz, Minority Counsel.

Mr. GALLEGLY. I call the Subcommittee to order.

As reportedly recently in the news, when 16-year-old Ashton Cline-McMurray was brutally murdered, his mother took some comfort in knowing that her son's illegal immigrant killers would not walk American streets again.

Under the belief that her son's killers would be removed, Sandra Hutchinson agreed to let prosecutors work plea agreements with the purported gang members, several of them illegal immigrants. They ultimately pled guilty to lesser charges. According to Mrs. Hutchinson, the prosecutors reassured her that after the convicted criminals who had killed her son completed their sentences, the killers would be deported.

Mrs. Hutchinson's son was attacked while walking home from a football game in Suffolk County just outside of Boston. He was disabled with cerebral palsy. According to the mother, "They stabbed him, they beat him. They beat him with rungs off the stairs. They beat him with a golf club. They stabbed him through his heart and then finally through his lungs. They stabbed him in his abdomen and he didn't really have any chance."

By pleading guilty to lesser charges for manslaughter to second degree murder, the four killers did not serve the mandatory life sentence without parole that comes with a murder conviction. This allowed one of the defendants, Loeun Heng, to be released by the Massachusetts parole board last March. Heng, an illegal immigrant, was immediately taken into custody by the U.S. Bureau of Immigration and Customs Enforcement after his release. But instead of being deported to his native Cambodia, Heng is back on the streets of the United States. Heng, like many other criminal

aliens, could not be deported because his home country refused to take him back.

Two other men convicted of the crime remain in prison. Both are believed to be illegal immigrants. It is believed that the Government will attempt to deport them once released, but the possibility remains that they may not be removed. The fourth man convicted is already free but is in the United States legally.

How can this happen? In a word, *Zadvydas*. A line of cases following the Supreme Court decision from 2001 in *Zadvydas v. Davis* set severe limitations on the ability for the Federal immigration authorities to detain immigrants who have been ordered deported but who cannot be removed.

In almost all cases, deportable aliens must be released after 180 days if they are not deported, no matter how dangerous they are. This usually occurs in situations where their home countries delay their removal and do not cooperate with the United States Government or the aliens have persuaded an immigration judge that they will be tortured if they return home.

The end result is that the American public is put at risk by nondeportable criminal aliens. Our communities are placed in danger as aliens who have serious criminal records and no legal right to be here are not placed in detention. Currently almost 5,000 aliens, 4,000 of them criminal aliens, are being released into the communities each year because of this decision.

The bill Chairman Smith has introduced will effectively address the problems created by the *Zadvydas* case. As a result, mothers such as Mrs. Hutchinson will be able to rest assured knowing criminal aliens such as Heng will not be released into the community and the American public will be a safer place.

The bill, H.R. 1932, follows:]

I

112TH CONGRESS
1ST SESSION

# H. R. 1932

To amend the Immigration and Nationality Act to provide for extensions of detention of certain aliens ordered removed, and for other purposes.

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IN THE HOUSE OF REPRESENTATIVES

MAY 23, 2011

Mr. SMITH of Texas introduced the following bill; which was referred to the Committee on the Judiciary

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# A BILL

To amend the Immigration and Nationality Act to provide for extensions of detention of certain aliens ordered removed, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE.**

This Act may be cited as the "Keep Our Communities Safe Act of 2011".

**SEC. 2. DETENTION OF DANGEROUS ALIENS.**

(a) IN GENERAL.—Section 241(a) of the Immigration and Nationality Act (8 U.S.C. 1231(a)) is amended—

(1) by striking out "Attorney General" each place it appears, except for the first reference in clause (a)(4)(B)(i), and inserting "Secretary";

(2) in paragraph (1), by amending subparagraph (B) to read as follows:

"(B) BEGINNING OF PERIOD.—The removal period begins on the latest of the following:

"(i) The date the order of removal becomes administratively final.

"(ii) If the alien is not in the custody of the Secretary on the date the order of removal becomes administratively final, the date the alien is taken into such custody.

"(iii) If the alien is detained or confined (except under an immigration process) on the date the order of removal becomes administratively final, the date the alien is taken into the custody of the Secretary, after the alien is released from such detention or confinement.";

(3) in paragraph (1), by amending subparagraph (C) to read as follows:

"(C) SUSPENSION OF PERIOD.—

"(i) EXTENSION.—The removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if—

"(I) the alien fails or refuses to make all reasonable efforts to comply with the removal order, or to fully cooperate with the Secretary's efforts to establish the alien's identity and carry out the removal order, including making timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal that is subject to an order of removal;

"(II) a court, the Board of Immigration Appeals, or an immigration judge orders a stay of removal of an alien who is subject to an administratively final order of removal; or

"(III) the Secretary transfers custody of the alien pursuant to law to another Federal agency or a State or local government agency in connec-

tion with the official duties of such agency.

"(ii) RENEWAL.—If the removal period has been extended under clause (C)(i), a new removal period shall be deemed to have begun on the date—

"(I) the alien makes all reasonable efforts to comply with the removal order, or to fully cooperate with the Secretary's efforts to establish the alien's identity and carry out the removal order;

"(II) the stay of removal is no longer in effect; or

"(III) the alien is returned to the custody of the Secretary.";

(4) in paragraph (3)—

(A) by adding after "If the alien does not leave or is not removed within the removal period" the following: "or is not detained pursuant to paragraph (6) of this subsection"; and

(B) by striking subparagraph (D) and inserting the following:

"(D) to obey reasonable restrictions on the alien's conduct or activities that the Secretary

prescribes for the alien, in order to prevent the alien from absconding, for the protection of the community, or for other purposes related to the enforcement of the immigration laws.".

(5) in subparagraph (4)(A), by striking "paragraph (2)" and inserting "subparagraph (B)";

(6) by striking paragraph (6) and inserting the following:

"(6) ADDITIONAL RULES FOR DETENTION OR RELEASE OF CERTAIN ALIENS.—

"(A) DETENTION REVIEW PROCESS FOR COOPERATIVE ALIENS ESTABLISHED.—For an alien who is not otherwise subject to mandatory detention, who has made all reasonable efforts to comply with a removal order and to cooperate fully with the Secretary of Homeland Security's efforts to establish the alien's identity and carry out the removal order, including making timely application in good faith for travel or other documents necessary to the alien's departure, and who has not conspired or acted to prevent removal, the Secretary shall establish an administrative review process to determine whether the alien should be detained or released on conditions. The Secretary shall make a de-

1 termination whether to release an alien after
2 the removal period in accordance with subpara-
3 graph (B). The determination shall include con-
4 sideration of any evidence submitted by the
5 alien, and may include consideration of any
6 other evidence, including any information or as-
7 sistance provided by the Secretary of State or
8 other Federal official and any other information
9 available to the Secretary of Homeland Security
10 pertaining to the ability to remove the alien.

11 "(B) AUTHORITY TO DETAIN BEYOND RE-
12 MOVAL PERIOD.—

13 "(i) IN GENERAL.—The Secretary of
14 Homeland Security, in the exercise of the
15 Secretary's discretion, may continue to de-
16 tain an alien for 90 days beyond the re-
17 moval period (including any extension of
18 the removal period as provided in para-
19 graph (1)(C)).

20 "(ii) SPECIFIC CIRCUMSTANCES.—The
21 Secretary of Homeland Security, in the ex-
22 ercise of the Secretary's discretion, may
23 continue to detain an alien beyond the 90
24 days authorized in clause (i)—

"(I) until the alien is removed, if the Secretary determines that there is a significant likelihood that the alien—

"(aa) will be removed in the reasonably foreseeable future; or

"(bb) would be removed in the reasonably foreseeable future, or would have been removed, but for the alien's failure or refusal to make all reasonable efforts to comply with the removal order, or to cooperate fully with the Secretary's efforts to establish the alien's identity and carry out the removal order, including making timely application in good faith for travel or other documents necessary to the alien's departure, or conspires or acts to prevent removal;

"(II) until the alien is removed, if the Secretary of Homeland Security certifies in writing—

"(aa) in consultation with the Secretary of Health and Human Services, that the alien has a highly contagious disease that poses a threat to public safety;

"(bb) after receipt of a written recommendation from the Secretary of State, that release of the alien is likely to have serious adverse foreign policy consequences for the United States;

"(cc) based on information available to the Secretary of Homeland Security (including classified, sensitive, or national security information, and without regard to the grounds upon which the alien was ordered removed), that there is reason to believe that the release of the alien would threaten the national security of the United States; or

"(dd) that the release of the alien will threaten the safety of

1 the community or any person,
2 conditions of release cannot rea-
3 sonably be expected to ensure the
4 safety of the community or any
5 person, and either (AA) the alien
6 has been convicted of one or
7 more aggravated felonies (as de-
8 fined in section 101(a)(43)(A))
9 or of one or more crimes identi-
10 fied by the Secretary of Home-
11 land Security by regulation, or of
12 one or more attempts or conspir-
13 acies to commit any such aggra-
14 vated felonies or such identified
15 crimes, if the aggregate term of
16 imprisonment for such attempts
17 or conspiracies is at least 5
18 years; or (BB) the alien has com-
19 mitted one or more crimes of vio-
20 lence (as defined in section 16 of
21 title 18, United States Code, but
22 not including a purely political
23 offense) and, because of a mental
24 condition or personality disorder
25 and behavior associated with that

1 condition or disorder, the alien is
2 likely to engage in acts of vio-
3 lence in the future; or
4 "(ee) that the release of the
5 alien will threaten the safety of
6 the community or any person,
7 conditions of release cannot rea-
8 sonably be expected to ensure the
9 safety of the community or any
10 person, and the alien has been
11 convicted of at least one aggra-
12 vated felony (as defined in sec-
13 tion 101(a)(43)); or
14 "(III) pending a certification
15 under subclause (II), so long as the
16 Secretary of Homeland Security has
17 initiated the administrative review
18 process not later than 30 days after
19 the expiration of the removal period
20 (including any extension of the re-
21 moval period, as provided in para-
22 graph (1)(C)).
23 "(C) RENEWAL AND DELEGATION OF CER-
24 TIFICATION.—

"(i) RENEWAL.—The Secretary of Homeland Security may renew a certification under subparagraph (B)(ii)(II) every 6 months, after providing an opportunity for the alien to request reconsideration of the certification and to submit documents or other evidence in support of that request. If the Secretary does not renew a certification, the Secretary may not continue to detain the alien under subparagraph (B)(ii)(II).

"(ii) DELEGATION.—Notwithstanding section 103, the Secretary of Homeland Security may not delegate the authority to make or renew a certification described in item (bb), (cc), or (ee) of subparagraph (B)(ii)(II) below the level of the Assistant Secretary for Immigration and Customs Enforcement.

"(iii) HEARING.—The Secretary of Homeland Security may request that the Attorney General or the Attorney General's designee provide for a hearing to make the determination described in item (dd)(BB) of subparagraph (B)(ii)(II).

"(D) RELEASE ON CONDITIONS.—If it is determined that an alien should be released from detention by a Federal court, the Board of Immigration Appeals, or if an immigration judge orders a stay of removal, the Secretary of Homeland Security, in the exercise of the Secretary's discretion, may impose conditions on release as provided in paragraph (3).

"(E) REDETENTION.—The Secretary of Homeland Security, in the exercise of the Secretary's discretion, without any limitations other than those specified in this section, may again detain any alien subject to a final removal order who is released from custody, if removal becomes likely in the reasonably foreseeable future, the alien fails to comply with the conditions of release, or to continue to satisfy the conditions described in subparagraph (A), or if, upon reconsideration, the Secretary determines that the alien can be detained under subparagraph (B). This section shall apply to any alien returned to custody pursuant to this subparagraph, as if the removal period terminated on the day of the redetention."; and

(7) by inserting after paragraph (7) the following:

"(8) JUDICIAL REVIEW.—Without regard to the place of confinement, judicial review of any action or decision pursuant to this section shall be available exclusively in habeas corpus proceedings instituted in the United States District Court for the District of Columbia, and only if the alien has exhausted all administrative remedies (statutory and regulatory) available to the alien as of right.".

(b) DETENTION OF ALIENS DURING REMOVAL PROCEEDINGS.—

(1) CLERICAL AMENDMENT.—Sections 235 and 236 of the Immigration and Nationality Act (8 U.S.C. 1225 and 1226) are amended by striking "Attorney General" each place it appears and inserting "Secretary" except that section 236(a) is amended by inserting "the Secretary or" before "the Attorney General" the second place that term appears;

(2) LENGTH OF DETENTION OF CERTAIN ALIENS; VENUE FOR CERTAIN ACTIONS.—Section 235 of the Immigration and Nationality Act (8 U.S.C. 1225) is amended by adding at the end the following:

1 "(e) LENGTH OF DETENTION.—

2 "(1) Notwithstanding any other provision of
3 this section, an alien may be detained under this
4 section, without limitation, until the alien is subject
5 to an final order of removal.

6 "(2) The length of detention under this section
7 shall not affect any detention under section 241.

8 "(f) JUDICIAL REVIEW.—Without regard to the place
9 of confinement, judicial review of any action or decision
10 made pursuant to subsection (e) shall be available exclu-
11 sively in a habeas corpus proceeding instituted in the
12 United States District Court for the District of Columbia
13 and only if the alien has exhausted all administrative rem-
14 edies (statutory and nonstatutory) available to the alien
15 as of right.".

16 (3) VENUE FOR CERTAIN ACTIONS SEEKING JU-
17 DICIAL REVIEW OF LENGTH OF DETENTION.—Sec-
18 tion 236(e) of the Immigration and Nationality Act
19 (8 U.S.C. 1226(e)) is amended by adding the fol-
20 lowing at the end: "Without regard to the place of
21 confinement, judicial review of any action or decision
22 made pursuant to subsection (f) shall be available
23 exclusively in a habeas corpus proceeding instituted
24 in the United States District Court for the District
25 of Columbia and only if the alien has exhausted all

1 administrative remedies (statutory and nonstatu-
2 tory) available to the alien as of right.''.
3 (4) LENGTH OF DETENTION.—Section 236 of
4 the Immigration and Nationality Act (8 U.S.C.
5 1226) is amended by adding the following sub-
6 section:
7 ''(f) LENGTH OF DETENTION.—
8 ''(1) Notwithstanding any other provision of
9 this section, an alien may be detained under this
10 section for any period, without limitation, until the
11 alien is subject to a final order of removal.
12 ''(2) The length of detention under this section
13 shall not affect detention under section 241 of this
14 Act.''.
15 (5) DETENTION OF CRIMINAL ALIENS.—Section
16 236(c)(1) of the Immigration and Nationality Act (8
17 U.S.C. 1226(c)(1)) is amended, in the matter fol-
18 lowing subparagraph (D) to read as follows:
19 ''any time after the alien is released, without regard
20 to whether an alien is released related to any activ-
21 ity, offense, or conviction described in this para-
22 graph; to whether the alien is released on parole, su-
23 pervised release, or probation; or to whether the
24 alien may be arrested or imprisoned again for the
25 same offense. If the activity described in this para-

1 graph does not result in the alien being taken into
2 custody by any person other than the Secretary,
3 then when the alien is brought to the attention of
4 the Secretary or when the Secretary determines it is
5 practical to take such alien into custody, the Sec-
6 retary shall take such alien into custody.".

7 (6) ADMINISTRATIVE REVIEW.—Section 236 of
8 the Immigration and Nationality Act (8 U.S.C.
9 1226) is amended by adding the following sub-
10 section:

11 "(g) ADMINISTRATIVE REVIEW.—

12 "(1) The Attorney General's review of the Sec-
13 retary's custody determinations under section 236(a)
14 shall be limited to whether the alien may be de-
15 tained, released on bond (of at least $1,500 with se-
16 curity approved by the Secretary), or released with
17 no bond.

18 "(2) The Attorney General's review of the Sec-
19 retary's custody determinations for the following
20 classes of aliens:

21 "(A) Aliens in exclusion proceedings.

22 "(B) Arriving aliens in removal pro-
23 ceedings, including aliens paroled after arrival
24 pursuant to section 212(d)(5).

"(C) Aliens described in sections 212(a)(3) and 237(a)(4).

"(D) Aliens described in section 236(c).

"(E) Aliens in deportation proceedings subject to section 242(a)(2) of the Act (as in effect prior to April 1, 1997, and as amended by section 440(c) of Public Law 104–132); is limited to a determination of whether the alien is properly included in such category.".

(7) CLERICAL AMENDMENTS.—

(A) Sections 235 and 236 of the Immigration and Nationality Act (8 U.S.C. 1225 and 1226) are amended by striking out "Attorney General" each place it appears and inserting "Secretary".

(B) Sections 236(a)(2)(B) and 236(b) of the Immigration and Nationality Act (8 U.S.C. 1226(a)(2)(B) and 1226(b)) are amended by striking out "conditional parole" and inserting in lieu thereof "recognizance".

(c) SEVERABILITY.—If any of the provisions of this Act or any amendment by this Act, or the application of any such provision to any person or circumstance, is held to be invalid for any reason, the remainder of this Act and of amendments made by this Act, and the application

1 of the provisions and of the amendments made by this Act
2 to any other person or circumstance shall not be affected
3 by such holding.

4 (d) EFFECTIVE DATES.—

5 (1) The amendments made by subsection (a)
6 shall take effect upon the date of enactment of this
7 Act, and section 241 of the Immigration and Na-
8 tionality Act, as so amended, shall in addition apply
9 to—

10 (A) all aliens subject to a final administra-
11 tive removal, deportation, or exclusion order
12 that was issued before, on, or after the date of
13 enactment of this Act; and

14 (B) acts and conditions occurring or exist-
15 ing before, on, or after the date of enactment
16 of this Act.

17 (2) The amendments made by subsection (b)
18 shall take effect upon the date of enactment of this
19 Act, and sections 235 and 236 of the Immigration
20 and Nationality Act, as so amended, shall in addi-
21 tion apply to any alien in detention under provisions
22 of such sections on or after the date of enactment
23 of this Act.

○

Mr. GALLEGLY. I strongly support H.R. 1932 and will now turn to my good friend from California, the Ranking Member, Ms. Lofgren, for her opening statement.

Ms. LOFGREN. Thank you, Mr. Chairman.

The new majority began this Congress by reading the U.S. Constitution aloud on the House floor. The Due Process Clause of the Fifth Amendment to the Constitution says—I quote—"No person . . . shall . . . be deprived of life, liberty, or property without due process of law."

For more than 110 years, the Supreme Court has recognized that "the Due Process Clause applies to all persons within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."

Today's bill not only violates this fundamental provision of individual liberty in the Constitution, but it does so at an incredible cost to the American taxpayer. ICE already spends approximately $2 billion annually on detention alone.

The Supreme Court has twice warned of the serious constitutional concerns that would be presented if our immigration laws authorize the indefinite and possibly permanent detention of civil immigration detainees. In *Zadvydas v. Davis*, the Court said that "freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that the [Due Process] Clause protects."

H.R. 1932 not only ignores the Supreme Court's constitutional warnings, but it goes further than past bills and authorizes the prolonged and in some cases mandatory detention of immigration detainees throughout their removal proceedings with no limit in time, virtually no procedural protections, and no consideration of whether detention is even necessary from a safety standpoint.

During today's hearing, we will hear about some individuals who have been released from an immigration detention and have gone on to commit very serious crimes. Those are terrible cases, and the holes that they expose in our current system should be addressed.

But while the title of this hearing suggests it is about how to authorize a continued detention of dangerous people, the bill reaches far beyond that. The bill authorizes, with no procedural checks, the extremely lengthy detention of asylum-seekers and lawful permanent residents, including those who have won their cases at every level but whose cases remain on appeal by DHS.

I would never argue that our current removal process is perfect. We know that thousands of people remain in immigration detention for prolonged periods of time, sometimes far longer than 6 months or 1 year, while their cases work their way through the system. Delays in our overburdened immigration courts are substantial, and ICE's current enforcement priorities are expected to lead to even greater delays.

So that is one problem we have to solve, but this bill does nothing to fix the underlying problems of inefficiencies in the removal process.

We also know that thousands of people each year spend more than 6 months in immigration custody beyond the date of their final order of removal solely because their government refused to cooperate with repatriation. That is another problem we have to

solve. We need to improve our ability to remove people in our custody who have final orders of removal.

I understand that ICE and the State Department recently signed a memorandum of understanding that lays out a series of escalating steps that can be taken to influence the decisions of foreign governments in this regard. I am hopeful that this MOU will improve the situation, but I am open to hearing whether additional authority is needed. Once again, this bill does nothing to fix this underlying problem.

Finally, we know that no matter what we do, there may still be some people who we are unable to remove from the U.S. Perhaps they are stateless like Mr. Zadvydas himself or perhaps their home countries cannot be convinced to accept them.

In the small number of cases where a person is specially dangerous, I agree with the Chairman that we must have a way to ensure public safety. Federal law permits the involuntary hospitalization of persons suffering from mental illness who should not be released from custody at the end of their prison sentences because they present a danger to the public that cannot be mitigated. The law provides for appointment of counsel, requires the Government to prove its case by clear and convincing evidence before a Federal district court judge, and mandates treatment if detention is warranted.

States also have procedures for civil commitment and involuntary hospitalization, and those procedures generally are available for persons being released from immigration detention.

Our current immigration regulations also provide for further detention in those limited circumstances and require ICE to prove its case before an immigration judge.

If current immigration regulations and the availability of State civil commitment proceedings are not sufficient, that may be a third problem we have to solve, but we need to design a system that is constitutional and narrowly tailored. Today's bill for indefinite detention in a broad category of cases without a hearing or even a personal interview falls short.

As we began the 112th Congress, we consistently heard two main themes from those on the other side of the aisle. First, we must honor the Constitution and protect basic civil liberties. Second, we need to cut the budget and exercise fiscal responsibility. So it is surprising that today's bill looks at a series of legitimate problems within our removal system but proposes an extremely costly and largely unconstitutional response that does not even attempt to get at the underlying causes. Detaining more people and detaining people longer without any meaningful process to determine whether detention is necessary or appropriate is not the answer.

I look forward to hearing from our witnesses, and I yield back the balance of my time.

Mr. GALLEGLY. I thank the gentlelady.

At this time, I would recognize the Chairman of the full Committee and the author of this legislation, the gentleman from Texas, Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman.

In the 2001 decision of *Zadvydas v. Davis*, the Supreme Court ruled that immigrants admitted to the U.S. and then ordered re-

moved could not be detained for more than 6 months if there was no reasonable likelihood of their being deported.

In the 2005 case, *Clark v. Martinez*, the Supreme Court expanded its decision in *Zadvydas* to apply to immigrants who entered illegally.

In 2006, the Department of Homeland Security Inspector General reported that thousands of criminal immigrants with final orders of removal were being released into our streets because some countries frustrate the removal process.

The Inspector General found that nearly 134,000 immigrants with final orders of removal instead had been released just from 2001 to 2004. The Inspector General also found that these illegal immigrants are unlikely to ever be repatriated, if ordered removed, because of the unwillingness of their country or origin to provide them the necessary travel documents.

In addition, thousands of criminal immigrants ordered removed have been released. This includes an immigrant who was implicated in a mob-related multiple homicide in Uzbekistan. It also includes an immigrant who shot a New York State Trooper after being released.

According to recent data provided by Immigration and Customs Enforcement, nearly 4,000 dangerous criminal immigrants have been released each year since 2008.

In two tragic instances, criminal immigrants released because of *Zadvydas* have gone on to commit murder. Huang Chen was ordered removed for assaulting Qian Wu. China refused to grant Huang the necessary documents and he was released as a result of *Zadvydas*. He then committed another assault and was again ordered removed. But again, China refused to issue travel documents. Huang was again released. He went on to violently murder Wu.

Abel Arango served time in prison for armed robbery. Since Cuba would not take him back, he was released. He then went on to shoot Fort Myers, Florida police officer Andrew Widman in the face. Officer Widman never had the opportunity to draw his weapon. The husband and father of three died at the scene. And the police chief from Fort Myers is a witness for us today.

Just because a criminal immigrant cannot be returned to their home country does not mean they should be freed into our communities. Dangerous criminal immigrants need to be detained.

H.R. 1932, the Keep Our Communities Safe Act, provides a statutory basis for DHS to detain as long as necessary specified dangerous immigrants under orders of removal who cannot be removed. It authorizes DHS to detain non-removable immigrants beyond 6 months, but only if the alien will be removed in the reasonably foreseeable future; the alien would have been removed but for the alien's refusal to make all reasonable efforts to comply and cooperate with the Homeland Security Secretary's efforts to remove him; the alien has a highly contagious disease; release would have serious adverse foreign policy consequences; release would threaten national security; or release would threaten the safety of the community and the alien either is an aggravated felon or has committed a crime of violence. Such aliens may be detained for periods of 6 months at a time and the period of detention may be renewed.

The bill also provides for judicial review of detention decisions in the United States District Court for the District of Columbia.

This legislation is desperately needed. There is no excuse for continuing to place American lives at risk.

Thank you, Mr. Chairman, and I will yield back.

Mr. GALLEGLY. The gentleman from Michigan, the Ranking Member of the full Committee, do you have an opening statement, Mr. Conyers?

Mr. CONYERS. I do. Thank you, Chairman Gallegly.

I would like to join in welcoming our witnesses today. This is an important discussion.

H.R. 1932 expands the ability of the Government to detain immigrants for many years, maybe indefinitely with little or no protections at all. In other words, it is unconstitutional.

And it is so ironic that this would be coming from the Judiciary Committee leadership that is supposed to be protecting the Constitution and constitutional rights of all of our citizens and from members of a party that prides itself on limited government and the protection of individual liberty. And the Republican Party's pledge was about ensuring limited government and fiscal responsibility, and the Tea Party people among them go even further than that. And so now it turns out today that the party of limited government turns out to be the party, in this case, of unlimited government. It is just amazing.

Intrusive government, they say, must be stopped. Government must be downsized. How many Members do I have telling me every time we talk that they are for limited government and that they want the government out of our business? And yet, here is a bill introduced by the Chairman of the Judiciary Committee that scraps the Constitution. And I hope that we get into a discussion about this.

Now, the power of government is nowhere more clear than its ability to deprive a citizen of its liberty, and that power becomes absolute when it can be exercised without any limit and no meaningful checks. And there are so many ways in which 1932, the bill before us, offends the rule of law that I can only recite a few of them here today. But believe me, I am doing a study. This 2-hour hearing is only the beginning of my examination of what is wrong with this bill and the thinking behind it.

Under the bill, thousands of immigration detainees would become subject to mandatory detention, no opportunity for a bond hearing, even if they pose no risk to the public and no risk of flight. Does that make you feel safer?

And I appreciate all these terrible stories of some reckless criminal, homicidal person that did all these bad things. So, therefore, we need a law that takes away unlimited rights of everybody.

Sometimes we say that the cost of an approach outweighs its benefit, but in this case, that would be too generous because what benefit do we get by detaining people without review? Where is our constitutional consciousness in a hearing like this?

People who we suspect will cooperate with the process, who are likely to win their immigration cases and will certainly not do us any harm. Under the bill before us today, detainees with final orders of removal can be held indefinitely simply by the stroke of a

pen from the Secretary of Homeland Security or the Director of Immigration and Customs Enforcement. Not only can a person be condemned to indefinite detention without a hearing before a neutral body, but it can take place without even a personal interview of the detainee. And as I have said before, the writ of habeas corpus to challenge the legality of detention is the most fundamental guarantee of our Constitution.

So I cannot say I am shocked by what I am going to hear today, but I am sure getting tired of hearing it week after week after month after month all year long, the same old tune in which people that want limited government except when they have a bill that we throw the Constitution out.

Habeas, immigration, detention, habeas corpus petitions should be filed in the court here. The only possible explanation for limiting them to the District of Columbia courts is it will make it harder for anybody that does not have a lawyer or cannot speak English or is being detained somewhere in Arizona—and I apologize—Texas. It is pretty clear what is behind all this. Nothing sophisticated about it.

And the other explanation is that consolidating all these cases around the country into one court will overwhelm the court and prevent any swift decisions in accordance with justice. Just recently, Chief Judge Lamberth of the district court said that the several hundred habeas petitions filed by Guantanamo detainees alone have already overburdened the court so that there will be very few cases until summer and the fall. And he said it is as bad as I have ever seen it.

So we need to make sure that our detention and removal system works and that we are holding the right people and under right conditions and for the right reasons. That is all I am asking here. I don't want anybody that shouldn't be released let out. I want to keep the people that would harm us or our country kept in. So this bill doesn't do that. It doesn't advance the goals. Instead it just increases the enormously expensive detention system and will remove or limit the few meaningful checks that still exist.

Thank you, Chairman Gallegly, for allowing my statement.

Mr. GALLEGLY. I thank the gentleman.

As I am sure most of you are aware, we have a joint session with the Prime Minister of Israel on the floor at 11 a.m., and as a result of that, we are going to recess, unfortunately, at 10:45. And we will try to get through as many of our witnesses' opening testimony as possible. I would really appreciate your sensitivity to the 5-minute time limit on testimony. The text of your entire statement will be made a part of the record of the hearing.

Our first witness today is Mr. Gary Mead. Mr. Mead is Executive Associate Director for the Enforcement and Removal Operations, U.S. Immigration and Customs Enforcement at the Department of Homeland Security. Prior to joining ICE in April 2006, he spent his entire Federal law enforcement career with the U.S. Marshal's Office. Mr. Mead holds a master's degree and has received two Senior Executive Service presidential rank awards.

Mr. Thomas Dupree, Jr., is a partner in the Washington, D.C. office of Gibson, Dunn & Crutcher. Mr. Dupree is an experienced trial and appellate advocate. He served in the Civil Division of the

U.S. Department of Justice from 2007 to 2009, ultimately becoming the Principal Deputy Assistant Attorney General.

Mr. Dupree graduated from Williams College and received his J.D. from the University of Chicago Law School.

Chief Douglas Baker has served as the Chief of Police for the City of Fort Myers since January 2009. He joined the Fort Myers Police Department in 1986 as a patrolman and was promoted through the ranks to his current position. A graduate from the 216th session of the National Academy in March 2004, Doug received his bachelor's and master's degree from Hodges University.

Mr. Arulanantham—is it close enough?

Mr. ARULANANTHAM. You can call me "Mr. Arul," Mr. Chairman.

Mr. GALLEGLY. Mr. Arul. That works for me. [Laughter.]

Is Deputy Legal Director at the ACLU of Southern California. Prior to joining the ACLU of Southern California, he was Assistant Federal Public Defender in El Paso, Texas, as well as a fellow at the ACLU Immigrants Rights Project in New York.

Mr. Arul is a graduate of Yale Law School and a graduate of Oxford University.

Mr. Mead?

**TESTIMONY OF GARY MEAD, EXECUTIVE ASSOCIATE DIRECTOR FOR ENFORCEMENT AND REMOVAL OPERATIONS, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, U.S. DEPARTMENT OF HOMELAND SECURITY**

Mr. MEAD. Thank you, Mr. Chairman. Chairman Gallegly, Ranking Member Lofgren, distinguished Members of the Subcommittee——

Mr. GALLEGLY. Mr. Mead, your mic is not working?

Mr. MEAD. It doesn't appear to be.

Mr. GALLEGLY. Can we move the other microphone over there? Bring it in closer and push the button.

Mr. MEAD. How about that?

Mr. GALLEGLY. That works perfect.

Mr. MEAD. Okay.

Chairman Gallegly, Ranking Member Lofgren, and distinguished Members of the Subcommittee, on behalf of Secretary Napolitano and Director Morton, I would like to thank you for the opportunity to discuss non-removable aliens and the impact of the Supreme Court decision, *Zadvydas v. Davis*, on ICE operations.

As the largest investigative arm of the Department of Homeland Security, ICE utilizes its immigration and customs enforcement authority to protect America and uphold public safety. On the whole, ICE is quite successful. In fiscal year 2010, ICE recorded the removal of more than 392,000 illegal aliens. Half of those removed, more than 195,000, were convicted criminals, the most ever removed from our country in a single year.

There are also challenges. Under *Zadvydas*, many aliens with final orders of removal may not be detained beyond a period of 6 months. To hold such aliens, there must be a significant likelihood of removal in the reasonably foreseeable future. Only a small number of aliens who pose certain health and safety risks may continue to be detained for a prolonged period of time.

These challenges have required changes in the way we hold aliens and conduct what we call post-order custody reviews. They have also required us to strengthen our relationship with the State Department in order to more effectively work with foreign governments to overcome delays or refusals in obtaining travel documents.

ICE conducts post order custody reviews for all aliens who have received a final order allowing their removal by ICE but, for one reason or another, there is not a significant likelihood of removal in the reasonably foreseeable future. These are done to ensure that detention is justified and in compliance with governing laws and regulations. The conclusion reached in each case is subject to an intensive fact-specific inquiry and officers use these facts and their own experiences and knowledge regarding a given country to make the determination as to whether removal is significantly likely in the reasonably foreseeable future.

Some of those aliens who are released due to *Zadvydas* have criminal records that include convictions for illegal activity ranging from property offenses to homicide. Under the regulations, ICE may continue to detain an alien whose release would pose a special danger to the public, if certain conditions are met.

While ICE can continue to detain specially dangerous aliens, ICE cannot indefinitely detain all criminal aliens under the law. Since the beginning of 2009, ICE has made 12,781 individual releases of aliens subject to *Zadvydas*. While the number of individual detainees re-booked into ICE custody, post-*Zadvydas* release is relatively low overall at 7 percent. ICE is deeply concerned by those criminal aliens that commit crimes after their *Zadvydas* release.

While crimes by aliens are of significant concern, ICE is not in the business of holding detainees for indefinite lengths of time. As a practical matter, immigration detention has a finite endpoint in most cases as the vast majority of aliens are able to be removed in a matter of days or weeks.

Ten years ago, *Zadvydas* addressed indefinite detention in the primary context ICE faces it today where ICE is unable to work with aliens and foreign governments to obtain travel documents. Getting foreign countries to allow repatriations remains a challenge for us today.

There are few countries that refuse to accept their nationals who are under final orders of removal, and there are some countries that often delay the removal process. These refusals or delays have often forced ICE to release aliens subject to *Zadvydas*. My longer remarks lay out some of the countries that present the greatest challenges in this area.

ICE has worked with the State Department to find solutions to address the timely issuance of travel documents. In an effort to decrease any delay in the removal process, in April 2011 ICE and the State Department's Bureau of Consular Affairs signed a memorandum of understanding, or MOU, establishing ways in which the State Department and the Department of Homeland Security will work together in this area.

The MOU also established procedures for meeting and working with countries that delay or refuse repatriation of specific nationals.

Though this work is difficult, it has had some results. ICE and State recently held promising discussions with officials from the Peoples Republic of China regarding repatriation issues, and ICE looks forward to continuing to work with the PRC.

ICE also completed draft demarches to nine countries requesting expeditious issuance of travel documents for aliens.

The removal of criminal aliens consumes time and poses challenges. Every alien's removal requires not only cooperation within the U.S. Government but also the cooperation of another country. While ICE attempts to remove criminal aliens under the current law in light of the *Zadvydas* decision, aliens whose removal is not necessarily foreseeable, outside of the limited circumstances set out in regulations, must be released from ICE custody while we continue working to effectuate their removal.

I thank the Committee for its support of ICE and our law enforcement mission. Your support is vital to our work. Your continued interest in and oversight of our actions is important to the men and women at ICE who work each day to ensure the safety and security of the United States.

I would be pleased to answer any questions you have at this time.

[The prepared statement of Mr. Mead follows:]

U.S. Immigration and Customs Enforcement

**STATEMENT**

**OF**

**GARY MEAD**
**EXECUTIVE ASSOCIATE DIRECTOR**
**ENFORCEMENT AND REMOVAL OPERATIONS**

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

**REGARDING A HEARING ON**

**"H.R. 1932, The Keep Our Communities Safe Act"**

**BEFORE THE**

**U.S. HOUSE OF REPRESENTATIVES**
**JUDICIARY COMMITTEE**

**SUBCOMMITTEE ON IMMIGRATION POLICY AND ENFORCEMENT**

**Tuesday, May, 24, 2011 - 10:00 a.m.**

## INTRODUCTION

Chairman Gallegly, Ranking Member Lofgren, and distinguished Members of the Subcommittee:

On behalf of Secretary Napolitano and Director Morton, I would like to thank you for the opportunity to discuss non-removable aliens and the impact of *Zadvydas v. Davis*, 533 U.S. 678, 121 S. Ct. 2491 (2001), on the day-to-day operations of U.S. Immigration and Customs Enforcement (ICE).

As the largest investigative arm of the Department of Homeland Security, ICE utilizes its immigration and customs enforcement authority to protect America and uphold public safety. ICE does this by dismantling terrorist and criminal organizations that seek to exploit our borders and by vigilantly identifying, apprehending, and removing criminal and other illegal aliens from the United States. In both 2009 and 2010, ICE removed a record number of illegal immigrants. In Fiscal Year 2010, ICE recorded the removal of more than 392,000 illegal aliens. Half of those removed—more than 195,000—were convicted criminals, the most ever removed from our country in a single year.

ICE, through the Office of Enforcement and Removal Operations (ERO), is responsible for detaining and removing aliens who violate U.S. immigration laws, consistent with our enforcement priorities, and for assuring that aliens released on orders of supervision comply with the conditions of their release. ICE is responsible for working with the consulates and embassies of foreign governments to assist removable aliens in obtaining travel documents so that ICE may remove them.

Prior to the U.S. Supreme Court's decision in *Zadvydas*, aliens subject to final orders of removal from the United States could potentially be detained indefinitely if they posed a threat to the community or posed flight risks. However, after *Zadvydas,* many aliens with final orders of removal, including aliens determined to pose a threat to the community or flight risks, may not be detained beyond a period of six months if there is no significant likelihood of removal in the reasonably foreseeable future. Only a small number of aliens who pose certain health and safety risks may continue to be detained for a prolonged period of time. These include aliens with highly contagious diseases, aliens who pose serious adverse foreign policy consequences of release, security or terrorism concerns, and aliens found after a hearing to be "specially dangerous" criminal aliens as provided in relevant regulations.

The decision in *Zadvydas* has presented ICE with both challenges and opportunities. As a result, ICE has taken steps to strengthen and improve related removal procedures. For example, ICE has made make significant changes not only in identifying and reviewing cases subject to *Zadvydas'* limitations, but also in how the agency identifies and tracks aliens released on orders of supervision. Further, it required ICE to change the post-order custody review process and the information we maintain on long-term detainees. It has also required us to strengthen our relationship with the Department of State (DOS) in order to more effectively work with foreign governments to overcome delays or refusals in obtaining travel documents for their nationals.

**IMPACT ON CUSTODY DETERMINATIONS**

The U.S. Supreme Court in *Zadvydas* analyzed the post-order custody provisions of the Immigration and Nationality Act (INA) in the context of review of petitions for writ of habeas corpus. The Court avoided Constitutional implications and decided the case based on the statutory removal period. In doing so the Court held that six months is the presumptively reasonable period of detention to effectuate removal. Thereafter, if there is good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the government must furnish evidence to rebut that or establish that special circumstances exist that require continued detention.

In accordance with *Zadvydas*, the former Immigration and Naturalization Service developed policies and procedures to provide for regular review of detained cases with final orders of removal that are now used by ICE. This process is referred to as Post-Order Custody Review (POCR). POCRs are regularly conducted for aliens who are detained in ICE custody after receipt of a final order of removal, in order to ensure that detention is justified and in compliance with governing laws and regulations. Initial reviews occur locally no later than 90 days after the issuance of a final order (if in custody when final order is issued), or no later than 90 days after coming into custody with an outstanding final order. If the alien has not been released or removed by the expiration of three month period after the review, jurisdiction regarding the decision to continue detention is transferred from the local field office to ICE's Case Management Unit (HQCMU) to determine whether or not continued detention is justified pursuant to 8 C.F.R.§ 241.4 (continued detention of inadmissible, criminal, and other aliens beyond the removal period), §241.13 (determination of whether there is a significant likelihood of

removing a detained alien in the reasonably foreseeable future), or § 241.14 (continued detention of removable aliens on account of special circumstances). If a significant likelihood of removal in the reasonably foreseeable future exists, detention is continued and reviewed by ICE at periodic intervals until the alien is removed.

ERO created the Monthly Post-Order Custody Review Report and established performance measures to ensure compliance with ERO's policies and procedures concerning POCR. ICE relies upon the knowledge and experience of officers assigned to its Travel Document Unit (TDU) to determine whether there is a significant likelihood of removing a detained alien in the reasonably foreseeable future under 8 C.F.R. § 241.13. These TDU officers are experts in the steps necessary to facilitate the removal of aliens to their designated countries and have established points of contact with the consulates and embassies of countries all over the world.

In addition, the TDU obtains additional, pertinent background from case officers in the field and the detainee's family members. TDU officers further consider other factors, such as the embassy/consulate's historical issuance practices and other extraordinary country conditions such as natural disasters or civil unrest.

The conclusion reached in each case is subject to an intensive fact-specific inquiry and TDU officers use these facts and their own experiences and knowledge regarding a given country to make their determination as to whether or not removal is significantly likely in the reasonably foreseeable future. Following consultation with the TDU, HQCMU officers examine each case on its own merits and make a custody determination based on the specifics of the case.

**IMPACT ON THE RELEASE OF CRIMINAL ALIENS**

Some aliens who may have to be released under *Zadvydas* have criminal records that include a wide variety of illegal activity including, but not limited to, arson, assault, property damage, extortion, forgery or fraud, homicide, kidnapping, weapons offenses, embezzlement, controlled substance offenses, and sexual offenses. Those aliens detained after a determination that there is no significant likelihood of removal because their home country will not accept them, may remain in detention based on 8 CFR § 241.14(f) as "specially dangerous" aliens under specific limited circumstances set out in regulations. Subject to the limitations of the federal courts, under 241.14(f), ICE is authorized to continue to detain certain "specially dangerous" aliens, even when the removal is not reasonably foreseeable, following a hearing before an immigration judge.

Pursuant to regulatory authority, with the approval of an immigration judge, ICE may continue to detain an alien whose release would pose a special danger to the public, if: the alien has previously committed one or more crimes of violence as defined in 18 U.S.C. § 16; due to a mental condition or personality disorder and behavior associated with that condition or disorder, the alien is likely to engage in acts of violence in the future; and no conditions of release can reasonably be expected to ensure the safety of the public. However, the courts of appeals for the Ninth Circuit and the Fifth Circuit have barred reliance on these procedures as exceeding the scope of statutory authority. *Tran v. Mukasey*, 515 F.3d 478 (5th Cir. 2008); *Tuan Thai v. Ashcroft*, 366 F.3d 790 (9th Cir. 2004.

More specifically, when an alien who has previously committed one or more acts of violence and, due to a mental condition or personality disorder and behavior associated

with that condition or disorder is deemed likely to engage in acts of violence in the future and an ICE Health Service Corps physician has determined after a full medical and psychiatric exam that there are no conditions that can be placed upon the alien's release that would ensure the safety of the public, ICE has the regulatory authority to invoke the procedures outlined under 8 CFR § 241.14(f), including a hearing before an immigration judge, in order to continue his or her detention beyond the *Zadvydas* period.

Since the beginning of FY 2009, ICE has released 12,567 individual aliens, including both criminal and noncriminal aliens, under the terms of the *Zadvydas* settlement. Of this amount, 868 individuals were re-booked into ICE custody, which is a relatively low re-detention rate of 7 percent. Of this number, 686 individuals were booked into ICE custody one additional time, 134 individuals were booked in twice, 30 were booked in three times and 18 were booked in four times.

