RELEASE OF CRIMINAL DETAINEES BY U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT: POLICY OR POLITICS?

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

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MATERIAL SUBMITTED FOR THE HEARING RECORD

RELEASE OF CRIMINAL DETAINEES BY U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT: POLICY OR POLITICS?

TUESDAY, MARCH 19, 2013

HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
Washington, DC.

The Committee met, pursuant to call, at 1:10 p.m., in room 2141, Rayburn Office Building, the Honorable Bob Goodlatte (Chairman of the Committee) presiding.

Present: Representatives Goodlatte, Coble, Smith, Bachus, Issa, Forbes, King, Franks, Gohmert, Jordan, Poe, Chaffetz, Marino, Gowdy, Labrador, Holding, DeSantis, Rothfus, Conyers, Scott, Watt, Lofgren, Jackson Lee, Johnson, Gutierrez, Bass, Richmond, DelBene, Garcia, and Jeffries.

Staff present: (Majority) Shelley Husband, Chief of Staff & General Counsel; Branden Ritchie, Deputy Chief of Staff & Chief Counsel; Allison Halataei, Parliamentarian & General Counsel; Dimple Shah, Counsel; Kelsey Deterding, Clerk; (Minority) Perry Apelbaum, Staff Director & Chief Counsel; Danielle Brown, Parliamentarian; and Tom Jawetz, Counsel.

Mr. GOODLATTE. The Judiciary Committee will come to order.

And without objection, the Chair is authorized to declare recesses of the Committee at any time.

I want to take the opportunity of this full Committee gathering to make Members aware of our new policy regarding participation in Subcommittee hearings. At the beginning of the Congress, I was asked whether Members who are not a Member of a Subcommittee would be allowed to participate in Subcommittee hearings. After giving it some thought, I have come up with what I think to be a reasonable solution that will allow our Members some level of participation without overburdening the Subcommittees.

A Member who is not a Member of a Subcommittee but is a Member of the full Committee may attend a hearing and sit on the dais. That Member may also ask questions of the witnesses but only if yielded time by an actual Member of the Subcommittee who is present at the hearing. I would ask that Members who intend to participate in this fashion let the majority staff know as far in advance of the hearing as possible so that we may prepare accordingly. And it will remain the policy of the Committee that we do

not allow Members to participate in our hearings who are not Members of the Judiciary Committee.

We welcome everyone to today's hearing on the "Release of Criminal Detainees by the U.S. Immigration and Customs Enforcement: Policy or Politics?"

And I will recognize myself for an opening statement.

On March 1, the sequestration deadline required that certain Federal agencies and departments to reduce their budget to avoid violating mandated spending caps established under the Budget Control Act of 2011. The Office of Management and Budget told them to "reduce risks and minimize impacts on the Agency's core mission in service of the American people." DHS instead politicized sequestration by deciding to release detained criminal and illegal immigrants that are a priority for removal from the United States. This decision directly contradicts ICE's mission to promote homeland security and public safety through the enforcement of our immigration laws.

Those released by ICE include: illegal immigrants convicted of or charged with theft, identity theft, forgery, and simple assault; illegal immigrants who had been arrested and charged with crimes because, under policy guidelines issued by the Director, illegal immigrants who are charged with a crime are not considered to be dangerous or criminal until they have been convicted; repeat immigration offenders, despite memos issued by the Director that these are enforcement priorities; and recent border-crossers, also one of the Director's enforcement priorities.

Among those released was an illegal criminal immigrant who spent nearly 3 years in a detention center in Georgia. According to the New York Times, this illegal immigrant became an illegal immigrant when he overstayed a visa in 1991. He was detained in 2010 when he violated probation for a conviction in 2005 of assault, battery, and child abuse, charges that sprang from domestic disputes with his ex-wife. He was transferred to ICE custody and has been contesting an existing order of deportation for over 3 years now.

During oral testimony at House Appropriations last week, Director Morton confirmed that the Agency released 2,228 detainees from detention. Of these, 629 were criminals and 1,599 were non-criminals.

However, Mr. Morton did not provide a breakdown of the non-criminals. We do not know how many were charged with crimes but not yet convicted, are absconders, had existing orders of removal, or are criminal gang members. Additionally, Mr. Morton did not think that any of the individuals released were national security concerns.