**IMPACT ON LENGTH OF STAY**

Unlike the Federal Bureau of Prisons (BOP), ICE's detention system is not designed to handle detainees for long periods of time. ICE's constitutional, statutory and regulatory authorities related to detention are different from those given to the BOP, in that ICE holds individuals fundamentally for purposes of removal from the United States. As a practical matter, immigration detention has a finite end point in most cases as the vast majority of aliens are readily removed in a matter of days, weeks, or months after a removal order becomes final. *Zadvydas* directly addressed the minority of cases in which a finite end to detention is not readily apparent. It also addressed the chief reason that the U.S. government is unable to remove aliens who have been ordered removed -- the inability to obtain valid travel documents in a timely manner.

**IMPACT ON REPATRIATION**

The majority of the more than 200 countries in the world accept the return of their citizens. There are a few countries that refuse to accept their nationals who are under final orders of removal and there are some countries that often delay the removal process. These refusals or delays have often forced ICE to release aliens subject to *Zadvydas*.

There are various reasons that countries may refuse to accept their nationals. For example, Cuba lacks formal relations with the United States and accepts only aliens from a very short list related to the Mariel boatlift. Under the U.S.-Vietnam Repatriation Agreement, Vietnam refuses to accept anyone who entered the United States prior to July 12, 1995, the date that relations with the U.S. were reestablished.

Other countries that eventually accept the return of their nationals will often delay the process. For example, China, India, Iran and Laos are very slow to issue travel documents to ICE. China and India both engage in lengthy background investigations to verify nationality and identity, thereby substantially delaying the issuance of travel documents. Similarly, Iran and Laos do not issue travel documents when ICE or the alien are unable to present a restricted set of that country's identity documents.

Countries that are recalcitrant in issuing travel documents or accepting return of their nationals in ICE custody are prioritized for removal because their recalcitrance result in the highest overall detention costs. Based on these factors, ICE has identified the following as countries of primary concern in this area:

| Country | Average Issuance Time |
|---|---|
| Antigua And Barbuda | 115 days |
| Bangladesh | 106 days |
| Cambodia | 227 days |
| Cuba | 154 days |
| China | 134 days |
| Democratic Republic of the Congo | 171 days |
| Dominica | 100 days |
| Guinea | 102 days |
| India | 155 days |
| Iran | 104 days |
| Iraq | 184 days |
| Jamaica | 59 days |
| Laos | 72 days |
| Liberia | 205 days |
| Pakistan | 117 days |
| St. Kitts And Nevis | 165 days |
| St. Lucia | 102 days |
| St. Vincent And Grenada | 102 days |
| Sierra Leone | 215 days |
| Somalia | 344 days |
| Trinidad And Tobago | 52 days |
| Vietnam | 218 days |
| Zimbabwe | 150 days |
| * e-TD Dashboard from April 2008 through April 5, 2011 | |

ICE has worked with DOS to find solutions to address the timely issuance of travel documents. These efforts have included ICE interaction with the National Security Staff and various DOS working groups regarding specific countries that are uncooperative in ICE removal efforts. These working groups have reviewed various options and recommend steps to be taken in obtaining cooperation; however, there is still substantial work to be done in this area.

In an effort to decrease any delay in the removal process, in April 2011, ICE and the DOS Bureau of Consular Affairs (DOS/CA) signed a memorandum of understanding

(MOU) establishing ways in which DOS and the Department of Homeland Security will work together to ensure that other countries accept the return of their nationals in accordance with international law.

The MOU, among other things, establishes a target average travel document issuance time of 30 days and outlines measures to address those countries that systemically refuse or delay repatriation of their nationals. ICE and DOS/CA will pursue the following steps in an attempt to increase compliance among countries that systematically refuse or delay repatriation of their nationals:

- issuing a demarche or series of demarches at increasingly higher levels;
- holding joint meetings with the Ambassador to the United States, DOS Assistant Secretary for Consular Affairs and the Director of ICE;
- considering whether to provide notice of the U.S. government's intent to formally determine that the country is not accepting the return of its nationals and that the U.S. government intends to exercise the provisions of Section 243(d) of the INA to gain compliance;
- considering visa sanctions under Section 243(d) of the INA; and
- calling for an interagency meeting to pursue withholding of aid or other funding.

The MOU also established agreed-upon procedures for working with countries that delay or refuse repatriation of specific nationals. The Director of ICE and the DOS Assistant Secretary for Consular Affairs recently held meetings with the Ambassadors of Bangladesh and India under the implementation of this new agreement. We hope that our collective efforts will yield significant results in the future.

In addition, on February 28, 2011, ICE has prepared demarches requesting that the respective host governments should begin issuing travel documents expeditiously for their nationals subject to orders of removal from the United States for transmittal by the DOS for the following nine countries:

1. Antigua and Barbuda
2. Democratic Republic of the Congo
3. Dominica
4. Iraq
5. Liberia
6. St. Kitts and Nevis
7. St. Lucia
8. St. Vincent and the Grenadines
9. Trinidad and Tobago

The objectives of these demarches are to: (1) have the governments of the respective countries begin issuing travel documents expeditiously for all of their nationals who have been issued final orders of removal from the United States; (2) alert the respective governments to the seriousness with which the U.S. government views this matter; and (3) learn how the process of issuing travel documents can be expedited.

Lastly, ICE is resuming Repatriation Working Group meetings with DOS to identify alternative means to improve travel document issuance for countries where a demarche has already been issued or where issuing a demarche is not recommended.

Though this work with the State Department and foreign governments is difficult, it has had some results. ICE and the Department of State recently held promising

discussions with Chinese officials regarding repatriation issues, and ICE looks forward to continuing to work with China to implement solutions in the coming months.

**CONCLUSION**

The removal of criminal aliens is central to ICE's mission. It consumes time and poses challenges but will continue to be one of our highest priorities. Every alien's removal requires not only cooperation within the U.S. government but also the cooperation of another country. While ICE attempts to remove criminal aliens under the law within 180 days of issuance of final orders of removal in light of the *Zadvydas* decision, aliens whose removal is not reasonably foreseeable, outside of the limited circumstances of 8 CFR § 241.14, must be released from ICE custody while we continue working to effectuate their removal.

I thank the Committee for its support of ICE and our law enforcement mission. Your support is vital to our work. Your continued interest in and oversight of our actions is important to the men and women at ICE, who work each day to ensure the safety and security of the United States. I would be pleased to answer any questions you have at this time.

Mr. GALLEGLY. Thank you very much, Mr. Mead.

Mr. Dupree?

**TESTIMONY OF THOMAS H. DUPREE, JR., PARTNER, GIBSON, DUNN & CRUTCHER LLP, WASHINGTON, DC**

Mr. DUPREE. Good morning. Thank you, Mr. Chairman, for inviting me to address an important legal issue that has immense, practical, real-world consequences: the executive branch's authority to detain dangerous aliens.

I served as Principal Deputy Assistant Attorney General under President Bush and am very familiar with the flaw in our Nation's laws that is the subject of today's hearing. Indeed, this is a problem that is well known within legal and law enforcement communities.

Although Congress in 1996 had granted the executive the power to detain removable aliens for extended periods, the courts have interpreted the law so as to require their release after a mere 6 months unless the Government can show that their removal is reasonably foreseeable. In many instances, however, removal is not reasonably foreseeable. The alien's country of origin may not take him back. Our obligations under the Convention Against Torture may not permit our removing him to his country of origin. There may be delays in obtaining the necessary travel documents, or the alien's country of origin may simply be unknown.

The consequence is that, under current law, the Government is compelled to release into our communities murderers, child molesters, and other predators who pose a clear and direct threat to public safety and national security.

The problem arises from the Supreme Court's decision in *Zadvydas v. Davis*. In *Zadvydas*, the Supreme Court construed the post-removal period detention statute to incorporate a presumptive 6-month limit on the detention of removable aliens. According to the Court, once an alien has been detained for 6 months under the statute, he must be released unless the Government can establish that his removal is reasonably foreseeable.

Four years later, the Supreme Court expanded the sweep of *Zadvydas* in *Clark v. Martinez* where it held that the 6-month limit applied to inadmissible aliens, those who never had any legal right to enter the United States in the first place.

The Court concluded by acknowledging the public safety concerns raised by the Government and by inviting Congress to amend the statute. In fact, the Court noted that shortly after *Zadvydas* was decided, Congress passed the USA PATRIOT Act which authorized continued detention of aliens whose removal was not reasonably foreseeable and who presented a national security threat or had been involved in terrorist activities.

Soon after *Zadvydas* was decided, Attorney General John Ashcroft expressed deep concern that the ruling threatened public safety. He said that many of the criminal aliens who would be set free as a result of the decision "have extensive histories of brutal violent crime and pose a danger to society." He added that he was "especially concerned that these criminal aliens may re-enter and prey upon immigrant communities in the United States."

The Attorney General's grim forecast has proven accurate. The impact of *Zadvydas* was immediate and substantial. One study

found that in the 2 months following *Zadvydas*, 829 criminal aliens were released into the United States and thousands more have been released in the years that followed.

The impact of *Zadvydas* continues today as the Department of Homeland Security is legally compelled to set loose individuals who are criminally violent and very likely to commit additional crimes once released. A 2007 audit conducted by the Inspector General of the Department of Justice found that out of a sample of 100 criminal aliens, 73 had an average of six arrests each after being released. According to the Inspector General, the study "produced results that, if indicative of the full population of criminal aliens identified, suggest that the rate at which criminal aliens are re-arrested is extremely high."

Congress has the power to fix this problem. The Supreme Court has never denied Congress the constitutional authority to provide for extended periods of detention. Quite the contrary. The Supreme Court has invited Congress to legislate in this area and to amend existing law in a way that clarifies the circumstances under which extended detention is permissible and that specifies the procedures that the executive must follow in approving detention for longer periods.

The proposed legislation will protect the American people by giving the Department of Homeland Security and the Department of Justice the legal tools they need to keep these dangerous predators off our streets. At the same time, the bill appropriately addresses potential due process concerns by narrowing the sweep of the statute to a small segment of particularly dangerous individuals. It provides for regular and individualized assessments of the need for continued detention by high-level officials within the Department of Homeland Security, as well as the opportunity to have those assessments reviewed by a Federal court.

There can be no question that this bill will clarify the law. It will expressly vest the executive with powers necessary to keep dangerous aliens out of our communities, and it will make America safer.

For all these reasons, I support the Subcommittee's efforts to address this critical public safety issue, and I look forward to your questions.

[The prepared statement of Mr. Dupree follows:]

**STATEMENT OF THOMAS H. DUPREE, JR.**

**FORMER PRINCIPAL DEPUTY ASSISTANT ATTORNEY GENERAL**

BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES,

COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON IMMIGRATION POLICY AND ENFORCEMENT

CONCERNING A BILL PROVIDING FOR THE DETENTION OF DANGEROUS ALIENS

MAY 24, 2011

Thank you, Chairman Smith, for inviting me to address an important legal issue that has immense, practical, real-world consequences: the executive branch's authority to detain dangerous aliens.

I served as Principal Deputy Assistant Attorney General under President Bush, and am very familiar with the flaw in our Nation's laws that is the subject of today's hearing. Indeed, this is a problem that is well known within the legal and law enforcement communities.

Although Congress in 1996 had granted the executive the power to detain removable aliens for extended periods, the courts have interpreted the law so as to require their release after a mere six months, unless the government can show that their removal is reasonably foreseeable. In many instances, however, removal is *not* reasonably foreseeable — the alien's country of origin may not take him back; our obligations under

the Convention Against Torture may not permit our removing him to his country of origin; or his country of origin may simply be unknown.

The consequence is that, under current law, the government is compelled to release — into our communities — murderers, child molesters and other predators who pose a clear and direct threat to public safety and national security.

Congress has the power to fix this problem. The Supreme Court has never denied Congress the constitutional authority to provide for extended periods of detention. Quite the contrary. The Supreme Court has *invited* Congress to legislate in this area and to amend existing law in a way that clarifies the circumstances under which extended detention is permissible and that specifies the procedures that the executive must follow in approving detention for longer periods.

The proposed legislation accepts the Supreme Court's invitation. It specifies the types of aliens that may be detained for extended periods — a small segment of particularly dangerous individuals — and sets forth the process through which the Secretary of Homeland Security must determine that detention is warranted. There can be no question that this bill will clarify the law; it will expressly vest the executive with powers necessary to keep dangerous aliens off the street; and it will make America safer.

### I. *Zadvydas* and *Clark*

When an alien has been found to be unlawfully present in the United States and a final order of removal has been entered, the government ordinarily removes the alien during the subsequent 90-day removal period, during which time the alien is typically

held in custody. 8 U.S.C. § 1231(a)(2). If the government is unable to remove the alien within 90 days, then further detention is authorized under 8 U.S.C. § 1231(a)(6). That provision — commonly known as the post-removal-period detention statute — provides that certain aliens, including criminal aliens or those who pose a national security or public safety threat, "may be detained beyond the removal period." It applies to aliens ordered removed who are inadmissible, removable or who present a flight risk or danger to the community. *Id.*

In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court construed the post-removal-period detention statute to incorporate a presumptive six-month limit on the detention of removable aliens. The Court held that the statute did not authorize the government to detain a removable alien indefinitely, but only for that period reasonably necessary to secure the alien's removal. Because indefinite detention "would raise serious constitutional concerns," the Court "construed the statute to contain an implicit 'reasonable time' limitation." *Id.* at 682. According to the Court, once an alien has been detained for six months under the statute — that is, six months after the end of the 90-day removal period — he must be released, unless the government can establish that his removal is "reasonably foreseeable." *Id.* at 699.

The Court decided *Zadvydas* not on constitutional grounds, but as a matter of statutory interpretation. It focused on the statute's use of the word "may" — the alien "may" be detained beyond the removal period — and stated that "[i]f Congress had meant to authorize long-term detention of unremovable aliens, it certainly could have spoken in clearer terms." 533 U.S. at 697; *see also id.* at 699 ("We have found nothing in

the history of these statutes that clearly demonstrates a congressional intent to authorize indefinite, perhaps permanent, detention."). The Court qualified its holding by noting that it was not "consider[ing] terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security." *Id.* at 696.

Justice Kennedy, in a dissent joined in relevant part by Chief Justice Rehnquist and Justices Scalia and Thomas, criticized the majority for "weakening the hand of our Government" and "committing [a] grave constitutional error by arrogating to the Judicial Branch the power to summon high officers of the Executive to assess their progress in conducting some of the Nation's most sensitive negotiations with foreign powers; and then likely releasing into our general population at least hundreds of removable or inadmissible aliens who have been found by fair procedures to be flight risks, dangers to the community, or both." 533 U.S. at 705, 713 (Kennedy, J., dissenting).

Four years later, the Supreme Court expanded the sweep of *Zadvydas* in *Clark v. Martinez*, 543 U.S. 371 (2005). In *Clark*, the Court held that *Zadvydas*'s six-month limit applied to inadmissible aliens — those who never had any legal right to enter the United States in the first place. The Court reasoned that "[t]he operative language of § 1231(a)(6), 'may be detained beyond the removal period,' applies without differentiation to all three categories of aliens that are its subject." *Id.* at 378. Thus, the Court determined that the six-month limit also applied to aliens who present a danger to the community. *See* 8 U.S.C. § 1231(a)(6) (authorizing detention of aliens who have

been "determined by the [Secretary of Homeland Security] to be a risk to the community or unlikely to comply with the order of removal . . . .").

The Court concluded by acknowledging the public safety concerns raised by the government and inviting Congress to amend the statute:

> The Government fears that the security of our borders will be compromised if it must release into the country inadmissible aliens who cannot be removed. If that is so, Congress can attend to it.

*Id.* at 386 (emphasis added). The Court noted that shortly after *Zadvydas* was decided, Congress passed the USA Patriot Act, which authorized continued detention of aliens whose removal was not reasonably foreseeable and who presented a national security threat or had been involved in terrorist activities. *Id.* at 386 n.8 (citing Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, § 412(a), 115 Stat. 350 (enacted Oct. 26, 2001) (codified at 8 U.S.C. § 1226a(a)(6))).

Several circuit courts have applied *Zadvydas* and *Clark* to order the release of dangerous aliens. In *Tuan Thai v. Ashcroft*, 366 F.3d 790 (9th Cir. 2004), the Ninth Circuit relied on *Zadvydas* in directing the government to release a violent and mentally ill alien who had been convicted of assault and rape. In dissenting from the denial of rehearing en banc, Judge Kozinski condemned the majority for "releas[ing] into the population of our circuit an individual who has been found, by clear and convincing evidence, to be mentally disturbed and dangerous." 389 F.3d 967, 967 (9th Cir. 2004) (Kozinski, J., dissenting).

In *Tran v. Mukasey*, 515 F.3d 478 (5th Cir. 2008), the court invoked *Zadvydas* and *Clark* in affirming the release of a mentally ill criminal alien who murdered his wife in the presence of their seven-year-old daughter. The court noted that it was "sympathetic to the Government's concern for public safety," but explained that it was "without power to authorize [the alien's] continued detention under § 1231(a)(6)." *Id.* at 485. The court concluded with the same advice — look to Congress to fix the problem — offered by the Supreme Court in *Clark*:

> We note . . . that in a similar circumstance where public safety was also of great concern, Congress took prompt action to address the issue [by enacting the USA Patriot Act]. . . . Thus, not only are the Government's concerns properly directed to Congress, but importantly Congress has shown that it has the authority and willingness to address these concerns.

*Id.* at 485.

One circuit court has taken a different approach. The Tenth Circuit, in a careful and scholarly opinion by Judge McConnell, upheld against a *Zadvydas* challenge a Justice Department regulation authorizing the extended detention of aliens determined to pose a special danger to the public. *See Hernandez-Carrera v. Carlson*, 547 F.3d 1237 (10th Cir. 2008). The court explained that the regulation was a reasonable and permissible interpretation of the post-removal-period detention statute, and was owed deference under the principles set forth in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 982-83 (2005), notwithstanding the Supreme Court's earlier contrary interpretation of the statute. The court went on to reject the argument that the detention scheme violated due process. "Although there is no one

formulation that signals when a civil detention scheme is permissible, those schemes which comport with due process typically apply narrowly to a small segment of particularly dangerous individuals and include meaningful procedural protections." *Id.* at 1251. The court concluded that the Justice Department's regulations passed constitutional muster. *Id.* at 1251-56.

**II. The Urgent Need for Amendment**

Soon after *Zadvydas* was decided, Attorney General John Ashcroft expressed deep concern that the ruling threatened public safety. He said that many of the criminal aliens who would be set free as a result of the decision "have extensive histories of brutal violent crime and pose a danger to society." He added that he was "especially concerned that these criminal aliens may re-enter and prey upon immigrant communities in the United States."[1]

The Attorney General's grim forecast has proven accurate. The impact of *Zadvydas* was immediate and substantial. One study found that in the two months following *Zadvydas*, 829 criminal aliens were released into the United States, and thousands more were released in the years that followed.[2]

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1 *U.S. Ponders Release of Criminal Aliens*, CNN Justice (July 19, 2001), http://articles.cnn.com/2001-07-19/justice/ashcroft.ins.detaine_1_criminal-aliens-ins-immigration-and-naturalization-service?_s=PM:LAW.

2 Rachel Canty, *The New World of Immigration Custody Determinations After* Zadvydas v. Davis, 18 Geo. Immigr. L.J. 467, 468 (2004).

There are many tragic stories of released criminal aliens terrorizing our communities. Abel Arango, a Cuban national, spent more than four years in prison for armed robbery and other crimes. When the United States attempted to remove him, Cuba refused to accept him, and *Zadvydas* compelled his release. Arango later murdered a Florida police officer, shooting him in the face at point-blank range. Huang Chen, a Chinese national whom China refused to repatriate, murdered a New York woman soon after being released pursuant to *Zadvydas*.

The impact of *Zadvydas* continues today, as DHS is legally compelled to set loose individuals who are criminally violent and very likely to commit additional crimes once released. A 2007 audit conducted by the Inspector General of the Department of Justice found that out of a sample of 100 criminal aliens, 73 had an average of six arrests each after being released. According to the Inspector General, the study "produced results that, if indicative of the full population of criminal aliens identified, suggest that the rate at which released criminal aliens are re-arrested is extremely high."[3]

The need for amendment is acute. Protecting public safety is one of the most fundamental obligations of government, yet under current law, the government is compelled to set dangerous criminals loose on the streets of the United States. In many instances, these are individuals who never had any right to be in the United States in the first place.

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[3] *Illegals Become Repeat Criminals*, Washington Times (Jan. 9, 2007), http://www.washingtontimes.com/news/2007/jan/9/20070109-122510-1365r.

There is absolutely no reason to leave uncorrected a law that compels the release of some of the most dangerous and deranged individuals in federal custody. Often their home countries do not want them back precisely *because* their crimes were so heinous. *See Zadvydas*, 533 U.S. at 715 (Kennedy, J., dissenting) ("Because other nations may refuse to admit aliens who have committed certain crimes, often the aliens who have committed the most serious crimes will be those who may be released immediately under the majority's rule.") (internal citation omitted).

The proposed legislation will protect the American people by giving the Department of Homeland Security and the Department of Justice the legal tools they need to keep these dangerous predators off our streets. At the same time, the bill appropriately addresses the constitutional concerns identified by the *Zadvydas* Court and discussed at length by the Tenth Circuit in its *Hernandez-Carrera* decision. It narrows the potential sweep of the post-removal-detention statute by limiting it to a small segment of particularly dangerous individuals. It provides for regular and individualized assessments of the need for continued detention by high-level officials within the Department of Homeland Security, as well as the opportunity to have those assessments reviewed by a federal court.

The Supreme Court and the Fifth Circuit have both recognized the dangers arising from *Zadvydas* and emphasized that the solution rests with Congress. Those courts have invited Congress to amend the post-removal-detention statute by speaking more precisely and thereby avoiding constitutional problems.

For all these reasons, I support the Subcommittee's efforts to address this critical issue and look forward to your questions. Thank you again for permitting me to share my views.



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Mr. GALLEGLY. Thank you, Mr. Dupree.
Chief Baker?

**TESTIMONY OF DOUGLAS E. BAKER, CHIEF OF POLICE, CITY OF FORT MYERS, FL**

Mr. BAKER. Good morning, Mr. Chairman.

In brief, if I could take you back to July 18th of 2008 at 2 o'clock in the morning, a handful of police officers were on a foot patrol in the City of Fort Myers as businesses and establishments closed. One of our officers, Officer Andrew Widman, was dispatched to a domestic violence incident in which it gave the description of an individual who had been in a fight with his girlfriend. Officer Widman identified the individual, and as he walked across Main Street to step onto the Patio de Leon area, Mr. Arango pulled a 9 millimeter handgun from his waistband and shot Officer Widman once in the face, killing him instantly. Officer Widman never had an opportunity to defend himself or pull his weapon.

Officer Widman left behind a wife and three children under 5 years old. He was just completing his first year of service with the Fort Myers Police Department.

When examining Mr. Arango and where he came from—in addition, officers from the police department engaged for the next 15 minutes in a gun battle with Mr. Arango, and Mr. Arango was subsequently shot and killed also in downtown Fort Myers.

When we look at where Mr. Arango comes from and his background, in 1998 Arango was convicted and sentenced to a 6-year prison term for armed robbery and four 5-year terms of carrying a concealed firearm, burglary, two counts of grand theft. Immigration and Naturalization Services placed a detainer on Abel Arango for him to be detained by INS upon a release from prison.

In 2000 or 2001 Arango was ordered to be deported back to Cuba after being sentenced for armed robbery in Florida. Abel Arango appealed his deportation order and the Bureau of Immigration Appeals denied his appeal, and his deportation order remained in effect.

On March 1, 2004, upon being released from Krome Detention Center in Miami, Abel Arango was not detained by Immigration and Naturalization Services or Immigration and Customs Enforcement and was unleashed on the Florida citizens.

On May 16, 2008, Abel Arango was arrested again and booked into the Lee County jail for five felony counts relating to the trafficking and sale and possession of cocaine. The filing within 24 hours, on May 17, 2008, Abel Arango was released from Lee County jail by posting a $100,000 surety bond.

It takes us back to July 18, 2:30 in the morning after walking around of Lee County Justice Center at or around 2 a.m., Abel Arango used a gun to violently and cowardly assassinate Officer Widman, a Fort Myers police officer.

On May 9th of this year, Florida Governor Rick Scott signed into law the Andrew Widman Act which will enhance officers' safety by providing an additional blanket of security by authorizing a judge to issue a warrant for the arrest of a probationer or offender who has violated the terms of probation or community control and allow for the judge to immediately commit serious offenders on the likelihood that the person will be imprisoned for the violation.

Had the judge been able to immediately charge Arango with the probation violation at the time of arrest, Officer Widman's murder may have been avoided.

Three other officers in Florida were shot and killed since January under similar circumstances.

We applaud House Judiciary Committee Chairman Lamar Smith for addressing the ruling and taking the steps he is taking to correct this injustice. I wholeheartedly agree with the Chairman Smith when he was quoted as saying, "It is outrageous that thousands of dangerous immigrant criminals have been released to our streets. Just because a criminal immigrant cannot be returned to their home country does not mean that they should be freed into our communities. Immigrant criminals should be detained and deported."

We have a responsibility to our citizens, our legal residents, visitors, and law enforcement personnel to ensure that these dangerous criminal aliens are not allowed to re-enter into the communities within the United States of America. Deportation or detention must be adhered to rather than allow them to go free.

Thank you for allowing me to have the opportunity to address the Committee.

[The prepared statement of Mr. Baker follows:]

# Judiciary Subcommittee on Immigration Policy and Enforcement

## Non-Deportable Criminal Aliens

**May 24, 2011**
**10:00 am**

**Rayburn House Office Building**
**Room 2141**

**Douglas E. Baker**
**Chief of Police**
**Fort Myers Police Department**
**2210 Widman Way**
**Fort Myers, FL 33901**

It has been nearly three years since Officer Andrew Widman of the Fort Myers Police Department was senselessly murdered while on patrol. On July 18, 2008, unbeknownst to Officer Widman, he approached an individual, Mr. Abel Arango, who had recently been involved in a heated domestic argument with his girlfriend. This individual had a lengthy criminal record, gang affiliations, and an active warrant out for his arrest. As Officer Widman began to speak with him, Arango pulled out a gun and shot Officer Widman at close range. Officer Widman died at the scene.

To provide some background into Arango's past, I offer the following:

- Abel Arango was ten years old when he fled Cuba, his birthplace, and arrived in the United States in 1991.

- In 1998 Arango was convicted and sentenced to a six year prison term for armed robbery and four five-year terms for carrying a concealed fire arm, burglary, and two counts of grant theft. Immigration and Naturalization Services placed a detainer on Abel Arango for him to be detained by INS upon his release from prison.

- On or about 2000 or 2001 Arango was ordered to be deported back to Cuba after being sentenced for armed robbery in Florida.

- Arango appealed his deportation order and the Bureau of Immigration Appeals denied his appeal and his deportation order remained in effect.

- On March 1, 2004, upon being released from Krome Detention Center in Miami, Abel Arango was not detained by Immigration and Naturalization Services or Immigration and Customs Enforcement and was unleashed on Florida citizens.

- Upon his release, Arango was to report to Immigration and Customs Enforcement officials every six months and he was on supervised probation as a convicted felon.

- Abel Arango was on supervised probation in the State of Florida since his 1998 conviction to the day he assassinated Fort Myers Police Officer Andrew Widman.

- On May 16, 2008, Abel Arango was arrested and booked into the Lee County Jail for five felony counts relating to the trafficking and sale and possession of cocaine.

- On May 17, 2008, Abel Arango was released from the Lee County Jail by posting a $100,000.00 surety bond.

- On May 29, 2008, a Collier County Judge signed an arrest warrant for Abel Arango for violation of probation and Arango was ordered to be held in custody without bond pursuant to the violation of probation and arrest warrant.

- On June 16, 2008, Abel Arango walked into the Lee County Justice Center, appeared in a court room and pled not guilty before a Judge in the presence of employees from the Office of the State Attorney, Lee County Sheriff's Office, bailiffs, his defense attorney, and other personnel which may have included state probation officials and clerk of courts officials in a court room fully equipped with access to the Clerk of Courts' computers.

- Arango entered a plea of not guilty before a Judge on June 16, 2008, and walked out of the courtroom on his own free will with a future court date.

- Arango had a private lawyer representing him and it is unknown what knowledge this lawyer possessed and what actions this lawyer made on behalf of Abel Arango before and during the court appearance, and what actions he took after Arango walked out of the Lee County Justice Center on June 16, 2008.

- Abel Arango was allowed to walk out of the Lee County Justice Center even though he had an active arrest warrant ordering he be arrested, taken into custody and not released on bond or bail, even though it appears he had a pending deportation order that he be deported out of the United States of America, and even though he was on supervised probation for a violent felony including armed robbery with a gun.

- On July 18, 2008, thirty-two days after walking out of the Lee County Justice Center, at or around 2:00 a.m. Abel Arango used a gun to violently and cowardly assassinate Andrew Widman, a Fort Myers police officer.

The reason Arango was walking the streets is a matter of federal law. In 2006, the Supreme Court ruled in Zadvydas v. Davis that ICE could not hold any criminal alien longer than six months after they had finished serving their prison sentence. If they could not be deported during that period, they must be released on an Order of Supervision.

On May 9, 2011 Florida Governor Rick Scott signed into law the Officer Andrew Widman Act, which will enhance officers' safety by providing an additional blanket of security by authorizing a judge to issue a warrant for the arrest of a probationer or offender who has violated the terms of probation or community control, and allow for the judge to immediately commit serious offenders on the likelihood that the person will be imprisoned for the violation.

Had the judge been able to immediately charge Arango with the probation violation at the time of his arrest, Officer Widman's murder may have been avoided. Three other officers in Florida were shot and killed since January under similar circumstances.

Although we are certainly thankful that Governor Scott signed into law the Officer Andrew Widman Act, had Arango been deported as ordered, Officer Widman would be alive today. Due to the fact that Arango was not deported and the similarities surrounding and the Supreme Court Ruling in Zadvydas v. Davis, I strongly urge the Judiciary Subcommittee on Immigration Policy and Enforcement to support a change.

These cases involve aliens who have a conviction and a final order of removal, but cannot be removed based on their country's inability or unwillingness to take them back. It has also been determined that in other circumstances aliens are thwarting their own deportation. According to the Supreme Court Ruling in Zadvydas v. Davis, an alien can only be detained for up to 6 months after completing their prison sentence, if there is no significant likelihood of deportation. Even when continued detention is justified, once the 6 months is up, the Supreme Court Ruling allows for dangerous, criminal aliens, who have orders of removal to be released into our communities.

I applaud House Judiciary Committee Chairman Lamar Smith for addressing this ruling and the steps he is taking to correct this injustice. I wholeheartedly agree with Chairman Smith when he was quoted as stating "It is outrageous that thousands of dangerous immigrant criminals have been released to our streets. Just because a criminal immigrant cannot be returned to their home country does not mean they should be freed into our communities. Immigrant criminals should be detained and deported."

We have a responsibility to our citizens, legal residents, visitors, and law enforcement personnel to ensure that these dangerous, criminal aliens are not allowed to reenter into communities within the United States of America. Deportation or detention must be adhered to rather than allowing them to go free.

Thank you for this opportunity to address the Committee. I am truly honored.

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Mr. GALLEGLY. Thank you very much, Chief Baker.
Mr. Arulanantham?

**TESTIMONY OF AHILAN T. ARULANANTHAM, DEPUTY LEGAL DIRECTOR, ACLU OF SOUTHERN CALIFORNIA**

Mr. ARULANANTHAM. Thank you, Mr. Chairman.

As the Deputy Legal Director of the ACLU of Southern California, I have spent much of the last 7 years representing immigrants facing prolonged and indefinite detention by the Department of Homeland Security. My clients come from all around the world. Some fled persecution or even torture based on their race or religion. Others came here for economic reasons seeking a better way of life, and still others did not choose to come at all. They came as infants when their parents brought them here.

But they have all had one thing in common. All were told by someone at some point along the way that America is a land of freedom and of opportunity. As the Supreme Court has stated it repeatedly, in our country liberty is the norm and detention is the narrowly limited exception.

But today's bill threatens that American tradition because it would dramatically expand an immigration detention system that is already fundamentally broken. Although much of the discussion today has focused on people convicted of crimes, about half of the people in immigration detention have never been convicted of a crime or they were convicted of very minor convictions for which they received little or no jail time or very old convictions and have long since rebuilt their lives. About 84 percent of these detainees have no attorney to represent them, and thousands of them are detained for years at a cost of $45,000 per detainee per year to the taxpayer.

The most serious problem with H.R. 1932 is that it would expand that detention under the system in two significant ways.

First, the bill would reverse a number of Federal court decisions requiring the Government to provide bond hearings in front of immigration judges to people subject to prolonged detention while their cases are pending.

And then second, as we have been discussing, the bill would give DHS vast new authority to indefinitely detain people convicted of ordinary crimes, crimes like writing a bad check or two petty thefts. The bill would permit their detention far beyond their sentences potentially for their whole lives, even if they can never be removed.

Now, I have represented many good people who would not have won their release had this bill been the law. Take, for example, Ahilan Nadarajah, who shares my name. He is a young man I first met nearly 7 years ago. He came here fleeing the worst form of persecution, torture, at the hands of the Sri Lankan army during the height of that country's civil war. He arrived at our borders, applied for asylum, but spent the next 4 and a half years in immigration detention. He repeatedly won his case, twice in front of the immigration judge and even in front of the Board of Immigration Appeals, but the Government kept him detained while it appealed his case. He lost half of his 20's in immigration detention. While other people finished school, got jobs, raised families, he sat there at $45,000 a year cost to the taxpayer.

Now, I recognize that not all detainees are like him. Some may be extremely dangerous, and the Constitution permits the Govern-

ment to detain people without trial for prolonged periods of time. But it allows such detention only under narrow circumstances where there is both a special justification for the detention beyond the general need to protect the public from crime and rigorous procedural protections designed to ensure that the detention is actually necessary.

And that constitutional rule, Chairman, makes good sense. In our legal system, it is criminal prosecutors and judges who have the most knowledge about how to protect the public. If Ahilan or any other immigrant commits a crime, he can be prosecuted to the full extent of the law, and in the cases we have talked about today, a sentencing judge with the information available made a decision that a particular sentence was the appropriate sentence to protect the public.

Now, in those rare instances where criminal prosecution is not sufficient, both the Federal Government and the States already have authority to indefinitely detain people or at least to detain them for prolonged periods of time if they have a mental condition that makes them especially dangerous. Sex offenders are detained under these laws in the current system. And when it comes to national security, Congress has passed legislation authorizing the prolonged detention of certain non-citizens as national security threats.

But H.R. 1932 is not limited to such individuals. It authorizes prolonged detention for broad categories of non-citizens who have no convictions at all. It irrationally prevents immigration judges from even deciding whether their detention is necessary, and its indefinite detention provisions would authorize potentially permanent detention.

Ahilan Nadarajah—I spoke with him last week. He would not have gotten out if this bill had been law. I spoke to him in English. He is doing really well. He has a driver's license. He has a job. He has a green card.

I came here today for him and for thousands of other immigrants like him because they are protected by our Constitution too.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Arulanantham follows:]

**Written Statement of the**
**American Civil Liberties Union**

**Ahilan T. Arulanantham**
Deputy Legal Director
American Civil Liberties Union of Southern California

For a Hearing on

**"Providing for the Detention of Dangerous Aliens"**

Submitted to the

**Subcommittee on Immigration Policy and Enforcement**

**House Judiciary Committee**

Tuesday, May 24, 2011

My name is Ahilan T. Arulanantham. I am the Deputy Legal Director of the ACLU of Southern California. I have spent much of the last seven years representing immigrants who spent months, and often years, in immigration detention. During that time I have served as counsel on several of the major court decisions in the field of immigration detention. My testimony today expresses the ACLU's strong opposition to the proposed legislation for which this hearing was convened.

Although immigration detention centers look and feel like prisons, especially to the immigrants locked inside, from a legal standpoint they differ from the criminal justice system's prisons in several crucial respects. Immigration detention is a form of *civil* detention, not a form of *criminal* punishment. Immigrants are sent to detention centers when the Department of Homeland Security (DHS) wants to deport them from the country. Sometimes that occurs because they have been convicted of a crime. In such cases the immigrants *first* serve their sentences and then, afterward, instead of being released as a U.S. citizen would be, they are sent to immigration detention while awaiting a decision on whether the conviction will result in their deportation. In many other situations, however, the trigger for immigration detention is not criminal activity at all, but instead some other kind of immigration matter, such as overstaying a visa or attempting to gain asylum. *More than half* of the people in immigration detention have never been convicted of any crime.[1] As one might expect then, the purpose of immigration detention is *not* to punish people for crimes, but rather to ensure that they appear for their deportation hearings and, if they lose, to facilitate their removal. Because detention while a deportation case is pending is not punishment for criminal activity, immigrants have no right to

[1] Donald Kerwin and Serena Yi-Ying Lin, Immigrant Detention: Can ICE Meet Its Legal Imperatives and Case Management Responsibilities? 20 ( Migration Policy Institute Sept. 2009), *available at* http://www.migrationpolicy.org/pubs/detentionreportSept1009.pdf (reporting that 58% of the detainees held on January 25, 2009 did not have criminal convictions).

an appointed attorney when they seek to challenge their immigration detention. In fact, an estimated 84% of immigration detainees do not have lawyers.[2]

Most importantly for present purposes, immigration detainees have no absolute right to a prompt bond hearing before a judge, as all criminal defendants do. The existing immigration laws make bond hearings available for some immigrants in detention, but not for others. In fact, as DHS interprets the immigration laws, even if you win your case, DHS can continue to detain you without bond while it appeals the decision in your favor. As a result, our immigration detention system already detains thousands of individuals who present no danger to the community or risk of flight.

Creating a vast new federal preventive detention authority, as the legislation under consideration is *guaranteed* to do, would result in the unnecessary detention of thousands more individuals who would otherwise contribute to the economy, serve their communities, and support their families, which often include U.S. citizen children and spouses. It would also come at great expense to taxpayers, who would foot the bill at a rate of $122 per detainee per day. Most important, the proposed legislation would also come at great cost to the liberty of thousands of immigrants for whom incarceration without due process is unjustifiable. In our society liberty is the norm, while detention without trial is the narrow exception. The Constitution's Due Process Clause protects each person's freedom by ensuring that no one is detained absent strong procedural protections to prevent the unnecessary deprivation of liberty. We cannot support a law that would allow the indefinite detention of the asylum-seeker who thirsts for freedom or the prolonged detention without due process of the immigrant mother who wants to pursue her legal right to stay and care for her U.S. citizen children. Such laws are fit for

[2] ABA Commission on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases.* (2010), 5-8, *available at* http://new.abanet.org/immigration/pages/default.aspx.

repressive regimes, not for the United States of America. The ACLU therefore strongly opposes this bill.

**I. Raymond, Warren, and Many**

"Dangerous aliens" is the title of today's hearing, but most of the immigrants covered by the proposed legislation are anything but dangerous. I want to begin by sharing a few of their stories. Although many advocates focus on individuals who are in immigration custody because they have committed crimes, I also want to discuss those who form the majority of immigration detainees – people who have no criminal history.

The Reverend Raymond Soeoth is a Christian Minister who fled Indonesia with his wife in 1999, where they faced persecution for practicing their faith. Reverend Soeoth was initially allowed to work in the U.S. while applying for asylum and eventually became the assistant minister for a church. He also opened a small corner store with his wife. Yet when his asylum application was denied in 2004, the government arrested him at his home and took him into detention.

Even though Reverend Soeoth posed no danger or flight risk, had never been arrested or convicted of any crime, and had the right to continue litigating his case in both immigration and federal court, he spent over two-and-a-half years in an immigration detention center while the courts decided whether or not to reconsider his asylum claim. During that time, he never received a hearing before an Immigration Judge to determine whether his detention was justified. Instead, the decision on whether or not to release him was left to DHS officials who did not even interview him, let alone conduct a hearing. Unsurprisingly, they concluded after each review that he should remain detained, leaving Reverend Soeoth separated from his wife, his community and his congregation. Because his wife could not maintain the store that the couple had jointly

run, she was forced to shut it down – all because our government would not give him a 15-minute bond hearing in front of an Immigration Judge.

In February 2007, after we filed a habeas corpus petition in federal court to obtain a bond hearing for Reverend Soeoth, the court ruled in our favor. After two and a half years in detention, he finally received a bond hearing and was ordered released by an Immigration Judge. He has lived in his community – back with his wife and his congregation – ever since, without doing any harm to anyone. He ultimately returned to his position as a congregational leader, won the right to reopen his case, and will likely be granted asylum. Under the proposed legislation, he would never have gotten the bond hearing that led to his release.

Mr. Soeoth is not alone. Warren Joseph is a lawful permanent resident of the United States and a decorated veteran of the first Gulf War. He moved to the United States from Trinidad nearly 22 years ago and has five U.S. citizen children, a U.S. citizen mother and a U.S. citizen sister. A few months after coming to the U.S., when he was 21 years old, Warren enlisted in the U.S. Army. He served in combat positions in the Persian Gulf, was injured in the course of duty, and received numerous awards and commendations recognizing his valiant service in that war. At one point during the conflict, he returned to battle after being injured and successfully rescued his fellow soldiers.

Like many Gulf War veterans, Warren returned from the war with symptoms that were only later diagnosed as Post Traumatic Stress Disorder (PTSD). His sister recalls that she "was shocked to see how much Warren had changed." He was anxious, had recurring nightmares about killing people, and would wake up in a cold sweat. He became withdrawn and thought about suicide constantly.

In 2001, Warren unlawfully purchased a handgun to sell to individuals to whom he owed money. He fully cooperated with an investigation by the Bureau of Alcohol, Tobacco, and Firearms, and his actions were not deemed sufficiently serious to warrant incarceration. Two years later, however, suffering from partial paralysis and debilitating depression, Warren violated his probation by moving to his mother's house and failing to inform his probation officer. He served six months for the probation violation. Upon his release, in 2004, he was placed in removal proceedings and subjected to mandatory immigration detention.

Warren remained in immigration detention for more than three years while he fought his deportation. During his entire period of incarceration, he was never granted a bond hearing to determine whether his detention was justified. Indeed, even after the Third Circuit Court of Appeals concluded that he was entitled to apply for relief from removal, and remanded his case back to the immigration court, the government continued to subject Warren to mandatory detention. My colleagues at the ACLU filed a habeas petition on Warren's behalf, which was pending when the Immigration Judge granted him relief from removal, and DHS finally released him. Fortunately, DHS chose not to appeal the Immigration Judge's grant of relief. Otherwise, he could have spent additional months in mandatory detention pending the government's appeal.

Warren has lived a productive life since his release, but has struggled to understand how our country could have locked him in immigration detention for three years *for no reason* after he served honorably during the Gulf war.

Many Uch is another immigrant who would never have won his freedom under the proposed legislation. His story was featured in the PBS documentary "Sentenced Home." He left Cambodia as a child refugee with his parents, fleeing persecution by the Khmer Rouge. The family settled lawfully in Seattle, Washington. As a teenager, Many ran with a bad crowd and

was convicted of armed robbery: he drove the getaway car. Many served 40 months - the sentence prescribed by the state judge – and then was transferred to immigration detention because he was not a U.S. citizen.

Although his conviction rendered him deportable, the United States lacked a repatriation agreement with Cambodia, so after Many finished serving his sentence he was neither released nor deported. Instead, he was lost in legal limbo, remaining in immigration detention for 28 months waiting to be deported because DHS believed it had authority to detain him until our foreign policy differences with Cambodia were resolved, no matter how long that could take. This predicament, known as "indefinite" detention, was widespread prior to the Supreme Court's decision in *Zadvydas v. Davis*,[3] because the federal government recognized no temporal limit on how long such detention could last. However, after the Supreme Court read the immigration laws to generally authorize such detention for only six months, it became possible for people like Many to avoid a life of permanent imprisonment. He eventually filed a habeas corpus petition and was released under supervision. For the past 12 years he has regularly reported to Immigration and Customs Enforcement (ICE). Since Many's release, he has consistently been employed, married a U.S. citizen, and has a four-year-old American citizen daughter. He is an active contributing member of his community, working with young Cambodian immigrants as a mentor and community mediator, and also helps lead a Buddhist society. Last year, the Governor of Washington pardoned Many for his conviction.

Reverend Soeoth, Warren, and Many wasted years of their lives in immigration detention for no reason, separated from their jobs, their families (including U.S. citizen children), and their communities. The federal taxpayer spent approximately $122 each day– $45,000 per person per year – for each of them to be needlessly detained. They are three among thousands of

[3] 533 U.S. 678 (2001).

individuals who exemplify why detention must be a last resort, used only where necessary, and always accompanied by robust procedural protections such as bond hearings before an Immigration Judge.

## II. Legal Principles

The proposed legislation dramatically expands DHS's detention authority in three areas. It greatly increases DHS's power to detain people *indefinitely* – that is, when no country will take them back, expands DHS's authority to detain people without bond hearings for *prolonged* periods of time, and increases DHS's authority to detain people without bond hearings based on *old convictions*. I will discuss each of these, and then discuss the ACLU's concerns with the proposed legislation's attempt to alter the federal courts' jurisdiction to consider challenges to DHS detention decisions.

### a. Indefinite Detention

The proposed legislation would work a radical expansion in DHS' authority to detain a vast number of individuals *indefinitely*. Under this law, thousands of people would be subject to permanent incarceration without trial, at the discretion of low-level DHS officials. The creation of a vast new preventive detention system would constitute a grave breach of our constitutional obligations, and would also represent a tremendous waste of taxpayer resources, while doing little to make us safer.

The law governing the detention of people who cannot be repatriated to another country, such as Many Uch, derives from the Supreme Court's rulings in *Zadvydas v. Davis* and *Clark v. Martinez*.[4] *Zadvydas* rests on a principle fundamental to our Nation's jurisprudence: "In our society liberty is the norm," and detention without trial "is the carefully limited exception."[5] As

[4] *Zadvydas v. Davis*, 533 U.S. 678 (2001); *Clark v. Martinez*, 543 U.S. 371, 378 (2005).
[5] *United States v. Salerno*, 481 U.S. 739, 755 (1978).

a result, *Zadvydas* recognized that "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem."[6] To avoid resolving that problem, *Zadvydas* interpreted the immigration detention statutes to authorize detention for a "presumptively reasonable" six month period of time, during which DHS may detain immigrants while attempting to deport them.[7]

DHS has implemented the Supreme Court's directive through a scheme that already permits lengthy detentions while DHS works to remove non-citizens who have lost their immigration cases. Under current law, noncitizens ordered removed due to their criminal history or for national security reasons cannot be released from detention during the 90-day "removal period" that follows their removal order.[8] Beyond that period, however, detention is permitted only under more limited circumstances. Because *Zadvydas* and *Clark* held that DHS may not indefinitely detain immigrants who have been ordered removed solely because no country will accept their return, DHS is obligated to release most detainees if there is no "significant likelihood of removal in the reasonably foreseeable future."[9] That limitation has not prevented DHS from detaining thousands of people for six months or longer after they receive a final order of removal, but it has prohibited the indefinite and potentially permanent detention of people like Many.

The Supreme Court's analysis in *Zadvydas* focused heavily on the purpose of immigration detention, which is to facilitate an individual's removal from the United States, *not* to permit general preventive detention on public safety grounds. Our system of justice already has two different legal regimes in place to deal with the general protection of public safety. The

[6] *Zadvydas*, 533 U.S. at 690.
[7] *Zadvydas*, 533 U.S. at 701.
[8] *See* 8 U.S.C. § 1231(a)(2).
[9] *Zadvydas*, 533 U.S. at 701.

criminal system incarcerates roughly 1.6 million people on any given day,[10] including thousands of non-citizens. In addition, a parallel civil system allows the detention of people who are mentally ill and dangerous, including sex offenders, even after their criminal sentences are over. Because it is fundamental to our system of justice that "preventive detention based on dangerousness [must be] limited to specially dangerous individuals and subject to strong procedural protections," the Supreme Court has made clear that the immigration detention system, with its broad mandate and limited procedural protections, is not a general preventive detention regime.[11]

Of course, as the Court in *Zadvydas* recognized, individuals who cannot be removed do not have to be left to "live at large" in the United States. Rather, they are released with "supervision under conditions that may not be violated."[12] These conditions can include electronic monitoring and other forms of intensive supervision. The use of such conditions of release has a substantial fiscal benefit when compared to detention. The immigration detention system already maintains an average daily population of more than 33,000 individuals at great monetary cost to the government -- $122 per person per day, for a total of $1.9 billion a year in this fiscal year, according to DHS estimates, with $100 million more than that requested in the fiscal year 2012 budget. In contrast, supervised alternatives to detention cost approximately $8.88 per person per day.[13]

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[10] *See* Bureau of Justice Statistics, "Total Correctional Population." (year end 2009), *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=11
[11] *Zadvydas*, 533 U.S. at 691.
[12] *Id.* at 696.
[13] Statement of John Morton, "The Fiscal Year 2011 Budget for U.S. Immigration and Customs Enforcement" U.S. House of Representatives Committee on Appropriations, Subcommittee on Homeland Security (Mar. 18, 2010); ICE, "Protecting the Homeland: ATD Nationwide Program Implementation Report" at 9 (Feb. 1, 2010); Department of Homeland Security, FY12 Congressional Budget Justification, 938, *available at* http://www.dhs.gov/xlibrary/assets/dhs-congressional-budget-justification-fy2012.pdf.

We do not need to distort the purpose of our immigration detention system and transform it into a new general preventive detention regime in order to make our country safe. As Justice Scalia recognized when he ruled that Congress had not authorized indefinite detention in *Clark v. Martinez*,[14] the government already has substantial authority available to deal with cases of truly "dangerous aliens" who cannot be removed.

First, all immigrants are subject to the same criminal laws that apply to all persons in the United States. Indeed, any immigrant convicted of a crime has already been sentenced by a judge with access to all available information concerning the offense and the perpetrator. That judge determined the appropriate sentence, taking into account considerations of public safety and the arguments of a prosecutor. Immigrants who violate the terms of probation or parole arising from a criminal sentence can have their release revoked, resulting in their return to prison. Similarly, immigrants who violate their conditions of supervised release from immigration custody can be prosecuted in the criminal system for such violations and sent to prison on that basis.

Second, immigrants who suffer from a mental illness that renders them a danger to themselves or others, including sex offenders, can be civilly committed under existing state and federal law after serving their criminal sentence. There is a dedicated set of provisions of the U.S. Code applicable to the Bureau of Prisons for "Hospitalization of a person due for release but suffering from mental disease or defect,"[15] and a similar provision for the commitment of sex

[14] 543 U.S. 371, 386 n.8 (2005).
[15] 18 U.S.C. § 4246.

offenders.[16] Public health measures such as quarantine laws also apply to non-citizens, as they do to citizens.[17]

Finally, the immigration laws themselves provide for the prolonged detention of immigrants who cannot be removed, but whose release would pose a threat to national security. The USA PATRIOT Act of 2001 addressed "mandatory detention of suspected terrorists," and through that provision authorizes the detention of non-citizens who cannot be removed, provided that they actually present a danger to our national security – a decision that has to be made by a high-level Department of Justice official.[18]

This extensive legal framework for addressing "dangerous aliens" renders the proposed legislation largely duplicative in some areas, such as those involving preventive detention for people who are mentally ill and dangerous or who pose a threat to national security. In other areas, where the new legislation proposes the preventive detention of those convicted of ordinary crimes, it represents an affront to our most basic Constitutional protections as already defined by the Supreme Court. In implementing *Zadvydas* and *Clark*, the courts have struck a careful balance between the government's interests and immigrants' rights grounded in the Constitution, developing a decade of legal doctrine based on the fundamental principle that the government should not have unchecked power to detain people indefinitely through the immigration laws.

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[16] 18 U.S.C. § 4248 (Civil commitment of a sexually dangerous person). The Supreme Court recently upheld this scheme against a constitutional challenge. *See United States v. Comstock*, 130 S. Ct. 1949 (2010).

[17] *See* Kathleen S. Swendiman and Jennifer K. Elsea, "Federal and State Quarantine and Isolation Authority." Congressional Research Service (Jan. 23, 2007), *available at* http://www.fas.org/sgp/crs/misc/RL33201.pdf .

[18] 8 U.S.C. § 1226a. In addition, existing federal regulations permit DHS to indefinitely detain certain non-citizens who cannot be removed in certain circumstances – where releasing the individual would pose a danger to the public on account of the person's highly contagious disease, would have adverse foreign policy consequences, would pose significant national security or terrorism risks, and would pose a special danger to the public because the person has been convicted of a crime of violence, possesses a mental condition or personality disorder and is likely to engage in future violence because of behavior associated with that condition or disorder, and no conditions of release can reasonably be expected to ensure public safety. 8 C.F.R. § 241.14. The federal courts are divided on the validity of these regulations in light of *Zadvydas* and *Clark*. *Compare Hernandez-Carrera v. Carlson*, 547 F.3d 1237 (10th Cir. 2008), *with Tran v. Mukasey*, 515 F.3d 478 (5th Cir. 2008), *and Thai v. Ashcroft*, 366 F.3d 790 (9th Cir. 2004).

Any legislation that gives DHS the power to indefinitely detain vast numbers of non-citizens would be both unwise and unconstitutional.

**b. Prolonged Detention**

The proposed legislation would also greatly expand DHS's power to detain non-citizens for prolonged periods of time while their cases remain pending in the courts. Individuals like Reverend Raymond Soeoth and Warren Joseph, who faced years of imprisonment in the immigration detention system while their cases were pending, would be ineligible for bond hearings under the proposed legislation. Through that change, the proposal would reverse the decisions of a number of federal courts that have ruled that individuals subject to prolonged detention while their cases are pending have a right to a bond hearing.

The rules governing release from detention while immigration cases are pending are critically important because of the time it can take to resolve an immigration case. While some cases are decided quickly, many others can take years to finish due to systemic failures for which DHS and DOJ are largely responsible. The current backlog of immigration cases in the immigration court system is "more than a third higher (44 percent) than levels at the end of FY 2008,"[19] compounding the immigration system's notorious difficulties in achieving just outcomes through fair hearings.[20] The director of the Executive Office for Immigration Review (EOIR) testified to the Senate Judiciary Committee last week that "[t]here are no signs today of the case receipts slowing. In fact, due to the receipt of more than 200,000 matters during the first half of FY 2011, EOIR projects that the case receipts for this fiscal year will top 400,000. Of the case receipts so far this fiscal year, 41 percent are detained cases. Of the cases EOIR has

[19] TRAC Immigration, "Immigration Case Backlog Still Growing in FY 2011" (Feb. 7, 2011) *available at* http://trac.syr.edu/immigration/reports/246/.
[20] *See, e.g.*, Immigration Court Observation Project of the National Lawyers Guild, *Fundamental Fairness: A Report on the Due Process Crisis in New York City Immigration Courts* (May 2011) *available at* http://nycicop.files.wordpress.com/2011/05/icop-report-5-10-2011.pdf.

completed in FY 2011, 43 percent were detained cases."[21] And while the Constitution requires that there be some judicial review of deportation cases, the time required for judicial review adds almost a year-and-a-half to the slow administrative proceedings, which took on average 280 days in the last fiscal year.[22]

Because cases routinely take years to resolve, the rules governing release while a case is pending are extremely important. People can lose years of their lives waiting for their cases to finish. Even if they win before the Immigration Judge, they can remain detained for years while the DHS litigates an appeal. The proposed legislation appears to take the power to consider such individuals for release from detention out of the hands of Immigration Judges who conduct bond hearings. In place of such bond hearings, the proposal would either mandate the prolonged detention of many individuals who pose no danger or flight risk, or otherwise place their liberty in the hands of DHS officials who make discretionary decisions without the benefit of hearings, and therefore consistently detain people who present no risk of danger or flight. In doing so, this portion of the proposed legislation also runs afoul of basic constitutional requirements.

The Supreme Court addressed immigration detention pending completion of removal proceedings several years ago, ruling in *Demore v. Kim* that the detention without bond hearings of immigrants convicted of certain crimes was constitutional where such detention was "*brief*."[23]

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[21] Testimony of Juan Osuna (May 18, 2011), *available at* http://judiciary.senate.gov/pdf/5-18-11%20Osuna%20Testimony.pdf.

[22] *See INS v. St. Cyr*, 533 U.S. 289, 300 (2001) (holding that some judicial intervention is "unquestionably" required in deportation cases); Judicial Business of the U.S. Courts, Annual Report of the Director 9, Table B-4C (2010), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/judicialbusinesspdfversion.pdf (reporting median time of 16.7 months from filing to final disposition of administrative agency appeals); TRAC Immigration, "Immigration Courts Taking Longer to Reach Decisions." (Nov. 11, 2010), *available at* http://trac.syr.edu/immigration/reports/244/

[23] *See* 538 U.S. 510, 513 (2003); 8 U.S.C. § 1226(c).

In reaching that conclusion, the Court relied on data establishing that the vast majority of immigration detentions (85%) lasted an average of 47 days or less.[24]

A snapshot look at detention on January 25, 2009, five years later, revealed that the average amount of time spent in pre-removal detention has greatly increased. The average detention length as of January 2009 was 81 days, while 26% of individuals spent more than ninety days behind bars, including 10% who spent up to a year and 3% who spent more than a year.[25] At least 4,170 individuals had been detained for six months or longer, and 1,334 for one year or more. Some had been detained as long as five, nine, and, in one case, 15 years.[26]

While the Supreme Court has yet to address such prolonged detentions, the lower courts have, and they have largely found that due process likely requires bond hearings for immigrants who face the threat of prolonged detention.[27] These courts have recognized that individuals in DHS custody have a profound liberty interest in avoiding years of incarceration while their immigration cases remain pending. Because of the weighty liberty interest involved, due process requires that civil immigration detention be reasonably related to its purpose of ensuring appearance for removal, and also that such detention be accompanied by adequate procedural

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[24] *Demore*, 538 U.S. at 529.
[25] Kerwin and Lin, *Immigrant Detention*, *supra*, at 1.
[26] See Roberts, Michelle, *AP Impact: Immigrants face detention, few rights*, Wash. Post. (Mar. 13, 2009).
[27] *See e.g.*, *Casas-Castrillon v. DHS*, 535 F.3d 942, 950 (9th Cir. 2008); *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005) (both construing § 1226(c) as only authorizing detention for "expeditious" removal proceedings in order to avoid the serious constitutional problem of prolonged mandatory detention); *Ly v. Hansen*, 351 F.3d 263, 271-72 (6th Cir. 2003) (construing § 1226(c) as only authorizing mandatory detention for the period of time reasonably needed to conclude proceedings promptly); *Welch v. Ashcroft*, 293 F.3d 213, 224 (4th Cir. 2002) (holding, prior to *Demore*, that "[f]ourteen months of incarceration . . . of a longtime resident alien with extensive community ties, with no chance of release and no speedy adjudication rights" to be impermissible); *Flores-Powell v. Chadbourne*, 677 F. Supp. 2d 455, 468-71 (D. Mass. 2010) (construing § 1226(c) to implicitly require that removal proceedings be completed within a reasonable period of time; if not, detention can only continue after an individualized determination of flight risk and dangerousness); *Alli v. Decker*, 644 F. Supp. 2d 535, 539 (M.D. Pa. 2009) (noting "the growing consensus . . . throughout the federal courts" that prolonged mandatory detention raises serious constitutional problems).

safeguards to ensure that this purpose is served in each detainee's case.[28] As a result, any system that robs Immigration Judges of the authority to hold bond hearings in cases where DHS has incarcerated a non-citizen for a prolonged period of time, and thereby eliminates even this minimal procedural protection from the prolonged detention system, would violate the Due Process Clause.

Even the existing immigration detention system struggles to satisfy these constitutional requirements. Immigration court proceedings are often delayed because immigrants have no right to appointed counsel, and are often detained in remote locations where they cannot obtain representation. In fact, about 84% of immigration detainees have no lawyer to represent them.[29] Many of these individuals pose no flight risk or danger to public safety, yet frequently, like Reverend Soeoth and Warren Joseph, they never receive a bond hearing to determine whether their detention is even necessary. They may well have substantial challenges to removal from the United States – indeed, Reverend Soeoth and Warren both won their cases – yet they are forced to endure years of incarceration as the price for pursuing their legal right to live in the this country. Such prolonged detention is arbitrary and unfair, and imposes tremendous hardship on immigrants and their relatives, many of whom are U.S. citizens or immigrants residing lawfully in the United States.

The problems arising from such extended detention are not limited to those non-citizens who have criminal convictions that subject them to mandatory detention. On the contrary, DHS interprets the existing laws to foreclose bond hearings for many people with no criminal history,

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[28] *Zadvydas*, 533 U.S. at 690-91; *Singh v. Holder*, - F.3d -, 2011 WL 1226379 (9th Cir. 2011); *Diouf v. Napolitano*, 634 F.3d 1081, 1092 (9th Cir. 2011).

[29] ABA, *Reforming the Immigration System*, *supra*, 5-8. To give but one example of the repercussions this entails, asylum seekers who have legal representation are three times as likely to be granted asylum. Human Rights First, *U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison* at 8 (2009) *available at* http://www.humanrightsfirst.org/pdf/090429-RP-hrf-asylum-detention-sum-doc.pdf.

and passage of the proposed legislation would ensure that bond hearings remain the exception rather than the rule for large sectors of the detainee population.

For example, I represented a Sri Lankan Tamil torture victim whose first name I share – Ahilan Nadarajah – who managed to escape Sri Lanka and sought asylum in our country. He was stopped at the border and detained for nearly five years despite being granted asylum twice, because the government repeatedly appealed his victories and kept him locked in detention. The prolonged detention of asylum-seekers is particularly tragic, as it leads to the re-traumatization of individuals who have already suffered torture and persecution.[30] Ahilan was released only after the U.S. Court of Appeals, speaking through a unanimous and ideologically diverse panel, ruled that his detention was unlawful because of its length, and because there was almost no chance the government would remove him in light of the Immigration Judge's rulings in his case.[31] The court confirmed "that the general immigration detention statutes do not authorize the Attorney General to incarcerate detainees for an indefinite period."[32]

Ahilan would not have won his release if the proposed legislation had been law. We know that asylum-seekers typically have no criminal history, and often have relatives lawfully present in the United States. Yet under the new legislation, even asylum-seekers who win asylum, withholding of removal, or relief under the Convention Against Torture from an Immigration Judge may be detained for prolonged periods while the government appeals their

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[30] *See generally*, Physicians for Human Rights and the NYU/Bellevue Center for Survivors of Torture, *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers* (June 2003); *see also* Human Rights First, *In Liberty's Shadow: U.S. Detention of Asylum Seekers in the Era of Homeland Security*, 33-34 (2004).

[31] The panel consisted of Circuit Judges Sidney R. Thomas and Richard C. Tallman, and District Judge James M. Fitzgerald.

[32] *Nadarajah v. Gonzales*, 443 F.3d 1069, 1078 (9th Cir. 2006). Although *Nadarajah* had no occasion to address the question, because it ruled on statutory grounds, non-admitted aliens subject to detention under § 1225(b) are also entitled to due process with respect to their detention. *See Kwai Fun Wong v. United States*, 373 F.3d 952, 971 (9th Cir. 2004) (holding that although non-admitted noncitizens lack procedural rights with respect to admission, they are otherwise entitled to due process protections); *Rosales-Garcia v. Holland*, 322 F.3d 386, 410-13 (6th Cir. 2003) (en banc) (holding that indefinite detention of inadmissible aliens under post-final order statute, 8 U.S.C. § 1231(a)(6), raises serious constitutional concerns).

cases. The proposed legislation would bar Immigration Judges from granting bond to such individuals, even if they have been detained for years. Similarly, lawful permanent residents (LPRs) often have strong legal claims and longstanding ties to the United States, including U.S. citizen spouses and family members. Nonetheless, the proposed legislation would prevent Immigration Judges from granting bond to returning LPRs, thus ensuring that many of them will remain detained for months, or even years, while their cases remain on-going, even if they present a minimal flight risk or danger to the community.

Nor is the problem of prolonged detention limited to asylum seekers and returning lawful permanent residents. Another client of mine, a Senegalese computer engineer named Amadou Diouf, spent nearly two years in detention while his case dragged on, even though he was married to a United States citizen, and had been convicted of only one crime – possession of less than 30 grams of marijuana. DHS had charged him with overstaying his visa, but their review process nonetheless found him unsuitable for release based on his marijuana conviction and lack of family ties. Again, he was released only after a federal judge ordered that he be given a bond hearing. He would never have gotten that hearing under the proposed legislation, and the taxpayers would have spent thousands of dollars detaining him, even though he has lived without incident under supervision for four years, while his removal case has remained pending.

The U.S. Court of Appeals opinion in Diouf's case, issued by another unanimous and ideologically diverse panel of judges, explained clearly why bond hearings before Immigration Judges present an important procedural protection that we must not abandon: "Diouf's own case illustrates why a hearing before an Immigration Judge is a basic safeguard for aliens facing prolonged detention . . . . The government detained Diouf in March 2005. DHS conducted custody reviews . . . in July 2005 and July 2006. In both instances, DHS determined that Diouf

should remain in custody pending removal because his 'criminal history and lack of family support' suggested he might flee if released. In February 2007, however, an Immigration Judge determined that Diouf was not a flight risk and released him on bond. If the district court had not ordered the bond hearing on due process grounds, Diouf might have remained in detention until this day."[33] This is but one example of the federal courts' wider recognition that there is "no evidence that Congress intended to authorize the long-term detention of aliens without providing them access to a bond hearing before an immigration judge."[34]

Against this backdrop, the proposed legislation would unlawfully and systematically subject thousands of non-citizens who are challenging the government's efforts to remove them to prolonged detention without constitutionally-adequate review. The regime it proposes relegates noncitizens to months, and often years, of detention regardless of whether that imprisonment has extended beyond the period reasonably necessary to conclude their removal proceedings, is sufficiently justified by flight risk or danger, or is accompanied by adequate procedural protections.

Finally, the proposed legislation provides that the length of detention during removal proceedings "shall not affect" any detention under the post-order detention statute, 8 U.S.C. § 1231. To the extent that this provision attempts to formalistically shield the entire length of an individual's detention from consideration by a court, it also raises serious due process concerns. As courts have recognized, "simple fairness, if not basic humanity, dictates that a court should take into consideration the entire period in which a person has lost his liberty—during what is

[33] *Diouf v. Napolitano*, 634 F.3d 1081, 1092 (9th Cir. 2011). The Ninth Circuit panel was composed of Judges Cynthia Holcomb Hall, Raymond C. Fisher, and Jay S. Bybee.
[34] *Casas-Castrillon v. DHS*, 535 F.3d 942, 950 (9th Cir. 2008).

essentially an integrated process—without parsing what statutory provision he may have been held under."[35]

In sum, the changes to the law governing prolonged detention being proposed today suffer from the same legal, policy, and moral defects as do the changes proposed regarding indefinite detention. There is no rationale for eliminating the role that Immigration Judges play, through bond hearings, to ensure that people being imprisoned for years actually present a risk of danger or flight. By eliminating that protection, the proposed legislation would create a massive strain on federal resources and run afoul of our most basic Constitutional principles.

**c. Mandatory Detention Based on Old Convictions**

The proposed legislation would also amend 8 U.S.C. § 1226(c), the mandatory detention statute, which requires the Attorney General to take custody of noncitizens who are deportable or inadmissible based on certain designated offenses "when the alien is released" from serving criminal sentences for those offenses. The overwhelming majority of federal courts to consider the issue have construed § 1226(c) not to apply where ICE takes custody of individuals long after their release from criminal confinement for an offense covered by the statute.[36] Along the same lines, a recent BIA decision establishes that § 1226(c) applies only to those individuals who are

[35] *Bourguignon v. MacDonald*, 667 F. Supp. 2d 175, 183 (D. Mass. 2009) (citing cases).
[36] *See, e.g., Louisaire v. Muller*, -- F. Supp. 2d --, 2010 U.S. Dist. LEXIS 129193, *16 (S.D.N.Y. Dec. 1, 2010); *Bracamontes v. Desanti*, No. 2:09cv480, 2010 U.S. Dist. LEXIS 75958, *18 (E.D. Va. June 16, 2010); *Dang v. Lowe*, No. 1:CV-10-0446, 2010 U.S. Dist. LEXIS 49780, *17, 35-36 (M.D. Pa. May 7, 2010); *Monestime v. Reilly*, 704 F. Supp. 2d 453, 458 (S.D.N.Y. 2010); *Khodr v. Adduci*, 697 F. Supp. 2d 774, 778 (E.D. Mich. 2010); *Scarlett v. U.S. Dep't of Homeland Sec.*, 632 F. Supp. 2d 214, 219 (W.D.N.Y. 2009); *Waffi v. Loiselle*, 527 F. Supp. 2d 480, 488 (E.D. Va. 2007); *Bromfield v. Clark*, No. C06-0757-JCC2006, U.S. Dist. LEXIS 98435 (W.D. Wash. Oct. 16, 2006); *Zabadi v. Chertoff*, No. 05-03335, 2005 U.S. Dist. LEXIS 31914, 2005 WL 3157377, *5 (N.D. Cal. Nov. 22, 2005); *Quezada-Bucio v. Ridge*, 317 F. Supp. 2d 1221, 1228 (W.D. Wash. 2004); *but see Sulayao v. Shanahan*, No. 09-7347, 2009 U.S. Dist. LEXIS 86497 (S.D.N.Y. Sept. 15, 2009); *Serrano v. Estrada*, No. 3:01CV1916M, 2002 U.S. Dist. LEXIS 3667, 2002 WL 485699 (N.D. Tex. Mar. 6, 2002).

taken into ICE custody upon their release from criminal custody for an offense that triggers mandatory detention.[37]

The proposed legislation would vastly expand the mandatory detention of individuals who have been at liberty for years, leading productive lives. Under the new provision, so long as the noncitizen could be charged with removability based on one of the grounds set forth in § 1226(c), it would make no difference when the triggering offense was committed – it might have taken place decades before the statute was enacted – or that the individual never even served any time in jail for that offense. Rather, if an individual were the subject of any form of criminal custody after the statute's effective date, he or she would be mandatorily detained.

The fundamental problem with this proposal is that it would lead to the detention of many individuals who present no flight risk or danger to the community. Take the example of Carlos Calcano. Carlos was a longtime lawful permanent resident who had a steady job managing the dining hall at Phillips Academy in Andover, Massachusetts, and lived with his U.S. citizen wife and two teenage U.S. citizen children. Carlos was arrested by ICE at his naturalization interview based on a firearms offense he committed nearly twenty years before and for which he was sentenced to and served two years probation. By itself, this offense, which occurred years before the mandatory detention provision went into effect, would not have subjected Carlos to mandatory detention. Nonetheless, ICE argued that Carlos was subject to mandatory detention because of a 2002 arrest for which he spent less than 24 hours in custody, after which the charges were promptly dropped. Carlos spent approximately six months in mandatory immigration

[37] *Matter of Garcia Arreola*, 25 I. & N. Dec. 267, 271 (BIA 2010). *Garcia Arreola* overturned the Board's prior decision in *Matter of Saysana*, 24 I. & N. Dec. 602 (BIA 2008), which held that any release from criminal custody after the effective date of the statute was sufficient to trigger mandatory detention if at some point the individual had been convicted of a designated offense, regardless of whether that offense occurred years prior to the statute's enactment. Prior to *Garcia-Arreola*, nearly all federal courts to have addressed the issue rejected *Saysana*'s interpretation of the statute. *See, e.g.*, *Saysana v. Gillen*, 590 F.3d 7 (1st Cir. 2009).

detention, during which time he lost his job and his family suffered extreme hardship. Despite being forced to fight his case from detention, Carlos was ultimately granted cancellation of removal—a permanent form of immigration relief—and has since become a U.S. citizen.

As courts have recognized, mandatory detention is unwarranted when applied to people like Carlos because noncitizens who committed an offense and were released from custody for that offense a considerable time ago generally do not present a great risk of danger or flight.[38] Moreover, the new provision needlessly compromises the ability of immigrants like Carlos, who have some of the strongest claims against removal, to meaningfully defend their right to remain in the United States. There is no good reason why such individuals should not be able to present their case for release to an Immigration Judge.

**d. Jurisdiction-Stripping and Exhaustion**

Finally, the proposed legislation is deeply flawed because it would undermine the basic protection that our Constitution affords to all those who have been detained: the right to seek the writ of habeas corpus from a federal court. This right has been a bulwark of liberty ever since the Constitution enshrined the principle established in England 800 years ago, that "the king is at all times entitled to have an account, why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted."[39] The proposed legislation would create havoc in the process governing habeas review of immigration detention by making judicial review of a noncitizen's detention "available exclusively in habeas corpus proceedings instituted in the United States District Court for the District of Columbia, and only if the alien has exhausted all administrative remedies (statutory and regulatory) available to the alien as of right." In addition

[38] *See Saysana v. Gillen*, 590 F.3d 7, 18 (1st Cir. 2009) (reasoning that "the more remote in time a conviction becomes and the more time after a conviction an individual spends in a community, the lower his bail risk is likely to be") (citing cases).
[39] 3 Blackstone *Commentaries on the Laws of England* (1765-1769) (ed. 1907), 131.

to being inconsistent with the government's frequently-expressed litigation position that habeas corpus actions must be filed in the district where an individual is actually detained, this restriction would impose significant burdens on the D.C. District Court, which will be flooded by habeas petitions filed by noncitizens from around the country. Both pro se and represented non-citizens will be disadvantaged by being forced to file and litigate their cases in a district far from where they are detained.

The D.C. federal district court is already overwhelmed with cases, particularly from Guantanamo detainees: in 2010, 372 criminal cases and 2,474 civil cases were filed in the D.C. District Court, which has a dozen active and four senior judges. The chief judge of the court stated in March that "[w]e plan to try very few civil cases this spring and summer . . . . This is as bad as I've seen it."[40] To put the numbers in perspective, in the year preceding March 2010, at least 767 immigrant detainee habeas petitions – but likely many more -- were filed across the country.[41] Thus, the provision would, at a bare minimum, increase the D.C. District Court's caseload by approximately 30%. Barring the allocation of significant additional resources, this change would almost certainly undermine the prompt and effective review of unlawful detention – the core function of the writ of habeas corpus.[42]

Moreover, the D.C. District Court would be faced with the dilemma of which substantive law to apply – the law of the circuit in which the individual is actually detained, or the law of the circuit where the petition is being litigated. As with other proposals for channeling judicial

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[40] Bill Mears, "Judicial nominee logjam creates 'crisis' in some federal courts." CNN (Mar. 4, 2011), available at http://articles.cnn.com/2011-03-03/politics/arizona.judicial.logjam

[41] This number reflects the number of cases classified as "alien detainee" habeas petitions on the federal courts' docketing system known as PACER. However, the number is underinclusive, because district courts do not consistently identify habeas petitions challenging unlawful immigration detention with this label.

[42] *See INS v. St. Cyr*, 533 U.S. 289, 301 (2001) ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive detention, and it is in that context that its protections have been strongest.").

review of immigration decisions to Washington, D.C., there is no basis for making such a significant change without extensive study and consultation with stakeholders.

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The proposed legislation is unconstitutional, costly, and unnecessary. It would create expensive categorical detention mandates for large groups of people who present no danger or risk of flight, and deny fair process to some of the most vulnerable members of the detained population, such as asylum-seekers. Its attempt to expand DHS's power to preventively detain individuals is unconstitutional, and would likely be struck down in the courts, although only after years of costly litigation. This legislation asks Congress to cast aside the robust procedural protections that our tradition requires whenever liberty is at stake, and substitute in its place a fiscally imprudent, unconstitutional, and inhumane alternative. Detaining for years thousands of immigrants like Reverend Raymond Soeoth, Warren Joseph, Many Uch, Ahilan Nadarajah, Amadou Diouf, and Carlos Calcano, all of whom are contributing members of our society today after being imprisoned without hearings, benefits no one. Precedent and principle unite in opposition to these measures, which offend the glorious but fragile rule that "[i]n our society liberty is the norm." We urge you to oppose the proposed legislation.[43]

[43] The appendix to this testimony contains another 15 examples of wrongful detention from cases in which I or other ACLU attorneys have been involved.

**APPENDIX**

**CASE STORIES**

The following case stories illustrate the serious civil liberties concerns raised by a preventive detention regime. As these stories show, prolonged, mandatory, and indefinite immigration detention result in the arbitrary and unnecessary imprisonment of countless individuals who pose no flight risk or danger, or whose removal is not significantly likely in the reasonably foreseeable future. Moreover, the government's failure to provide adequate custody review means that there is often no meaningful procedure by which to ensure that detention is used appropriately. These stories also make all too clear that prolonged and indefinite detention causes tremendous hardship to both the detainees themselves and their families and communities. Unfortunately, these stories are typical of the thousands of noncitizens who are wrongfully deprived of their liberty every year by the government's unlawful detention practices.

* * *

**MB** is a 39-year-old citizen of Haiti who has resided continuously in the United States as a lawful permanent resident since 1986. Mr. B was subject to mandatory detention for nine years while defending his right against removal to Haiti, where he faces torture at the hands of the authorities.

Mr. B suffers from paranoid schizophrenia and takes anti-psychotic medication to manage his condition. He was placed in removal proceedings in April 2000 based on a 1997 conviction for attempted robbery. The incident underlying the conviction stemmed from Mr. B's attempt to get five dollars back from a street vendor who had sold him two beers, which Mr. B wanted to return because they were warm. The immigration judge granted Mr. B. relief under the Convention Against Torture (CAT) on the grounds that that, as a deportee with a criminal record, he would be imprisoned upon return to Haiti, deprived of his medication, and face severe physical abuse by guards. The government, however, appealed the judge's decision, and the Board of Immigration Appeals (BIA) reversed it, beginning a ten-year legal struggle to defend Mr. B's rights against removal and torture in Haiti. Initially, the government stipulated to remand Mr. B's case to the BIA in light of BIA case law granting CAT relief to other mentally ill Haitians in Mr. B's situation. Nonetheless, the BIA reaffirmed its decision ordering Mr. B's removal. Mr. B then moved to reopen his case based on new evidence that Haiti had begun confining mentally ill deportees with criminal records in crawl-spaces, not even big enough to stand up in. The BIA denied reopening. On appeal, the U.S. Court of Appeals for the Second Circuit reversed on the grounds that the BIA had failed to provide an adequate justification for its denial of reopening. Shortly after the earthquake in Haiti in January 2010, Mr. B's attorneys submitted additional evidence to the BIA regarding the impact of the earthquake on care for the mentally ill and conditions for prisoners in Haiti and requested that the BIA remand the case for

further proceedings. The BIA granted this motion. Mr. B's case is currently pending before the immigration judge, with a hearing date scheduled in January 2012.

Mr. B was in immigration detention in a New Jersey jail for nine of the ten years that his removal case has been pending – three times longer than his sentence for the conviction that gave rise to the removal case. U.S. Immigration and Customs Enforcement (ICE) released Mr. B in January 2009. At that time, due to inadequate management of his mental illness while in immigration detention, Mr. B was deemed by doctors at the Kings County Hospital Center to be psychotic. After extensive treatment, Mr. B has regained his ability to think rationally and function normally. Though he continues to reside in a psychiatric facility, he is now able to be employed and leave the facility on weekends to visit his family – all U.S. citizens and permanent residents – without supervision.

**Baskaran Balasundaram** is a Tamil farmer who suffered severe persecution from both sides in Sri Lanka's bloody civil war. In May 2007, the Liberation Tigers of Tamil Eelam (LTTE)—also known as the "Tamil Tigers," and designated by the U.S. government as a terrorist organization in 1997—captured Mr. Balasundaram at gunpoint and held him at one of their training camps. He managed to escape, only to be repeatedly captured and tortured by Sri Lankan government forces.

Fearing for his own safety and that of his family, Mr. Balasundaram fled to the United States, arriving at Boston's Logan Airport in July 2008. However, the Department of Homeland Security (DHS) took him into custody, where he remained for over two years because DHS maintained that being forced to work in a kitchen making food for other captives was enough to trigger the "material support" statute, which barred him from obtaining asylum. Even once an immigration judge granted Mr. Balasundaram asylum, DHS continued to hold him while they appealed the decision.

The ACLU filed suit in federal district court asking for the immediate release of Mr. Balasundaram, or at least for a fair bond hearing to determine whether his continued detention was appropriate. In June 2010, Judge Young issued an order stating that the government did not have the right to hold Mr. Balasundaram indefinitely—but giving the government three more months to conclude the asylum proceedings. In July 2010, two years after Mr. Balasundaram arrived in the United States, the government agreed to release him pending the conclusion of the proceedings.

Balasundaram commented from his detention facility: "I won asylum from the judge. Why am I still here? I am no criminal. I told the truth. Why punish me for two years in jail? . . . I'm very sad and scared to be in this place. I haven't spoken to my family in two years. This place is really bad."

**RC**, a native and citizen of Ireland, entered the United States as a lawful permanent resident in 1955 at the age of five, where he has lived continuously ever since. His entire immediate family is in the United States. In recent years, Mr. C has struggled with a drug problem and, in August 2006, was convicted of a misdemeanor drug possession offense, for which he was sentenced to time served and a six month suspension of his driver's license. On the basis of this offense alone, Mr. C was placed in removal proceedings and subject to mandatory detention for approximately ten months while fighting his case. Ultimately, in March 2011, Mr. C was granted cancellation of removal—a permanent form of immigration relief—and released. He now lives in Queens, New York with his brother. Mr. C celebrated his 60th birthday in detention.

**Carlos Calcano** was detained by U.S. Immigration and Customs Enforcement (ICE) at his naturalization interview and subjected to mandatory detention for a firearms offense he had committed nearly twenty years before. Mr. Calcano was sentenced to two years probation for his offense, which he served without incident. Mr. Calcano had a steady job managing the dining hall at Phillips Academy in Andover, Massacusetts, a U.S. citizen wife, and two teenage U.S. citizen children. Because his firearms offense predated the mandatory detention statute by several years, it could not by itself subject him to mandatory detention. Nonetheless, ICE argued that he was still subject to mandatory detention because of a 2002 arrest in which Mr. Calcano spent less than 24 hours in custody, and for which the charges were promptly dropped. Mr. Calcano spent approximately six months in mandatory detention, during which time he lost his job and his family suffered extreme hardship. He ultimately won cancellation relief and has since become a U.S. citizen. Mr. Calcano has been reunited with his family and has returned to his job at Phillips Academy, where he has been promoted to kitchen supervisor.

**Aurora Carlos-Blaza**, a citizen of the Philippines, lawfully entered the United States years ago as a teenager. Ms. Blaza has been deeply committed to her family, working in California fruit orchards during school vacations to help her parents finance a house and attending a local community college so as to be able to serve as a caregiver for members of her extended family. However, after her husband conceived a child in an extramarital affair, divorced her, and left her deeply in debt and ashamed of asking her family for assistance, Ms. Blaza was convicted on charges arising out of loans she took out for herself in the name of her aunt and cousin. For two and a half years, U.S. Immigration and Customs Enforcement (ICE) kept Ms. Blaza in detention while she pursued her claim that the statute under which she was convicted did not make her deportable. ICE maintained custody despite an outpouring of support from Ms. Blaza's family and her U.S. citizen partner and her strong equities as a

committed worker and caregiver. Moreover, ICE detained Ms. Blaza in a facility in Hawaii, far from her home and family in Fresno, California.

In December 2008, Ms. Blaza was given a bond hearing under the Ninth Circuit's decision in *Casas-Castrillon v. Department of Homeland Security*, 535 F.3d 942 (9th Cir. 2008). An immigration judge granted Ms. Blaza release on $5,000 bond, holding that the government failed to show that she presented a sufficient danger or flight risk to justify her continued detention. Upon her release, Ms. Blaza returned to Fresno, worked as an office assistant, and gave birth to a son. After ultimately losing her immigration case, Ms. Blaza returned to the Philippines with her child without incident.

**Amadou Diouf** has lived in this country for approximately fifteen years. He entered the United States on a student visa, obtaining a degree in information systems from a university in Southern California. The government initiated removal proceedings against him for overstaying his student visa after he was arrested and charged with possession of a small quantity of marijuana—an offense that did not render him deportable. Nevertheless, Mr. Diouf was detained for over 20 months during the pendency of his removal proceedings, even though he was *prima facie* eligible for adjustment of status to lawful permanent residence through his marriage and had not been convicted of a removable offense. Notably, the only process Mr. Diouf received during his prolonged imprisonment were two perfunctory reviews of his administrative file in which U.S. Immigration and Customs Enforcement (ICE) summarily continued his detention. Ultimately, a federal district court ordered that Mr. Diouf receive a bond hearing before an immigration judge where the government was required to show that his detention was still justified. Upon conducting a hearing, the immigration judge found that Mr. Diouf did not present a flight risk or danger sufficient to justify detention and ordered his release on bond. Despite this decision and the fact that Mr. Diouf was living on conditions of supervised release without incident since being released, the government continued to argue that he should be detained without a bond hearing. Mr. Diouf has continued to report to ICE without incident for more than four years since his release. He works as a car salesman.

**Jose Farias-Cornejo**, a lawful permanent resident and citizen of Mexico, came to the United States with his parents prior to his first birthday. All of his immediate family lives in the United States, including his mother, who is a lawful permanent resident, and his four siblings, all of whom are U.S. citizens. His fiancée, Melissa Lopez, is also a U.S. citizen. In 2003, Mr. Cornejo, who has a learning disability, successfully graduated from high school and proceeded to work a variety of jobs near his hometown, including in construction and landscaping. In September 2009, following a conviction for being under the influence of a controlled substance, U.S. Immigration and Customs Enforcement (ICE) initiated removal proceedings against Mr.

Cornejo. Despite his strong family and community ties, ICE incarcerated Mr. Cornejo for over 16 months while he awaited a final decision in his immigration case, which he ultimately won in January 2011. Throughout that time, Mr. Cornejo was never once afforded a bond hearing to determine whether his ongoing detention was justified. Since being released from detention, Mr. Cornejo has moved to Pomona, California, where he remains close to his family and is eagerly awaiting the birth of his first child.

**Ms. G-Z**, a nineteen-year-old woman from Colombia, was abducted twice by members of the Revolutionary Armed Forces of Colombia (FARC)—a leftist guerilla insurgent group—as a result of her association with military officers and policemen. After a third kidnapping in 2006, the young woman fled to the United States in search of refuge. She arrived at Newark Liberty International airport, where she was arrested and detained in New Jersey. Although the immigration judge found her testimony credible, the judge concluded that she did not meet the definition of a refugee. U.S. Immigration and Customs Enforcement ignored her request for release on parole while her appeal was pending, despite a diagnosis for anxiety and depression that was exacerbated by her detention. In January 2008—after 17 and a half months in detention—Ms. G-Z decided to accept deportation, "averr[ing] that despite the fact that her 'fear of persecution is as strong as ever[,]' the detention was . . . 'affecting me physically and destroying me mentally' and . . . served as a daily and unwelcome reminder of the indignity of detention at the hands of the FARC."[44] After her deportation, the U.S. Court of Appeals for the Third Circuit found that she had a well-founded fear of future persecution.

**Sam Kambo**, an accomplished government employee and engineer, was detained at his green card interview in 2006, twelve years after he had legally entered the United States, because U.S. Immigration and Customs Enforcement (ICE) suspected that he had taken part in politically-motivated executions in his native Sierra Leone. This caused outrage and an outpouring of support from his community in Austin, Texas.