Simultaneously, DHS claimed that all the released illegal immigrants are at low priorities and have not committed serious crimes. This is inconsistent with the fact that both Secretary Napolitano and Director Morton have repeatedly indicated that the Agency detains only "the worst of the worst illegal immigrants in light of their inability to detain, deport, and remove all the illegal immigrants the Agency encounters based on a lack of financial resources."

Irresponsible decisions to release detained illegal immigrants unreasonably and unnecessarily put the public at risk. The question remains: Are these individuals being released based on legitimate budgetary concerns or because sequestration gave the Obama administration a political reason to release deportable aliens? Surely other budgetary considerations could have come first such as cutting expenditures for conferences, detailees, or international travel.

Releasing criminal and illegal immigrants on their own recognizance provides them little incentive to report to authorities and subject themselves to deportation. As we have learned from hard experience, many of them will simply abscond and become fugitives. Furthermore, recidivism rates are extremely high for any incarcerated population. The Director has already indicated that ICE has had to re-apprehend 4 out of the 10 of those criminal immigrants released for more severe crimes. To make matters worse, many of these individuals released lack the money, family, support, and the ability to get a job, not just because they are present in violation of the law, but because they have a criminal record. This release is a recipe for disaster that is irresponsible and unjustified.

Ultimately, these nonsensical actions demonstrate the inability and lack of desire on behalf of the Administration to enforce the law even against illegal immigrants convicted of serious crimes. To make matters worse, they undermine the good will necessary to develop a common sense, step-by-step approach to improving our immigration laws.

At this time, it is my pleasure to recognize the Ranking Member of the Committee, the gentleman from Michigan, Mr. Conyers, for his opening statement.

Mr. CONYERS. Thank you, Chairman Goodlatte.

Ladies and gentlemen of the Committee, the title of today's hearing, the "Release of Criminal Detainees by U.S. Immigration and Customs Enforcement: Policy or Politics?", is really somewhat misleading.

First, we have learned at a recent hearing before the Homeland Security Appropriations Subcommittee that 72 percent of the people released had no criminal record at all. Another 21 percent had convictions for one or two misdemeanors only. Unless Director Morton, whom we welcome here today, tells us something different, this means that 93 percent of the people released by ICE were noncriminals or low, low level offenders.

Second, the title of the hearing asks whether this was motivated by policy or politics. From my investigations, I do not believe it was either.

I do not believe it was policy because we have no reason to think that someone sat down and decided to release thousands of detainees without reason. Remember, this Agency over the past 5 years has consistently set deportation and detention records.

I also do not believe this is about politics. The President's top legislative priority is enacting comprehensive immigration reform. I share the President's goal. The American people share the President's goal. And I know a growing majority of Members of Congress support that goal. This discussion does not advance that goal. So I do not see how it could be motivated by politics.

So why did the Agency release more than 2,000 people from custody in February? Based on what we have learned, it seems that it was motivated by overzealous use of detention in late 2012, combined with poor communication between the people in charge of ICE's budget and the people in charge of its enforcement operations.

Why do I say that? Because ICE is funded by appropriations to detain an average of 34,000 people per day over a fiscal year. That comes out at a daily cost of about $122 per bed. But from October through December of 2012, ICE regularly detained well over 35,000 people per day. ICE nearly hit 37,000 detainees on some days. Not only did this mean ICE was paying more for detention beds but it was paying more overtime, more fuel costs for additional transportation, and more of everything else required for detention. These secondary costs brought the real cost of detention closer to $164 per person per day and explain why ICE was maybe $100 million in the red.

ICE tried to put the brakes on all of that spending when its chief financial officer figured out that the Agency was burning through its money faster than its budget would allow. In early January, the Agency was on pace to run out of money for custody operations by March 9, more than 18 days before the continuing resolution expired on March 27. ICE seems to have had no choice but to release some detainees to bring its spending in check.

And so I would like to put this in the record that we need to really move with great care in terms of the assertions that were made to me in this misleading title.

And I thank the Chairman for allowing me to make this statement.

Mr. GOODLATTE. I thank the gentleman from Michigan, and without objection, the remainder of his statement and the opening statements of all other Members will be made a part of the record.

[The prepared statement of Mr. Conyers follows:]

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary

The title of today's hearing, the—"Release of Criminal Detainees by U.S. Immigration and Customs Enforcement: Policy or Politics?", is somewhat misleading.