In June 2007, the immigration judge found that there was no credible evidence to tie Mr. Kambo to the crimes in Sierra Leone and ordered him released, but ICE immediately appealed this determination. In fact, on two separate occasions, ICE appealed the immigration judge's determination that Mr. Kambo should be released on bond. Mr. Kambo's friends and co-workers rallied around him, organizing a plate lunch every month to raise money for groceries for his wife and U.S. citizen children. The federal district court judge presiding over Mr. Kambo's habeas petition pointedly rebuked ICE, saying, "I am confused by what the government is doing

[44] *Gomez-Zuluaga v. AG of the United States*, 527 F.3d 330, 339 (3rd Cir. 2008).

here. You have an order in June '07 that is adverse to you . . . You have an individual who has been in this country . . . at least since 1994 . . . What is the problem with allowing him to go on bond?" Finally, in October 2007, Mr. Kambo was granted release. Because Mr. Kambo could not work legally while awaiting resolution of his case, he and his family left the United States during the summer of 2008.

**Warren Joseph** is a lawful permanent resident of the United States and a decorated veteran of the first Gulf War. He moved to the United States from Trinidad nearly 22 years ago and has five U.S. citizen children, a U.S. citizen mother and a U.S. citizen sister.

A few months after coming to the U.S., when he was 21 years old, Warren enlisted in the U.S. Army. He served in combat positions in the Persian Gulf, was injured in the course of duty and received numerous awards and commendations recognizing his valiant service in that war, including returning to battle after being injured and successfully rescuing his fellow soldiers.

Like many Gulf War veterans, Warren returned from the war with symptoms that were only later diagnosed as Post Traumatic Stress Disorder. His sister recalls that she "was shocked to see how much Warren had changed." He was anxious, had recurring nightmares about killing people, and would wake up in a cold sweat. He became withdrawn and thought about suicide constantly. In 2003, he drank rust remover and had to be hospitalized.

In 2001, Warren unlawfully purchased a handgun to sell to individuals to whom he owed money. He fully cooperated with an investigation by the Bureau of Alcohol, Tobacco, and Firearms, and his actions were not deemed sufficiently serious to warrant incarceration. Two years later, however, suffering from partial paralysis and debilitating depression, Warren violated his probation by moving to his mother's house and failing to inform his probation officer. He served six months for the probation violation. Upon his release, in 2004, he was placed in removal proceedings and subjected to mandatory immigration detention.

Warren remained in immigration detention for more than three years while he fought his deportation. During his entire period of incarceration, Warren was never granted a hearing to determine whether his detention was justified. Indeed, even after the U.S. Court of Appeals for the Third Circuit found that he was entitled to apply for relief from removal, and remanded his case back to the immigration court, the government continued to subject him to mandatory detention. He was not released until he finally prevailed on his application for relief before the Immigration Judge, which conclusively resolved his deportation case in his favor.

Commenting on his ordeal, Mr. Joseph said: "I joined the Army because I love the United States; I am very disappointed that I have been treated this way, but I still love this country."

**Aiman Musleh** is a Palestinian born in Bethlehem, within the Israeli Occupied West Bank, who came to the United States on a visitor's visa in 1998. He has no criminal record. Mr. Musleh overstayed his visa and was ordered removed in 2003. In 2008, days before Mr. Musleh's wedding, immigration authorities arrested him at his home and placed him in custody. Mr. Musleh remained in detention for eight months even though, as with many individuals from the West Bank, his removal was not reasonably foreseeable. Ultimately, Mr. Musleh was released on an order of supervision because U.S. Immigration and Customs Enforcement was unable to obtain travel documents to effectuate his removal. Since his release from detention in September 2008, Mr. Musleh has complied with all conditions of his supervision. He has been steadily employed and was recently promoted to a supervisory role.

**Ahilan Nadarajah**, an ethnic Tamil farmer who was tortured in his native Sri Lanka, was detained for nearly five years while seeking asylum in the United States. From the age of 17, Mr. Nadarajah was brutally and repeatedly tortured by soldiers in the Sri Lankan Army who arrested him and accused him of belonging to the insurgent group, the Liberation Tigers of Tamil Eelam (LTTE). Over the course of several arrests, soldiers beat him, hung him upside down, pricked his toenails, burned him with cigarettes, held his head inside a bag full of gasoline until he lost consciousness, and beat him with plastic bags full of sand. Eventually, Mr. Nadarajah fled to the United States in October 2001, where he was immediately arrested at the border. U.S. Immigration and Customs Enforcement (ICE) then held Mr. Nadarajah in detention for nearly five years while he fought his case, despite an immigration judge twice holding that he was entitled to asylum and rejecting the government's claims, based on false and secret evidence, that he was in fact a member of the LTTE. The BIA affirmed the grant of asylum, and the Attorney General declined further review, giving Mr. Nadarajah refugee status.

Although Mr. Nadarajah was initially granted parole with bond, ICE subsequently rejected his attempt to tender money for the bond years later on the grounds that the bond order was "stale." ICE also denied Mr. Nadarajah's further parole requests after he won relief from the immigration judge and BIA. At no point during his lengthy detention did Mr. Nadarajah receive an opportunity to contest his detention before an immigration judge. Ultimately, in March 2006, Mr. Nadarajah was ordered released from detention by the U.S. Court of Appeals for the Ninth Circuit, which held that the immigration laws did not authorize his detention where his removal was not reasonably foreseeable, and that the government lacked any facially legitimate or bona fide ground for denying his parole request.

**Hiu Lui Ng**, a Chinese national with a U.S. citizen wife and two young U.S. citizen children, was detained by U.S. Immigration and Customs Enforcement when he appeared for his green card interview. Mr. Ng clearly posed no danger or risk of flight: he was a computer

programmer with a good job and no prior criminal history, and he was eligible for a green card based on a petition filed by his wife. Yet he was detained for more than a year while he sought to reopen a past in absentia removal order, the validity of which he contested. His case became front page news in August when he died in detention after failing to receive proper medical care and suffering horrendous abuse from prison guards, including an injury that caused him to break his spine. In an editorial issued shortly thereafter, the *New York Times* criticized not only the way Mr. Ng was treated, but the fact that he was detained in the first place.[45]

**Lobsang Norbu**, a Buddhist monk from Tibet, fled China after he had been arrested, incarcerated, and tortured twice on the basis of his religious beliefs and political expressions in support of Tibetan independence. He arrived in New York and was immediately placed into immigration detention pending the adjudication of his asylum claim. Mr. Norbu's attorney filed a parole application that included an affidavit from a member of the American Tibetan community who pledged to provide Mr. Norbu lodging and ensure his appearance at any hearings. During Mr. Norbu's ten-month detention, the government provided no response to this parole request, and Mr. Norbu was never given the opportunity to argue for his release before an immigration judge. In August 2007, the Board of Immigration Appeals reversed the immigration judge's denial of Mr. Norbu's asylum claim, stating that the judge clearly erred in finding that Mr. Norbu was not credible. Mr. Norbu is currently living in a Tibetan group home on Long Island, New York and working at a restaurant. He has applied for adjustment of status.

**Julio Peguero**, a native and citizen of the Dominican Republic, entered the United States over 15 years ago as a lawful permanent resident. He has spent over 19 months in immigration detention while challenging the government's efforts to remove him, without ever receiving an opportunity to contest his imprisonment before an immigration judge. The government is seeking Mr. Peguero's removal based on a single, ten-year old conviction for felony sale and possession of a controlled substance for which he was sentenced to one day of jail time and probation. He has no other criminal history. Moreover, Mr. Peguero maintains that he is innocent of the charges and was coerced into pleading to the offense by his defense attorney, and that his attorney never advised him of the immigration consequences of his plea. As a result, Mr. Peguero's conviction is likely to be vacated due to ineffective assistance of counsel under the Supreme Court's recent decision in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010).

Mr. Peguero was arrested by U.S. Immigration and Customs Enforcement in November 2009 after he was denied naturalization based on his conviction. At the time of his arrest, he had been living in Nassau County, New York for approximately fifteen years. He owned a home, ran

[45] *See* Nina Bernstein, *Ill and in Pain, Detainee Dies in U.S. Hands*, N.Y. TIMES, Aug. 12, 2008, at A1; Editorial, *Mr. Ng's Death*, N.Y. TIMES, Aug. 17, 2008, at WK9.

two barbershops, and also helped support his lawful permanent resident mother. As a result of his prolonged detention, Mr. Peguero has already lost one of his businesses. In April 2011, a federal district court granted his petition for a writ of habeas corpus and ordered a bond hearing where the government must show that his continued detention is justified.

**Alejandro Rodriguez**, a Mexican national who has been in the United States since he was a baby, was detained for more than three years without a meaningful hearing on the propriety of his prolonged detention in light of the non-violent nature of his convictions and his strong community ties. Prior to his detention, Mr. Rodriguez lived near his extended family in Los Angeles, working as a dental assistant to support his two U.S. citizen children. His claim against removal hinged on whether he could be deported for two non-violent convictions—joyriding when he was 19, and a misdemeanor drug possession when he was 24. Mr. Rodriguez was denied release by U.S. Immigration and Customs Enforcement (ICE) on the basis of administrative file custody reviews in which ICE rejected his requests for release based entirely on a written questionnaire, without even interviewing him. After Mr. Rodriguez filed a habeas petition in district court—but before the petition was adjudicated—ICE released him on his own recognizance, revealing that the agency had never considered him a flight risk or danger to the community. He has remained released on conditions of supervision without incident since his release over three years ago.

**Leticia Salguero-Morales** is a single mother of two U.S. citizen children and has lived in Phoenix, Arizona for 20 years. Originally from Guatemala, Ms. Salguero was detained for 21 months until her release in September 2010. She has never been arrested or convicted of any crime. Ms. Salguero was first placed in proceedings for having entered the United States without inspection. She applied for relief from removal in the form of suspension of deportation and asylum. An immigration judge initially found her eligible for suspension on the grounds that her deportation would cause extreme hardship, but later deemed her ineligible under a retroactive bar to relief enacted in the 1996 immigration laws. Ultimately, this resulted in a final removal order in 2004. However, because her attorney failed to inform her of this order, Ms. Salguero was not aware she had been ordered removed until January 2009, when she was arrested by ICE and placed in detention.

Despite her clean record and family ties and requests by counsel for her release, U.S. Immigration and Customs Enforcement (ICE) continued to detain her in deplorable and inhumane conditions. For more than one year, while detained at the Pinal County Jail, Ms. Salguero was not allowed to have contact visits with her children, did not have access to outdoor recreation, and endured extreme depression and anxiety. Moreover, at no point in her lengthy imprisonment did Leticia receive a bond hearing before an immigration judge over whether her

continued detention was justified. Instead, Ms. Salguero received a series of administrative file custody reviews by ICE officials that merely rubber-stamped her detention.

Ultimately, in September 2010, a federal district court granted a habeas corpus petition ordering the Board of Immigration Appeals (BIA) to decide whether Ms. Salguero's case should have been administratively closed and "re-papered" so that she could proceed with her application for suspension/cancellation of removal. The BIA administratively closed her case. The district court also ordered ICE to determine whether Ms. Salguero could be released under its guidelines regarding detention priorities. Ms. Salguero was subsequently released on conditions of supervision and has reunited with her children.

When asked about her situation, Ms. Salguero said "the law of ICE is so unfair to people. I am a single mother, working, honest, fighting here in this jail for months, separated from my children, fighting for my case. This law, which separates many families, closes the door to fixing our immigration status, and destroys the lives and futures of our children who are citizens paying the consequences of this great cruelty."

**Raymond Soeoth** is a Christian minister from Indonesia. In 1999, when Reverend Soeoth and his wife fled Indonesia to escape persecution for practicing their faith, they could not have anticipated the treatment they would receive in the United States. Initially, Reverend Soeoth was allowed to work in the United States while applying for asylum and eventually became the assistant minister for a church. He and his wife also opened a small corner store. Yet when his asylum application was denied in 2004, the government arrested him at his home and took him into detention. Even though Reverend Soeoth posed no danger or flight risk, had never been arrested or convicted of any crime, and had the right to seek reopening of his case before both the immigration courts and federal courts, ICE insisted on keeping him in detention. He spent over two and a half years in an immigration detention center while the court decided whether or not to reconsider his asylum claim. During that time, he never received a hearing to determine whether his detention was justified.

While in detention, Reverend Soeoth was isolated from his family and community as well as his congregation. His wife was unable to maintain the store that the couple had jointly run and she was forced to shut it down. In February 2007, Reverend Soeoth finally received a bond hearing as a result of a successful habeas corpus petition filed by the ACLU. Following that hearing Reverend Soeoth was released on a $7,500 bond. Although his asylum case was subsequently denied, the government granted him "deferred action" status, a temporary form of relief that can be renewed annually on a discretionary basis, as part of a settlement reached because the government had subjected him to illegal forcible drugging during his detention. He and his wife subsequently won their motion to reopen their asylum case.

Commenting on his ordeal, Reverend Soeoth stated that "I can't understand why in America I must choose between two evils: going back to Indonesia to face persecution or being detained while I fight for asylum."

**Saluja Thangaraja**, who was released from immigration detention on her 26th birthday, fled Sri Lanka in October 2001 after being tortured, beaten and held captive there. She was detained on the United States-Mexico border later that month, on her way to reunite with relatives in Canada, and was imprisoned in a federal detention center near San Diego for over four and a half years, until March 2006.

During years of civil unrest and turmoil, Saluja and her family were displaced from their home and forced to live in a police camp after conflict broke out in their small town between the Sri Lankan Army and the separatist group, the Liberation Tigers of Tamil Eelam. After finally returning to her home, Saluja was twice abducted, beaten and tortured by the Sri Lankan army. Saluja went into hiding after her second abduction, and soon after the family decided she needed to leave the country to protect her life.

Despite finding that she had a credible fear of persecution, the government refused to release her from detention while she sought asylum before the immigration court, the Board of Immigration Appeals (BIA), and ultimately the U.S. Court of Appeals for the Ninth Circuit. In August 2004, after almost three years in detention, the Ninth Circuit found that Saluja faced a well-founded fear of persecution if she were returned to Sri Lanka and granted her withholding of removal—a form of relief that prohibits the government from returning her to that country. In addition, the Court found Saluja eligible for asylum, concluding that the immigration judge and the BIA's previous rejection of her claims lacked a reasonable basis in law and fact.

Despite this stinging rebuke, the government continued to doggedly pursue Saluja's removal and to insist on her detention. Indeed, even after the immigration judge granted Saluja asylum in June 2005, the government appealed that decision to the BIA and refused to release Saluja during this process.

Saluja finally gained her freedom in March 2006, but only after the ACLU petitioned the district court for her release. Upon her release, she was finally able to reunite with her family in Canada, where she has now married and had a child.

**Buu Van Truong** is a native and citizen of Vietnam who became a lawful permanent resident in 1999. He has a young U.S. citizen son. In 2007, Mr. Truong pled guilty to two counts of encouraging his nieces to come to the United States unlawfully, for which he was sentenced to six months in jail and three years probation. He has no other criminal history. As a

result of his offense, Mr. Truong was ordered removed in May 2009. Mr. Truong waived appeal in the hopes that he would be promptly removed so that he could return to Vietnam and earn money to support his son. He fully cooperated with the government's efforts to remove him. Nonetheless, Mr. Truong languished in detention for over 16 months because the government was unable to secure a travel document from the Vietnamese embassy. Ultimately, Mr. Truong was released on conditions of supervision after he filed a habeas petition in federal district court. Since his release, he has been reunited with his son and is currently working as a store clerk. He is regularly reporting to U.S. Immigration and Customs Enforcement.

**Many Uch** is a Cambodian national who was subjected to indefinite detention by ICE for over two years. His story was featured in the PBS documentary, "Sentenced Home." Mr. Uch left Cambodia as a child with his parents, who were refugees fleeing persecution at the hands of the Khmer Rouge. He and his family lived and wandered in the forests for over 10 months until the United Nations found them. The family settled as refugees in Seattle, Washington. As a teenager, Mr. Uch got involved in a gang, and was convicted in 1994 of robbery in the first degree with a weapon, as the driver of the getaway car. After serving his criminal sentence, he was taken into immigration custody.

While Mr. Uch was in immigration custody, the United States did not have a repatriation agreement with Cambodia, so there was no way for the United States to deport him. Mr. Uch languished in immigration custody for over two years (28 months) waiting to be deported. He eventually filed a habeas petition and obtained release in October 1999 (several years before the United States would even resume deportations to Cambodia). He regularly reported to ICE since that time.

Since his release, Mr. Uch has been consistently employed (he currently holds two jobs), has married a U.S. citizen, and has a four-year-old daughter. He has also been an active member of his community. He organizes and does advocacy on issues concerning deportees; he has been part of a youth organizing group for young Cambodians, serving as a mentor and community mediator; and he serves on the board of directors for a Buddhism society in Seattle.

In 2010, Mr. Uch obtained a pardon for his crime from the Governor of Washington, Chris Gregoire.



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Mr. GALLEGLY. Thank you very much.

At this time, I would yield to the gentleman from Texas, the Chairman of the full Committee and the sponsor of this legislation, for opening questions.

Mr. SMITH. Thank you, Mr. Chairman.

Mr. Mead, let me direct my first question toward you. And I am looking at the most recent figures for the *Zadvydas* releases of criminal aliens, and I just want to confirm this is accurate. I have in fiscal year 2009 almost 4,000 criminal immigrants were released into our communities. Is that about right? I have 3,847.

Mr. MEAD. Yes, sir, that is about right.

Mr. SMITH. And is the figure for fiscal year 2010 accurate, 3,882, almost 4,000 released then? And then for fiscal year 2011, we are on track to maybe even exceed 4,000 criminal immigrants released into our communities.

Mr. MEAD. Yes, Congressman, that is correct.

Mr. SMITH. The way I figure it, considering the recidivism rate is about 40 percent and those are just the ones who are convicted again, we have thousands and thousands of crimes committed every year that arguably don't need to be committed if, in fact, we detain these individuals for longer in prison. Is that accurate?

Mr. MEAD. Yes, sir. I would just like to say that one of our highest priorities is to apprehend and remove criminal aliens who pose a threat to our communities, and every decision that we make, whether it is initial detention or detention under *Zadvydas*, is based on a full examination of their criminal history. And one of the things we do consider is——

Mr. SMITH. My point is that there are thousands of additional crimes committed every year that could be prevented were these individuals detained.

Mr. MEAD. That could be true, sir, yes.

Mr. SMITH. Thank you.

Mr. Dupree, let me ask you. You have studied the bill, looked at the language. Do you feel that the bill is sufficiently broad to prevent some of these crimes from occurring, yet sufficiently narrow as to be constitutional?

And before you answer your question, I know we have had a Member of the full Committee say this morning that there was no judicial review. If individuals will look on page 14 of the bill, they will find a judicial review.

But in any case, what is your opinion of the bill, again broad enough to prevent the crimes, narrow enough to be constitutional? What do you think?

Mr. DUPREE. I think the bill strikes an appropriate balance. On one hand, there is no question that this bill will make our country safer. As you noted a moment ago, there are crimes that will be prevented if this bill passes. This bill is targeted at an exceedingly narrow segment of particularly dangerous offenders. Those people will be kept off our streets. Our communities will be safer as a result.

On the other side of the coin, the bill contains appropriate procedural protections. It allows for Federal court review. It allows for individualized assessments of dangerousness by a high-level DHS official, and it sweeps narrowly. One of the concerns the Supreme Court expressed in *Zadvydas* was that the statute, as it currently exists, could be construed to sweep broadly and could encompass, for example, people who overstay a tourist visa. This bill is much more narrowly targeted. It focuses on individuals who have committed violent crimes, who are likely to commit violent crimes in

the future, or who should be detained for another special circumstance or particularly compelling reason.

Mr. SMITH. Thank you, Mr. Dupree.

Chief Baker, thank you for being here. I appreciate what you and your department have been through recently.

I am curious in regard to the released criminal immigrants. We are talking about 4,000 a year, and I know you have had several tragedies occur in Florida as a result of the release of these types of individuals. Is there any tracking system available today? And in your opinion, if there is not, could a tracking system be implemented whereby you could access a Federal database or be alerted to the presence of these individuals?

Mr. BAKER. Within the City of Fort Myers, we track every prisoner releasee as they return to the city. We meet with their probation officer—and this is on the Federal, State, and even on the county—examining whether or not they are living up to the conditions or standards of their probation and then to provide them other social service direction that they can do to better their lives and not to return to a life of crime.

In recent, we know of about 900 illegal aliens that have been involved in criminal activity that have been sentenced and returned up and down our area of the coast of Florida, our southwest Florida area. So we know that we have individuals that do fit that capacity. And within the city limits, we do monitor their activity to ascertain whether or not they fit that parameter—they are following their probation conditions.

Mr. SMITH. Let me also ask you—I assume you think this bill would help prevent some of those crimes from occurring.

Mr. BAKER. I am sorry. I had a hard time hearing you.

Mr. SMITH. You feel that this legislation would help prevent some of those crimes from occurring.

Mr. BAKER. Yes, sir, I do. You know, what we are looking here is from a standpoint of prevention. We are trying to reduce or eliminate future victims and future crimes. It is unfortunate, obviously, from our circumstances on our loss of Officer Widman, but we believe if this bill would have been in place, it would have greatly enhanced Officer Widman's outcome because the individual would not have been out on the streets to begin with. And when we look at other violent crime that occurs—and I will speak specifically within Fort Myers, but we are not unique. That violent crime occurs across the country in every community, and our goal is to provide safe measures to our communities and to our police officers that they go out and risk their life each and every day. So I believe that this would greatly enhance our safety and the community's safety.

Mr. SMITH. Okay, thank you, Chief Baker.

Mr. BAKER. Thank you, sir.

Mr. SMITH. Mr. Arul, a question for you. You have mentioned several times in your testimony a minute ago that it costs $45,000 a year to detain some of these individuals. I do not know if it is $45,000 or $37,000, but it is many thousands of dollars.

Don't you feel that the widow of Officer Widman would be happy for the Government to spend $45,000 to have prevented the death of her husband? As far as that goes, I suspect she would have been

happy to have spent $45,000 of her own money to prevent the death of her husband who was an officer in the Fort Myers police force.

So it seems to me that we may make a mistake by putting a price on it rather than valuing what a life is worth. And I would only suggest to you that again it may be cheap for the price to detain some of these individuals who go on and commit all the type of horrific crimes that you and I could cite.

But let me ask you a question. And that is, in your testimony you mention that under this bill, it gives indefinite power to detain individuals. I know you are familiar with the legislation. I don't think we give indefinite power. We talk about very limited special circumstances. Don't you think it is possible that the Supreme Court would hold that because those special circumstances are sufficiently narrow, that it might be constitutional?

Mr. ARULANANTHAM. Thank you, Mr. Chairman. Let me answer the second part first.

The bill authorizes the potentially indefinite detention of people who committed aggravated felonies. On page 9 to 10 is where it is. That category sounds bad, but you don't have to either have a felony and it does not have to be aggravated to be an aggravated felony under the immigration law.

Mr. SMITH. And in any case, there is judicial review possible after 6 months.

Mr. ARULANANTHAM. Judicial review is a separate question, Mr. Chairman. The question is you can be indefinitely detained for, for example, writing a bad check or failing to comply with a court order or two petty thefts or tax evasion. I mean, all of these can be aggravated felonies under the immigration law, and so the DHS would have the authority under this bill to make the determination that such individuals could be detained indefinitely. And that I think is not consistent with *Zadvydas*.

To go to your other point, Mr. Chairman, I feel awful when I hear that story. You know, I feel awful about it. Of course, I would certainly pay that amount of money to prevent a death unnecessarily.

But the question is what kind of procedures have to be in place to make sure that this doesn't happen and——

Mr. SMITH. Let me just acknowledge I think you and I have a different philosophy on that. To me, we have, because of judicial review, an out for individual cases as you just mentioned. But beyond that, it just seems to me that considering the thousands of preventable crimes that occur every year, including the murder of police officers, that we ought not be so concerned about the $45,000 a year. We ought to be more concerned about the safety and lives of innocent Americans.

I am not denying that you don't care—or I am not suggesting that you don't care about innocent Americans and the lives of innocent Americans. I am just simply saying I think the bill does what it is intended to do, and that is to prevent some of these tragedies from occurring. But I understand your point of view as well

Thank you, Mr. Chairman. Am I the Chairman?

I think Chairman Gallegly has left, and since I am the last Member standing and since we are due on the House floor momentarily,

we will need to recess for an hour. Thank you all for your patience and I hope a number of Members will return in about an hour. And we stand in recess.

[Recess.]

Mr. GOWDY [presiding]. The Committee will come to order.

I want to thank our four witnesses for your patience. It is not usual for us to have a joint session and such an honored speaker as Mr. Netanyahu. So thank you for indulging us.

Without further ado, I will recognize the gentlelady from California, Ms. Lofgren.

Ms. LOFGREN. Thank you very much. Let me join in our apologies to the witnesses. Certainly we don't often have a joint session of Congress, and it was important that all the Members be present for the Prime Minister of Israel, who gave a terrific speech by the way.

You know, I want to explore a little bit about the court decisions and the people involved. We have heard of horrific cases where people—for example, the officer. I mean, that is a terrible thing. But this bill does not target criminals I think.

Mr. Arulanantham, your testimony was that individuals who had not committed any criminal offense would be caught up in this type of situation. Do you think that having reviewed the cases, that the bill would authorize or mandate prolonged detention without a bond hearing? And would that possibly satisfy the Court, the due process requirements in the Constitution in your judgment?

Mr. ARULANANTHAM. Thank you, Congresswoman. You did hear me correctly about that. Portions of the bill concerning prolonged detention, which are sort of farther down in the legislation—but they are there—would authorize the—would reverse a set of Court decisions that have required that when you have a prolonged detention, while a case is pending, the simple requirement that the person get a bond hearing in front of an immigration judge to be considered for release, that that requirement then would no longer be in place under this bill.

So, yes, for example, I had dinner last Sunday—it was 2 days ago—with a Christian minister from Indonesia who was my client. He was detained for 2 and a half years until the Court decision ordered his release on bond while his case was pending. He has now won his motion to reopen. He was never convicted of any crime certainly.

There are other examples in my testimony. There was a Tibetan monk named Lobsang Norhbu. He was detained about 10 months, obviously also never convicted of any crime, not a dangerous individual, not a risk of flight. But under the bill, he would not have a right to a bond hearing in front of an immigration judge. Just to get your day in court, do you have to lock me up while my case is pending? And of course, they can often take years. So that is a very serious problem under this bill. It has really nothing, in a sense, to do with the terrible cases that we are discussing today, but this bill would result in the detention of those people for prolonged periods of time at great taxpayer expense.

Ms. LOFGREN. I am interested, Mr. Baker, whether we can—I assume that you are not necessarily in favor a Christian minister who has not committed a crime being held for 2 and a half years

without bond or review. I don't want to put in your mouth, but I assume that is not what you are seeking here.

Mr. BAKER. You would be correct on that.

Ms. LOFGREN. So I am wondering whether we couldn't narrow this in such a way that we really target the kind of people you are talking about that pose a threat to us. What are your thoughts on that? What would you advise on that?

Mr. BAKER. My focus here—my understanding from my presence here—is to put a face and name of some of the victims that have been victimized to the point of murder of police officers.

Ms. LOFGREN. And you have done that very well, and it is important that you did do that.

Mr. BAKER. That is what my focus is. You know, even before coming here, my idea is to hold those accountable that need to be held accountable. And I can certainly understand several of the individuals the gentleman here to my left has talked about. That is not my focus or my purpose. My focus and purpose is hold those individuals accountable for their criminal acts that they hold against law enforcement and the communities, obviously, that we serve.

And I am sure that position that you hold as well, you are fully aware of these types of incidents. They are not special to Fort Myers. They are across the country. And the level of accountability needs to be there so that these individuals do not come back out and continue with a life of a crime and continue with violent acts toward us.

Ms. LOFGREN. Right.

Mr. Mead, one of the concerns that we have is that there are nations that simply won't accept back their nationals when there has been an order for removal. And right now, all we have got is a blunt instrument where we could eliminate all visas for that country. But then you end up punishing Americans. I mean, you have got an American who is married to somebody from that country. You know, it is really hard. Well, we don't use that tool because it is too blunt an instrument.

One of the things, when I was on the Homeland Security Committee, that we talked about was making—the State Department would have to do this, not Homeland Security because it is a diplomatic issue, but to make the visa removal system for diplomats only so that we wouldn't be hurting Americans who are trying to get their husband or wife in or the like, but we would actually catch the attention of a foreign nation. What do you think about that as a possible idea? Maybe I can't ask you if that hasn't been cleared by OMB. But does the Department have a position on that?

Mr. MEAD. Well, I think the new MOU with Consular Affairs at State gets right at what you are suggesting, and that is to have a graduated process that begins with demarche, moves to direct conversation with ambassadors, then considers visa sanctions, whatever they turned out to be, followed by financial sanctions. So to that extent, I certainly agree that we need to not, as you said, use a blunt instrument approach to this, that we need to follow a process that makes sense to everyone. And I think the new MOU does that and the fact that it also sets as a target a 30-day average time

for issuing travel documents gives us a nice benchmark to work against.

Ms. LOFGREN. Have we used that new MOU yet? Or it is too new?

Mr. MEAD. Well, actually we have done some things pursuant to it. There have been meetings between Director Morton and the State Department with officials from Bangladesh. That has produced five travel documents already. That is within the past couple of weeks. We have seen some positive results already with Pakistan, and just last week we had some very good results out of China where they have agreed to pilot electronic travel documents, use a standard application for travel documents, and even consider charter flights to return multiple people rather than what we do now, which is one individual at a time. So I think that having the joint effort with State, having a clear set of principles in the MOU will help us considerably as we move forward.

Ms. LOFGREN. I would ask the indulgence of the Chair for an additional quick minute, if I could.

I raise this issue because it has been raised to me repeatedly by diplomats and others where we deport gang members. I am not against that. I am for that. But we don't always notify or prepare the receiving country. I mean, they are not arguing that we shouldn't deport gang members. We all want to do that. But without adequate notice to the receiving country, it has caused some crime problems in their own countries. And I am wondering if there is a way to notify or work with, for example, some of the Latin American countries now have a huge gang problem that they didn't used to have that has really been exported from the United States—whether there is an ability to articulate this more carefully with receiving countries.

Mr. MEAD. It is an issue that we are very concerned about, particularly as we move toward more criminal aliens, and particularly in terms of Central America, we do have very specific requirements for each country in terms of what criminal history information they require, how much notice they need in terms of gang members coming back, and we also make available to them all of the appropriate information when they interview their potential citizens for return. So you are correct. We do have an obligation to provide that information, and we try to do that.

Ms. LOFGREN. Thank you, Mr. Chairman, for the additional. I have been wanting to ask that question for quite some time.

Mr. GOWDY. Yes, ma'am. Thank you.

The Chair will recognize himself.

Chief Baker, first of all, thank you for your service, and if you would be gracious enough to let Officer Widman's widow and three children know that they have our continuing, undying appreciation for the sacrifices that he made for our public safety. If you would let them know that all the way to South Carolina and Washington, how grateful we are and his family.

Mr. BAKER. Thank you for your comments, and I will be sure to contact Mrs. Widman, as well as his parents.

Mr. GOWDY. Thank you, Chief.

Mr. Dupree, for those who may not be as intimately familiar with the process, assume for the sake of hypothetical that an alien is

convicted in State or Federal court, a sentence is imposed, and that sentence is satisfied. What happens?

Mr. DUPREE. Once he's done, in many cases detention jurisdiction will shift from the State or Federal correctional authorities and he will be held in immigration custody. At some point during this process, in all likelihood, he may be put in removal proceedings. If and when that happens, there is a timetable concerning how quickly the Government is obligated to actually remove that alien from this country under the *Zadvydas* decision that we have been discussing as well as the relevant statutes. In some cases, the Government is able to effect the removal of those aliens very quickly. In other cases, it can take longer for a number of different reasons, including the difficulties that historically we have encountered with repatriation from some countries.

Mr. GOWDY. Mr. Mead, I am looking at the list of countries that have been difficult to work with with respect to accepting back their citizens who commit crimes in our country. Can you tell me specifically, for instance, what is being done in Cambodia?

Mr. MEAD. I can't speak specifically to Cambodia today, but all of those countries are countries that under the new MOU with State we will pursue this graduated approach and Cambodia would certainly be one that we would begin this effort to either use demarches, use conversations with the ambassadors and the like to move toward better issuance of travel documents.

Mr. GOWDY. All that is great and wonderful and I am a huge fan of conversations. I am more of a fan of consequences. So at what point will we begin to impose consequences on countries who either receive foreign aid or wish to have a relationship with our country when they don't accept their citizens back who have victimized our citizens? At what point will it move beyond a memorandum of understanding or memorandum of agreement and a conversation to real consequences? How quickly are we going to get there?

Mr. MEAD. It is hard to put a date on that in terms of number of days, but that would be something that would be determined jointly between the Department of Homeland Security and the Department of State as to when, as you said, we moved past demarche or conversation with ambassadors to visa sanctions and aid sanctions.

Mr. GOWDY. Are you in favor of expediting the conversation so we can get more quickly to the consequences?

Mr. MEAD. I am in favor of doing whatever we can do to increase the issuance of travel documents because ultimately that is the way to remove criminal aliens from the country that historically have been difficult to remove.

Mr. GOWDY. Well, it seems like some of these countries do either have relationships with us or aspire to have relationships with us. I find it befuddling why that would not be a condition of a relationship, that you actually take your citizens who commit crimes against our citizens back to your country.

Mr. MEAD. And I agree that we need to work with them to make sure that they honor their international obligations. Every country has an obligation to take back their citizens.

Mr. GOWDY. Which brings me, Mr. Arulanantham—is that close?

Mr. ARULANANTHAM. Very close.

Mr. GOWDY. That is probably as close as I am going to get. So I will stop there.

Let's assume, for the sake of argument—and there is an argument—whether or not Somalia is a country as opposed to just a collection of gangs. Assume Somalia is a country. Assume a Somali commits a crime in South Carolina or California, that that Somali is convicted, serves a sentence. What would you purport to do with that Somali after the execution of that sentence?

Mr. ARULANANTHAM. Well, I think as the Supreme Court's decision in *Zadvydas* makes clear, if the person cannot be deported, which I take it is the premise of your question—I mean, we should make whatever efforts we can to deport the person. I too support what you have been talking about. The Supreme Court has said, for example, that they don't even have to have a government in order to deport them to Somalia. That was the decision of the Supreme Court several years ago in case called Jama.

But assume that they cannot be deported. The decision makes clear that you can release the person on an order of supervision which can be quite intensive. They can wear an electronic monitor. They can be forced to appear on a very regular——

Mr. GOWDY. I hear you, but I have yet to see an electronic bracelet that is going to deter someone who is hell-bent on committing another criminal offense. I just think that is—that is wonderful in an academic setting. It just doesn't work in the real world. So what, beyond staying in this country—if a country won't accept them back and we don't want them here, what do you purport? What is your version of Mr. Smith's bill?

Mr. ARULANANTHAM. Mr. Representative, the Supreme Court yesterday affirmed a decision. Justice Kennedy wrote the opinion.

Mr. GOWDY. I am well aware of it.

Mr. ARULANANTHAM. And it orders the release of something like 37,000 people.

Mr. GOWDY. Despite Congress specifically telling the courts to consider public safety as a factor in reaching those decisions, you are right. They have released close to 40,000 prisoners in California. I am aware of that.

Mr. ARULANANTHAM. So view about that is Justice Kennedy really believed that the Constitution constrains what you could do in the name of public safety in that context. I would say here you have got thousands of citizens—1.6 million citizens and non-citizens incarcerated today in the criminal system as a whole, all the different criminal systems. Right? And those people, when they commit the same crimes that your hypothetical Somali commits, when they are done, we put them on probation or parole or whatever it is, and eventually we release them back into society one way or another.

Mr. GOWDY. They are citizens. Right? I mean, you are not arguing for the same system for non-citizens as citizens, are you?

Mr. ARULANANTHAM. I am not, Mr. Representative, except to say that in the public safety problem, which is your fundamental concern and a concern that I recognize and think is absolutely important in this context——

Mr. GOWDY. What is your proposed solution? What is your proposed solution? Mr. Smith has come up with a proposed solution. You don't like it. What is your proposed solution?

Mr. ARULANANTHAM. My proposed solution would be——

Mr. GOWDY. Electronic monitoring?

Mr. ARULANANTHAM. No. My proposed solution, Mr. Representative, would be to implement detention to the extent that the Constitution permits it. In the Constitution, it is well laid out. The Constitution permits the detention of people if they are specially dangerous and——

Mr. GOWDY. What was the vote in the California case? Do you recall?

Mr. ARULANANTHAM. I believe Justice Kennedy is the fifth vote.

Mr. GOWDY. It was a 5 to 4 decision. So I am reluctant to assign lots of constitutional gravity when this Supreme Court continues to splinter on 5 to 4 votes. In South Carolina, we don't have a speedy trial act. Is the Due Process Clause implicated if we hold somebody, detain somebody for 12 months prior to trial? Is 90 days the maximum?

Mr. ARULANANTHAM. I cannot speak to it in the criminal system, Mr. Representative. I can say that we are talking about people held for years in many cases who have either committed no crime or have committed only very old convictions.

Mr. GOWDY. What if we gave them a bond hearing and applied the same bond analysis that we do with United States citizens: a danger to the community and flight risk? And they just have a bond, but they can't reach the bond because it is set at half a million dollars. Would that satisfy it?

Mr. ARULANANTHAM. It is a case-by-case situation about whether bond amounts may become unreasonable even under the regular Federal system. That is a question that is analyzed under the Bail Reform Act.

I do believe that for prolonged detainees, all the Constitution would require would be the same criminal bond system that we have in regular criminal cases. If you just implemented that—you know, in that system you get in at about 48 hours. In a few days you get that hearing.

Mr. GOWDY. But I am talking post-adjudication. I am talking about after the crime has been committed. Lots of States, including the Federal system, doesn't have parole anymore. So there is no apparatus by which to monitor people who have already executed their sentence.

Are you advocating for the same analysis for citizens as non-citizens?

Mr. ARULANANTHAM. I think we are talking about two slightly different things here. But for people whose sentences are over and if they were a citizen, they would be released back onto the street——

Mr. GOWDY. Right, with no conditions.

Mr. ARULANANTHAM. Right. My point is just even under existing law, under *Zadvydas*, we can release that same person if they are a non-citizen with more supervision and more public safety protections than we can if they are a citizen.

Mr. GOWDY. My question is how do we get them back to their country of origin.

Mr. ARULANANTHAM. And to that, other than telling you what I think the constitutional constraints are, my solutions are only what Mr. Mead had said, to negotiate with those countries and to take whatever diplomatic and foreign policy steps we can take to ask those countries to accept their nationals back.

Mr. GOWDY. Where does public safety factor into your due process analysis?

Mr. ARULANANTHAM. It is one of the considerations which the Supreme Court says is very important in deciding when you can detain people after a sentencing judge has already decided, right, that they should only be sentenced to a certain amount of time.

But my point is just that that safety consideration is important, but it is not like you are more dangerous because you are a non-citizen. That doesn't make you more of a threat to public safety. Right? You have committed the crime you have committed. Now we know either you are likely to recidivate or you are not, and there are a bunch of factors that go into that. And that doesn't change whether you are one or the other. Of course, we should deport people if they flout our immigration laws. For sure, we should. But if you can't, the Constitution doesn't allow you to lock the person up forever for their whole life just because they are a non-citizen, whereas if they were a citizen, you would have to let them go back to the street. So in our view it is just what the Constitution demands.

And you are right, Mr. Representative, that Brown is 5-4, but the analysis in *Zadvydas* rests on a long line of cases. It is not like the idea that you can indefinitely detain people after their sentence is over. It is like a new idea for five Justices of the Supreme Court. I mean, it is a set of cases over time that have established that rule. It is a basic, fundamental principle in our constitutional system that after your sentence is done, when the sentencing judge has decided, then——

Mr. GOWDY. Well, let me say this because my time is up. The system we have now is woefully broken. Representative Smith has come up with a way to fix it that I think is laudable, and I am always amazed—and I am not talking about you specifically—at the folks who aspire to shoot holes in other people's ideas and don't come to the table with their own.

And with that——

Ms. LOFGREN. Mr. Chairman, may I be recognized for a unanimous consent request?

Mr. GOWDY. Sure.

Ms. LOFGREN. I have a series of letters and statements for the record prepared for today's hearing. There are so many that I won't read them all. But nearly 100 immigration and constitutional law professors and scholars, as well as the Constitution Project and the American Immigration Lawyers Association, religious organizations such as the U.S. Conference of Catholic Bishops, Lutheran Immigration Refugee Services, and the Hebrew Immigrant Aid Society, civil liberties groups such as the Leadership Conference for Civil and Human Rights, and the League of United Latin American Citizens, refugee organizations, human rights groups, and immigration

advocacy organizations. And I would ask unanimous consent that their statements and letters be made a part of the record.

Mr. GOWDY. Without objection.

[The information referred to follows:]

May 23, 2011

The Honorable Lamar Smith
Chairman
House Judiciary Committee
2409 Rayburn House Office Bldg.
Washington, DC 20515

The Honorable John Conyers, Jr.
Ranking Member
House Judiciary Committee
2426 Rayburn Office Bldg.
Washington, DC 20515

Re: Constitutional Concerns Regarding Prolonged and Indefinite Civil Immigration Detention

Dear Chairman Smith and Ranking Member Conyers:

We, the undersigned immigration and constitutional law professors and scholars, write to provide the constitutional context governing the federal government's use of civil immigration detention as the House Judiciary Committee's Subcommittee on Immigration Policy and Enforcement considers reforms. Civil immigration detention—particularly with respect to prolonged, indefinite, or otherwise unlawful detention—raises serious constitutional concerns. We urge Congress to craft legislation that will promote, rather than undermine, constitutional guarantees of due process and judicial review in this context.