First, we learned at a recent hearing before the Homeland Security Appropriations Subcommittee that 72% of the people released had no criminal record at all. Another 21% had convictions for one or two misdemeanors only.

Unless Director Morton tells us something different today, that means 93% *of the people released by ICE were non-criminals or low-level offenders.*

Second, the title of the hearing asks whether this was motivated by policy or politics, but I don't believe it was either.

I don't believe it was policy, because we have no reason to think someone sat down and decided to release thousands of detainees without a reason. Remember: this agency over the past 5 years has consistently set deportation and detention records.

I also don't believe this is about politics. The President's top legislative priority is enacting a comprehensive immigration reform. I share the President's goal. The American people share the President's goal. And I know a growing majority of Members of Congress support that goal. This discussion does not advance that goal, so I don't see how it could be motivated by politics.

So why did the agency release more than 2,000 people from custody in February? Based on what we have learned, it seems this was motivated by the over-zealous use of detention in late 2012 combined with poor communication between the people in charge of ICE's budget and the people in charge of its enforcement operations.

Why do I say that? Because ICE is funded by appropriations to detain an average of 34,000 people per day over a fiscal year. That comes at a
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per bed. But from October through December of 2012, ICE regularly detained well over 35,000 people per day. ICE nearly hit 37,000 detainees on some days.

Not only did this mean ICE was paying for more detention beds, but it was paying for more overtime, more fuel costs for additional transportation, and more of everything else required for detention. Those secondary costs bring the real cost of detention closer to $164 per person per day and explain why ICE was maybe $100 million in the red.

ICE tried to put the brakes on all of that spending when its Chief Financial Officer figured out that the agency was burning through its money faster than its budget would allow. In early January, the agency was on pace to run out of money for Custody Operations by March 9—more than 18 days before the Continuing Resolution expires on March 27. ICE seems to have had no choice but to release some detainees to bring its spending in check.

Third, I want to remind everyone that Congress funds cost-effective alternatives to detention for a reason. We should place good candidates into alternatives to detention whenever possible and not just when we are forced to do so by budgetary constraints.

It should tell us something that in a three-week period, Director Morton identified more than 2,000 detainees who would not pose any danger to the public if they were released.

Not one of these people was required by law to be in detention. And, 93% were non-criminals or low-level offenders who probably never served prison time for their criminal convictions. We need to ask ourselves what they were doing in immigration detention in the first place if cost-effective alternatives are at our disposal.

I hope Director Morton will explain whether it makes sense, from a law enforcement perspective or from the perspective of fiscal responsibility, to require him to keep a certain number of people in custody on any given day.

- We don't require the Bureau of Prisons to maintain a minimum average daily population.
- We don't require the U.S. Marshals Service to maintain a minimum average daily population.
- And I have yet to find a state or local law enforcement agency that sets such requirements.

It makes no sense that we would require ICE to maintain a minimum average daily population.

I hope we can reconsider this apparent mandate in the future and I thank Director Morton for his testimony today.

[The prepared statement of Mr. Gowdy follows:]

Prepared Statement of the Honorable Trey Gowdy, a Representative in Congress from the State of South Carolina, and Member, Committee on the Judiciary

Mr. Chairman, thank you for calling this hearing. There are several things that have people vexed. This Administration claims it only detains the "worst of the worst." Recently, this Administration released some detainees from detention claiming it did not have adequate funding to exercise the preeminent function of government, which is public safety.

So, initially we have to examine that oft-repeated Administration talking point that it only detains the "worst of the worst." If that is true, it necessarily follows that some of those "worst of the worst" were recently released.

Just so we are clear, the Administration claims it released hundreds of detainees when in reality the Administration released thousands of detainees. Some of those detainees released were Level 1 offenders, which means they were aggravated felons. Many of those released were Level II detainees, which means they were repeated offenders.

So against the backdrop of knowing that some "worst of the worst" detainees were released, including aggravated felons we must examine who made the decision to release these detainees. Did Secretary Napolitano make this decision? Did she know about the decision ahead of time? Did she set the parameters of a danger assessment to decide who should be released and who should not be released? If she didn't

make the decision herself precisely what kind of decision is important enough that she would actually be aware of it. If releasing thousands of detainees isn't worth troubling her with, what is?