The deprivation of liberty inherent in civil immigration detention raises significant concerns under the Due Process Clause of the Fifth Amendment of the U.S. Constitution.[1] As the Supreme Court has explained, "[f]reedom from imprisonment—from Government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects."[2] All noncitizens subject to civil immigration detention—even those with final orders of removal—have a liberty interest protected by the Due Process Clause.[3] Because of the liberty interest involved, the U.S. Constitution requires that civil immigration detention be reasonably related to its purpose and be accompanied by adequate procedural safeguards.[4] Where civil detention becomes *prolonged*, an even greater justification is required to outweigh the greater deprivation of liberty, and even stronger procedural protections are necessary.[5]

Decisions by both the Supreme Court and the lower courts have consistently applied these principles to limit the government's authority to subject noncitizens to prolonged and indefinite detention. In *Zadvydas v. Davis*, the Supreme Court recognized that *indefinite* civil immigration

[1] U.S. Const. amend. V.
[2] *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).
[3] *Id.* at 690-91.
[4] *Zadvydas*, 533 U.S. at 690-691; *see also Jackson v. Indiana*, 406 U.S. 715, 738 (1972).
[5] *Zadvydas*, 533 U.S. at 690-692.

detention—where removal is no longer reasonably foreseeable—raises serious due process concerns because detention no longer serves its purpose: to effectuate removal. The Supreme Court therefore construed the post-removal-order detention statute (which authorizes the detention of noncitizens who have final orders of removal even after the conclusion of a 90-day removal period) as authorizing detention only for the "period reasonably necessary to secure removal," a period which it found to be presumptively six months.[6] In doing so, the Court acknowledged significant constitutional limitations on the federal government's ability to indefinitely detain a noncitizen with a removal order. In *Clark v. Martinez*, the Supreme Court applied its holding in *Zadvydas* to all noncitizens who are detained pursuant to the statute, including Mariel Cubans who could not be removed in the foreseeable future due to the lack of a repatriation agreement with Cuba.[7]

In *Demore v. Kim*, the Supreme Court upheld the mandatory pre-removal-order detention of a noncitizen who had conceded his removability "for the brief period necessary" to effectuate removal proceedings.[8] In reaching this conclusion, the Supreme Court presumed that this brief period lasts "roughly a month and a half in the vast majority of cases . . . and about five months in the minority of cases in which the alien chooses to appeal [to the Board of Immigration Appeals]."[9] In contrast, the mandatory detention of individuals who raise a *bona fide* challenge to removal or who are held longer than a "brief period" pending a decision on removal—in many cases, for months or years, given agency backlogs and the time required to seek judicial review—would raise serious constitutional concerns. Indeed, since *Demore*, a growing consensus of federal courts recognizes that due process requires significant limits on the detention of noncitizens who are exercising their right to challenge the government's efforts to remove them.[10]

In light of these important constitutional concerns, Congress should refrain from enacting laws that would undermine due process protections for detained noncitizens. We are aware that some legislative proposals may include provisions that would attempt to authorize mandatory detention until removal proceedings are concluded—even if such proceedings last months or years—despite contrary post-*Demore* case law recognizing the due process constraints on prolonged detention without individualized review; expand the scope of mandatory detention even though such an expansion would include individuals who have proven track records of posing no danger or flight risk and are most likely to be pursuing legitimate challenges to their removal; expand or toll the commencement of the "removal period" despite the effect this would have on prolonging detention for years; or otherwise attempt to authorize the detention of noncitizens beyond the six-month period in *Zadvydas* and *Clark* without constitutionally

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[6] *Id.* at 701.
[7] *Clark v. Martinez*, 543 U.S. 371 (2005).
[8] *Demore v.Kim*, 538 U.S. 510, 513 (2003).
[9] *Id.* at 530.
[10] *See, e.g.*, *Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011); *Casas-Castrillon v. Dep't of Homeland Sec.*, 535 F.3d 942 (9th Cir. 2008); *Tijani v. Willis*, 430 F.3d 1241 (9th Cir. 2005); *Ly v. Hansen*, 351 F.3d 263, 267, 271-72 (6th Cir. 2003); *Flores-Powell v. Chadbourne*, 677 F. Supp. 2d 455 (D. Mass 2010); *Monestime v. Reilly*, 704 F. Supp. 2d 453 (S.D.N.Y. 2010); *Alli v. Decker*, 644 F. Supp. 2d 535 (M.D.Pa. 2009); *Sengkeo v. Horgan*, 670 F. Supp. 2d 116 (D. Mass. 2009); *Bourguignon v. MacDonald*, 667 F.Supp.2d 175 (D.Mass. 2009).

adequate protections. Whether such changes are made across the board or targeted towards specific classes of noncitizens, the end result of such proposals would be the creation and expansion of an unconstitutional civil immigration detention scheme.

Moreover, we are aware that some legislative proposals may attempt to curtail access to judicial review of detention authority, by eliminating the authority of most district courts to address these issues through habeas corpus and/or by creating unwieldy administrative exhaustion requirements. Such changes would virtually ensure the elimination of any prompt and effective review of unlawful detention authority—an anathema to our longstanding constitutional and legal principles.[11]

Rather than exacerbate current problems in the system, to the extent that Congress contemplates reforms, it should enact legislation that would enhance due process and judicial review of civil immigration detention decisions. All noncitizens who are civilly detained should have access to a hearing where the federal government must establish that their continued detention is justified. Decisions to continue noncitizens' civil immigration detention should be subject to robust judicial review.

Individualized review and strong procedural protections are the bedrock of due process in the civil immigration detention context. We hope that Congress will keep these principles in mind as it continues to examine this complex and important area of law.

Sincerely,

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[11] *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive detention, and it is in that context that its protections have been strongest.").

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Regional Representation in Washington

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23 May 2011

11/LG/116

Dear Chairman Gallegly and Ranking Member Lofgren:

As the Regional Representative of the Office of the United Nations High Commissioner for Refugees (UNHCR) in Washington, DC, I would like to express my serious concerns regarding proposed changes to United States law and policy that would further subject asylum seekers and other persons of concern to UNHCR to a risk of prolonged or indefinite administrative detention in this country. These proposed changes would not only violate the rights of those seeking protection in the United States, but would also be at odds with principles and obligations under international refugee and human rights law.

UNHCR is mandated by the United Nations General Assembly to provide international protection to refugees and to assist governments in providing permanent solutions to their problems. UNHCR has the duty of supervising the application of both the 1951 Convention Relating to the Status of Refugees (1951 Convention) and the 1967 Protocol Relating to the Status of Refugees (1967 Protocol). As you are aware, in 1968, the United States acceded to the 1967 Protocol, which incorporates by reference all the substantive provisions of the 1951 Convention. The United States Congress passed the 1980 Refugee Act with the explicit intention to bring the United States into compliance with, and give effect to, its international obligations under the Protocol and Convention. Among the responsibilities of UNHCR our mandate requires that we remain vigilant that individuals and families seeking international protection are not subject to arbitrary deprivations of their rights.

Hon. Elton Gallegly
Chairman
House Judiciary Subcommittee on
Immigration Policy and Enforcement
Committee on the Judiciary
Rayburn House Office Building
Washington, DC 20515

Hon. Zoe Lofgren
Ranking Member
House Judiciary Subcommittee on
Immigration Policy and Enforcement
Committee on the Judiciary
Rayburn House Office Building
Washington, DC 20515

Detention can have a particularly severe and detrimental effect on refugees and asylum-seekers who are often traumatized from the experiences that prompted them to flee and seek protection elsewhere. Many of them have fled their country as a result of direct harm, threats of harm, or harm to family members or other loved ones. Detention can further traumatize them and create additional obstacles to their ability to participate fully in the preparation and presentation of their requests for asylum and related protection.

UNHCR maintains that the detention of refugees, asylum seekers, stateless persons and others of concern is inherently undesirable, and that there should be a presumption against their detention.[1] Rather, detention should only be used as a last resort, after an individualized determination of its necessity in a particular case, and then in only the least restrictive manner and for the least time necessary.[2] UNHCR fully recognizes and respects States' prerogative to ensure public safety within their borders. In exercising this authority in this context, however, any form of detention must be determined to be necessary, reasonable and proportional to the risk that a person represents. Critical to this process is an independent administrative or judicial review of any decision to detain,[3] promptly following the initial determination and, if detention is undertaken, on-going periodic independent review with release from custody as expeditious as possible.[4] This position is soundly based in the 1951 Convention and its 1967 Protocol, and it is consistent with other international human rights instruments.

In the case of refugees and asylum seekers, such a determination must consider that they were forced to flee their country of origin based on experienced or feared persecution. In the case stateless persons, such a determination must consider that they have no country to which they can return. In either case, obstacles beyond their control prohibit these individuals from being able to return their country of origin—a situation for which they must not be penalized. Nor does their status in and of itself justify the deprivation of their rights, prominent among which are the right to seek and enjoy asylum; the right to non-discrimination; and the right to liberty and security of person. As stated in a recent study commissioned by UNHCR on alternatives to detention:

> International law confirms that seeking asylum is not an unlawful act and, therefore, that one cannot be detained for the sole reason of being an asylum-seeker. In addition, there are specific international legal guarantees against penalization for illegal entry or stay, which would include penalties in the form of detention. Detention must therefore be used only as a last resort and only according to a justified purpose other than the status of being an asylum-seeker. Likewise, for *de jure* as well as *de facto* stateless persons, their lack of legal status or documentation means that they risk being held indefinitely, which is unlawful under international law. Statelessness cannot be a bar to release, and using the

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[1] United Nations High Commissioner for Refugees (UNHCR), Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, Detention of Asylum Seekers, Guideline 3 (February 1999) [UNHCR Detention Guidelines].

[2] UNHCR, Executive Committee Conclusion on Detention of Refugees and Asylum-Seekers (A/AC.96/688), para. 128 (1986); UNHCR Detention Guidelines, Guideline3 (February 1999).

[3] UNHCR Detention Guidelines, Guideline 5.

[4] UNHCR, "Detention of Asylum Seekers and Refugees: the Framework, the Problem and Recommended Practice," a Conference Room Paper for the Standing Committee, EC/49/SC/CRP.13 (4 June 1999).

> lack of any nationality as an automatic ground for detention would run afoul of non-discrimination principles.[5]

As such, laws that provide for the detention of refugees, asylum seekers, and stateless individuals for prolonged or indefinite periods of time are inconsistent with international refugee and human rights principles and obligations, including those embodied in the 1951 Convention and its 1967 Protocol. These violations are exacerbated if there is no meaningful, independent review of that detention. Moreover, giving the state the power to deprive someone of her liberty, potentially in perpetuity, simply on the basis of her status as a refugee, asylum seeker or stateless person is inconsistent with democratic values.

Pragmatically, UNHCR would also draw attention to the fact that immigration detention is an ineffective and costly tool for carrying out immigration enforcement policy. Recent UNHCR research globally on alternative to detention (ATD) models indicates that immigration detention is "an extremely blunt instrument" in terms of its effectiveness in deterring forms of irregular migration. This is particularly true in the context of asylum seekers and refugees, for whom "threats to life or freedom in countries of origin are likely to be a greater push factor than any disincentive created by detention policies in countries of destination."[6] UNHCR studied a range of ATD models around the world and concluded that overall, releasing from detention to ATD programs - such as payment of bond, orders of supervision, or release to community-based programs - is far more cost-effective for the government, yields high compliance rates, and substantially lessens the detrimental impact on an asylum seeking family or individual. Instead of expanding the authority to detain, governments like the United States would do well to more broadly implement the use of ATD arrangements.

The year 2011 marks the 60th anniversary of the 1951 Convention Relating to the Status of Refugees, and the 50th anniversary of the 1961 Convention on the Reduction of Statelessness. As part of the Commemorative Celebrations, UNHCR is requesting that States make pledges to reaffirm their commitment to enhancing the protection of all persons of concern to UNHCR protected by these instruments. To further this process, UNHCR has provided the United States Government a number of proposed pledges to consider undertaking in fulfillment of its renewed commitment. One proposal is that the U.S. pledge to reaffirm its "commitment to providing meaningful protection to refugees, asylum seekers, and other persons of concern … by ensuring that domestic legislation, policy, practices and procedures comply with the obligations set forth under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees . . . ."[7]

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[5] UNHCR, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, p. iv, April 2011, PPLA/2011/01.Rev.1, *available at*: http://www.unhcr.org/refworld/docid/4dc935fd2.html.

[6] *Id.*, p. 2.

[7] UNHCR, *Proposed Pledges for the United States to Enhance Protection for Refugees, Asylum Seekers, Stateless Individuals and All Persons of Concern to the United Nations High Commissioner for Refugees*, January 2011, *available at*: http://www.unhcrwashington.org/files/row_pledges.pdf. An additional proposed pledge specifically addresses the issue of immigration detention in the United States: "Pledge to ensure that, in compliance with Article 31 of the 1951 Convention and Article I of the 1967 Protocol, the detention of refugees, asylum seekers, and other persons of concern to UNHCR is neither automatic nor unduly prolonged and occurs only when determined to be necessary; and that conditions of detention comply with basic standards and norms of treatment set forth in international human rights instruments applicable to detainees."

UNHCR

Recognizing the concerns raised in this letter and refraining from implementing the proposed changes in the detention of asylum-seekers, stateless individuals and others of concern would be a significant step in the fulfilment of this pledge. UNHCR respectfully submits these comments in this context and calls on the United States to continue its international leadership in protecting those subject to political, religious, and other forms of persecution, and to reject proposals that would subject asylum seekers, refugees and stateless persons to prolonged or indefinite detention.

Yours sincerely,

Vincent Cochetel
Regional Representative

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May 23, 2011

Congressman Lamar Smith
Chairman, House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

Congressman John Conyers, Jr.
Ranking Member, House Committee on the Judiciary
B-351 Rayburn House Office Building
Washington, DC 20515

Re: Subcommittee on Immigration Policy and Enforcement Hearing on May 24, 2011, "H.R. X, Providing for the Detention of Dangerous Aliens"

Dear Chairman Smith and Ranking Member Conyers:

CABA is a nonpartisan, non-profit, voluntary bar association in the State of Florida with 2,000 members. Founded in 1974, CABA has a membership that includes judges, lawyers, and law students of Cuban and Cuban-American descent, as well as those who are not of Cuban descent, but are interested in issues affecting the Cuban community.

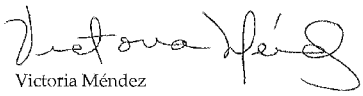
In 2004, CABA signed an amicus brief submitted to the Supreme Court in support of the immigrant detainee in the case that became Clark v. Martinez, 543 U.S. 371 (2005). Our brief emphasized that: "Indefinite detention . . . involves a heightened intrusion of a person's liberty, and thus is justified only in the rarest of circumstances." Such detention can only take place "in narrow circumstances, such as where there is an identifiable need to protect the community or where a person presents a dangerous mental illness," and then only with "basic procedural safeguards, such as the right to counsel, a neutral decision maker, the availability of judicial

review, the right to confront adverse evidence, a clear standard of proof, and the placement of the burden of proof on the government."

We objected to the Cuban Review Plan, "an administrative scheme that fails to provide even minimal due process protections and routinely produces arbitrary outcomes. As a result, many Mariel Cubans who would otherwise be free from custody remain in immigration imprisonment serving potential life sentences." We gave the example of "Eduardo Dominguez, who came to the United States during the Mariel boatlift [and] was detained in a federal prison for six years despite repeated recommendations of release." In its decision, the Court vindicated our position that it should adhere to *Zadvydas v. Davis*, 533 U.S. 678 (2001), in order to ensure that the rule of law "will prevent the arbitrary and indefinite detention of Mariel Cubans at the virtually unfettered discretion of an administrative official."

As the House Judiciary Committee considers "Providing for the Detention of Dangerous Aliens," CABA urges that the Committee keep at the foreground of its deliberations the principle that, as the Supreme Court recognized in *Zadvydas*, "freedom from physical restraint is a fundamental liberty interest protected by the Due Process Clause." 533 U.S. at 690. Based on our particular interest and ongoing involvement in the experiences of Mariel Cubans, CABA is dedicated to the importance of adhering to established principles in this field of law.

Thank you for your consideration.



Victoria Méndez
CABA President

May 23, 2011

Hon. Elton Gallegly
Chairman
House Judiciary Subcommittee on
Immigration Policy and Enforcement
Committee on the Judiciary
Rayburn House Office Building
Washington, DC 20515

Hon. Zoe Lofgren
Ranking Member
House Judiciary Subcommittee on
Immigration Policy and Enforcement
Committee on the Judiciary
Rayburn House Office Building
Washington, DC 20515

Dear Chairman Gallegly and Ranking Member Lofgren:

On behalf of the undersigned community organizations serving Southeast Asian American and refugee constituents, we urge Congress to oppose and reject all legislative proposals that would erode the Supreme Court's rulings and allow for the prolonged or indefinite detention of immigrants. As a refugee community that has endured and survived war and genocide, we recognize that such proposals not only threaten and erode the constitutional rights of individuals, but also violate their basic human rights.

The Supreme Court's rulings in *Zavydas V. Davis* and subsequent cases on prolonged and indefinite detention uphold the basic rights of individuals like Sam (not his real name). At the age of 9, Sam and his mother were resettled in the U.S. as refugees fleeing persecution from Cambodia in the aftermath of the Khmer Rouge genocide. His family was resettled in an impoverished community in Philadelphia, Pennsylvania where he grew up. Thirteen years ago, at the age of 21, Sam was involved in a neighborhood fight resulting in a conviction that made him deportable. He served all of his sentence in a correctional facility. Sam was placed in deportation proceedings but because ICE was unable to obtain the proper documents for his

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deportation, Sam was released on supervision in accordance with the Supreme Court rulings on indefinite detention and reported regularly to ICE. Since his release, for 7 years, Sam has been an outstanding resident and contributing member of his community. He started his own thriving small business as a barber, became a role model and advocate for youth in his community through volunteer work, and is the proud father of two young children.

Provisions to roll back important rulings like *Zadvydas* would not only be unconstitutional, it would unnecessarily warehouse men and women who are fully rehabilitated, like Sam, and who should be with their families and communities rather than using up tax dollars through long term detention. Had it not been for successful Supreme Court rulings against prolonged and indefinite detention, Sam would have been unnecessarily detained for 7 years until his deportation was definite. In those years, he would not have been able to reclaim his life with his family or contribute to the community through his volunteerism and small business. Sam's story reveals that alternatives to detention work and that blanket policies to indefinitely detain or prolong the detention of immigrants fail to consider the individual and totality of circumstances faced by those affected.

Sam also faced unnecessary and unfair detention, however, in September 2010 when ICE, without notice, detained him as they again pursued travel documents to deport him. He was detained for 8 more months and was denied all opportunities for release, even to close out his business, before he was finally deported to the very country he fled as a child refugee. There was no reason to precipitously bring him back into detention if his removal was still many months away. This action continues to have a profound impact on his U.S. citizen children and family emotionally and financially as they have lost their caretaker, the business he owned, and had to foreclose on their home.

Detention and deportation profoundly affect American families and immigration courts are already limited in their ability to take into consideration the breadth of impact detention and deportation has on the family and community. Eliminating one of the few protections available to immigrants facing detention will only further erode an already broken immigration system.

We urge Congress to value and uphold the rights of individuals and reject proposals that seek to eliminate the Supreme Court rulings against prolonged and indefinite detention. We stand ready to work with you to ensure sound immigration policies can effectively and humanely be implemented.

Sincerely,

Doua Thor, Executive Director
Southeast Asia Resource Action Center

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In partnership with the following organizations:

**Cambodian Association of Greater Philadelphia**
Philadelphia, PA

**CAPI USA**
Minneapolis, MN

**Deported Diaspora**
Boston, MA

**Family Unity Network**
Boston, MA

**Hmong American Partnership**
St. Paul, MN

**Khmer Health Advocates**
West Hartford, CT

**Lao Assistance Center of Minnesota**
Minneapolis, MN

**One Love Movement**
Philadelphia, PA

**Providence Youth Student Movement**
Providence, RI

**Vietnamese Young Leaders Association of Louisiana**
New Orleans, LA

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Grace Meng, *Researcher*
Alison Parker, *Director*
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Michele Alexander, *Deputy Executive Director, Development and Global Initiatives*
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Iain Levine, *Deputy Executive Director, Program*
Chuck Lustig, *Deputy Executive Director, Operations*
Walid Ayoub, *Information Technology Director*
Emma Daly, *Communications Director*
Barbara Guglielmo, *Finance and Administrative Director*
Peggy Hicks, *Global Advocacy Director*
Babatunde Olugboji, *Deputy Program Director*
Dinah PoKempner, *General Counsel*
Tom Porteous, *Deputy Program Director*
James Ross, *Legal & Policy Director*
Joe Saunders, *Deputy Program Director*
James F. Hoge, Jr., *Chair*

HUMAN RIGHTS WATCH

www.hrw.org

May 23, 2011

The Honorable Elton Gallegly
Chairman
House Judiciary Subcommittee on
Immigration Policy and Enforcement
Committee on the Judiciary
2309 Rayburn House Office Building
Washington, DC 20515

The Honorable Zoe Lofgren
Ranking Member
House Judiciary Subcommittee on
Immigration Policy and Enforcement
Committee on the Judiciary
1401 Longworth House Office Building
Washington, DC 20515

Dear Chairman Gallegly and Ranking Member Lofgren:

Human Rights Watch writes with concern about legislative proposals that seek to give the Department of Homeland Security expanded powers to indefinitely detain immigrants in the United States.

Human Rights Watch is an independent organization dedicated to promoting and protecting human rights in some 90 countries around the globe. We work to secure increased recognition of and respect for internationally recognized human rights in the United States, focusing on issues arising from excessive punishment and detention, insufficient access to due process, and discrimination.

We believe that a proposed scheme of indefinite detention of immigrants violates constitutional guarantees of due process and US obligations under international human rights law.

Both US domestic law and international human rights law affirm the right to liberty and the need for effective safeguards against arbitrary and indefinite detention.[1]

[1] United States Constitution, Fifth Amendment. The Due Process Clause of the Fifth Amendment safeguards against arbitrary detention, as recognized by the US Supreme Court: "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects." *Zadvydas v. Davis*, Supreme Court of the United States, 533 US 678 (2001). International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, ratified by the United States on June 8, 1992, art. 9(1). "No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law;" ICCPR, art. 9(4). "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."

The prohibition on arbitrary detention in US law applies to the detention of immigrants.[2] In *Zadvydas v. Davis*, the US Supreme Court discussed the likely unconstitutionality of a statute that permitted the indefinite detention of immigrants.[3] The Court discussed the non-punitive, civil nature of immigration detention, which serves to aid in the process of deportation. However, if the purpose of the detention disappears, so does the right to detain.[4] That is to say, once deportation is no longer an option, immigration detention serves no reasonable purpose and becomes arbitrary.[5]

The prohibition against arbitrary detention in international human rights law extends to immigration detention.[6] The International Covenant on Civil and Political Rights (ICCPR), binding law in the United States since 1992, provides that "[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention."[7] The Human Rights Committee, the international expert body that monitors state compliance with the ICCPR, has applied the prohibition to the situation of detained immigrants, and has concluded that immigration detention becomes arbitrary "if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of *proportionality* becomes relevant in this context."[8] This means that immigration detention becomes arbitrary when the governmental purpose of detention (such as securing an individual's presence for deportation) is no longer present.

Whether detention is arbitrary also requires determining, if the length of the detention is defined or predictable.[9] The need for predictability in any detention has been repeatedly stressed by the United Nations Working Group on Arbitrary Detention, which in a document laying out principles to protect detained immigrants, stated that any detention term must have a "maximum period" set by law and not be of "unlimited or of excessive length."[10] The Working Group has also stated that, "[g]rounds for detention must be clearly and exhaustively defined and the legality of detention must be open for challenge before a court and regular review within fixed time limits."[11]

The principle that detention of immigrants is invalid and arbitrary once the purpose of detention disappears is found in European human rights law as well. In the *Kadzoev* case,

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[2] *Zadvydas v. Davis*, Supreme Court of the United States, 533 US 678 (2001), http://supreme.justia.com/us/533/678/case.html (accessed May 20, 2011).
[3] *Zadvydas*, 690.
[4] The US Supreme Court has stated that "[a]t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson v. Indiana*, Supreme Court of the United States, 406 US 715, 738 (1972), http://supreme.justia.com/us/406/715 (accessed May 23, 2011).
[5] Human Rights Committee, General Comment No. 8, The Right to Liberty and Security of Persons, U.N. Doc. HRI/GEN/1/Rev.1 (1982), para. 1. "Paragraph 1 is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc." The UN Human Rights Committee is an independent expert body that monitors state compliance with the ICCPR and provides authoritative interpretation of the covenant.
[6] ICCPR, art. 9(1).
[7] *A v. Australia*, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993, April 30, 1997, para. 9.2 (emphasis added).
[8] UN Human Rights Committee, Communication No. 458/1991, A. W. Mukong v. Cameroon, U.N. Doc. CCPR/C/51/D/458/1991 (1994), para. 9.8. "'[A]rbitrariness' is not to be equated with 'against the law,' but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law."
[10] UN Commission on Human Rights Working Group on Arbitrary Detention, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment regarding the situation of immigrants and asylum seekers, U.N. Doc. E/CN.4/2000/4/Annex 2 (1999), principle 7
[11] UN Human Rights Council, Report of the Working Group on Arbitrary Detention, U.N. Doc. A/HRC/10/21, para. 67.

the Court of Justice of the European Union stated that "detention ceases to be justified and the person concerned must be released immediately when it appears that, for legal or other considerations, a reasonable prospect of removal no longer exists."[12] The European Court of Human Rights found that detention of immigrants for purposes of aiding deportation was only allowable if there were "realistic prospects of expulsion."[13]

Certain governments in South America have also limited the detention of immigrants who have been ordered deported. In Argentina, for example, the law prohibits the detention of a non-citizen under a final order of deportation beyond 45 days.[14] After just 15 days of detention, the government must provide a detailed report to the courts justifying the extended detention every 10 days, up to a maximum of 45 days. In Brazil, the term of detention after a final order of deportation is issued is 60 days, renewable once for another 60-day period. After that, the detainee must be released and be placed under supervision.[15]

The US Congress should not seek to adopt legislation counter to the US Supreme Court, human rights laws binding on the United States, and a growing international consensus that indefinite detention of immigrants is contrary to fundamental human rights principles. Any legislative proposal that allows for the indefinite detention of immigrants, extended in intervals at the whim of a certifying government official, fails the prohibition against arbitrary detention.

Should detention no longer serve to aid in deportation, there is no justifiable rationale for allowing indefinite detention in the context of immigration detention. Immigration detention is not punitive. Public safety concerns should be addressed in the criminal justice system, with its concomitant protections. Any proposals to do otherwise neglect the clear language of the Constitution and international human rights obligations.

Sincerely,

Antonio M. Ginatta
Advocacy Director, US Program
Human Rights Watch

[12] European Union Agency for Fundamental Rights, "Detention of third-country nationals in return procedures," November 2010, http://www.fra.europa.eu/fraWebsite/attachments/FRA-report-detention-december-2010_EN.pdf (accessed May 20, 2011), p.34.
[13] Ibid.
[14] Decreto 616/2010, Publicado en B.O. del 6/05/2010, Reglamentación de la Ley de Migraciones Nº 25.871 y sus modificatorias, http://www.gema.com.ar/decreto616.html (accessed May 23, 2011), art. 70.
[15] Law 6815/80 Foreigner Statute, http://www.planalto.gov.br/ccivil_03/Leis/L6964.htm#art2 (accessed May 23, 2011), art. 61, art. 73.

May 23, 2011

Hon. Elton Gallegly
Chairman
House Judiciary Subcommittee on
Immigration Policy and Enforcement
Committee on the Judiciary
Rayburn House Office Building
Washington, DC 20515

Hon. Zoe Lofgren
Ranking Member
House Judiciary Subcommittee on
Immigration Policy and Enforcement
Committee on the Judiciary
Rayburn House Office Building
Washington, DC 20515

**Re: Indefinite Detention Violates American Values and Human Rights**

Dear Chairman Gallegly and Ranking Member Lofgren,

We, the undersigned organizations who work to promote fair, just, and comprehensive immigration reform, urge Congress to reject proposals that would lead to indefinite and prolonged detention of non-citizens in violation of fundamental principles of due process and justice. Excessive detentions are also a financial drain that our nation can ill afford.

Speaking first to the legal issues, the Constitution guarantees due process for all people in this country, not just U.S. citizens. Indeed, it is undisputed that our Constitution guarantees due process and judicial review to individuals who are detained by the government. In addition, the United States Supreme Court has confirmed that immigration detention raises strong due process concerns, especially when used for lengthy durations. See *Demore v. Kim*, 538 U.S. 510 (2003) (upholding the constitutionality of mandatory detention but only for "the brief period necessary for [completing] removal proceedings"—a period that typically "lasts roughly a month and a half in the vast majority of cases…"); *Zadvydas v. Davis*, 533 U.S. 678 (2001) (sets a six month timeframe for the government to deport individuals with final orders of removal; if removal is not complete after that period has elapsed, the government bears the burden to show why continued detention is necessary).

Since 2001, a growing consensus of courts has found mandatory detention unconstitutional when an individual contests removability, especially when that detention is not brief.

Sensible immigration enforcement strategies protect due process and human rights, and allocate fiscal resources wisely. Deprivation of liberty is an awesome government power that should be always subject to robust oversight and review. In the immigration context, detention has the narrow purpose of ensuring that individuals comply with the adjudication and removal processes. It is civil, not punitive, in nature. As such, immigration detention should be used only as a last resort when necessary to achieve compliance.

Additionally, detention comes at a great financial cost to our country. Under current practices, the Department of Homeland Security is detaining nearly 400,000 individuals each year at a cost of at least $122 per day, per detainee.

Instead of entertaining ideas to detain more and more non-citizens, at enormous fiscal cost and in violation of the due process principles that make America great, we urge Congress to focus its energy on a comprehensive immigration reform bill that respects the rights of everyone in the United States.

Sincerely,

America's Voice Education Fund
Farmworker Justice
Hebrew Immigrant Aid Society
Illinois Coalition for Immigrant and Refugee Rights
Immigrant Legal Advocacy Project
International Institute of the Bay Area
Justice Ministry Team of the Downtown Presbyterian Church
Leadership Conference on Civil and Human Rights
League of United Latin American Citizens
Massachusetts Immigrant and Refugee Advocacy Coalition
Migrant Support Services of Wayne County (NY)
National Council of La Raza
National Immigrant Justice Center
National Immigration Forum
National Latina Institute for Reproductive Health
New York Immigration Coalition
South Asian Americans Leading Together
U.S. Conference of Catholic Bishops
Wayne Action for Racial Equality
Women's Refugee Commission

May 23, 2011

Hon. Elton Gallegly
Chairman
House Judiciary Subcommittee on
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Committee on the Judiciary
Rayburn House Office Building
Washington, DC 20515

Hon. Zoe Lofgren
Ranking Member
House Judiciary Subcommittee on
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Committee on the Judiciary
Rayburn House Office Building
Washington, DC 20515

Re: Proposed Legislation That Would Expand Prolonged and Indefinite Immigration Detention

Dear Chairman Gallegly and Ranking Member Lofgren:

We write in reference to the Subcommittee's upcoming hearing on legislation that would overturn limitations imposed by the Supreme Court on the extended and unnecessary detention of immigrants. Based on our 25 years of expertise in detention issues, we urge the Subcommittee to reject this dangerous and inhumane proposal without delay.

Numerous reports by government agencies and nongovernmental organizations have detailed the injustices in the current immigration detention system.[1] The proposed legislation would increase those injustices. Congress should not curtail immigration judges' authority to make detention decisions. If Congress entrusts Immigration Judges with the authority to permit individuals to enter or remain in the United States as asylees or permanent residents – to be our neighbors and co-workers and our children's classmates – it follows that judges should also have the discretion to decide if detention is appropriate. In our experience, immigration judges make detention decisions largely based on whether a noncitizen is likely to ultimately prevail; for individuals ultimately granted relief, a six to twelve month detention is damaging to the individual, to the nation's budget, and to our commitment to fairness and justice.

Heartland Alliance's National Immigrant Justice Center (NIJC) is a Chicago-based, non-governmental organization dedicated to safeguarding the rights of noncitizens, including immigrants, refugees, victims of human trafficking, unaccompanied minors, and asylum seekers. NIJC's Detention Project provides legal advice to hundreds of detained immigrants each month and represents dozens of detained immigrants in immigration court, before the Board of

[1] *See, for example,* http://bit.ly/d2OOeU.

Immigration Appeals, and in federal court. NIJC staff, *pro bono* attorneys and volunteers travel hundreds of miles each month to provide the only legal orientation presentations available in remote detention facilities. In our statement, we will highlight the case stories of five clients, whose experiences in detention exemplify the lengthy and unnecessary detention suffered by many immigrants each day.

**Refugee, Translator for U.S. Military in Iraq, Detained for Eleven Months**

In 1997, NIJC client Louie Al-Bareh came to the United States as a political refugee from Iraq. He became a lawful permanent resident (LPR) several years later. In 2005, he used his language skills to work as a translator for the United States Army in Iraq. After a wire fraud conviction, the Department of Homeland Security (DHS) sought to terminate his LPR status and deport him to Iraq.

During these proceedings, DHS detained Mr. Al-Bareh. An immigration judge terminated Mr. Al-Bareh's lawful permanent residence but, based on a finding that he was more likely than not to face persecution in Iraq due to his work for the U.S. Army, the judge granted withholding of removal. Despite the grant of withholding of removal and the fact that there was no likelihood of removal, the government continued to detain Mr. Al-Bareh during the removal period, and considered him subject to procedures for release pursuant to *Zadvydas*.

After nearly a year in detention, DHS placed Mr. Al-Bareh on an order of supervision three years ago. Today, he has a steady job, does not have an arrest record and has complied with the requirements of his immigration supervision.

**Estimated Cost of Detention: $40,870**[2]

**Long-time Lawful Permanent Resident, Father of Two U.S. Citizen Children, Detained for Five Years**

> "I cannot understand why I should have been detained for five years and suffer as much as I did in a country like this, just because I exercised my rights to challenge my deportation." – Carlyle Dale

Carlyle Dale, a Jamaican citizen, entered the United States in 1971 and became a lawful permanent resident in 1977. He married and had two children in the United States. He studied and worked in various industries until 2000, when he was charged with attempted aggravated assault, stemming from an altercation. In 2005, after completing his parole, DHS sought to terminate his LPR status, alleging that his crime was an "aggravated felony."

[2] DHS estimates that immigration detention costs $122 per individual per day. *See* Transcript of House Appropriations Subcommittee on Homeland Security Hearing on the Proposed Fiscal 2012 Appropriations for Immigration and Customs Enforcement, March 11, 2011, statement of ICE Director John Morton, available on-line at http://bit.ly/jCF6gr.

During these proceedings – which lasted more than five years – DHS detained Mr. Dale. He appeared in the proceedings without counsel, where he disputed DHS's characterization of his conviction. In June 2010, in his second appeal to the Fifth Circuit Court of Appeals – and now with *pro bono* assistance from Kirkland & Ellis and NIJC attorneys – the court found that Mr. Dale's conviction did not meet the definition of an "aggravated felony," and remanded his case to the Board of Immigration Appeals. In June 2010, after extraordinary attempts by legal counsel to obtain medical attention for him, including appeals to the White House, a petition to the United Nations Working Group on Arbitrary Detention, and an article in the *New York Times,* DHS placed Mr. Dale in a supervised release program.

Since his release, Mr. Dale has lived in Florida with his son's family and he is actively involved in community life. He has complied with the conditions and requirements of his supervised release with DHS.

**Estimated Cost of Detention: $222, 650**

**Long-time Lawful Permanent Resident, Detained for Four Years**

Domingo Cueto Estrada, a Mexican national, became a LPR in 1990. Fifteen years later, in January 2005, following a probation violation for a controlled substance conviction, DHS unexpectedly detained Mr. Cueto Estrada and prepared to remove him to Mexico. Mr. Cueto Estrada then learned – for the first time – that the United States Citizenship & Immigration Service (USCIS, formerly the Immigration & Naturalization Service or INS) claimed to have rescinded his LPR status almost a decade earlier. Based on this alleged rescission of his status, DHS issued a deportation order.

Mr. Cueto Estrada, who had never received notice that USCIS had rescinded his immigration status, contested DHS's deportation order. Mr. Cueto Estrada maintained that (1) USCIS had not rescinded his status and (2) his conviction did not constitute an aggravated felony. For the following five years, Mr. Cueto Estrada challenged the agency's determination. He twice appealed DHS' deportation order – initially without counsel, and then with *pro bono* assistance from attorneys at Sidley Austin and NIJC – and he prevailed in both appeals.

Although his case is not settled, in May 2010 – after more than 4 years in detention – DHS placed Mr. Cueto Estrada on an order of supervision, which allows him to live with his family in the Chicago suburbs. Without family in Mexico, Mr. Cueto Estrada has reunited with a sister battling a serious medical illness, and has committed himself to being a productive member of society by maintaining steady employment. He has had no further encounters with the law and has complied with all conditions and requirements of his supervised release with DHS.

**Estimated Cost of Detention: $178,120**

**Asylum Seeker, Detained More than Two Years**

Ms. Roome Joseph, a native of Pakistan, entered the United States in 1998 as a minor with her mother and siblings and applied for asylum based on fear of persecution because of her Christian

beliefs. DHS denied the family's asylum application. Ms. Joseph was subsequently convicted of two theft offenses, leading to her detention by DHS, which sought to deport her to Pakistan. Ms. Joseph feared returning to Pakistan, where her family, who had been abusive to her in the past, threatened to force her into an arranged marriage.

Based on this fear, Ms. Joseph filed a motion to reopen her case to renew her request for asylum. Represented *pro bono* by attorneys from Mayer Brown and NIJC, Ms. Joseph appealed her case to the Seventh Circuit Court of Appeals, which twice granted petitions for review in her case.

DHS detained Ms. Joseph for two years. Although her case is not completed, DHS has now placed Ms. Joseph on an order of supervision. Ms. Joseph has complied with the requirements and conditions of her supervised release. She has attended all immigration court hearings and has had no further encounters with the authorities.

**Estimated Cost of Detention: $89,160**

**Wife of U.S. Citizen, Mother of a Six-Year-Old Daughter, Detained for More Than One Year**

> "…[I]t seems that Atunnise's 'no' answer to one confusing bulletpoint is the reason she has been detained in a cell for two years."[3]
>
> – Judge Rovner, Seventh Circuit Court of Appeals

Christiana Atunnise, a native of Nigeria, arrived in Chicago in 2006 with her six-year-old daughter to join her husband, a U.S. citizen. Although DHS had issued Ms. Atunnise an entry visa, DHS detained her and her daughter upon arrival at Chicago's O'Hare Airport. DHS charged that she should have sought a waiver because she had previously admitted a desperate attempt to enter the U.S. by fraud to be with her husband; and argued that the waiver could only have been sought while she was abroad.

While DHS released her six-year-old daughter to the custody of Ms. Atunnise's husband, it detained Ms. Atunnise during the removal proceedings, and Ms. Atunnise was initially unsuccessful in the immigration courts. With *pro bono* attorneys from Jenner & Block and NIJC, Ms. Atunnise appealed to the Seventh Circuit Court of Appeals, which found in her favor and remanded her case to allow her to apply for adjustment of status.

In 2007, while her federal appeal was pending, DHS placed Ms. Atunnise on an order of supervision, after keeping her separated from her family for over a year. Since then, she has been raising her daughter and caring for her husband, as her family tries to recover from the effects of that horrible time. Ms. Atunnise's daughter suffered anxiety and depression and Ms. Atunnise became clinically depressed because she was separated from her family. Now Ms. Atunnise

[3] In fact, the government had released Ms. Atunnise during the Court of Appeals litigation, after detaining her for more than one year; but it had not informed the Court of Appeals.

volunteers at her daughter's school and at her church, where she participates in the choir. Ms. Atunnise has complied with all obligations of her order of supervision.

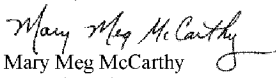
**Estimated Cost of Detention: $44,530**

**Recommendation**

Louie Al-Bareh, Carlyle Dale, Domingo Cueto Estrada, Roome Joseph, and Christiana Atunnise are representative of the fathers, mothers, wives, and grandfathers that NIJC attorneys meet in immigration detention each day. The scale of unnecessary and prolonged detention is unprecedented in this country's history and unmatched in any other industrialized country. The legislation before this Subcommittee would directly conflict with our international human rights obligations, would harm vulnerable immigrants including asylum seekers, and would unnecessarily waste government resources. We urge the Subcommittee to reject this legislation outright and without delay.

Thank you for the opportunity to submit this statement to the Subcommittee. If you need any further information, please don't hesitate to contact me.

Sincerely,



Mary Meg McCarthy
Executive Director
National Immigrant Justice Center
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(312) 660-1351

May 23, 2011

Congressman Lamar Smith
Chairman, House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

Congressman John Conyers, Jr.
Ranking Member, House Committee on the Judiciary
B-351 Rayburn House Office Building
Washington, DC 20515

Re: Statement of the Constitution Project Submitted to Subcommittee on Immigration Policy and Enforcement of House Judiciary Committee re Hearing on May 24, 2011, "H.R. X, Providing for the Detention of Dangerous Aliens"

Dear Chairman Smith and Ranking Member Conyers:

The Constitution Project ("TCP") submits this letter to assist Congress as it considers possible reforms to the immigration system. Recent years have seen a dramatic increase in the number of non-citizens detained by U.S. immigration officials. Moreover, non-citizens facing removal are subject to ever-lengthening detention periods while their cases are processed, frequently with very limited procedural and due process safeguards and often under harsh circumstances and conditions. In addition, non-citizens subject to removal proceedings frequently have little or no access to legal representation in these proceedings. We urge Congress not to enact legislation that would expand mandatory detention requirements and prolong the length of detentions, or deprive non-citizens seeking to enter this country of important due process rights. Further, we also urge Congress to use its oversight authority to encourage and facilitate reforms by the Department of Justice (DOJ) and the Department of Homeland Security (DHS) that would ensure that we adequately protect both our nation's borders as well as the rights of the individuals who seek asylum on our shores.

TCP is a bipartisan organization that promotes and defends constitutional safeguards. In 2009, TCP's Liberty and Security Committee, comprised of an ideologically diverse group of prominent Americans, issued a report entitled *Recommendations for Reforming our Immigration Detention System and Promoting Access to Counsel in Immigration Proceedings*,[1] which highlighted its concerns about the increasing reliance on and length of immigration detention and the limited access to counsel afforded to non-citizens facing removal. In this report, the Committee makes a number of specific recommendations aimed at reforming the immigration detention system and at improving access to counsel for non-citizens in removal proceedings. Notably, many of these reforms would not only enhance the currently limited constitutional rights afforded to non-citizens subject to removal proceedings, but would also help ease the

[1] This report is available at http://www.constitutionproject.org/pdf/359.pdf.

backlog faced by the immigration courts by making the process more efficient, thus allowing for the faster removal of those non-citizens who should be required to exit the country.

The increasing use of detention places a significant strain on government resources and an economic strain on non-citizens and their families. The custody operations budget of U.S. Immigration and Customs Enforcement ("ICE") will undoubtedly need to be increased if Congress expands the use of mandatory and prolonged detention, further overburdening U.S. taxpayers.

TCP urges Congress that any efforts to expand the use of mandatory and prolonged detention would only compound the problems highlighted in our 2009 report. Similarly, TCP opposes legislation intended to further deprive non-citizens of due process rights. In fact, we urge Congress to amend the immigration laws to make them reflect the greater constitutional rights enjoyed by Lawful Permanent Residents (LPRs). This could be achieved by enacting a hardship waiver from mandatory detention for which only LPRs would be eligible. Several factors should be relevant to the question whether an LPR is entitled to a hardship waiver, including: (1) whether the LPR's criminal record contains only minor offenses; (2) whether the LPR has lived in the United States for a significant period of time; (3) whether the LPR has extenuating health circumstances; and (4) whether the LPR has significant ties to the community, including family ties.

Additionally, TCP urges Congress to use its oversight authority to encourage DHS and DOJ to improve the immigration detention system as follows:

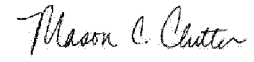
- DHS should amend its regulations to require that "credible fear" interviews of non-citizens seeking relief from removal (e.g. asylum) take place no later than two weeks after apprehension. Although the Committee supports existing DHS practices that require a 48-hour "cooling off" period between a non-citizen's arrival and his or her credible fear interview, it is concerned that too many applicants are subject to long periods of detention while they await their interviews.
- Immigration and Customs Enforcement ("ICE") should promulgate regulations governing the circumstances under which non-citizens who have received a positive credible fear determination may be paroled pending their hearings before an immigration judge. Non-citizens should be presumed eligible for parole if they can establish their identities and present credible evidence that they do not pose a risk of flight or a danger to the community.
- All non-citizens with positive credible fear determinations who have been denied parole should have the right to a prompt appeal. Currently, this right of appeal is available only to some groups of non-citizens, such as those apprehended near a land border, and not to other groups, such as those arriving by air who have been apprehended at an airport. The Committee sees no rational reason for these types of distinctions. In addition, during the appeal process, administrative decisionmakers should be encouraged to consider and implement alternatives to detention, such as home visits, self-reporting by telephone, or, where appropriate, electronic monitoring devices.
- DHS should undertake to clarify its expedited removal regulations to make sure that they are applied in an even-handed way. Currently, non-citizens intercepted within 100 air miles of the land borders of the United States may be subject to expedited removal if they

- DHS should consider rigorous in-home detention as an alternative to custodial detention in a facility for those mandatory detainees who do not present a danger to the community and who do not pose a flight risk.
- DHS should release "mandatory hold" detainees where removal is impossible because the non-citizen's country of origin does not have a valid repatriation agreement with the United States and there are no other legitimate grounds for detention unrelated to immigration status. It serves no legitimate policy objective to detain non-citizens during removal proceedings who will have to be released whether or not they are deemed removable.
- DHS should reform its legal standard for determining whether or not a non-citizen qualifies as a "criminal alien" subject to mandatory detention. Currently, in order to avoid mandatory detention, non-citizens must show that the government is "substantially unlikely" to prove that an underlying conviction makes the non-citizen subject to mandatory detention. In the Committee's view, this standard imposes too heavy a burden on non-citizens. Instead, non-citizens should be able to obtain relief from mandatory detention if they can "raise a substantial question of law or fact" regarding the basis of mandatory detention.
- DOJ and DHS should implement regulations to establish a maximum time limit between the initiation of removal proceedings and the date of a merits hearing before an immigration judge. Currently, there is no such maximum time limit, and many non-citizens are subject to detention for lengthy periods of time before they receive hearings on the merits of their cases.
- DHS should evaluate the Institutional Removal program to make sure that it complies with basic due process requirements and consider its expansion upon completion of this review. This program allows DHS to identify removable prisoners serving criminal sentences and to initiate removal proceedings against those prisoners while they are serving out their criminal sentences. While the Committee believes that with the proper protections in place, the Institutional Removal program is a valuable tool that works to the advantage of both the government and non-citizens, it is nonetheless concerned about reports of insufficient notice to detainees about upcoming hearings, denial of access to legal materials or assistance, as well as the atmospheric and logistical implications of these proceedings taking place in prisons. Therefore, we recommend that DHS establish safeguards to ensure that the program is conducted in a fair manner with full regard to the procedural rights afforded non-citizens during removal proceedings.

- DHS should implement its own Inspector General's recommendations regarding the monitoring of the cases of non-citizens subject to final orders of removal. Under current regulations, non-citizens who are detained following a final order of removal receive hearings ninety days and six months after the date of the final order of removal to determine whether further detention is warranted. Improved tracking of these cases is critical to ensuring non-citizens receive their ninety-day and six-month hearings in a timely fashion. DHS should also ensure that detainees have ready access to information about the status of their hearings. Finally, DHS should prioritize the securing of travel documents for non-citizens who would present a danger to the public or a national security threat.
- ICE should modify its standards used to determine whether further detention is warranted because of the possibility y that travel documents will be forthcoming. In conducting this analysis, ICE should pay attention to individualized factors. In many cases, repatriation of a specific individual to his or her country of origin may be impossible even though it is possible to repatriate others to that country. Additionally, ICE should issue guidance on what non-citizens need to do in order to demonstrate "cooperation" for purposes of their ninety-day and six-month reviews.
- ICE should implement an administrative complaint process for untimely six-month reviews in order to help ensure that the agency conducts these hearings in a timely manner.

The Constitution Project urges Congress to carefully consider the recommendations we have highlighted here and those detailed more fully in the Liberty and Security Committee's report.

Sincerely,



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**JOINT STATEMENT OF HUMAN RIGHTS ORGANIZATIONS:**

AMNESTY INTERNATIONAL USA
LAW OFFICE OF CHRISTOPHER NUGENT
POLITICAL ASYLUM/IMMIGRATION REPRESENTATION PROJECT, BOSTON
PENNSYLVANIA IMMIGRATION RESOURCE CENTER
SOUTH ASIAN AMERICANS LEADING TOGETHER (SAALT)
IMMIGRANT LAW CENTER OF MINNESOTA
NO MORE DEATHS
BORDER NETWORK FOR HUMAN RIGHTS
JESUIT SOCIAL RESEARCH INSTITUTE/LOYOLA UNIVERSITY NEW ORLEANS
AMERICA FOR ALL, HOUSTON OFFICE
CENTRAL AMERICAN RESOURCE CENTER (CRECEN)

BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES

COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON IMMIGRATION POLICY AND ENFORCEMENT

CONCERNING A BILL "KEEP OUR COMMUNITIES SAFE ACT OF 2011"

MAY 24, 2011

***"Freedom from imprisonment - from government custody, detention or other forms of physical restraint - lies at the heart of the liberty the [Due Process] clause protects."***

- *Zadvydas v. Davis*, 533 US 678, 690 (2001)

***"The [undocumented] person, without right to residence and without the right to work, had of course constantly to transgress the law. He was liable to jail sentences without ever committing a crime … Since he was the anomaly for which the general law did not provide, it was better for him to become an anomaly for which it did provide, that of the criminal."***

- Hannah Arendt, 1951

***"If you don't have enough evidence to charge someone criminally but you think he's illegal, we [ICE] can make him disappear."***

- James Pendergraph, Former Executive director of the ICE Office of State and Local Coordination, August 21, 2008[1]

[1] James Pendergraph, speaking at the Police Foundation National Conference, *The Role of Local Police: Striking a Balance between Immigration Enforcement and Civil Liberties*, Washington, D.C., as recorded by Sarnata Reynolds.

**I. INTRODUCTION**

Chairman Elton Gallegly, Ranking Member Zoe Lofgren, and distinguished Members of the Subcommittee:

We are national and international human rights organizations concerned that the House of Congress may consider legislation expanding permanently indefinite[2] and prolonged mandatory detention[3] of individuals in removal proceedings. The legislation proposed will extend detention without any meaningful right to challenge whether the detention is a necessary and proportionate measure consistent with human rights law and the United States constitution. Given that the United States is already in violation of its human rights obligations when depriving a person of her or his liberty in the immigration context,[4] passing legislation that makes the prospect of a custody review or a bond hearing almost impossible to pursue and qualify for is a dire proposition.

Immigrants come from every country in the world, and not surprisingly, countries in the Americas make up the majority. Because the current immigration system does not provide the tens of thousands of visas that are needed to meet the demand for qualified workers, and struggling workers from other countries are desperate to provide for their families and community, it is not surprising -- in fact it is to be expected -- that at times they will enter the U.S. without inspection. A variety of U.S. businesses and households, including agribusiness, meat and poultry processing

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[2] INA § 241.

[3] INA § 236(c).

[4] *International Covenant on Civil and Political Rights*, 1966 *Article 9(1)* (Everyone has the right to liberty and security of person); I*nternational Convention on the Protection of the Rights of All Migrant Workers and Members of their Family*, 1990 *Article 16(1)*; *General Comment No. 8 (1982) of the Human Rights Committee*, Humane treatment of persons deprived of their liberty (Article 9 of the ICCPR) *Article 1*; *Universal Declaration of Human Rights*, 1948 (Adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948), *Article 3* (Everyone has the right to life, liberty and security of person); *UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, 1988 (Adopted by General Assembly resolution 43/173 of 9 December 1988) ("Body of Principles on Detention"), *Principle 2* (Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose); *Declaration on the Human Rights of Individuals who are not nationals of the country in which they live* (Adopted by General Assembly resolution Adopted by General Assembly resolution 40/144 of 13 December 1985), *Article 5(1)* (Aliens shall enjoy, in accordance with domestic law and subject to the relevant international obligation of the State in which they are present, in particular the following rights: *(a)* The right to life and security of person; no alien shall be subjected to arbitrary arrest or detention; no alien shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established by law).

plants, construction, and working parents rely on this labor, and without papers, immigrants are at a heightened risk of exploitation, discrimination and abuse.[5] Rather than treating this phenomenon as a direct result of impractical and out-of-date immigration law, increasingly the U.S. government, media talking heads and the general public are blaming immigrants, and treating undocumented workers as criminals: arrested, put in excessive restraints, including handcuffs, belly chains and leg restraints, detained alongside individuals incarcerated for criminal offenses, stigmatized and criminalized even though they have no responsibility for the dysfunctional immigration system currently in place.

Detaining and deporting immigrants en masse, and often in violation of due process, may be delicious eye candy for anti-immigrant advocates, but it does nothing to promote or protect the human rights of immigrants, and U.S. citizens of color presumed to be immigrants, who are targeted for abuse in this country. Instead these cruel and dehumanizing actions promote an environment in which abuse and exploitation is justified because they "committed a crime" by crossing the border.[6]

As is well known, undocumented immigrants often work in degrading conditions and are frequently denied access to a variety of other human rights including healthcare, housing, livelihood, and access to justice. Individuals committing abuses against immigrants act with impunity because they know unauthorized immigrants are often reluctant to turn to the authorities, fearing the possibility of detention and deportation. Their fears are well-founded, as even immigrant victims of domestic violence have called the police only to be arrested, detained, locked up for months or years and then deported away from their children, who may end up in foster care or adopted without their parents' consent.[7] Despite the devastating consequences of detention to a severely traumatized individual or family, Representative Smith's legislation would subject almost all immigrants who entered irregularly within two years of apprehension to mandatory and/or prolonged detention, including unidentified victims of domestic violence, trafficking and slavery, regardless of the inherent coercion, violence and misrepresentation involved. Incredibly, at the same time Congress will appropriate funds to protect this very group from continued harm, consistent with the Violence Against Women Act (VAWA).[8] Sadly, although Representative Smith and many of his Republican colleagues voted for the enactment of this important legislation in

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[5] *See* Human Rights Watch, *Blood, Sweat and Fear: Workers' Rights in U.S. Meat and Poultry Plants,* 24 January 2005, available at http://www.hrw.org/en/reports/2005/01/24/blood-sweat-and-fear-0.

[6] *See Has Bill O'Reilly Stopped Lying About Arizona's Immigrant Crime Wave?*, Peter Hart, The Huffington Post, June 4, 2010, available at http://www.huffingtonpost.com/peter-hart/has-bill-oreilly-stopped_b_601164.html

[7] *More on Family Separation and Parental Rights*, Women's Refugee Commission (2011).

[8] *See* the Violence Against Women Act and legislative updates.

2000, they do not seem to be connecting the expansion of detention to a population to which they spare sympathy.[9]

More than 400,000 men, women and children will likely go through the U.S. immigration detention quagmire this year.[10] They will include asylum seekers, torture survivors, survivors of human trafficking, longtime lawful permanent residents, laborers, caretakers, breadwinners and the parents of U.S. citizen children. Because the federal government does not have sufficient facilities to incarcerate these individuals, it relies on approximately 350 state prison and county or local jails across the country to house individuals pending deportation proceedings.[11] Approximately 67 percent of immigration detainees are held in these facilities, while the remaining individuals are held in facilities operated by immigration authorities and private contractors.[12] The average cost of detaining an immigrant is at least $100 per person, per day,[13] adding up to millions per month, but the current debt crisis seems to be of no regard when the government is addressing undocumented immigrants from the south. Billions more will be spent to lock them up should this legislation pass because it makes almost every allegedly deportable immigrant in removal proceedings subject to prolonged mandatory detention, as long as they are apprehended within two years of their entry. At the same time, due to a financial shortage, teachers, firemen, nurses, government workers, and other essential professionals will lose their jobs and/or their pensions.

Alternatives to detention, which generally involve some form of reporting, are significantly cheaper, with some programs costing as little as $12 per day.[14] These alternatives have been shown to be effective with an estimated 91 percent appearance rate before the immigration courts.[15] Despite the effectiveness of these less expensive and less restrictive alternatives in ensuring compliance with immigration procedures,

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[9] Congressional Record, V. 146, Pt. 15, October 6, 2000 to October 12, 2000.

[10] U.S. Department of Homeland Security Annual Report, *Immigration Enforcement Actions: 2007*, December 2008, available at: http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_07.pdf.

[11] According to the Office of Detention and Policy Planning (ODPP), this number has dropped below 300 detention centers. AIUSA meeting with ODPP, notes on file.

[12] ICE currently detains individuals in seven privately contracted detention facilities, eight ICE-owned facilities and five Federal Bureau of Prison facilities. See Immigration and Customs Enforcement, *Detention Management Program*, 4 November 2008, available at: http://www.ice.gov/partners/dro/dmp.htm?searchstring=detention%20AND%20management%20AND%20control%20AND%20program.

[13] Detention Watch Network, *About the U.S. Detention and Deportation System*, available at: http://www.detentionwatchnetwork.org/aboutdetention.

[14] American Immigration Lawyers Association, *Alternatives to Detention Position Paper*, available at: http://www.aila.org/Content/default.aspx?docid=25874.

[15] Vera Institute of Justice, *Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program*, Volume I, Final Report to the Immigration and Naturalization Service, 1 August 2000, available at: http://www.vera.org/publication_pdf/aapfinal.pdf.

the use of immigration detention and electronic monitoring (as the go-to alternative) continue to rise at the expense of the U.S.' human rights obligations.

***The use of detention as a tool to combat unauthorized migration falls short of international human rights law, which contains a clear presumption against detention. Everyone has the right to liberty, freedom of movement, and not to be arbitrarily detained.***

**II. The Current and Extraordinary Power to Detain Immigrants:**

The Department of Homeland Security (DHS) has broad discretion to apprehend individuals it suspects of immigration violations. Individuals may be apprehended at the border, during employment or household raids, as a result of traffic stops by local police, or after having been convicted of a criminal offense. Detention quickly leads to removal proceedings to determine whether the person is actually deportable. Consistent with human rights law and standards, the decision to detain a person pending removal proceedings must be justified as a necessary and proportionate measure in each individual case, and should only be used as a measure of last resort subject to regular judicial review. Currently the U.S. is in woeful violation of these basic safeguards against the arbitrary deprivation of liberty, and if today's legislation becomes law, almost any safeguards against arbitrary detention would cease to exist, even when ICE detains a U.S. citizen by mistake, which does not happen infrequently.[16]

Three types of immigration detention exist before, during and after an order of removal. First, Immigration and Customs Enforcement (ICE), Customs and Border Patrol (CBP), or a local police officer deputized as an immigration officer can request that a detainer be placed on a person being processed at a jail for a traffic violation or another "offense."[17] Once the detainer is lodged, the jail may legally hold the individual for 48 hours without charge until CBP or ICE arrives to pick up the person.[18] Second, and generally closer to the U.S.' southwest border are "holding cells". These facilities look the same or worse than a detention center, but because the purported intent is that they be used for no longer than 48 hours, they are identified differently.[19] Finally, hundreds of thousands of people are subject to deprivations of liberty in county, state, private and government run jails during and after removal proceedings.[20] Current law

[16] Tyche Hendricks, *US citizens wrongly detained, deported by ICE* (July 27, 2009).
[17] The Department of Homeland Security is authorized to "deputize" local law enforcement, which means that the officer can conduct him or herself as an immigration officer, stopping, arresting, booking, and charging a person with an immigration violation.
[18] http://www.ice.gov/doclib/foia/secure_communities/securecommunitiesops93009.pdf
[19] AIUSA interview with CBP in Arizona, notes on file. *See also*, No More Deaths, *Crossing the Line* (2009).
[20] *See* National Immigration Forum, *Summaries of Recent Reports on Immigration Detention* (2010), available at www.immigrationforum.org/.../**2010**/DetentionReportSummaries.pdf.

provides ICE and immigration judges with some discretion to release individuals in specific circumstances, and while Representative Smith's proposed legislation also provides for some discretion to release individuals in a handful of cases, the legislation also ***expands grounds on which a person may be subject to mandatory and prolonged or indefinite detention, that already implicitly exist to authorize continued detention, providing more cover for ICE officers and judges who do not wish to release an individual, regardless of the circumstances.***

**III. The Indefinite Detention of Immigrants Post Removal Order:**

Rep. Smith's legislation would expand the government's ability to jail a person indefinitely after receiving a removal order, which would seem duplicative except to the extent that it provides new justifications for existing behavior. ***The difference, however, is that rather than relying on twisted reasoning, ICE now has the blessing of Congress to explicitly detain individuals indefinitely.*** Even after someone is presumptively eligible for release extensive justifications to hold continue detention are used regularly. There is no better example of why this legislation is unnecessary and the extensive damage it may do than to look at the experience of people who cannot exercise their right to nationality, the *de facto* stateless. For them, restricting the ability to challenge indefinite detention and then requiring that the overrun D.C. circuit court hear the case may essentially result in sentences to life without parole, not because the person committed a heinous crime, but because no State is willing to extend human rights protection.

*De facto* stateless people are those individuals who formally hold a nationality, but cannot access the basic rights of nationality such as the right to reenter their country. In the United States, the *de facto* stateless often find themselves stuck in legal limbo - the U.S. is unwilling to accept them; yet for legal or practical reasons, such as a lack of diplomatic ties or home countries refusing to recognize or accept their return, they end up indefinitely detained.

This section focuses on the *de facto* stateless withering away in U.S. immigration prisons. It demonstrates that the legislation contemplated today is superfluous, a direct violation of human rights, and as the Court found in *Zadvydas v. Davis,* likely unconstitutional. U.S. law and policy neither contemplated the existence of stateless people nor addressed their particular concerns in the context of immigration law. While this discussion is based primarily on statute, regulation and case law, it is informed by the dozens of *de facto* stateless people AIUSA has met and interviewed in detention around the U.S., whose voices speak clearly to the need for a fundamental shift in the automatic and indefinite detention of people who cannot be removed and should not be detained for life.

**Current law already provides the tools to detain indefinitely:**

Under U.S. law, once a person has been ordered removed, DHS has 90 days to detain and effect the person's removal.[21] If DHS does not remove the person within 90 days, s/he "shall be subject to supervision under regulations" prescribed by DHS.[22] By statute, release under supervision may be conditioned on certain requirements including periodic reporting, bond, and restrictions on activities and conduct.[23] By statute again (although it's not clear that the statute is constitutionally sound), DHS may detain beyond the 90-day statutory period in "special circumstances" if the person is inadmissible or removable due, generally, to crimes, national security issues, or if the person is deemed a danger to the community or a flight risk.[24] Today's legislation would expand these categories, making almost anyone with a removal order subject to indefinite detention, regardless of whether the person has any possibility of deportation to their home or another country.

Currently, regulations provide that if a person can demonstrate by clear and convincing evidence that s/he poses neither a danger nor a flight risk, s/he may be released.[25] However, the Supreme Court has ruled that regardless of the above regulations, once removal is no longer reasonably foreseeable, detention is no longer permitted.[26] If passed, the legislation today would circumvent this constitutional protection against indefinite detention by stripping the federal courts of habeas and direct review, making it almost impossible for a person to qualify for a custody review or bond hearing. Ironically, on the one hand the statute and regulations are already so cumbersome and discretionary that new legislation is unneeded to ensure this result. At the same time, the Supreme Court has already identified concern with the current crafting of post-removal detention, specifically because it may result in indefinite detention, so upon introduction today's legislation would also seem likely unconstitutional. ***The legislation, however, attempts to avoid this result by stripping the federal courts of jurisdiction to review cases of indefinite detention. In the United States, where liberty is the most fundamental of rights, this is an outrageous act.***

In a 2001 case, *Zadvydas v. Davis*,[27] the Supreme Court found that detention beyond the time that a person's removal was "reasonably foreseeable" would raise constitutional problems, and so the Court construed the relevant statute to implicitly include custody review as a protection against indefinite detention. The Court identified

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[21] INA § 241(a)(1)(A)
[22] *See* INA § 241(a)(3).
[23] *See* INA § 241(a)(3). *But see U.S. v. Witkovich*, 353 U.S. 194 (1957) (construing scope of authority conveyed by similar statutory language as limited to assuring appearance at removal).
[24] INA § 241(a)(6).
[25] 8 CFR § 241.4(d)(1), 1241.14.
[26] INA § 241(a)(6). *See also Clark v. Martinez*, 543 U.S. 371 (2005), *Tran v. Mukasey*, 515 F.3d 478 (5th Cir. 2008).
[27] 533 U.S. 678 (2001).

six months as a presumptively reasonable time to effect removal. In a 2005 case, *Clark v. Martinez,* the Court extended the reasoning of *Zadvydas*, finding that as a matter of statutory construction, inadmissible people (or people seeking entry into the United States) whose removal was not reasonably foreseeable must also be released after 6 months. Under a *Zadvydas* analysis, the person seeking release may have the initial burden to demonstrate that there is "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, but once this is demonstrated, the burden then shifts to the government to demonstrate that the removal remains reasonably foreseeable." While this may sound straightforward, it often results in indefinite, unreviewable detention - because DHS holds the keys to the jail cell.

Before *Zadvydas* and *Clark*, most individuals subject to indefinite detention originated from Cuba, Vietnam and a handful of other nations lacking diplomatic relations with the U.S.[28] Due to an exceptionally harsh reading of the statute, however, on January 25, 2009, people subject to indefinite detention originated from dozens of countries.[29] And despite the clear holdings of these two cases, the indefinite detention of *de facto* stateless people continued – as it does today. In fact, on January 25, 2009, eight years after *Zadvydas*, just over 32,000 people were in immigration detention. Of those, 4222 had been in detention for *at least* 180 days in total. ***Upon review of the 400 longest detentions, one person had been detained for 3434 days, or almost nine and a half years, and number 400, the outlier, had been detained for 654 days, or about 19 months. In fact, on January 25, 2009, 240 people with removal orders had been in detention for at least 654 days in total, and all of them had been detained for more than 180 days since being ordered removed.*** This is just a snapshot of a much larger problem among the 33,000 or more people detained every single day. Many of them entered in the United States without proper documentation, but have no criminal records, and no ability to return to their country of origin through no fault of their own. They are the *de facto* stateless, and ironically Representative Lamar's legislation may not worsen their experience because current law is already interpreted in a way that consistently prevents their release. In the current economic crisis, Congress should be contemplating how to release people who pose no danger and no flight risk to the community rather than spending time enacting superfluous laws that waste billions of dollars on unnecessary deprivations of liberty. If Representative Lamar's intent is to ensure that people found removable be detained indefinitely, then the tools already exist in the law.

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[28] Kerwin and Lin at 22.

[29] ICE Response to Freedom of Information Act requested by reporter Michelle Roberts of the Associated Press (March 16, 2009).

**U.S. Law Regarding Cooperation with Removal Orders:**

Despite *Zadvydas* and *Clark*, there are several reasons that the government may refuse to release a person from detention 180 days after a final order of removal, even when removal is not reasonably foreseeable. For example, in a custody review, an ICE agent may find that the person is "refusing to cooperate" with his removal, and therefore the officer does not "start" the initial 90-day removal period, or if it has already started, the officer can toll the period due to the individual's perceived misconduct. Of course, there are cases where a person may refuse to complete forms that would assist in securing a travel document, but this is often not the case. Yet, ICE officers have exceptional discretion and authority to make a finding of non-cooperation, and the detained individual has almost no remedy. For example, one Chinese man told AIUSA that he received a custody review stating that his detention would be continued because he was not cooperating with his removal. The conduct in question – ***he would not agree to sign a form stating that he was willing to go to China without proper travel documents from the Chinese government. He refused to sign this form because he was sure he would be jailed in China if he attempted entry without proper permission.*** He had, in all others ways, cooperated in securing travel documents –but the Chinese government would not issue them.[30]

To the extent that a finding of this sort is reviewable through a petition for writ of habeas corpus, at least 84% of detained individuals are not represented by counsel, and therefore do not have the knowledge or capacity to seek this review.[31] And within that small category of people who were represented in their removal hearing, it is very unlikely that the attorneys continued representation after the final order of removal. If today's legislation were passed, an attorney would be a waste of money because indefinitely detained individuals would have no right to habeas or judicial review.

Even if a court assumed jurisdiction over a question of indefinite detention, courts give substantial deference to the findings of ICE officers in this context. In one case, a district court found that although a Nigerian man had made no affirmative step to obstruct his removal, he did not exhaust all readily available resources in making a good faith effort toward removal, so his habeas was denied.[32] ICE attorneys also argue that the filing of a direct appeal to the circuit court is non-cooperative and tolls the removal period, but this position has been successfully challenged in district court. Incredibly, in another case the government *unsuccessfully* argued that the destruction of a passport well ***before*** the commencement of removal proceedings demonstrated non-cooperation with the ultimate removal, tolling the 90-day removal period indefinitely.[33]

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[30] Interview with AIUSA (June 2009), notes on file.
[31] *See Jailed Without Justice*, at 30.
[32] *Davis. v. Gonzales*, 482 F.Supp.2d 796 (W.D. Texas 2007).
[33] *Khan v. Gonzales*, 481 F.Supp.2d 638 (W.D. Texas 2006).

To enhance its legal position as to the tolling of the 90-day removal period due to noncooperation, currently DHS provides a detained individual with a letter stating that s/he must present specific documentation if s/he is considered to be in cooperation with DHS. The required documents include copies of passports, birth certificates and other nationality documents, copies of correspondence demonstrating good faith efforts to obtain a passport from the country of nationality or the country designated on the removal order, copies of receipts and responses from embassies regarding travel documents, and any other evidence demonstrating removal is not reasonably foreseeable.[34] The *de facto* stateless may seek recognition in a myriad of ways, but ***whether the country of origin is willing to provide a travel document is not decided by the detained individual, it is instead a political and diplomatic negotiation between two governments.*** It is patently unfair to deprive someone of liberty when the person is not responsible or able to remedy any "wrongdoing." Current legislation makes this point clear: it does not identify this as non-cooperation by the individual; instead it punishes a State by making it more difficult to secure a visa through the U.S. consulate office. The punishment for the detained individual: expensive, arbitrary, life-changing and indefinite detention.

**Seeking Release from Detention:**

Even if a person has the opportunity to make a request for release in writing presenting credible evidence that her/his removal is not reasonably foreseeable within the 90-day removal period, the regulations state that DHS has no obligation to release the individual unless it has had the opportunity in a six month period to determine whether the person is removable in the reasonably foreseeable future.

***In July AIUSA met two Chinese men who did not speak English, and could not even tell AIUSA where they were being detained because no one had bothered to tell them in a language they understood.*** At the time AIUSA met them they had been detained with final orders of removal for more than six months. It's unlikely they would be able to make a written request for release, so absent an attorney they likely had no ability to seek release. Regardless, once the request is submitted, an ICE officer can find that the person has not cooperated with his removal, and state that no further action will be taken until the individual complies with removal.

ICE (through the DHS HQ Post-order detention unit) can also decide to release the person if there are no "special circumstances" warranting continued detention. It can also deny release by declaring there is a significant likelihood of removal in the reasonably foreseeable future. There is no appeal of this decision. And based on the people spoken to by AIUSA, this seems to often be the decision made. A man in Minnesota who had been detained for years after receiving a removal order told AIUSA, ***"the reasonable future is just a loophole and I'm stuck in it."***

[34] Letter to detainee, reprinted in 79 No. 18, Interpreter Releases 621, 637 (Apr. 29, 2002).

Another man in California told AIUSA, being indefinitely detained is ***"really, really awful. This is worse than sentencing me to ten years because at least then I know when I'm going to be released. Right now I wonder, another three months, another 3 years? I wait for every 90 day review and it's always the same answer – soon."*** This man had filed a *pro se* habeas petition, but was transferred to another jurisdiction shortly afterward. When he first filed his habeas he was in the Northern District of CA, and now he was in the Eastern District. He didn't know if the court had responded to his habeas petition because he wasn't receiving mail and the court would not be aware of his transfer. Also, of course, the Northern District may have lost jurisdiction to hear his case when he was transferred.

By statute, if DHS decides to release a person, it can set conditions for release including continued efforts to obtain travel documents. DHS may, but is not required to, grant work authorization in this situation. One stateless man AIUSA met was finally released after a second six-month period of detention, but his birth certificate was not returned to him and he was not granted work authorization.[35]

DHS also reserves the right to withdraw or revoke release if removal is reasonably foreseeable or the person has violated the conditions of release.[36] While the former finding may seem consistent with *Zadvydas*, the latter is entirely inconsistent because it makes irrelevant the requirement that detention be imposed only when removal is reasonably foreseeable. And of course, DHS denies release, regardless of foreseeability under "special circumstances" as previously discussed. These regulations, however, have been found *ultra vires* by some district courts. Today's legislation would address this concern directly, and it would likely collapse the only tunnel out of indefinite detention.

**IV. The Extension of Mandatory and Prolonged Detention During Removal Proceedings:**

From a human rights perspective, the arbitrary and/or automatic detention of people deemed to be undocumented or deportable is among the most problematic immigration laws in the U.S. Detention leads in some cases to the direct abuse of human rights. The process of expulsion can involve excessive use of force, in some cases resulting in the death of the person concerned, torture and other ill treatment during detention. U.S. immigration law and policies, or the lack thereof, put immigrants in removal proceedings, particularly vulnerable immigrants, such as pregnant or nursing women, the mentally disabled, children, the elderly and the sick, at greater risk of a range of other human rights violations while in detention.

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[35] Interview with AIUSA in Minnesota (August 2009), notes on file.

[36] The United State Code, however, does not permit the automatic re-detention of individuals absent a finding in criminal court that the person violated the terms of release.

Under the current statute, mandatory detention attaches to almost all criminal convictions (nonviolent or violent, misdemeanor or felony) and immediately precludes a person from a bond hearing regardless of whether the person presents a danger or flight risk. Thousands of individuals every year are subject to mandatory detention while deportation proceedings take place.[37] U.S. citizens[38] and lawful permanent residents have been incorrectly subject to mandatory detention, and have spent months or years behind bars before being able to prove they are not deportable from the United States.[39] ***Mandatory and prolonged detention has been described by those detained as worse than serving a criminal sentence of 10 years, because at least then a person can prepare mentally for the incarceration***. Mentally preparing for prolonged detention isn't possible, because the immigration court, Board of Immigration Appeals and circuit court backlogs generally result in years of waiting on initial hearings and appeals. Today's legislation would extend mandatory detention drastically, to include people who did not pass through a lawful port of entry in the past two years, regardless of whether they are a flight risk or a danger to the community.

Immigrants subject to mandatory detention already include asylum seekers arriving without documentation or with fraudulent documentation, those who are inadmissible or deportable on a variety of criminal grounds, including non-violent misdemeanors without any jail sentence, those who are inadmissible or deportable on national security grounds, those certified as terrorist suspects, and those who have final orders of deportation. For example, a conviction for possession of drug paraphernalia subjects someone to mandatory detention.[40] A conviction is not even necessary if an individual is charged as an arriving alien and simply admits, whether knowingly or unknowingly, the elements of certain crimes, INA § 212(a)(2)(i). This expansive legislation begs the question: if the current statute already permits the prolonged and mandatory detention of thousands of individuals, why is it necessary and is it fiscally responsible to exponentially expand the category of those subject to mandatory detention?[41] An increase in mandatory and arbitrary detention, and the massive escalation of jails needed to detain all these people will cost countless billions of dollars without any question as to whether a person poses a flight risk or a danger to the community. The proposed legislation is explicitly arbitrary and does nothing to ameliorate the fact that the U.S. is already in violation of international human rights law

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[37] According to ICE officials, the number of mandatory detentions is expected to grow exponentially through the employment of federal/state enforcement programs such as "Secure Communities."

[38] On many occasions, local police and ICE officers have detained U.S. citizens only to learn much later, sometimes years later, that the person is not deportable as a U.S. citizen.

[39] *See Appendix 1*: Memo detailing cases in which the BIA or circuit courts have ultimately found that a criminal conviction did not constitute a crime involving moral turpitude, as well as a guide to determining whether criminal conduct or a conviction constitute a CIMT.

[40] *Luu-Lee v. INS*, 224 F.3d 911 (9th Cir. 2000)

[41] See H.R. X "Proving for the Detention of Dangerous Criminals,

to which it was an author and signatory.

According to EOIR, in 2006, at least 25,509 migrants and asylum seekers were subject to mandatory detention. In 2007, at least 31,959 were mandatorily detained and in the first six months of 2008, ICE had already subjected at least 18,776 individuals to mandatory detention. These numbers only reflect the number of people an IJ determined (whether correctly or incorrectly) that s/he did not have bond jurisdiction over because the person was subject to mandatory detention. It does not include all others subject to mandatory detention who did not request that an IJ review the mandatory detention decision.[42]

***ICE will often justify the detention of people who pose no danger to the community or flight risk by asserting that the average detention stay is 37 days,[43] but immigrants and asylum seekers who contest removability will be detained for months or even years as they go through a log-jammed system*** that will ultimately decide whether or not they are eligible to remain in the United States. For example, it can take months in some areas of the country for a person deprived of her/his liberty to go before an immigration judge for the first time.[44] According to a study, asylum seekers who were eventually granted asylum spent an average of 10 months in detention with the longest reported period being 3.5 years.[45] Amnesty International documented several cases in which individuals had been detained for four years before ultimately prevailing on their cases, and without ever having the right to a bond hearing.

The U.S. criminal justice system guarantees individuals deprived of liberty a hearing to challenge their detention before a court and provides legal counsel for individuals who cannot afford to pay themselves. In fact, in every context researched except immigration, the profound deprivation of liberty that takes place when a person is locked up requires safeguards for the individual, such as the government having the burden of proof. The proposed legislation does the opposite by attempting to wipe out any opportunity for a meaningful custody review or bond hearing, regardless of how long the person has been in removal proceedings, whether the person will ever be

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[42] *EOIR response to questions posed by AI researchers, July 31, 2008.*

[43] U.S. Government Accountability Office, *Alien Detention Standards: Observations on the Adherence to ICE's Medical Standards in Detention Facilities*, 4 June 2008, available at: http://www.gao.gov/new.items/d08869t.pdf.

[44] Bridget Kessler, *In Jail, No Notice, No Hearing... No Problem? A Closer Look at Immigration Detention and the Due Process Standards of the International Covenant on Civil and Political Rights,* American University International Law Review24, no 3 (2009): 593. *See also* Yuba County Jail detail, http://detentionwatchnetwork.org/node/1879

[45] Physicians for Human Rights and the Bellevue/NYU Program for Survivors of Torture, *Fram Persecution to Prison: The Health Consequences of Detention for Asylum Seekers*, June 2003, page 5, available at: http://physiciansforhumanrights.org/library/documents/reports/report-perstoprison-2003.pdf.

removed, and whether s/he poses any danger at all to the U.S. or could even be considered a flight risk.

Depriving someone of his/her liberty through detention is a very coercive measure, which carries a strong stigma and severely impacts on individual rights. Criminalizing immigrants, not only by imposing criminal penalties for entering or remaining in the U.S without permission, but also jailing them for months and years has the effect of limiting or entirely denying protection and access to fundamental human rights, such as due process, access to justice, family unity, and the prohibition on arbitrary detention.

In fact, ***AI researchers identified more than 100 cases in which an immigrant or asylum seeker was charged by DHS in a manner triggering mandatory detention without any opportunity for release who were ultimately deemed to be improperly charged***.[46] Unfortunately, these cases regularly take years to resolve, wreak havoc on families and their financial status, and in the meantime U.S. taxpayers pay at least $100 per day to unlawfully detain the person. This quickly adds up to billions of wasted dollars per month. The burden to taxpayers should today's legislation be passed is incomprehensible.

Governmental agencies, human rights and other non-governmental organizations have demonstrated for years that not only is immigration detention used at a phenomenal rate, ***the U.S. is not equipped to detain these massive populations, so they are housed in facilities that provide no access to the most basic human needs, such as fresh air. Deaths, sickness, and abuse, among other concerns are regularly reported and often ignored unless exposed by the media.*** It is within this context that today's proposed legislation would eliminate the ability to challenge detention for legitimate reasons, regardless of the state in which people are housed and regardless of whether detention is necessary or proportionate .

**The consequence for immigrants**: Widespread and thoughtless incarceration can result in the wrongful detention of immigrants, asylum seekers and even U.S. citizens for months and years, sometimes without any remedy at all. AIUSA observed over and over again that when the length of detention is prolonged, which will almost always be the case if today's legislation were to become law, individuals often forego their rights and stipulate to a deportation order, even when the person is a U.S. citizen, is not

[46] This number is almost certainly low. In order to identify cases of incorrect legal interpretation leading to months and years of mandatory detention, AI researchers reviewed all circuit court decisions reversing the incorrect findings of the BIA in which the immigration charge mandated detention. As such, it does not include the cases of individuals who were unable to secure representation to pursue a case before the circuit courts and/or BIA, and therefore were deported incorrectly. *See* Appendix A.

deportable, and even if it means being returned to a country of persecution.[47] There remains no consequence for the ICE attorneys who proceed with removal cases and file automatic stays of detention even when individuals win their cases and are clearly eligible for a favorable result.[48]

**V. Recommendations:**

1. Today's legislation should not be considered in committee or on the floor of the House as it is in gross violation of human rights and will raise serious constitutional concerns.
2. Should government authorities continue to operate a policy of detaining immigrants, Amnesty International urges at a minimum, the following recommendations be adopted:
    a. Detention of immigrants should be used only if, in each individual case, it is demonstrated that it is a necessary and proportionate measure that conforms with international law;
    b. Criteria for detention should be clearly set out by law;
    c. Alternative non-custodial measures, such as reporting requirements, should always be considered before resorting to detention;
    d. The decision to detain should always be based on a detailed and individualized assessment, including the personal history of, and the risk of absconding presented by, the individual concerned. Such assessment

[47] *See* Chicago Tribune, *Immigrant Debate Rages, Advocates: Fast-Track Deportation Orders Put Rights in Jeopardy* (August 4, 2008). Reliance on DHS officers in this context is extremely problematic given that DHS officers engaged in immigration raids and other migrant roundups routinely make mistakes. According to one Immigration Judge (IJ) interviewed by AIUSA in August 2008, about 10% of the stipulated removal cases she reviewed were incorrect due to a misunderstanding of immigration law, because the person charged was clearly eligible for relief from removal, and in one case, because the person was a US citizen. All of these cases involved an individual who had agreed to deportation because a DHS officer informed her/him that no avenue for relief from deportation existed. Absent the IJ's review and intervention, the person would have been detained and deported. IJ's examine stipulated removal documents between cases and/or after finishing a full caseload each day. According to one IJ, ICE has regularly submitted 5 stipulated removal cases regularly per day, and once submitted 40 stipulated removal cases for review in one day. IJ and advocates interviewed by AI researchers also confirmed that this is taking place regularly.

[48] Although in 1996 Congress mandated that IJs had the authority to hold attorneys in contempt, implementation required the promulgation of regulations by the Attorney General. The Attorney General failed to do so, however, citing concern that IJs, who are technically attorneys in the Department of Justice, shoud not have the power to hold other government attorneys in contempt. *See* Hon. Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, Bender's Immigration Bulletin at 10 (January 1, 2008). "Although EOIR has a robust attorney discipline program in place, it has been criticized as discriminatory because it only applies to private practitioners; EOIR lacks the ability to discipline DHS Trial Attorneys who appear in immigration courts." *Id.* at FN 43.

should consider the necessity and appropriateness of detention, including whether it is proportionate to the objective to be achieve

e. Each decision to detain should be automatically and regularly reviewed as to its lawfulness, necessity and appropriateness by means of a prompt, oral hearing by a court or similar competent independent and impartial body, accompanied by the appropriate provision of legal assistance;
f. Detainees have the right to be informed of the reason for their detention in orally and in writing in a language which they understand;
g. Detention should always be for the shortest possible time and must not be prolonged or indefinite;
h. There should be a maximum duration for detention provided by law that should be reasonable in its length. Once this period has expired the individual concerned should automatically be released;
i. Migrants should be granted access to legal counsel, consular officials (if desired), interpreters, doctors, members of their families, friends, and religious and social assistance;
j. There should be a prohibition on the detention of unaccompanied children provided by law;
k. Any allegations of racism, ill-treatment and other abuses of those held in detention should be investigated immediately in compliance with relevant international standards and those responsible should be dealt with appropriately by disciplinary or penal measures as appropriate;
l. Detention of migrants with mental health issues, as well as those belonging to vulnerable categories and in need of special assistance, should be only allowed as a measure of last resort;
m. Detainees should have access to adequate medical and psychological assistance.

3. The U.S. Congress should pass legislation creating a presumption against the detention of immigrants and asylum seekers and ensuring that it only be used as a measure of last resort.
4. The U.S. government should ensure that alternative non-custodial measures, such as reporting requirements or an affordable bond, are always explicitly considered before resorting to detention. Reporting requirements should not be unduly onerous, invasive or difficult to comply with, especially for families with children and those of limited financial means. Conditions of release should be subject to judicial review.
5. The U.S. government should ensure the adoption of enforceable human rights detention standards in all facilities housing immigration detainees, either through legislation or through the adoption of enforceable policies and procedures by the Department of Homeland Security. There should be effective independent oversight to ensure compliance with detention standards and accountability including fines, the termination contracts and criminal sanctions for violations.

**APPENDIX A**

**Common Misunderstandings Concerning Conviction-Related INA Violations In Notices to Appear and Related To Eligibility For Relief From Removal**

***Sarnata Reynolds, Policy Director, Refugee and Migrants' Rights***
**May 24, 2011**

**I. CRIMINAL CONVICTIONS – Crimes Involving Moral Turpitude (CIMT)**

**A. Interpretation of What Constitutes a CIMT**

1. A CIMT is not defined in the statute or case law so instead DHS officers and Attorneys rely on the interpretation of the definition under case law.

(a) It is generally accepted that a conviction is for a CIMT when the criminal offense requires conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.[i]

(b) The BIA has held that the element of an evil intent generally must be present for a crime to constitute a CIMT. [ii]

2. To determine whether a criminal statute defines a crime that is a CIMT, one must take care to examine the inherent *nature* of the crime as the statute defines it.

(a) An officer/adjudicator may not base his evaluation on the individual facts and circumstances that underlie the criminal charges and the conviction.[iii]

(b) The nature of the crime of conviction, and whether it constitutes a CIMT, is determined according to a *categorical* analysis of by the crime of which the offender was convicted, and not an analysis of what he may have done.

3. A commission or a conviction of a CIMT is not always a ground of inadmissibility or deportability under the INA.

(a) Even if a criminal conviction meets the general definition of a CIMT, a CIMT is
***not*** a ground of inadmissibility under INA § 212 if it comes within the statutory definition of, either:

(i) The "juvenile exception": the crime was committed when the alien was under 18, and the crime was committed and the alien released from confinement more than 5 years before the alien applies for admission;[iv] or

(ii) The "petty offense exception": the maximum penalty possible for the crime does not exceed 1 year imprisonment, and, if the alien was convicted, the sentence imposed by the judge did not exceed 6 months.[v]

(b) Even if a criminal conviction satisfies the definition of a CIMT, above (A.1), it is ***not*** a ground of deportability under INA § 237 in circumstances where:

(i) there is only one conviction of a CIMT, AND the crime resulting in that conviction was NOT committed within 5 years (or 10 years if under 245(j)) after the applicant's or resident's date of admission, AND the maximum possible sentence is less than one year.[vi]

(ii) there are two or more convictions for CIMTs, and one or more did not occur *after* admission, and/or the CIMT offenses arose out of a single scheme of criminal misconduct.[vii]

**B. Multiplicity of Variables Related To CIMT Determinations (Selected)**

1. Finality: If a DHS officer encounters a person subject to an order of probation, but without a *final disposition* of the crime because the state court has the statutory authority to designate the offense as a misdemeanor or felony *after* the completion of probation, DHS may not categorize the offense for immigration purposes until after the state court's final designation. Before its designation, the undesignated offense is not an indeterminate sentence.[viii]

2. Intent: The presence of the element of intent in an offense is NOT always equivalent to the requirement of an evil intent or an intent to defraud.