Why were the releases ordered in the first place? Secretary Napolitano contends she found herself between "a rock and hard place" so the only alternative was to release thousands of detainees. Frankly, Mr. Chairman, that explanation strains credibility.

ICE was funded at the level to maintain 34,000 beds, which is enough to avoid this recent detainee release. An additional $240 million was available that could have been used to detain these aggravated felons and repeated offenders that were released. ICE could have asked for permission to move money from less vital services to more vital services. For instance, did ICE consider reducing funding for training, for travel, for conferences, for printing, for promotional materials, for government vehicles? Those are not my suggestions Mr. Chairman. In the interest of giving credit where credit is due, those were recommendations from the President himself.

Was releasing detainees really the only option at your disposal? Couldn't cut anything else? Nowhere else to turn, nothing else to do, except release detainees from custody?

I will tell you, Mr. Chairman, that it appears as if the decision to release detainees was a political determination rather than a monetary one. It appears as if the release of detainees was part of a sequester campaign that included the fictional firing of teachers, meat inspectors being laid off, the closing of the White House for tours and now the release of aggravated felons. This is a concerted, curious effort to persuade the public that nothing whatsoever could be cut in government.

It would be advisable in the future Mr. Chairman if the time spent trying to persuade the public that mayhem was about to break loose had been spent figuring out how better to protect the public from mayhem that was previously detained.

Today's witness, Director John Morton explained, that some of those released were really low-risk detainees including those with drunk driving convictions, theft convictions, and "simple assault and battery" convictions.

I appreciate Mr. Morton's prior service as a prosecutor. I do. But I disagree with any assessment of low-risk that includes recidivists.

For those of us that have had to explain to parents, or spouses or loved ones, how a recidivist drunk driver was allowed back on the street, back into a vehicle, back behind the wheel under the influence of drugs or alcohol only to drive drunk again and kill or seriously injure a member of the innocent motoring public. That isn't low risk.

Some of those released because of this public relations stunt gone wrong are going to reoffend. Some are going to abscond and fail to report for their removal hearing. There are going to be consequences for this decision and today we are going to find out who made this decision and why. Because public safety is the most important function government has. And it should never be jeopardized for political expediency.

[The prepared statement of Ms. Lofgren follows:]

Prepared Statement of the Honorable Zoe Lofgren, a Representative in Congress from the State of California, and Member, Committee on the Judiciary

We have all read the recent stories about ICE's decision to release varying numbers of detainees from custody in a short period of time. As information began to percolate up from communities around the country, we have heard many different versions of what happened.

Some stories suggested the detainees had already been granted bond by an Immigration Judge, but had been unable to come up with the necessary funds. Others said that thousands of detainees with criminal convictions–and some with gang ties–were released without any regard for public safety.

Last week we learned from Director Morton that 2,228 detainees were released in February on account of budgetary constraints. 72% had no criminal history, and an additional 21% had misdemeanor convictions only. Director Morton testified then that to his knowledge none of the detainees posed a danger to the public or had gang ties.

We also heard different stories regarding the budgetary constraints that led to the releases. The first explanation that came out had to do with the impending sequester. Secretary Napolitano recently testified before the Senate that sequestration

would mean a decrease in detention bed space. That explanation is certainly plausible. Across-the-board spending cuts that force us to take a thoughtless approach to our spending with undoubtedly lead to cuts that are imprecise.

But as it turns out, that is not the whole story. Under the continuing resolution that expires later this month, ICE is funded at a level to sustain an average daily detainee population of 34,000. But months into the current fiscal year, with the sequester looming, and the expiration of the current CR on the horizon, ICE was exceeding its average daily population by more than 2,000 beds per day. This means ICE's detention bed costs—as well as the secondary costs of paying officers, fuel charges, and the like—were outpacing the approved spending plan.

ICE's Enforcement and Removal Operations (ERO) was burning through its funds for custody operations at an unsustainable pace by early January. Without reducing costs or raiding other accounts for unobligated funds, ERO was looking at running out of money for custody operations 18 days before the end of the CR.

So why didn't ICE reprogram funds to cover the shortfall created by ERO's overspending? Director Morton testified last week that doing so would have been like robbing Peter to pay Paul. Taking funds from another account—such as the money budgeted for Homeland Security Investigations—would have meant taking Special Agents off the streets and interfering with their criminal investigations.