3. Mens rea: Criminal statutes that require only recklessness or criminal negligence generally do not include crimes that are CIMTs.[ix]

4. The element of "willful" or "knowing" mens rea only shows the intent to commit an unlawful act, but it does not show the inherent nature of the act.[x]

*<u>Note</u>: If the statute includes some conduct that requires intent and other conduct that is reckless, then it is a divisible statute, cannot be categorically considered a CIMT, and requires review of the record of conviction for actual conduct constituting intent*

*before it can be charged as a CIMT. (See below).*

5. A single conviction of a crime that amounts to a petty offense does not render a person ineligible for relief.[xi]

6. The petty offense exception applies even if a person has another conviction as long as that conviction is for a crime that is not a CIMT. The applicability of the petty offense exception can only be defeated when there are two CIMTs.[xii]

7. The commission of more than one CIMT may preclude the establishment of 7 years continuous residence for the purpose of non-LPR cancellation of removal under the "stop-time rule," but the stop-time rule is *not* triggered until there is one conviction for a CIMT that is not a petty offense, or upon the commission of the second petty offense CIMT.[xiii]

**C. Complex Determinations Required To Resolve Whether Crimes Are CIMTs**

1. The determination whether any one particular crime is a CIMT involves an analysis of common issues.

(a) The first step in the analysis is to determine <u>whether the statute of conviction sets forth one, single offense that can result in conviction</u>, so that any conviction incurred is of the one offense that is described in the criminal statute.

(i) If it does, then the elements of that criminal offense, which include the *actus reas* – the prohibited conduct, and the *mens rea* – the intent, must be a categorical match with the elements described as the CIMT ground of inadmissibility or deportability in the INA.

(ii) In other words, the offender must have a specific intent to carry out a criminal act and the criminal act in question must involve conduct that is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.

(iii) If the conviction does not require the offender to have such an intent or to engage in such conduct, then the conviction is not for a CIMT.

(b) The second step in the analysis – if the criminal statute covers more than one offense or type of conduct -- is to determine whether the criminal statute covers some conduct that is inherently base, vile, or depraved, which would constitute a CIMT, and some conduct that is not.

(i) If a criminal statute covers conduct that would amount to a CIMT, as well as conduct that would not amount to a CIMT, it is considered to be a *divisible statute*, and the fact that a person has been convicted under this statute is insufficient, without more, to find that the conviction is for a CIMT.

| STOP! | **Going further to determine whether an offense is a CIMT requires consideration of more than a "rap sheet" and should involve a legal evaluation made by an attorney.** |
|---|---|

(ii) When a statute of conviction is a divisible one, it is not possible to establish a categorical match, so the documents in the record of conviction in the particular criminal case -- including the indictment, complaint or information, the plea, sentence, or judgment may be consulted to determine whether the conviction is for an offense that is a CIMT.[xiv]

*Note: In many cases, a defendant does not plead guilty to the charges in an original indictment or information; only the document to which the defendant pled guilty may be reviewed.*[xv]

(iii) If the record of conviction is available and can be consulted it must reflect that the offender was convicted of an offense under the divisible statute that constitutes a CIMT,[xvi] and if these documents do not contain facts establishing that the offense was one involving moral turpitude, the conviction is NOT of an offense that is a CIMT.[xvii]

2. The recent precedent decision of former Attorney General Mukasey in *Matter of Silva-Trevino,* 24 I&N Dec. 647 (A.G. 2008) summarizes this categorical/modified categorical approach process as follows, holding that an adjudicator should:

(a) "look to the statute of conviction under the categorical inquiry and determine whether there is a 'realistic probability' that the State or Federal criminal statute pursuant to which the alien was convicted would be applied to reach conduct that does not involve moral turpitude; "[xviii] and

(b) *Matter of Silva-Trevino* provides that "if the categorical inquiry does not resolve the question, the adjudicator then should engage in a modified categorical inquiry and examine the record of conviction, including documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript;" and,

(c) "if the record of conviction is inconclusive, consider any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question." *Id.*

**D. Convictions of Crimes That Are Not CIMTs: Substantive Crimes**[xix]

***1. Assault***

a. A simple assault is NOT a CIMT.[xx]
b. Putting the victim in apprehension of harm is NOT a CIMT.[xxi]

c. Battery unlawful or offensive touching is NOT a CIMT.[xxii]
d. Many assault statutes often include both willful acts and reckless acts. This kind of statute is divisible and a conviction is NOT categorically a CIMT.[xxiii]
e. Many assault statutes have several sections ranging from assault with serious injury to simple assault such as offensive touching. These statutes are divisible and a conviction under the statute is NOT categorically a CIMT.[xxiv]
f. Without "serious bodily injury," reckless or negligent assault/battery is NOT a CIMT.[xxv]
g. Some statutes include aggravated factors, such as the victim's age. However, these statutes often do not require knowledge of the status of the victims. Absent a finding of knowledge, the victims' status does not elevate an otherwise non-CIMT into a CIMT.[xxvi]
h. Some statutes have language such as "attempt to commit a reckless act." Courts have held that this is conceptually incoherent, and therefore convictions under this kind of statute are NOT CIMTs.[xxvii]

***2. Manslaughter***

a. When the statute includes both voluntary and involuntary (under which willful conduct is not an element) manslaughter, it is divisible and NOT categorically a CIMT.[xxviii]

***3. Sex offense***

a. *Statutory rape*: this kind of crime can often include consensual intercourse and therefore no evil intent is involved. Therefore, it is often NOT categorically a CIMT.[xxix]
b. *Indecency*: although most of the statutes have "willful" requirement, it is irrelevant to the existence of any evil intent. Evil intent is not inherent in the nature of this offense, and therefore the crime is NOT a CIMT.[xxx]

***4. Crimes involving falsity, but not fraud***

a. False statement: "willfully" or "knowingly" making a false statement is different from defrauding (e.g. passing bad checks knowing there is insufficient fund is different from passing bad checks intending to defraud the recipient).[xxxi] Making a false statement may NOT be a CIMT.
b. Money laundering:
   (i) If the statute does not require as an element the intent to create legitimate wealth or deception, a conviction is NOT categorically CIMT.[xxxii]
   (ii) Possession of forged item
   (iii) Conviction is not categorically a CIMT, because the forged item might include all correct info and used for an otherwise legal purpose (e.g. using a forged resident card bearing correct address, name, DOB for the purpose of buying alcohol. [xxxiii]

***5. Crimes against property***

a. Malicious mischief: it is usually NOT CIMT, because it's not of a grave nature of baseness.[xxxiv]

b. Possession of stolen property: some statutes do not require the defendant to have knowledge of the nature of the property; therefore, convictions under this kind of statute are not generally categorically CIMT.[xxxv]
c. Joyriding: this kind of crime only requires intent to drive without consent of the owner; it does not require evil intent or intent to deprive the car from the owner permanently. Therefore, it's NOT categorically CIMT.[xxxvi]
d. Burglary
   (i) Most burglary convictions are NOT categorically CIMT, because the underlying crime after entry can include both CIMT and non-CIMT.[xxxvii]
   (ii) Possession of burglary tools: NOT categorically CIMT, because the intent to use such tools is not clear.[xxxviii]

***6. Accessory to felony***

a. Just because this crime violates the duty owed to society does not make it CIMT, because all crimes violate the duty owed to the society.[xxxix]
b. It is NOT categorically CIMT because the underlying crime itself might not even be a CIMT.[xl]

***7. Child abandonment***

a. "Intentionally" abandon child does not mean it is of evil intent.[xli]
b. Statutes are often divisible, which can include negligent acts that have no evil intent so may NOT be CIMT.[xlii]

***8. Drug offense***

a. Possession alone is NOT CIMT.[xliii]
b. Some statutes criminalizing unlawful disposing drugs are not CIMT because they do not require any evil intent, but only the intent to not register or pay tax, etc.[xliv]

**9. Leave scene of accident**

a. Evil intent is often not an element in such statutes.[xlv]
b. Statutes can include a list of the duties for the driver, and failure to fulfill the duty is sufficient for conviction.[xlvi]

***10. Immigration violation***

a. Smuggling - this crime is NOT categorically CIMT because it can include the mere intent to deviate from immigration laws.[xlvii]
b. Unlawful reentry- this crime is NOT categorically CIMT because it can include the mere intent to deviate from immigration laws same reason as above.

***11. Kidnapping***

a. The statute might be divisible because there might be a section regarding taking one's own child without consent from legal custodian temporarily. If this is the case, a conviction under this statute is not categorically a CIMT.[xlviii]

12. ***Desertion***: desertion from military service is NOT a CIMT.[xlix]

13. ***Gambling***: Establishing gaming devices is NOT a CIMT.[1]

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***Endnotes***

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[1]Matter of Franklin, 20 I. & N. Dec. 867 (BIA 1994)(Moral turpitude refers generally to conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.)

[2]Matter of Solon, 24 I&N Dec. 239, 240 (BIA 1007),

3Matter of Short, 20 I. & N. Dec. 136 (BIA 1989)(Court looks at the inherent nature of the crime as defined by statute and interpreted by the courts as limited and described by the record of conviction.)

[iv] INA § 212(a)(2)(A)(ii)(I).

[v] INA § 212(a)(2)(A)(ii)(II).

[vi] INA § 237(a)(2)(A)(i).

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[8] INA § 237(a)(2)(A)((ii) ]

------Note: fns. 9 and 10 do not appear in text of footnotes. Numbering corresponds to text notations.------

[8]Lafarga v. INS, 170 F.3d 1213 (9th Cir. 1999)(Court held an undesignated offense is different from an indeterminate sentence); Garcia-Lopez v. Ashcroft, 344 F.3d 840 (9th Cir. 2003)(the "wobbler" statute allows the Court to make the final designation of the offense, to which the agency must follow); In Re: Eligio Gonzalez Amador, 2003 WL 23508708 (BIA 2003) (NOT published)(Citing Garcia-Lopez, the BIA held that the state Court's final designation renders the crime a petty offense.)

[ix] In re Leonardo Ruiz Agonias, 2007 WL 4711434 (BIA 2007)(Reckless disregard of safety alone is not CIMT); In re Luaiva Tui Fualaau, 21 I. & N. Dec. 475 (BIA 1996)(A crime involving recklessness is not CIMT per se; to be a CIMT, the recklessness must be combined with serious bodily injury.); Partyka v. Attorney General, 417 F.3d 408 (3d Cir. 2005)(The court held that "the hallmark of moral turpitude is a reprehensible act committed with an appreciable level of consciousness or deliberation." The negligent infliction of bodily injury lacks this essential culpability requirement.); Jean-Louis v. Attorney General, 582 F.3d 462 (3d Cir. 2009)(No knowledge of the victim's age is required, and therefore no culpability); Matter of Perez-Contreras, 20 I. & N. Dec. 615 (BIA 1992)(BIA held that no moral turpitude involved for shooting the victim with criminal negligence); In re Ruben Gonzalez-Carrillo, 2007 WL 4707438 (BIA 2007) (NOT published)(Reckless manslaughter is not CIMT because willful conduct is not required); Matter of Lopez, 13 I. & N. Dec. 725 (BIA 1971)(Conviction is not categorically CIMT because the statute includes both voluntary and involuntary manslaughter); Quintero-Salazar v. Keisler, 506 F.3d 688 (9th Cir2007)(Consensual intercourse does not involved evil intent and is not CIMT); Subah v. Attorney General, 256 Fed.Appx. SS6 (3d Cir. 2007) (NOT published)(For the crime corruption of a minor, the least culpable offense does not involve mens rea.)

[x] Hirsch v. INS, 308 F.2d 562 (9th Cir. 1962)("Willful" and "knowingly" in the language of the statute are only evidence of intent to commit the act. They are not evidence of evil intent or intent to defraud.); Matter of Balao, 20 I. & N. Dec. 440 (BIA 1992)("Knowingly" passing a bad check does not automatically mean fraud)

[xi] In re Garcia-Hernandez, 23 I. & N. Dec. 590 (BIA 2003)(The BIA held that petty offense does not render one ineligible for cancellation of removal, because the requirement of "having not been convicted of a crime under section 212(a)(2)" includes the petty offense exception.); In re Andres Rosas Villagomez Elena I. Moscosa, 2004 WL 2375146 (BIA 2004) (Not published)(The BIA, citing In re Garcia-Hernandez, held that a misdemeanor conviction under that statute did not render the alien ineligible for cancellation of removal under sections 240A(b)(1)(B), 240A(b)(1)(C), or 101(f)(3) of the Act. This conviction alone could not form the basis of a finding of lack of good moral character under sections 101(f)(3) or 240A(b)(1)(B) of the Act.)

[xii] In re Jose Arturo Mares-Martinez, 2004 WL 1398730 (BIA 2004) (Not published)( The BIA held that an alien with multiple criminal convictions is still qualified for petty offense exception if only one of them is CIMT.); In re Jose Juan Sanchez-Resendiz, 2004 WL 1167084 (BIA 2004) (Not published)(Multiple non CIMTs do not disqualify petty offense exception.); In re Fabian Dario Rojas-Montoya a.k.a. Jose Ventura, 2003 WL 23269916 (BIA 2003) (Not published)(The first offense is not a CIMT; the second, though CIMT, falls into the petty offense exception. Therefore, the petitioner is still eligible for cancellation of removal.)

[xiii] In re Deanda-Romo, 23 I. & N. Dec. 597 (BIA 2003)(Stop-time occurs at the commission of the second petty offense CIMT, not at the first); In re Antonio Francisco Mandigma, 2008 WL 1734632 (BIA 2008) (Not published)(The first offense was set aside, and therefore is not a CIMT that triggers stop-time); In re Yen Thi Phi Nguyen, 2007 WL 4699857 (BIA 2007) (Not published)(The stop-time did not occur until the second petty offense CIMT, which was more than 7 years after continuous residence.)

[xiv] Fernandez-Ruiz v. Gonzales, 468 F.3d 1159 (9th Cir. 2006)(If the statute of conviction is not a categorical match because it criminalizes both conduct that does and does not involve moral turpitude, the Court applies a modified categorical approach under which it may look beyond the language of the statute to a narrow, specified set of documents that are part of the record of conviction, including the indictment, the judgment of conviction, jury instructions, a signed guilty plea, or the transcript from the plea proceedings.)

[xv] US v. Rebelo, 646 F.Supp.2d 682 (D.N.J. 2009)(Because New Jersey law differentiates between complaints, indictments and accusations, the petitioner pled guilty not to the complaint but to the prosecutor's accusation. Therefore, the record of conviction here is the accusation, conviction, and sentence, none of which proves culpability.)

[xvi] A divisible statute is a statute that includes CIMT and non-CIMT conduct.

[xvii] Fernandez-Ruiz v. Gonzales, 468 F.3d 1159 (9th Cir. 2006)

[xviii] Fernandez-Ruiz v. Gonzales, 468 F.3d 1159 (9th Cir. 2006)

[xix] The following list of criminal conduct has been found NOT to be a CIMT based on the language of the statute (the categorical approach). While the criminal conviction may be found to constitute a CIMT after reviewing the record of conviction (under the modified categorical approach), this determination cannot be made without the review of admissible conviction documents. Because the vast majority of NTAs are prepared without the benefit of conviction documents, absent these documents DHS officers ONLY have the authority to engage in a categorical analysis of statutory language.

[xx] In the Matter of E, 1 I. & N. Dec. 505 (BIA 1943)(Assault in the 3rd degree under a New York statute is a simple assault and there is not CIMT); Zaffarano v. Corsi, 63 F.2d 757 (2d Cir. 1933)(Resisting arrest can be a minor case of assault and is therefore simple assault); In the Matter of B, 5 I. & N. Dec. 538 (BIA 1953)(A simple assault on a police officer does not necessarily make it CIMT).

[xxi] Fernandez-Ruiz v. Gonzales, 468 F.3d 1159 (9th Cir. 2006)

[xxii] In re Sejas, 24 I. & N. Dec. 236 (BIA 2007)(Assault on household member under the Virginia statute includes any form of touching); Garcia-Meza v. Mukasey, 516 F.3d 535 (7th Cir. 2008)(statute includes making physical contact in an insulting or provoking nature and no harm is required.)

[xxiii] Fernandez-Ruiz v. Gonzales, 468 F.3d 1159 (9th Cir. 2006); In re Leonardo Ruiz Agonias, 2007 WL 4711434 (BIA 2007); Partyka v. Attorney General, 417 F.3d 408 (3d Cir. 2005); US v. Rebelo, 646 F.Supp.2d 682 (D.N.J. 2009)

[xxiv] In re Sejas, 24 I. & N. Dec. 236 (BIA 2007)(Virginia statute of battery of household members includes both physical injury and mere offensive touching); In the Matter of B, 5 I. & N. Dec. 538 (BIA 1953)(statute criminalizing assisting another in prison breach is overly broad and includes simple assault); Garcia-Meza v. Mukasey, 516 F.3d 535 (7th Cir. 2008)(Illinois statute includes intentionally causing physical injury and making insulting or provoking contact); Zaffarano v. Corsi, 63 F.2d 757 (2d Cir. 1933)(statute criminalizing resisting arrest can include very minor case of resistence); In re Sanudo, 23 I. & N. Dec. 968 (BIA 2006)(domestic battery under a California statute can include mere touching without consent); In the Matter of O, 4 I. & N. Dec. 301 (BIA 1951)(assault of the police during riot can include very minor acts)

[xxv] In re Sejas, 24 I. & N. Dec. 236 (BIA 2007)(The crime does not require physical injury and can include any kind of touching); In re Leonardo Ruiz Agonias, 2007 WL 4711434 (BIA 2007)(Absent harm, the mere threat is not categorically CIMT); In re Luaiva Tui Fualaau, 21 I. & N. Dec. 475 (BIA 1996)(A crime involving recklessness is not CIMT per se. To be a CIMT, the recklessness must be combined with serious bodily injury.)

[xxvi] Jean-Louis v. Attorney General, 582 F.3d 462 (3d Cir. 2009)(statute does not require the culpability of the age of the victim); In the Matter of O, 4 I. & N. Dec. 301 (BIA 1951)(the statute does not require the knowledge that the victim is a police officer)

[xxvii] Gill v. INS, 420 F.3d 82 (2d Cir. 2005)("attempt to recklessly injure another" has conceptual incoherence); Knapik v. Ashcroft, 384 F.3d 84 (3d Cir. 2004)("attempt to commit a reckless act" is non-conceptual.)

[xxviii] In re Ruben Gonzalez-Carrillo, 2007 WL 4707438 (BIA 2007) (NOT published)(Reckless manslaughter does not require willful conduct.); Matter of Lopez, 13 I. & N. Dec. 725 (BIA 1971)(conviction is not categorically CIMT because the statute includes both voluntary and involuntary manslaughter)

[xxix] Quintero-Salazar v. Keisler, 506 F.3d 688 (9th Cir. 2007)(If an act is statutorily prohibited, rather than inherently wrong, the act generally is not CIMT. Since consensual intercourse can be convicted under this statutory rape statute, a conviction under this statute is not categorically CIMT.)

[xxx] Nunez v. Holder, 594 F.3d 1124 (9th Cir. 2010)(The statute that criminalizes exposing oneself in public includes motivations that do not require the defendant to even bother the victims; the crime can be committed without the intent to harm anyone); Toutounjian v. INS, 959 F.Supp. 598 (W.D. N. Y. 1997)("willfully" commited an indecent act

in public is so broad that it can include negligence); In the Matter of D, 1 I. & N. Dec. 190 (BIA 1942)(mailing obscene letters does not require a finding of vicious motive or corrupted mind)

[xxxi] Notash v. Gonzales, 427 F.3d 693 (9th Cir. 2005)(the statute criminalizes both false and fraudulent statements; "willful" only indicates intent, but not always intent to defraud); Hirsch v. INS, 308 F.2d 562 (9th Cir. 1962)("Willful" or "knowingly" are only evidence of intent to commit the act. It is not evidence of evil intent or intent to defraud. "False" statement is different from "fraudulent" statement.); Matter of Balao, 20 I. & N. Dec. 440 (BIA 1992)( "Knowing" does not mean intent to defraud.)

[xxxii] Tejwani v. Attorney General, 2009 WL 3387961 (3d Cir. 2009)(New York statute of money laundering does not have elements of deception or recklessly concealing criminal conduct; the statute does not require an attempt to create the appearance of legitimate wealth)

[xxxiii] Hernandez-Perez v. Gonzales, 241 Fed.Appx. 430 (9th Cir. 2007) (NOT published)(Knowing possession of a forged instrument does not categorically involve CIMT; a person, using a fake permanent residence card bearing correct name, address and DOB to purchase alcohol can be convicted under this statute while no intent to defraud is involved.)

[xxxiv] Rodriguez-Herrera v. INS, 52 F.3d 238 (9th Cir. 1995)(Crimes like malicious mischief that are not of the gravest nature, and no fraud can be found; the intent requirement-malicious, can be simply inferred by wrongfully done without just cause.); In re Oswaldo Eulises Saravia Rivera, 2008 WL 5025208 (BIA 2008) (NOT published)(damaging property while fleeing from accident scene is not a ground for a finding of CIMT); In the Matter of B, 2 I. & N. Dec. 867 (BIA 1947)(Willfully damaging mailboxes and other property is not CIMT).

[xxxv] In the Matter of K, 2 I. & N. Dec. 90 (BIA 1944)(Statute includes acts of negligence; it can convict a person who, without knowledge of the nature of the property, failed to make an inquiry into it.); Ramirez v. Ashcroft, 361 F.Supp.2d 650 (S.D. Tex. 2005)(Mere unauthorized use of vehicle without the owner's consent is not categorically CIMT)

[xxxvi] Ramirez v. Ashcroft, 361 F.Supp.2d 650 (S.D. Tex. 2005)(Mere unauthorized use of vehicle without the owner's consent is not categorically CIMT)

[xxxvii] Matter of M, 2 I. & N. Dec. 721 (AG 1946)(Burglary statute is broad enough to include acts that do not involve baseness or depravity); In the Matter of G, 1 I. & N. Dec. 403 (BIA 1943)(Burglary conviction is not CIMT without evidence of the intent to commit a CIMT after entry); Wala v. Mukasey, 511 F.3d 102 (2d Cir. 2007)(The burglary statute criminalizes unlawful entry into a building with the intent to commit any crime; since burglary alone is not CIMT, and this underlying crime may or may not be CIMT, the conviction here is not categorically CIMT.)

[xxxviii] Guarino v. Uhl, 107 F.2d 399 (2d Cir. 1939)(The statute does not inquire into the nature of the crime one intends to commit with the burglary tool); In the Matter of S, 6 I. &N. Dec. 769 (BIA 1955)(possession of burglary tool statute does not require a finding of the intent to commit a crime with the tools)

[xxxix] Navarro-Lopez v. Gonzales, 503 F.3d 1063 (9th Cir. 2007)( Not all accessory after the fact is CIMT; if accessory is categorically CIMT, there is the fallacy where the person committing the underlining crime did not commit a CIMT while the person providing assistance can be held committed a CIMT)

[xl] Navarro-Lopez v. Gonzales, 503 F.3d 1063 (9th Cir. 2007)( Not all accessory after the fact is CIMT; if accessory is categorically CIMT, there is the fallacy where the person committing the underlining crime did not commit a CIMT while the person providing assistance can be held committed a CIMT)

[xli] Rodriguez-Castro v. Gonzales, 427 F.3d 316 (5th Cir. 2005)(The Texas court has held that "intentionally" refers only to the offender's act of leaving the child unattended by another caretaker. Thus, conviction does not require proof that the offender knew that his act of abandonment exposed the child to unreasonable risk of harm, but requires only that the circumstances in which the child was left would have been recognized by a reasonable similarly situated adult to present an unreasonable risk of harm to the child.)

[xlii] Rodriguez-Castro v. Gonzales, 427 F.3d 316 (5th Cir. 2005)(At the lowest culpability of the statute, a negligent act is enough for a conviction)

[xliii] Matter of Abreu-Semino, 12 I. & N. Dec. 775 (BIA 1968)

[xliv] In the Matter of R, 4 I. & N. Dec. 644 (BIA 1952)("Disposing of narcotic drugs unlawfully" consists of merely failing to register or pay tax; no element of intent, motive or knowledge is required under this statute.)

[xlv] Cerezo v. Mukasey, 512 F.3d 1163 (9th Cir. 2008)(The statute contains a list of the reporting requirements for an accident; the court held that the defendant could be convicted as long as he failed one or more of the requirements even if no specific intent for such failure is found)

[xlvi] Cerezo v. Mukasey, 512 F.3d 1163 (9th Cir. 2008)(The statute contains a list of the reporting requirements for an accident; the court held that the defendant could be convicted as long as he failed one or more of the requirements even if no specific intent for such failure is found)

[xlvii] Matter of Tiwari, 19 I. & N. Dec. 875 (BIA 1989)(Statute does not require a finding of evil intent, but only an intent to violate the immigration law)

[xlviii] Hamdan v. INS, 98 F.3d 183 (5th Cir. 1996)(The kidnapping statute has multi sections, with one section involving custodian.)

[xlix] In the Matter of S-B-, 4 I. & N. Dec. 682 (BIA 1952)(Statute does not inquire into the motive for desertion)

[l] Matter of Gaglioti, 10 I. & N. Dec. 719 (BIA 1964)(Gambling is not a base, vile, or depraved crime)

**FOR IMMEDIATE RELEASE:**
Monday, May 23, 2011

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## AILA DENOUNCES HOUSE DETENTION BILL

*More jailing of immigrants is unconstitutional, unnecessary, and un-American*

**Washington, DC** – On Tuesday, the House Subcommittee on Immigration Policy and Enforcement will hold a hearing to discuss objectionable legislation introduced by House Judiciary Chairman Lamar Smith. The bill, H.R. 1932, would strip important due process protections of harmless individuals by needlessly increasing the government's already broad authority to detain noncitizens. It would also attempt to undo the Supreme Court's decision in *Zadvydas v. Davis* that established the minimum standards designed to prevent the long-term, indefinite detention of noncitizens.

"The Supreme Court has made it clear that the Constitution does not permit indefinite detention under our laws. Congress cannot and should not attempt to circumvent the fundamental principles of due process. The Constitution protects all persons--citizens and noncitizens—from being locked-up indefinitely," said AILA President David Leopold. The draft bill would permit the government to jail, without limit, noncitizens who cannot be sent back to their home countries because those foreign governments have closed their doors to repatriation. "In America we simply do not lock people up and throw away the key if their country won't take them back. We are better than that," said Leopold.

"Chairman Smith's bill would also jail lawful permanent residents and people seeking asylum while they are waiting for the civil immigration courts to process their claims—that can be months or even years," said Leopold. "I have clients who were granted asylum by an immigration judge after fleeing horrible persecution in their home country but then waited years in a jail cell just because the government wanted to appeal the case. Americans want to protect public safety and protect our values of fairness and humanitarianism, not one or the other."

The Smith proposal would expand the government's power dramatically while simultaneously mandating the Department of Homeland Security (DHS) to jail people even when immigration officers deem it unnecessary. "The deprivation of liberty is a powerful tool that must be exercised carefully. DHS has exceptional latitude to detain noncitizens who are a flight risk or pose a danger to our communities. Those powers do not need further expansion," said Leopold. The Smith bill would also put further

restrictions on detainees' ability to challenge their detention in court undermining basic due process that is fundamental to America's justice system.

Last year, DHS detained close to 400,000 individuals costing taxpayers nearly $2 billion. Many were detained without any opportunity for a hearing before a judge to decide whether their detention was needed. "That's not a smart way to enforce immigration law or keep Americans safe. DHS has other means besides detention, including bond, supervision, and more intensive tracking methods like ankle devices. Chairman Smith should not introduce this grossly overreaching proposal which is wasteful and inhumane. Detention should be the last resort, not a knee-jerk reaction," concluded Leopold.

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*The American Immigration Lawyers Association is the national association of immigration lawyers established to promote justice, advocate for fair and reasonable immigration law and policy, advance the quality of immigration and nationality law and practice, and enhance the professional development of its members.*

Lutheran Immigration and Refugee Service

www.lirs.org

**Statement of Lutheran Immigration and Refugee Service**

**House Judiciary Subcommittee on Immigration Policy and Enforcement**

**May 24, 2011 Hearing: "H.R. 1932, the Keep Our Communities Safe Act of 2011"**

**BALTIMORE, May 24, 2011**—Lutheran Immigration and Refugee Service (LIRS), the national organization established by Lutheran churches in the United States to serve uprooted people, is deeply concerned about the lack of judicial review and the arbitrary and often prolonged or indefinite detention of migrants who most need our welcome and protection, such as survivors of torture, refugees, asylum-seekers, and other individuals who fear persecution and torture if removed from the United States.

"LIRS's broad network of social ministry organizations, including partners that offer legal services and spiritual comfort to people held in immigration detention, is committed to promoting justice for all migrants," said Linda Hartke, LIRS President and CEO. "As a faith-based organization, we are gravely concerned about the impact of mandatory detention on all migrants, particularly the most vulnerable. We urge Congress and the Administration to address the complexities of our broken immigration system in a way that reflects our American values and strengthens our moral integrity."

Federal mandatory detention laws, without review of an individual's circumstances, are responsible for the detention of thousands of migrants, including asylum-seekers, refugees who have adjusted to lawful permanent residency, and undocumented migrants seeking asylum. These laws have expanded a system of arbitrary detention that contradicts international law and stands in contrast to other systems of justice in the United States. While recent parole policy changes have created a narrow exception for arriving asylum-seekers, they limit government discretion to release asylum-seekers, even when detention is deemed unnecessary.

While the U.S. government deports many migrants in a timely fashion, some cannot be removed because removal is dependent on a third country accepting the deportee. These problems impact stateless individuals, people from countries that do not have repatriation agreements with the United States, and people from countries that lack travel documents for their safe return.

**Impact of Prolonged or Indefinite Detention on Vulnerable Migrants**

Every year mandatory detention policies impact thousands of migrants, many of whom are pursuing meritorious applications to remain in the United States to be protected from persecution or torture or to stay with their family. Detention without judicial review is inappropriate for vulnerable populations and creates significant humanitarian costs. Many of these migrants have suffered past

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persecution or torture. Detention is a re-traumatizing event and causes psychological harm, especially to individuals seeking protection from persecution and torture who remain detained for months or years.[1] Research also shows that detention is particularly harmful to survivors of torture and other victims who have suffered abuse from totalitarian governments and government officials in their countries of origin.[2]

LIRS witnesses the impact of prolonged and indefinite detention through the work of local partners in our Detained Torture Survivors' Legal Support Network.

Jonathan,[3] a survivor of torture from Sudan, had been detained in York, Pennsylvania for ten months while awaiting the resolution of his legal case. While he was still pursuing legal protection from removal based on his fear that he would be tortured again in Sudan, Jonathan abandoned his application. "Over time I became insensitive and lost hope," he said. "My belief in God is diminishing." Because he was born in Southern Sudan, the autonomous region of Sudan that recently declared its independence, it is unclear whether he will be removed from the United States and to which country. Moreover, he could be in detention for several more months before having the opportunity for a judge to review whether his detention is even necessary.

Isaac[4] fled Jamaica after escaping threats to his life by an armed wing of a political group. After arriving in the United States, he presented a false passport to immigration officials. Not understanding U.S. asylum laws, he did not express his fear of being deported. He was removed and lost his chance to seek asylum. To escape another attempt on his life, he returned to the United States a few months later. Immigration officials placed him into detention though this time he protested his removal. He waited for months behind bars until an asylum officer found that his fear was reasonable and referred him to an immigration judge for a final decision. While waiting for his legal case to be resolved, he had flashbacks to his suffering back in Jamaica – to the beatings he faced, to the feeling of being shot, and to the fear of running to save his life. He had strong family ties in the United States and posed no threat to the community, yet he was detained for nearly three years until he was finally granted legal protection in the United States. "My faith is the only thing that keeps me going," said Isaac. "I read the Bible every day to maintain my hope and to stop the nightmares."

**Safe Release for Migrants from Detention and Risk Assessment**

To properly measure the risk factors in individual cases and to inform decisions about custody and safe release of migrants, the federal government needs a dynamic risk assessment tool. Such a tool would enable the government to identify which individuals present genuine risks of flight or threats to public safety as well as people who may be negatively impacted by detention, such as survivors of torture, domestic abuse victims, and other victims of violence. It would also inform the government

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[1] G. J. Coffey and others. 'The meaning and mental health consequences of long-term immigration detention for people seeking asylum' (2010) 70(12) Soc Sci Med 2070 2070-2079; M. Ichikawa, S. Nakahara and S. Wakai. Effect of post-migration detention on mental health among Afghan asylum seekers in Japan' (2006) 40(4) Aust N Z J Psychiatry 341 341-346; Z. Steel and others. 'Impact of immigration detention and temporary protection on the mental health of refugees' (2006) 188(1) The British Journal of Psychiatry 58 58-64.

[2] Physicians for Human Rights, Bellevue NYU Program for Survivors of Torture. 'From Persecution to Prison' <http://physiciansforhumanrights.org/library/report-persprison.html> accessed 4/17/2011 In immigration detention "[s]urvivors of torture often describe feelings of fear and powerlessness caused by the clanging of cell doors, footsteps in the corridor and uniforms, which restimulate their distress.";
A. Burnett and M. Peel. 'Asylum seekers and refugees in Britain: The health of survivors of torture and organised violence' (2001) 322(7286) BMJ: British Medical Journal 606

[3] Name has been changed to protect his identity.

[4] Name and country of origin have been changed to protect his identity.

about the level of risk in individual cases which would mitigate the risk in the most cost-effective and least restrictive manner, including the use of alternatives to detention. Equipped with relevant information, the government would be empowered to facilitate the safe release of vulnerable migrants who pose no risks of flight or danger, but whose applications are pending in the immigration courts or on appeal. A system of informed decision-making, a continuum of effective alternatives to detention, and a process of release that promotes safety will foster long-term security and maintain a model of efficient and just governance that is consistent with the spirit of welcome the United States is known to embody.

"The U.S. government must uphold the human rights of all migrants, including survivors of torture, refugees, and asylum seekers, by ending arbitrary detention without any assessment of risk factors demonstrating why an individual's detention is necessary," said Leslie E. Vélez, LIRS Director for Access to Justice. "Detention is an excessive precaution, especially for migrants who are detained for prolonged and indefinite periods of time. Indefinite detention forces people to choose between giving up their legal claim and face real threats to their safety in their home country of origin when they are deported or bear the unnecessary confinement while they continue to pursue their claim."

**LIRS Recommendations to Congress:**

- Oppose proposals to restrict the liberty of migrants based on determinations that do not evaluate individual risk factors or demonstrate the need to detain.
- Repeal federal statutes that mandate detention without an individualized assessment of the need for detention, i.e., a real public safety threat or a demonstrated risk of flight which cannot otherwise be mitigated.
- Ensure access to judicial review of any decision to restrict liberty, including but not limited to the use of detention.
- Oppose proposals that curtail judicial review of restriction of individual liberty.
- Require any restriction of liberty be the least restrictive form of custody necessary and proportionate to meet government interests.

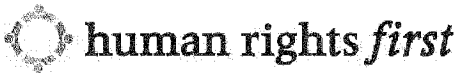
LIRS welcomes refugees and migrants on behalf of the Evangelical Lutheran Church in America, the Lutheran Church—Missouri Synod and the Latvian Evangelical Lutheran Church in America. LIRS is nationally recognized for its leadership advocating with and on behalf of refugees, asylum seekers, unaccompanied children, immigrants in detention, families fractured by migration and other vulnerable populations, and for providing services to migrants through over 60 grassroots legal and social service partners across the United States.

If you have any questions about this statement, please feel free to contact Eric B. Sigmon, LIRS Director for Advocacy, at (202) 626-7943 or via email at esigmon@lirs.org.

To read the LIRS statement on improving efficiency and ensuring justice in the immigration court system, click here: http://bit.ly/j2s4Db.

To read the LIRS statement on concerns about state and local law enforcement participation in interpreting and enforcing federal immigration laws, click here: http://bit.ly/kjuG5c.

To read the LIRS statement on the Department of Homeland Security's December 2009 parole policy directive for arriving asylum-seekers, click here: http://bit.ly/lkQLom.



**Statement of Human Rights First**

**House Judiciary Subcommittee on Immigration Policy and Enforcement Hearing on "H.R. X, Providing for the Detention of Dangerous Aliens"**

**May 24, 2011**

Human Rights First urges Congress to reject amendments to the Immigration and Nationality Act (INA) that would broaden the scope of the Department of Homeland Security's (DHS) already vast power to detain asylum seekers and other immigrants in removal proceedings and limit the already inadequate safeguards presently in place to protect asylum seekers and other immigrants against arbitrary or prolonged detention. While this proposed legislation couches itself as providing for the detention of dangerous aliens and as a measure to "keep our communities safe," its adverse impact would be felt by a great many persons who do not warrant that description and whose detention is unconnected to community safety. Congress should recognize the effect that any such amendments would have on asylum seekers and other vulnerable immigrants.

Since 1978, Human Rights First has worked to protect and promote fundamental human rights and to ensure protection of the rights of refugees. Human Rights First operates one of the country's largest pro bono asylum representation programs. Our volunteer lawyers have helped victims of political, religious, and other persecution from over 80 countries—including Burma, China, Colombia, Congo (DRC), Iraq, and Zimbabwe—gain protection from persecution through asylum in this country. Because of the inadequate due process protections that currently exist in the immigration detention system, many of these refugees have been held in U.S. immigration detention centers for months—some for years—even after they have been found by the government to have a credible fear of persecution and when there is no reason to believe they pose a risk of flight or danger to others.

In April 2009, Human Rights First released a report, *U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison*, in which we found that between 2003 and 2009, DHS detained over 48,000 asylum seekers in jails and jail-like facilities at an estimated cost of over $300 million.[1] Refugees who have been forced to languish for months or years in jails and jail-like facilities before being granted asylum in the United States include:[2]

[1]Human Rights First, *U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison*, April 2009, available at http://www.humanrightsfirst.org/wp-content/uploads/pdf/090429-RP-hrf-asylum-detention-report.pdf.
[2]Id.

- A Burmese school teacher, who supports democracy and was jailed for two years by the Burmese military regime, fled to the United States for protection and was detained by DHS for 7 months in a Texas immigration jail before being granted asylum;

- A Baptist Chin woman, who fled Burma for political and religious reasons, was detained by DHS for 24 months before being granted asylum, even though she had proof of her identity and family in the United States and the U.S. government agreed that she would be subjected to torture if returned to Burma. Her detention cost U.S. taxpayers more than $90,000;

- An Afghan teacher who was threatened by the Taliban, in part due to his affiliations with U.S. armed forces, spent 20 months in detention at three county jails in Illinois and Wisconsin, despite having letters of support from U.S. government officials who knew him because he taught at an educational institution sponsored by U.S. and NATO forces in Afghanistan. He was eventually released on an ankle monitor and granted asylum.

- A Tibetan man, who was tortured by Chinese authorities and detained for more than a year after putting up pro-Tibetan independence posters, was held for 11 months at a New Jersey facility—at a cost of over $53,000—before being granted asylum;

- An Ethiopian refugee was detained at the Pearsall Detention Center in Texas after he crossed the Mexican border in order to seek asylum in the United States. In Ethiopia, he had been tortured and detained after he was falsely accused of taking part in an anti-government protest. He remained in DHS detention for over 5 months and was released only after he was granted asylum;

- A Colombian refugee, who had been jailed, beaten, and tortured for participating in a political demonstration in Colombia, was detained by DHS in Arizona for 14 months, including for over 8 months after an Immigration Judge had ruled that he was eligible for asylum; and

- A Sri Lankan fisherman, who was a victim of kidnapping by the Liberation Tigers of Tamil Eelam (LTTE), was detained in an immigration detention facility in Elizabeth, NJ for 30 months before being released on a highly restrictive ankle bracelet. After several years, he was eventually granted asylum.

These asylum seekers – and thousands of others like them – were held at the American taxpayer's expense for months and sometimes years because the system lacks basic due process safeguards. Under current law, refugees arriving at U.S. borders or ports of entry seeking asylum are subject upon arrival to mandatory detention under the "expedited removal" provisions of U.S. immigration law. The initial determination to detain an asylum seeker is not based on an individualized assessment of factors such as whether the person poses a security

threat or a risk of flight. Rather, it is a blanket determination based on whether a person possesses valid travel documents or expresses an intention to apply for asylum upon arrival in the United States.

If the person is found by DHS to have a "credible fear of persecution," DHS's Immigration & Customs Enforcement (ICE)—which is the detaining authority—can assess whether to release the asylum seeker on parole. But if ICE denies release, that decision cannot be appealed, even to an immigration judge, under Department of Justice regulations that preclude immigration judges from reviewing the detention of "arriving aliens," a category that includes asylum seekers who request refugee protection at U.S. airports and borders. Reforms to ICE's own parole procedures that went into effect in January 2010, while a welcome improvement, did not address the lack of prompt independent court review of ICE's detention decisions. This lack of review is inconsistent with the treaty obligations of the United States under the 1967 U.N. Protocol Relating to the Status of Refugees and the International Covenant on Civil and Political Rights (ICCPR).[3]

DHS regulations set no limit on the length of time an asylum seeker may be detained while his or her asylum proceedings are pending, and there are currently limited procedures in place to review the detention of asylum seekers and other vulnerable immigrants, arriving aliens or otherwise, who are facing a risk of prolonged detention while they wait for a final decision on their cases. Asylum seekers who have suffered from prolonged detention during removal proceedings have included refugees granted asylum who were detained further while DHS appealed the decisions in their favor. Improving the immigration detention system so as to make it both more cost-effective and more consistent with the human rights requires strengthening the protections available under current law, not curtailing them.

Beyond the considerable fiscal cost, the unnecessary detention of asylum seekers takes a lasting emotional toll on them and their families. It also makes it more difficult for asylum seekers, particularly the increasing proportion now detained in remote locations, to obtain legal help or to assemble the evidence necessary to prove their cases in immigration court.

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[3] Article 9(4) of the ICCPR provides that "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." Article 31 of the 1951 U.N. Convention Relating to the Status of Refugees exempts refugees from being punished because of their illegal entry into or presence in the country of refugee and also provides that states shall not restrict the movements of refugees more than is "necessary." By ratifying the 1967 Protocol, the United States bound itself to the substantive provisions of the 1951 Refugee Convention. The Executive Committee of the U.N. High Commissioner for Refugees (UNHCR), of which the United States is a member, has recommended that the detention of asylum seekers "be subject to judicial or administrative review," and UNHCR guidelines on the detention of asylum seekers make clear that there should be "automatic review before a judicial or administrative body independent of the detaining authorities." UNHCR Exec. Comm., *Detention of Refugees and Asylum-Seekers, Conclusion No. 44* (XXXVII), ¶ e (Oct. 13, 1986); UNHCR, *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, Guideline 5(iii) (Feb. 1999).

Human Rights First cautions Congress against expanding DHS's detention authority, limiting access to bond hearings by immigration judges, expanding any categories of mandatory detention, and/or limiting judicial review. As a nation committed to the rule of law, the United States must guarantee basic due process protections designed to prevent asylum seekers and other immigrants from being subjected to arbitrary and prolonged detention. Efforts to strip these basic protections run contrary to the fundamental principles of liberty and freedom that have made this country a beacon of hope for the persecuted around the world.



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Mr. GOWDY. The Chair would now recognize gentlelady from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. I thank the Chair.

And I am very intrigued by the Chairman's bafflement and desire to find a remedy. And I would say to the Chair that what I have gotten from Mr. Arulanantham's commentary is, without him

saying it, that America is different and that we have the responsibility to respond to the needs of Chief Baker. And none of us here are asking to eliminate deportations, those who are in the midst of deportations.

But when we look at the good efforts of my friend from Texas, sometimes good efforts are not good enough. And frankly, what we have is what we call in Texas a lassoing by horseback and with one of our profound, talented cowboys and just rounding up everyone and anything. I don't think that is the American way. We are here to ensure that America is safe, that our law officers do not have to be subjected to reckless, violent actions of individuals that have been in detention and possibly in removal proceedings. And I believe there is a way of finding a reasoned balance.

Mr. Mead, let me ask you. What are you doing? You have got two decisions, the Fifth Circuit and the Ninth Circuit. What are you doing right now in terms of your detention? Do you have people in detention?

Mr. MEAD. In the Fifth Circuit?