Faced with that reality, ICE officials decided on an approach in which they would identify detainees for release. These detainees should not be subject to mandatory detention, should not pose a danger to the public, and should be released on orders of supervision or into formal Alternatives to Detention programs.

As ICE was already far surpassing the 34,000 detention-bed average, a temporary reduction in detainees would keep the agency on track to meet that average by the end of the current fiscal year. That is what ICE did.

ERO's detention efforts throughout the Fall and early Winter were setting new records and were entirely unsustainable in light of the CR—especially as the now-realized threat of the sequester loomed. They had to reduce spending.

Aside from these reductions, I propose that we spend some time this morning talking about the so-called "34,000 detention-bed mandate" that is a big reason for the controversy before us. As we know, our appropriations acts now require ICE to "maintain a level of not less than 34,000 detention beds."

There is some disagreement about the exact meaning of this phrase. The agency and some appropriators believe this means that over an entire fiscal year, the average daily population in detention must be no lower than 34,000 beds. Other appropriators seem to believe this means that on any given day, ICE must have no fewer than 34,000 people in custody.

Either way, both sides see it as a mandate to keep people in detention without regard to any other factors. To me, the requirement has always meant nothing more than that at a given time, 34,000 detention beds must be available for use by ICE should the agency need them. That is the clearest way to read the language itself, and it makes more sense than any other interpretation.

From a law enforcement perspective—where detention decisions are based on need, not arbitrary mandates—that would make a lot more sense. The same is true if you were to think of it from the perspective of fiscal responsibility. I suppose that is why the Heritage Foundation encourages a much wider use of cost-effective alternatives to detention for appropriate candidates.

Policy or politics? I don't really think it was either. Based on what we now know, the releases were the product of poor budgetary practices combined with the kind of record-setting enforcement efforts that we have come to expect from ICE.

Mr. ISSA. Mr. Chairman?

Mr. GOODLATTE. Yes?

Mr. ISSA. I would ask unanimous consent that along with the Ranking Member's insertion, that the order of the Office of the President, the executive order of January 14, be placed in the record next to it.

Mr. GOODLATTE. Without objection, it will be placed in the record.

[The information referred to follows:]

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

January 14, 2013

M-13-03

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Jeffrey D. Zients
Deputy Director for Management

SUBJECT: Planning for Uncertainty with Respect to Fiscal Year 2013 Budgetary Resources

In the coming months, executive departments and agencies (agencies) will confront significant uncertainty regarding the amount of budgetary resources available for the remainder of the fiscal year. In particular, unless Congress acts to amend current law, the President is required to issue a sequestration order on March 1, 2013, canceling approximately $85 billion in budgetary resources across the Federal Government. Further uncertainty is created by the expiration of the Continuing Appropriations Resolution, 2013 (CR) on March 27, 2013. This memorandum directs agencies to take certain steps to plan for and manage this budgetary uncertainty.

The Administration continues to urge Congress to take prompt action to address the current budgetary uncertainty, including through the enactment of balanced deficit reduction to avoid sequestration. Should Congress fail to act to avoid sequestration, there will be significant and harmful impacts on a wide variety of Government services and operations. For example, should sequestration remain in place for an extended period of time, hundreds of thousands of families will lose critical education and wellness services through Head Start and nutrition assistance programs. The Department of Defense will face deep cuts that will reduce readiness of non-deployed units, delay needed investments in equipment and facilities, and cut services for military families. And Federal agencies will likely need to furlough hundreds of thousands of employees and reduce essential services such as food inspections, air travel safety, prison security, border patrols, and other mission-critical activities.

At this time, agencies do not have clarity regarding the manner in which Congress will address these issues or the amount of budgetary resources that will be available through the remainder of the fiscal year. Until Congress acts, agencies must continue to prepare for the possibility that they will need to operate with reduced budgetary resources.

Prior to passage of the American Taxpayer Relief Act of 2012 (ATRA), the President was required to issue a sequestration order on January 2, 2013. Although the ATRA postponed this date by two months, agencies had already engaged in extensive planning for operations under post-sequestration funding levels before this postponement was effected. In light of persistent budgetary uncertainty, all agencies should continue these planning activities, in coordination with the Office of Management and Budget (OMB), and should intensify efforts to identify actions that may be required should sequestration occur.

Agencies should generally adhere to the following guiding principles, to the extent practicable and appropriate, in preparing plans to operate with reduced budgetary resources in the event that sequestration occurs:

- use any available flexibility to reduce operational risks and minimize impacts on the agency's core mission in service of the American people;
- identify and address operational challenges that could potentially have a significant deleterious effect on the agency's mission or otherwise raise life, safety, or health concerns;
- identify the most appropriate means to reduce civilian workforce costs where necessary – this may include imposing hiring freezes, releasing temporary employees or not renewing term or contract hires, authorizing voluntary separation incentives and voluntary early retirements, or implementing administrative furloughs (appropriate guidance for administrative furloughs can be found on the OPM website [here]); consistent with Section 3(a)(ii) of Executive Order 13522, allow employees' exclusive representatives to have pre-decisional involvement in these matters to the fullest extent practicable;
- review grants and contracts to determine where cost savings may be achieved in a manner that is consistent with the applicable terms and conditions, remaining mindful of the manner in which individual contracts or grants advance the core mission of the agency;
- take into account funding flexibilities, including the availability of reprogramming and transfer authority; and,
- be cognizant of the requirements of the Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. §§ 2101-2109.

While agency plans should reflect intensified efforts to prepare for operations under a potential sequestration, actions that would implement reductions specifically designed as a response to sequestration should generally not be taken at this time. In some cases, however, the overall budgetary uncertainty and operational constraints may require that certain actions be taken in the immediate- or near-term. Agencies presented with these circumstances should continue to act in a prudent manner to ensure that operational risks are avoided and adequate funding is available for the remainder of the fiscal year to meet the agency's core requirements and mission. Should circumstances require an agency to take actions that would constitute a change from normal practice and result in a reduction of normal spending and operations in the

immediate- or near-term, the agency must coordinate closely with its OMB Resource Management Office (RMO) before taking any such actions.

All agencies should work with their OMB RMO on the appropriate timing to submit draft contingency plans for operating under sequestration for review. Furthermore, should Congress take action that affects the current budgetary uncertainty, OMB will provide agencies with additional guidance as appropriate.

Mr. GOODLATTE. We welcome our only witness today, Director John Morton of U.S. Immigration and Customs Enforcement. And I will begin by introducing him, but first, Director Morton, if you would please rise and be sworn in.

[Witness sworn.]

Mr. GOODLATTE. Let the record show that the witness answered in the affirmative.

And we welcome you again. John Morton is Director of Immigration and Customs Enforcement at the U.S. Department of Homeland Security. Immigration and Customs Enforcement is the second largest investigative agency in the Federal Government and charged with enforcing the Nation's immigration laws and investigating the illegal movement of people and goods into, within, and out of the United States.

Prior to Director Morton's appointment by President Obama, he spent 15 years at the Department of Justice and served in several positions, including Assistant United States Attorney, Counsel to the Deputy Attorney General, and acting Deputy Assistant General of the Criminal Division.

Director Morton received a law degree from the University of Virginia School of Law.

And, Director Morton, you are welcome to proceed with your testimony.

TESTIMONY OF THE HONORABLE JOHN MORTON, DIRECTOR, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT

Mr. MORTON. Good afternoon, Chairman Goodlatte, Mr. Conyers, Members of the Committee.

While much has been made of ICE's recent reduction in detention levels, the truth is that the reduction was a direct result of ICE's efforts to stay within its budget in light of the continuing resolution and the possibility, now a reality, of sequester.

As the Committee knows, we do not have a traditional appropriation for fiscal year 2013. Rather, ICE is funded through a continuing appropriation at fiscal year 2012 levels through next Wednesday, March 27, and we do not yet know what Congress will provide ICE for the remaining 6 months of the fiscal year.

Additionally, as of March 1, we are living under a sequester of 5 percent of our annual funds, a reduction just shy of $300 million. Thus, while the expiring CR provides ICE budget authority to maintain an average of 34,000 detention beds, sequestration has, in turn, reduced those same funds by 5 percent, a reduction that if left unchanged by Congress, will affect ICE's ability to maintain our average daily population going forward.

Despite these challenges, ICE continues to produce impressive enforcement results. During the first 5 months of the 6-month CR—that is, the portion without sequestration—we were solidly on pace to maintain an average level of 34,000 beds. Indeed, on the last full week of that period, our average annual daily population was 33,925 beds. Mr. Chairman, this is the highest level of detention ICE has ever maintained over the first 5 months of any fiscal year in history.