Ms. JACKSON LEE. Do you have people in detention, yes, in those areas and outside those areas?

Mr. MEAD. Yes, we have people in detention in the Fifth Circuit.

Ms. JACKSON LEE. And what is the block that you now have with the decision that is in place?

Mr. MEAD. In that particular circuit, the special circumstances that would allow us to detain people beyond the 180 days don't apply.

Ms. JACKSON LEE. So what is your response?

Mr. MEAD. Well, we up to that point continue to try and get a travel document for those people and remove them and at that point that we would have to release them, we put whatever controls on them we can, as was discussed, electronic monitoring, regular reporting, and during that time also continue to try and get travel documents.

Ms. JACKSON LEE. So you don't stop your work of trying to remove these individuals from the country.

Mr. MEAD. No, ma'am, we do not.

Ms. JACKSON LEE. Though I am not applauding necessarily the decision of the Fifth and Ninth Circuits, but you are also anxiously moving quicker in terms of trying to move the document process along.

Mr. MEAD. Well, I don't know that we move quicker because in all cases we move as quickly as we can. Our goal is not to detain people. Our goal is to remove them. And so we move as quickly——

Ms. JACKSON LEE. Well, let us just say that you are persistent and determined. Is that correct?

Mr. MEAD. Yes, ma'am, we are persistent and determined.

Ms. JACKSON LEE. You said something in your testimony that said that ICE is not in the business of holding detainees for an indefinite time. My assessment of this legislation would cause you to hold detainees with lesser offenses, theft, receiving stolen property. Is this going to be an effective utilization of your resources? Do you have the necessary detention, if you will, infrastructure to be able to now expand? Rather than giving you the authority that you wanted before, now it is expanding what your jurisdiction is. It is

now going to all of these lesser offenses that you will be holding persons for, not allowing them to have a bond under this legislation.

Mr. MEAD. Congresswoman, I can't comment on the legislation, but I can tell you that the number of detention beds we have is finite, as appropriated by Congress, and as a result, we do prioritize the use of them, beginning with people that pose the greatest threat and pose the greatest risk of flight. So that is how we handle them.

Ms. JACKSON LEE. And that is a common sense approach.

Let me go to Mr. Arulanantham and help you—not that you need helping out, but let me just pointedly say are you, in essence, insensitive to the need to provide detention and the deportation process. You are aware that there is a process in place that is a legitimate process. Is that correct?

Mr. ARULANANTHAM. Absolutely.

Ms. JACKSON LEE. Then how undermining is this legislation when it comes to both our constitutional premise, what we are guided by, even though these individuals are non-citizens, but also just the plain sense of detaining people indefinitely, no judicial intervention, people with mental illness having no ability for treatment, individuals traveling with their families who are children, no seemingly exemptions made for them? How unrealistic and how troublesome is this when it relates to the constitutional premise of due process?

Mr. ARULANANTHAM. Thank you, Representative.

The Due Process Clause says it applies to all persons, and there is no question that the people that we are talking about today are persons under the Due Process Claus. So there are two ways in which the bill really fundamentally undermines those.

And the first is that it allows, while a person is going through the deportation process and may have a very good argument that they should not be deported—they may ultimately win their case. While that process is going on, this bill makes it, in many cases, impossible for them just to get a day in court on do I have to be locked up while I am going through my case. And so people get detained for years while their cases are pending, and they don't ever get a bond hearing. And that applies to people who have no criminal convictions at all.

Ms. JACKSON LEE. Sometimes it is difficult for them to have counsel for those bond hearings. Many do not have, and in detention there is not a procedural requirement for them to have a lawyer.

Mr. ARULANANTHAM. That is right. And 84 percent, according to a study from a couple of years ago, do not—of the detained population, do not have a lawyer.

Ms. JACKSON LEE. And we are certainly not talking about Osama bin Laden's cousin, the level of intensity that we are speaking about right now.

Mr. ARULANANTHAM. No, and some of the people are people I talked about earlier. My client was detained 2 and a half years. He is a Christian minister. You know, there is a Senegalese information systems—a variety of people who have no criminal history at all or only extremely minor crimes.

And the second way it does is it authorizes the potentially permanent detention. This is the second issue that we have been discussing. And under this bill, it includes a lot of people who have been convicted of very ordinary offenses. Again, we are not talking about terrorists or people who have committed very, very serious crimes.

I think this goes back to the question, Representative Gowdy, you were asking me. Let me see if I can do a little bit better to give you an alternative.

Ms. JACKSON LEE. I will allow you to expand on that.

Mr. ARULANANTHAM. I appreciate that.

All of the States have civil commitment systems, and those have been upheld—they have not all been upheld but several of them have been upheld in the Supreme Court—for the detention of people who are specially dangerous, but with very rigorous procedural protections.

So, for example, you were discussing this Fifth Circuit case, Representative. My understanding of it—I did not represent that person. The ACLU did. My understanding is that after the Government lost that person's case, he was detained in the civil commitment system in Massachusetts. Now, I haven't followed up to know what happened yesterday, but that is my understanding from——

Ms. JACKSON LEE. So there was an alternative.

Mr. ARULANANTHAM. Right. So all of the people described in the bill could be referred to State civil commitment systems. Those systems have been—like I said, I won't say every single one, but they have been upheld by the Supreme Court as a general matter in a couple cases out of Kansas. And if they qualify for civil commitment, they can be held under that system.

But the bill authorizes the indefinite detention of a lot of people who are not very dangerous and probably wouldn't get detained under those systems. And that is the other reason why it is unconstitutional.

Ms. JACKSON LEE. Mr. Chairman, can I just ask indulgence for him to answer my question about what the bill would do for individuals who are experiencing mental illness or those families who have children under 18 who may be in that process and unaccompanied. There seems to be no provisions or relief if people are in those conditions or no required treatment if you are in that condition and you indefinite extension of your detention, and then there doesn't seem to be an exemption for families with children that may be in an indefinite detention.

Mr. ARULANANTHAM. That is correct, Representative. So, for example, Warren Joseph, who is a person I talk about in my written testimony. He was a veteran of the Gulf War, a decorated veteran of the Gulf War. And he had PTSD. He was convicted of a firearms offense. In the original conviction, he wasn't sentenced to any time. But that conviction made him deportable. And he was eligible for release, and he ultimately won that release. So he won his immigration case, but it took 3 years for that case to go on. And that Gulf War veteran spent 3 years in immigration detention while he was fighting his case.

And the courts have now—there is a growing consensus in the Federal courts that that is unlawful. It violates the Due Process

Clause because if you are going to be detained for that long, you should get a bond hearing. But this bill would reverse those.

Ms. JACKSON LEE. And children as well.

Mr. ARULANANTHAM. Yes, similarly no special provision for them either.

Ms. JACKSON LEE. I thank you. I think we should studiously, Mr. Chairman, look carefully at this legislation.

I yield back.

Mr. GOWDY. I thank the gentlelady from Texas.

And the Chair would recognize the Chairman of the full Committee, the gentleman from Texas, for any concluding comments or questions he may have.

Mr. SMITH. Thank you, Mr. Chairman. I asked my questions earlier.

But Mr. Arul, I had one more question for you. Are there any criminals, perhaps a mass murderer or a serial rapist, whom you would support being detained indefinitely or, say, in a series of 6-month periods, which is allowed under the bill?

Mr. ARULANANTHAM. Yes. In the sense, Representative, the Supreme Court in two cases, *Kansas v. Hendricks* and *Kansas v. Crane*, has upheld the constitutionality of the prolonged detention, under certain rigorous procedural protections, of people who are specially dangerous. You have to look at a particular case to see if it fit those rules, but that is constitutional. The Supreme Court has upheld it and we would have no——

Mr. SMITH. Let's just take those examples. So you would support detaining a mass murderer or a serial rapist indefinitely?

Mr. ARULANANTHAM. They would have to meet the criteria set forth in those cases. But if a person was specially dangerous and met the criteria in those cases——

Mr. SMITH. So at least there are some instances where you would support indefinite detention. You don't have an absolute stand that no, never.

Mr. ARULANANTHAM. Yes. The Supreme Court upheld——

Mr. SMITH. I think the answer is yes. Okay, thank you.

Ms. LOFGREN. Mr. Chairman, since we are doing afterthought questions——

Mr. GOWDY. Yes, ma'am. The Chair would recognize the gentlelady from California for any concluding remarks she may have.

Ms. LOFGREN. As I look at the list of countries, I couldn't help but notice that more than half of the people who have not been deported are from Cuba. People can have different viewpoints about that, but I do notice that we don't have diplomatic relations with Cuba and that there is a strong contingent of Congress that dramatically opposes opening the door to diplomatic relations with Cuba. So I think that is a major impediment to the deportation problem that we are discussing today. I just thought it was important to note that.

And I know that the Chairwoman of the Foreign Affairs Committee—I don't know what she thinks about this bill, but I do know what she thinks about Cuba, and she is not in favor of having diplomatic relations with Cuba. So I think we just need to state that that is a big part of this whole issue.

I just wanted to finally comment that we have taken some steps, it sounds like, that were, frankly, far overdue in terms of forcing these countries to act. So I think it is worth noting that this new memorandum of understanding is already having—the Cuba issue is a side one, but it is already having an impact and I expect that it will continue to have an impact in some cases.

And I would remiss if I did not mention the case of Vietnam because we have a communist government in Vietnam as well. I have a large number of Vietnamese American constituents who do not support—I mean, if it is a person who is a criminal. That is one thing. But if someone is here on an immigration violation, they do not support sending somebody back to the communists, and they are as serious about that as Ileana is about Cuba.

I remember we had a witness here of a young woman who tragically lost her life in an auto accident whose family escaped from communist China in a boat. They were picked up by a German liner. And this young girl was born in Germany, and then her parents came to the U.S. and overstayed their visa. And we tried to get Germany to take her, but they wouldn't.

Under this bill, she would be in jail for her life, and that is unreasonable. It doesn't solve the issue, Chief, that you have raised. It is a legitimate one and needs an answer, but this goes too far. I am hopeful that we can work through it and fix it and get something that we are all proud of.

And I thank the gentleman for yielding.

Mr. GOWDY. Yes, ma'am.

In conclusion, I couldn't help that note that Iraq was on this list. When you consider the amount of money and other natural resources, including the blood and limbs of our boys and girls that have been spent in that country, that needs to be fixed yesterday.

And in conclusion, I would note my colleague, the gentlelady from Texas, said America is different, and she is correct in many ways, and most of them are laudatory. But we have one of the highest crime rates in the world. We have an unacceptably high recidivism rate. And talismanically, 5 to 4 Supreme Court decisions all of a sudden become bright-line constitutional rules the minute they are published, and most of us find that frustrating.

But on a happier note, we want to thank our witnesses for their testimony today.

Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses which we will forward and ask the witnesses to respond to as promptly as they can so their answers may be made part of the record.

Without objection, all Members will have 5 legislative days to submit any additional materials for inclusion in the record.

With that and on behalf of all of us, again, we apologize for the intrusion into your time, and thank you for helping shed light on this significant issue.

With that, we are adjourned.

[Whereupon, at 1:08 p.m., the Subcommittee was adjourned.]

# APPENDIX

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## MATERIAL SUBMITTED FOR THE HEARING RECORD

Letter from Thomas M. Susman, Director, Governmental Affairs Office, the American Bar Association

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May 31, 2011

The Honorable Elton Gallegly
Chairman
Subcommittee on Immigration Policy and Enforcement
Committee on the Judiciary
Washington, DC 20515

The Honorable Zoe Lofgren
Ranking Member
Subcommittee on Immigration Policy and Enforcement
Committee on the Judiciary
Washington, DC 20515

Dear Chairman Gallegly and Ranking Member Lofgren:

On behalf of the American Bar Association (ABA), I write to express the ABA's views on measures to expand the Department of Homeland Security's detention authority contained in H.R. 1932, the "Keep Our Communities Safe Act of 2011." I request that you make this letter part of the record for the hearing held on May 24, 2011. In summary, the ABA believes that Congress should be taking steps to shorten and provide alternatives to, rather than prolong, detention.

**Background**

The American Bar Association is the world's largest voluntary professional organization, with a membership of nearly 400,000 lawyers, judges and law students worldwide. The ABA continuously works to improve the American system of justice and to advance the rule of law in the world. Through its Commission on Immigration, the ABA advocates for modifications in immigration law and policy; provides continuing education to the legal community, judges, and the public; and develops and operates pro bono legal representation programs that encourage volunteer lawyers to provide high quality representation for immigrants, with a special emphasis on the needs of the most vulnerable immigrant and refugee populations.

The ABA opposes proposals to prolong detention, both while an immigration case is pending as well as after a final order of removal. We also oppose proposals to increase the use of mandatory detention. The ABA is committed to ensuring that foreign nationals in the United States receive fair treatment. The many obstacles to obtaining legal representation faced by immigrants in detention, and the reports we continue to receive about deficiencies in conditions of detention, are important reasons that the ABA opposes the detention of noncitizens in removal

proceedings except in extraordinary circumstances, such as when the individual presents a threat to national security or public safety, or presents a substantial flight risk.

There are cost-effective alternatives to detention that have been proven effective in ensuring that noncitizens appear in court and for removal. The ABA supports expanding the use of humane alternatives to detention, for those who would otherwise be detained, that are the least restrictive necessary to ensure appearance in court.

**Detention and Lack of Access to Counsel Adversely Affects Case Outcomes**

Noncitizens are often subject to prolonged detention, even if they do not present a threat to national security or public safety, or present a substantial flight risk. There is evidence that being detained affects the *outcome* of immigration proceedings. Newly released preliminary findings from The New York Immigrant Representation Study, a two-year project of the Judge Robert A. Katzmann Immigrant Representation Study Group, show that "[t]he two most important variables in obtaining a successful outcome in a case (defined as relief or termination) are having representation and being free from detention."[1] The study analyzed cases in the New York immigration courts and found that only 3% of individuals who were unrepresented and detained had successful outcomes, versus 74% of individuals who were represented and released or never detained.[2] The stakes for many noncitizens are high: they face loss of livelihood, permanent separation from U.S. family members, or even persecution or death if deported to their native countries. In this context, getting the right result is critical.

Detention does not come cheaply: it costs U.S. taxpayers an average of $122 per day to detain one person. Alternatives to detention are far more cost effective, at less than $8.00 per day for full service alternative programs, including supervision and support to help ensure appearance at hearings and compliance with removal orders.[3] A snapshot of the detained population on January 25, 2009 showed that of the 32,000 noncitizens in Immigration and Customs Enforcement (ICE) custody, 18,600 had pending removal cases.[4] The average length of detention for that group was 81 days, although 13% had been detained for between 90 days and six months, 10% for between six months and one year, and 3% for one year or more. 10,873 detainees had received final orders of removal, and their average length of detention was about 114 days.[5] The daily cost of detaining these 10,873 people for 114 days today would be over $151 million. Alternatives to detention could be provided for a fraction of that amount.

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[1] The New York Immigrant Representation Study, *Preliminary Findings*, at 1, *available at* http://www.nylj.com/nylawyer/adgifs/decisions/050411immigrant.pdf.

[2] *Id.* 18% of individuals who were represented but detained were successful, and 13% of individuals who were unrepresented but released or never detained.

[3] The cost of providing electronic monitoring alone is under $1.00 per day.

[4] Donald Kerwin and Serena Yi-Ying Lin, *Immigrant Detention: Can ICE Meet Its Legal Imperatives and Case Management Responsibilities?* Migration Policy Institute, at 1 (Sept. 2009), *available at* http://www.migrationpolicy.org/pubs/detentionreportSept1009.pdf. DHS Immigration and Customs Enforcement (ICE) currently detains about 33,400 people per day, or about 400,000 per year, at a cost of $1.77 billion in FY 2010.

[5] 114 days is the average length of detention for 10,771 of the 10,873; data was missing for the other 102 people. *See id.*

The importance of meaningful access to legal representation for individuals in removal proceedings cannot be overstated. Immigrants in detention are in administrative proceedings, but the consequences of removal can be as severe as consequences in criminal proceedings. Removal may result in permanent separation from family members and communities, or violence and even death for those fleeing persecution. Yet immigrants have no right to appointed counsel and must either try to find lawyers or represent themselves from inside detention facilities. For all who face removal, legal assistance is critical for a variety of reasons, including a lack of understanding of our laws and procedures due to cultural, language, or educational barriers. Asylum seekers in particular may find it extremely difficult to articulate their experiences or to discuss traumatic situations with government officials. Detainees, however, face the additional obstacle of having virtually no direct access to sources of evidence or witnesses; legal representation is therefore indispensable.[6] Nevertheless, in FY 2010 only 16% of people in detention were represented by counsel, and 40% of noncitizens overall were represented.[7] In south Texas, where the ABA's South Texas Pro Bono Asylum Representation Project (ProBAR) operates, only about 36% of people in immigration proceedings are represented, and the quality of representation varies widely.

The ABA receives written correspondence and telephone calls from detainees every day — more than 50 calls and letters each week. Almost every person who contacts the ABA lacks legal representation. The need is great, and resources are very limited. Although the DOJ Executive Office for Immigration Review (EOIR) provides a list of legal service providers, most people who contact us report that the providers listed do not answer the phone, do not take detained cases, or charge too much money. The National Immigrant Justice Center recently issued a report finding that 28% of the detention facilities surveyed, holding about 3,000 people, are not served by any legal aid organization. Eight facilities with more than 100 detainees did not have any access to legal aid organizations, including any type of legal orientation program.[8]

Many experts agree that access to counsel creates efficiency, including providing cost savings as well as fairness in the system. For example, having access to legal orientation presentations reduces detention time, as individuals learn whether or not they have relief. The ABA supports expanding the DOJ Legal Orientation Program (LOP), which currently reaches about half of detained noncitizens in removal proceedings. Under this program, an attorney or paralegal meets with the detainees who are scheduled for immigration court hearings in order to educate them on the law and to explain the removal process. Based on the orientation, the detainee can decide whether he or she potentially qualifies for relief from removal. Persons with no hope of obtaining relief more readily submit to removal. According to the Department of Justice, LOPs improve the administration of justice and save the government money by expediting case

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[6] American Bar Association, *American Justice Through Immigrants' Eyes*, 2004, at 53, available at http://www.abanet.org/publicserv/immigration/americanjusticethroughimmigeyes.pdf. According to one study, asylum seekers are four to six times more likely to succeed if represented. See A. Schoenholtz and J. Jacobs, "The State of Asylum Representation: Ideas for Change," 16 *G'town. Immig. L.J.* 739 - 740 (Summer 2002). See also http://usscuf.gov/countries/global/asylum_refugees/2005/february/legalAssist.pdf at 239.

[7] Executive Office for Immigration Review, Office of Planning, Analysis, and Technology, *FY 2010 Statistical Year Book* (January 2011), at G1, *available at* http://www.justice.gov/eoir/statspub/fy10syb.pdf.

[8] Heartland Alliance National Immigrant Justice Center, *Isolated in Detention* (Sept 2010), at 8; *available at* http://www.immigrantjustice.org/policy-resources/isolatedindetention/intro.html.

completions and leading detainees to spend less time in detention.[9] ABA provides LOPs to adults in detention in south Texas and San Diego and can unequivocally attest to the benefits that these presentations bring both to detainees and the immigration court system. The ABA supports expansion of the Legal Orientation Program to all detained and non-detained persons in removal proceedings.

**Deprivation of Liberty and Inadequate Detention Conditions Necessitate Limiting the Duration of Detention**

Recognizing the grave deprivation of liberty involved with long-term detention, the U.S. Supreme Court in *Zadvydas v. Davis*, 533 U.S. 678 (2001) and *Clark v. Martinez*, 543 U.S. 371 (2005) articulated limits on the allowable duration of detention. Under those decisions, the Department of Homeland Security may only detain a person for longer than six months after the issuance of a final removal order if there is a significant likelihood of removal in the reasonably foreseeable future. Regulations currently permit continued detention when the government asserts that: a person has a highly contagious disease posing a threat to public safety; a person's release would have adverse foreign policy consequences; a person is a national security concern; or a person is determined to be "specially dangerous" due to a "mental condition or personality disorder" and prior criminal history.

The ABA opposes proposals to expand the categories of people who can be detained indefinitely and supports full compliance with the Supreme Court's decisions in *Zadvydas v. Davis* and *Clark v. Martinez*. Prior to the Supreme Court's decisions (and even afterwards, in some cases), too many individuals languished needlessly in immigration detention at taxpayer expense, unable to be rejoined with families, seek medical and other care at their own expense, or productively contribute to the economy.

Prolonged detention, including post–final order detention, unnecessarily taxes the American people, creates liability issues for the government, and deprives noncitizens of access to the basics of human existence, including appropriate medical treatment. Since 2003, the ABA has kept records of reports of inadequate and even harmful detention conditions, received in telephone calls and written correspondence from individuals in detention. Unfortunately, the type of complaints has hardly changed in that time. In the past six months, the ABA has forwarded 10 of the most serious complaints to Immigration and Customs Enforcement (ICE), which include the story of one man who notified medical staff when he entered ICE detention that he had recently been told to seek immediate attention for pressure building in his eye. Although he immediately signed the medical release, four months passed without medical care because the facility did not follow up on requesting his medical file. After this time, he lost vision in the eye. A second man reported loss of vision in one eye and lack of adequate care to address deteriorating vision in the other. A third man reported that he fractured his spine in detention but received inadequate attention in part because he was transferred twice and the doctor in a receiving facility would not honor test results or an approval for surgery issued while the man was in the transferring facility.

[9] U.S. Department of Justice, Board of Immigration Appeals, "The BIA Pro Bono Project is Successful" (Oct. 2004); U.S. Department of Justice, Executive Office for Immigration Review, "Evaluation of the Rights Presentation" (Jan. 2000).

In 2006, at the request of the Government Accountability Office, the ABA compiled a list of detention conditions issues of greatest concern, including issues that should have been corrected if DHS's own detention standards were enforced. The list has hardly changed in five years. Common conditions complaints include: (1) telephone calls, including calls to attorneys, are prohibitively expensive and phones do not work properly; (2) mail does not arrive or is delayed, legal mail is prohibited or is opened outside the presence of detainees, and outgoing legal mail is inspected; (3) law libraries have insufficient or outdated materials, or detainees do not have access to law libraries or legal information; (4) detainees are housed with criminals and are treated like criminals; (5) grievance procedures are not followed (including detainees being threatened with losing privileges or being reclassified for filing grievances); (6) medical and dental complaints, including medication not being received in a timely fashion, delayed treatment, and inadequate treatment including pain relievers offered in response to any complaint regardless of its nature; (7) unsanitary conditions; (8) spoiled or insufficient food, or food not meeting medical or religious diet needs; (9) facility staff problems, including verbal and physical abuse, discriminatory comments based on race, nationality, or sexual orientation, lack of awareness of or sensitivity to trauma experienced by asylum seekers; and (10) abuse by criminal inmates or other detainees.

**Conclusion**

The ABA believes that the overuse of immigration detention does irreparable harm to individuals who lack adequate counsel, are separated from their families, and may be unjustly deported. We believe that a number of steps should be taken to address these concerns, including: maintaining and ensuring compliance with case law that limits prolonged and indefinite detention; using humane alternatives to detention for those who do not present a threat to national security or public safety or a substantial flight risk; and expanding pro bono programs including the Legal Orientation Program to individuals in immigration proceedings nationwide. Each of these steps would increase efficiency as well as address many of the failures in our immigration system.

Thank you for the opportunity to share our views.

Sincerely,

Thomas M. Susman

Letter from Douglas E. Baker, Chief of Police, Fort Myers Police Department, Fort Myers, FL

**FORT MYERS POLICE DEPARTMENT**

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May 12, 2011

Dimple R. Shah
Majority Counsel
Subcommittee on Immigration Policy and Enforcement
House Judiciary Committee
Rayburn House Office Building
Room B-353
Washington, DC 20515

Dear Counsel Shah:

Per our earlier conversation, I would like to provide you with background information on the death of Officer Andrew Widman.

On July 18, 2008 Officer Andrew Widman of the Fort Myers Police Department was senselessly murdered while on patrol. Unbeknownst to Officer Widman, he approached an individual, Mr. Abel Arango, who had recently been involved in a heated domestic argument with his girlfriend. This individual had a lengthy criminal record, gang affiliations, and an active warrant out for his arrest. As Officer Widman began to speak with him, Arango pulled out a gun and shot Officer Widman at close range. Officer Widman died at the scene.

To give you some history into Arango's past, I offer the following:

- Abel Arango was ten years old when he fled Cuba, his birthplace, and arrived in the United States in 1991.
- In 1998 Abel Arango was convicted and sentenced to a six year prison term for armed robbery and four five-year terms for carrying a concealed fire arm, burglary, and two counts of grant theft; Immigration and Naturalization Services placed a detainer on Abel Arango in 1991 for him to be detained by INS upon his release from prison.
- It appears on or about 2000 or 2001 Abel Arango was ordered to be deported back to Cuba after being sentenced for armed robbery in Florida.
- It appears Abel Arango appealed his deportation order and the Bureau of Immigration Appeals denied Abel Arango's appeal and his deportation order remained in effect.

- On March 1, 2004, upon being released from Krome Detention Center in Miami, Abel Arango was not detained by Immigration and Naturalization Services or Immigration and Customs Enforcement and was unleashed on Florida citizens.

- Upon his release, Abel Arango was to report to Immigration and Customs Enforcement officials every six months and he was on supervised probation as a convicted felon.

- Abel Arango was on supervised probation in the State of Florida from 1998 to the day he assassinated Fort Myers Police Officer Andrew Widman.

- On May 16, 2008, Abel Arango was arrested and booked into the Lee County Jail for five felony counts relating to the trafficking and sale and possession of cocaine.

- On May 17, 2008, Abel Arango was released from the Lee County Jail by posting a $100,000.00 surety bond.

- On May 29, 2008, a Collier County Judge signed an arrest warrant for Abel Arango for violation of probation and Abel Arango was to be held in custody without bond pursuant to the violation of probation and arrest warrant.

- On June 16, 2008, Abel Arango walked into the Lee County Justice Center, appeared in a court room and pled not guilty before a Judge in the presence of employees from the Office of the State Attorney, Lee County Sheriff's Office, bailiffs, his defense attorney, and other personnel which may have included state probation officials and clerk of courts officials in a court room fully equipped with access to the Clerk of Courts' computers.

- Abel Arango entered a plea of not guilty before a Judge on June 16, 2008, and walked out of the courtroom on his own free will with a future court date.

- Abel Arango had a private lawyer representing him and it is unknown what knowledge this lawyer possessed and what actions this lawyer made on behalf of Abel Arango before and during the court appearance, and what actions he took after Arango walked out of the Lee County Justice Center on June 16, 2008.

- Abel Arango was allowed to walk out of the Lee County Justice Center even though he had an active arrest warrant ordering he be arrested, taken into custody and not released on bond or bail, even though it appears he had a pending deportation order that he be deported out of the United States of America, and even though he was on supervised probation for a violent felony including armed robbery with a gun.

- On July 18, 2008, thirty-two days after walking out of the Lee County Justice Center, at or around 2:00 a.m. Abel Arango used a gun to violently and cowardly assassinate Andrew Widman, a Fort Myers police officer.

On May 9, 2011 Florida Governor Rick Scott signed into law the Officer Andrew Widman Act, which will enhance officers' safety by providing an additional blanket of security by authorizing a judge to issue a warrant for the arrest of a probationer or offender who has violated the terms of probation or community control, and allow for the judge to immediately commit serious offenders on the likelihood that the person will be imprisoned for the violation.

Had the judge been able to immediately charge Arango with the probation violation at the time of his arrest, Officer Widman's murder may have been avoided. Three other officers in Florida were shot and killed since January under similar circumstances.

Although we are certainly thankful that Governor Scott signed into law the Officer Andrew Widman Act, had Arango been deported as ordered, Officer Widman would be alive today. Due to the fact that Arango was not deported and the similarities surrounding and the Supreme Court Ruling in Zadvydas v. Davis, I am honored to be asked to provide testimony when legislation is introduced at a hearing to be held on May 24, 2011 at 10:00 am.

As we have discussed, these cases involve aliens who have a conviction and a final order of removal, but cannot be removed based on their country's inability or unwillingness to take them back. We cannot allow dangerous, criminal aliens, who have orders of removal to be continually released back into our communities.

I have spoken with Officer Widman's widow, Susanna Makinson and his parents, Joe and Marti Widman, they are overwhelmed and very supportive of the possibility of naming this Federal legislation in honor of Andy.

As the Chief of Police for the City of Fort Myers, Florida where Officer Widman served, I am truly honored to testify and assist in any way needed. Should you need to reach me in advance of the May 24th Hearing, I can be reached at 239.321.7727 (office) or 239.850.4974 (cell).

Sincerely,

Douglas E. Baker
Chief of Police

DEB/dee

cc: Susanna Makinson
Joe & Marti Widman

**FY2009-FY2011YTD Zadvydas Releases by Citizenship Country and Criminality**

| Citizenship Country | FY2009 | | FY2010 | | FY2011(YTD) | |
|---|---|---|---|---|---|---|
| | Non-Criminal | Convicted Criminal | Non-Criminal | Convicted Criminal | Non-Criminal | Convicted Criminal |
| **TOTAL** | **1,390** | **3,847** | **1,045** | **3,882** | **1,605** | **1,012** |
| AFGHANISTAN | 2 | 8 | 1 | 8 | 2 | 2 |
| ALBANIA | 3 | 0 | 2 | 7 | 2 | 1 |
| ALGERIA | 3 | 5 | 5 | 6 | 6 | 2 |
| ANGOLA | 3 | 1 | 0 | 5 | 0 | 1 |
| ANTIGUA-BARBUDA | 1 | 9 | 0 | 8 | 1 | 2 |
| ARGENTINA | 1 | 0 | 2 | 2 | 4 | 0 |
| ARMENIA | 7 | 6 | 2 | 17 | 14 | 3 |
| AZERBAIJAN | 0 | 8 | 1 | 4 | 1 | 2 |
| BAHAMAS | 0 | 12 | 0 | 19 | 7 | 4 |
| BANGLADESH | 26 | 13 | 23 | 9 | 11 | 1 |
| BARBADOS | 1 | 1 | 0 | 7 | 0 | 1 |
| BELARUS | 0 | 1 | 0 | 4 | 1 | 0 |
| BELGIUM | 0 | 0 | 0 | 1 | 0 | 0 |
| BELIZE | 1 | 1 | 0 | 4 | 2 | 0 |
| BENIN | 1 | 1 | 2 | 0 | 0 | 1 |
| BERMUDA | 0 | 0 | 0 | 0 | 0 | 1 |
| BHUTAN | 0 | 0 | 1 | 0 | 0 | 0 |
| BOLIVIA | 0 | 1 | 1 | 2 | 0 | 0 |
| BOSNIA-HERZEGOVINA | 1 | 11 | 2 | 14 | 8 | 5 |
| BOTSWANA | 0 | 0 | 0 | 0 | 1 | 0 |
| BRAZIL | 4 | 1 | 8 | 4 | 9 | 1 |
| BRITISH VIRGIN ISLANDS | 0 | 0 | 0 | 1 | 0 | 0 |
| BULGARIA | 1 | 1 | 0 | 2 | 0 | 0 |
| BURKINA FASO | 1 | 1 | 5 | 0 | 4 | 0 |
| BURMA | 4 | 0 | 1 | 5 | 0 | 0 |
| BURUNDI | 2 | 2 | 1 | 0 | 1 | 0 |

| | | | | | | |
|---|---|---|---|---|---|---|
| CAMBODIA | 10 | 126 | 6 | 94 | 40 | 33 |
| CAMEROON | 11 | 7 | 5 | 7 | 1 | 1 |
| CANADA | 0 | 1 | 0 | 0 | 0 | 1 |
| CAPE VERDE | 0 | 4 | 0 | 7 | 5 | 4 |
| CENTRAL AFRICAN REPUBLIC | 2 | 1 | 0 | 1 | 1 | 0 |
| CHAD | 1 | 1 | 0 | 0 | 0 | 0 |
| CHILE | 0 | 0 | 0 | 1 | 0 | 0 |
| CHINA, PEOPLES REPUBLIC OF | 269 | 88 | 258 | 116 | 144 | 23 |
| COLOMBIA | 5 | 2 | 4 | 7 | 3 | 0 |
| COMOROS | 0 | 0 | 0 | 1 | 0 | 0 |
| CONGO | 8 | 4 | 3 | 5 | 3 | 1 |
| CROATIA | 0 | 1 | 2 | 1 | 0 | 0 |
| CUBA | 137 | 1714 | 57 | 1425 | 395 | 386 |
| DEM REP OF THE CONGO | 3 | 3 | 7 | 10 | 2 | 3 |
| DOMINICA | 0 | 0 | 0 | 2 | 0 | 1 |
| DOMINICAN REPUBLIC | 0 | 5 | 3 | 6 | 3 | 3 |
| ECUADOR | 0 | 0 | 6 | 1 | 4 | 0 |
| EGYPT | 4 | 7 | 1 | 8 | 4 | 1 |
| EL SALVADOR | 23 | 14 | 49 | 18 | 74 | 14 |
| ERITREA | 5 | 8 | 4 | 3 | 6 | 2 |
| ESTONIA | 1 | 1 | 0 | 0 | 1 | 0 |
| ETHIOPIA | 10 | 14 | 3 | 18 | 5 | 1 |
| FIJI | 1 | 0 | 1 | 1 | 0 | 0 |
| FRANCE | 0 | 4 | 0 | 3 | 2 | 1 |
| FRENCH GUIANA | 1 | 0 | 1 | 0 | 0 | 0 |
| GAMBIA | 27 | 21 | 12 | 19 | 14 | 2 |
| GEORGIA | 2 | 5 | 1 | 2 | 0 | 0 |
| GERMANY | 2 | 1 | 1 | 4 | 1 | 0 |
| GHANA | 14 | 11 | 22 | 21 | 15 | 2 |
| GREECE | 0 | 1 | 0 | 0 | 1 | 0 |
| GRENADA | 0 | 2 | 0 | 1 | 0 | 1 |
| GUATEMALA | 1 | 5 | 27 | 14 | 30 | 3 |
| GUINEA | 41 | 43 | 27 | 37 | 14 | 10 |

| | | | | | | |
|---|---|---|---|---|---|---|
| GUINEA-BISSAU | 0 | 1 | 0 | 0 | 0 | 1 |
| GUYANA | 3 | 2 | 3 | 9 | 4 | 6 |
| HAITI | 279 | 97 | 21 | 307 | 49 | 27 |
| HONDURAS | 11 | 4 | 40 | 11 | 48 | 8 |
| HONG KONG | 0 | 4 | 0 | 1 | 0 | 0 |
| HUNGARY | 0 | 1 | 0 | 2 | 0 | 0 |
| INDIA | 56 | 40 | 66 | 26 | 67 | 9 |
| INDONESIA | 1 | 0 | 0 | 1 | 3 | 0 |
| IRAN | 9 | 63 | 17 | 83 | 19 | 14 |
| IRAQ | 11 | 83 | 9 | 65 | 26 | 22 |
| ISRAEL | 5 | 4 | 2 | 9 | 2 | 2 |
| ITALY | 0 | 1 | 0 | 2 | 1 | 3 |
| IVORY COAST | 23 | 12 | 9 | 13 | 4 | 4 |
| JAMAICA | 16 | 51 | 13 | 71 | 32 | 25 |
| JAPAN | 0 | 1 | 1 | 0 | 0 | 0 |
| JORDAN | 5 | 13 | 4 | 13 | 13 | 7 |
| KAZAKHSTAN | 0 | 4 | 0 | 2 | 2 | 0 |
| KENYA | 5 | 4 | 6 | 19 | 15 | 5 |
| KOREA | 0 | 1 | 0 | 2 | 0 | 0 |
| KOSOVO | 0 | 0 | 0 | 3 | 0 | 0 |
| KUWAIT | 0 | 3 | 0 | 2 | 0 | 0 |
| KYRGYZSTAN | 1 | 1 | 0 | 0 | 1 | 0 |
| LAOS | 20 | 258 | 11 | 254 | 52 | 57 |
| LATVIA | 1 | 1 | 0 | 2 | 1 | 0 |
| LEBANON | 2 | 3 | 0 | 8 | 1 | 6 |
| LIBERIA | 20 | 59 | 27 | 108 | 28 | 30 |
| LIBYA | 0 | 0 | 1 | 0 | 0 | 0 |
| LITHUANIA | 1 | 0 | 0 | 1 | 1 | 0 |
| MACEDONIA | 3 | 1 | 0 | 2 | 3 | 0 |
| MALAYSIA | 1 | 1 | 0 | 2 | 0 | 0 |
| MALI | 20 | 23 | 13 | 13 | 7 | 5 |
| MAURITANIA | 11 | 11 | 9 | 7 | 3 | 3 |
| MEXICO | 11 | 12 | 14 | 25 | 16 | 8 |

| | | | | | | |
|---|---|---|---|---|---|---|
| MOLDOVA | 0 | 1 | 0 | 1 | 1 | 0 |
| MONGOLIA | 0 | 0 | 3 | 1 | 1 | 0 |
| MONTSERRAT | 1 | 0 | 0 | 0 | 0 | 0 |
| MOROCCO | 0 | 3 | 1 | 15 | 5 | 1 |
| NEPAL | 0 | 0 | 1 | 0 | 1 | 0 |
| NETHERLANDS | 1 | 1 | 0 | 1 | 0 | 1 |
| NICARAGUA | 1 | 0 | 3 | 2 | 8 | 0 |
| NIGER | 6 | 5 | 7 | 7 | 3 | 1 |
| NIGERIA | 12 | 11 | 8 | 10 | 8 | 6 |
| PAKISTAN | 32 | 34 | 41 | 44 | 27 | 9 |
| PANAMA | 0 | 7 | 0 | 6 | 0 | 1 |
| PERU | 0 | 1 | 2 | 1 | 8 | 0 |
| PHILIPPINES | 4 | 1 | 0 | 2 | 1 | 0 |
| POLAND | 0 | 4 | 0 | 8 | 2 | 0 |
| PORTUGAL | 0 | 0 | 0 | 1 | 0 | 0 |
| ROMANIA | 2 | 2 | 1 | 2 | 0 | 1 |
| RUSSIA | 6 | 19 | 7 | 16 | 9 | 8 |
| RWANDA | 2 | 0 | 0 | 0 | 3 | 0 |
| SAMOA | 0 | 1 | 0 | 0 | 0 | 0 |
| SAUDI ARABIA | 0 | 0 | 0 | 2 | 0 | 0 |
| SENEGAL | 6 | 10 | 10 | 14 | 6 | 3 |
| SERBIA AND MONTENEGRO | 3 | 3 | 0 | 4 | 2 | 0 |
| SIERRA LEONE | 30 | 38 | 15 | 44 | 19 | 7 |
| SINGAPORE | 0 | 0 | 0 | 1 | 0 | 1 |
| SOMALIA | 37 | 74 | 51 | 79 | 52 | 15 |
| SOUTH AFRICA | 0 | 0 | 0 | 0 | 1 | 1 |
| SOUTH KOREA | 0 | 0 | 0 | 2 | 1 | 2 |
| SPAIN | 0 | 0 | 1 | 1 | 0 | 0 |
| SRI LANKA | 3 | 1 | 1 | 1 | 2 | 1 |
| ST. KITTS-NEVIS | 0 | 6 | 1 | 6 | 4 | 2 |
| ST. LUCIA | 1 | 8 | 2 | 3 | 3 | 4 |
| ST. VINCENT-GRENADINES | 0 | 3 | 0 | 2 | 4 | 2 |
| STATELESS | 2 | 4 | 2 | 6 | 0 | 2 |

| | | | | | | |
|---|---|---|---|---|---|---|
| SUDAN | 5 | 36 | 4 | 45 | 23 | 21 |
| SURINAME | 3 | 1 | 0 | 0 | 0 | 1 |
| SWAZILAND | 0 | 0 | 0 | 0 | 1 | 0 |
| SWEDEN | 0 | 0 | 1 | 0 | 0 | 0 |
| SYRIA | 1 | 2 | 0 | 0 | 0 | 1 |
| TAIWAN | 0 | 1 | 1 | 0 | 0 | 0 |
| TAJIKISTAN | 1 | 0 | 1 | 0 | 0 | 0 |
| TANZANIA | 6 | 2 | 5 | 1 | 1 | 3 |
| THAILAND | 2 | 35 | 1 | 25 | 5 | 3 |
| TOGO | 2 | 0 | 0 | 0 | 0 | 0 |
| TRINIDAD AND TOBAGO | 2 | 7 | 5 | 9 | 4 | 1 |
| TUNISIA | 1 | 2 | 0 | 0 | 0 | 0 |
| TURKEY | 0 | 3 | 1 | 0 | 0 | 0 |
| TURKMENISTAN | 0 | 1 | 0 | 0 | 0 | 0 |
| TURKS AND CAICOS ISLANDS | 0 | 1 | 0 | 0 | 0 | 1 |
| UGANDA | 4 | 2 | 3 | 3 | 2 | 1 |
| UKRAINE | 8 | 26 | 6 | 22 | 9 | 4 |
| UNITED KINGDOM | 2 | 3 | 2 | 11 | 5 | 3 |
| UNKNOWN | 1 | 1 | 0 | 2 | 0 | 0 |
| USSR | 1 | 9 | 0 | 4 | 2 | 2 |
| UZBEKISTAN | 1 | 7 | 2 | 10 | 2 | 2 |
| VENEZUELA | 1 | 7 | 2 | 3 | 1 | 1 |
| VIETNAM | 26 | 503 | 22 | 420 | 129 | 128 |
| YEMEN | 2 | 2 | 2 | 6 | 2 | 1 |
| YUGOSLAVIA | 8 | 10 | 0 | 5 | 2 | 3 |
| ZAMBIA | 0 | 1 | 0 | 2 | 0 | 1 |
| ZIMBABWE | 9 | 12 | 7 | 7 | 6 | 5 |

Source: IIDS v1.6 data as of 04/15/2011 as provided by the Statistical Tracking Unit.

Data is based on the approved Zadvydas methodology of 04/14/2011: 1. All active cases booked out with Release Reasons of Order of Supervision and have a the Final Order that was issued 90 days prior to the release as well as
2. All active cases with citizens from recalcitrant countries that have a Release Reason of Order of Supervision regardless of time frame.

Data includes individual detentions. An alien may have been released on OSUP multiple times in the reporting time frame. Anyone that had been released on Zadvydas but has since been removed has been excluded from the data.

Data excludes ORR and MIRP facilities.

The U.S. Supreme Court, in Zadvydas v. Davis, 533 U.S. 678 (2001), in the context of review of petitions for writ of habeas corpus, analyzed the post order custody provisions of the U.S. Immigration and Nationality Act. The Court held that, in light of the Constitution's demands, the statute implicitly limits an alien's detention to a period reasonably necessary to bring about that alien's removal from the United States and does not permit indefinite detention. The Court determined that for the sake of uniform administration in the federal courts, six months is a presumptively reasonable period of time. Thereafter, if the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the government must furnish evidence to rebut that showing. In addition to the Zadvydas decision and the underlying statute, federal immigration regulations govern the consideration of whether an alien should be released from post-order detention. Those regulations require periodic reviews, including reviews conducted upon the passage of 90 days of post-removal-order detention, and also upon the passage of 180 days of post-removal-order detention.

You have requested statistics for "Zadvydas" releases, which may be understood to apply to various categories of previously-detained aliens. To provide you with the most comprehensive view of ICE detainees released following a regulatory post-order custody review, we have provided you with release data related to all periods defined in the post order process. Data provided relating to releases during these periods are generally related to ICE's inability to effect the alien's removal; however, a small number of aliens may have been released due to other factors including, but not limited to, the agency's consideration of the individual's equities or pursuant to a request from another law enforcement agency. We regard this number to be so small as to be statistically insignificant.