This comes on the heels of ICE maintaining 34,260 beds over last fiscal year and having removed 409,000 illegal immigrants, 225,000 of whom were criminals, again the highest levels in all categories we have ever achieved.

At times during this fiscal year, we have maintained well over 34,000 beds due in part to increased support we have given the Border Patrol along the Southwest border. On October 2, 2012, for

example, we had an actual level of 36,036 beds in use. With budget authority that only supports 34,000 beds, we obviously could not maintain such highs over the year. So we had to temporarily lower our detention to levels below 34,000 to ensure that at the end of the CR we remained within budget.

This need to lower our detention levels was heightened by three factors.

First, two of the funds we use to maintain detention space did not receive the funds expected. The Breached Bond Fund, in particular, had a projected shortfall of $20 million for the fiscal year.

Second, 4 months into the fiscal year on January 18, 2013, we were maintaining an average daily excess of 630 beds over 34,000. Had we continued to operate at this level, we would have faced a yearlong shortfall of $128 million.

Finally, our immigration enforcement expenses for transportation and overtime exceeded our CR budget by $16 million.

In the context of a known full-year budget, we can usually address these sorts of issues over the balance of the fiscal year. This year, however, we only had 6 months of known funding and uncertain levels thereafter. Therefore, ERO, in coordination with the chief financial officer, decided to temporarily reduce our detention levels at the end of the CR to stay within budget. To do this, ERO released some detained aliens to other forms of supervision on a weekly basis throughout the month of February. Local ERO offices were instructed to focus on aliens who were not subject to mandatory detention and who did not pose a significant threat to public safety.

Everyone released for budget reasons remained in removal proceedings. From February 9 through March 1, on average, we released over 700 aliens a week to this end. Contrary to some reports, those released for budget reasons did not include thousands of criminals who posed a significant risk to public safety. Indeed, 70 percent of those released had no criminal record at all. The remaining 30 percent were either misdemeanants or other criminals whose prior conviction did not pose a violent threat to public safety.

During this period, most of our field offices released on average fewer than 15 detainees each week. Five larger offices released an average of 92 detainees per week. In total, we released 2,228 aliens over a 3-week period in February for solely budgetary reasons, bringing our year-to-date detention average on the last full week prior to sequester to 33,925, 99.8 percent of 34,000.

Of the 2,228 individuals released, 629 had a past criminal conviction. 460 were level 3 offenders, our lowest classification; 160 were level 2 offenders, our medium classification; only 9 were level 1 offenders—excuse me—8. We are reviewing all of these cases as they progress and will detain or adjust the conditions of release as necessary. Indeed, as the Chairman has already noted, there are only four level 1 offenders on release.

In short, there are no mass releases of dangerous criminals underway or any planned for the future, just efforts to live within our budget. We will continue to do our level best over the remaining 6 months of the year to maintain strong detention levels, subject to the requirements of the sequester and whatever funding Congress provides us at the end of the month.

Thank you.
[The prepared statement of Mr. Morton follows:]

U.S. Immigration and Customs Enforcement

STATEMENT OF

JOHN MORTON

DIRECTOR

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT

REGARDING A HEARING ON
IMMIGRATION ENFORCEMENT

BEFORE THE

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY

TUESDAY, MARCH 19, 2013

INTRODUCTION

Chairman Goodlatte, Ranking Member Conyers, and members of the Committee: thank you for the opportunity to appear before you today to testify about U.S. Immigration and Customs Enforcement's (ICE) immigration enforcement efforts.

ICE's Immigration Enforcement Successes

Over the past four years, ICE has transformed the immigration enforcement system, smartly focusing resources on the apprehension, detention and removal of individuals who fall within our highest enforcement priorities, namely national security and public safety threats. ICE's immigration enforcement statistics from the last fiscal year (FY) highlight the Administration's success in focusing the enforcement system efforts on removing from the country convicted criminals, public safety threats, recent illegal border entrants and other priority individuals. Overall, in FY 2012 ICE's Office of Enforcement and Removal Operations removed a record number of 409,849 individuals. Of these, approximately 55 percent, or 225,390 of the people removed, were convicted of felonies or misdemeanors – almost double the removal of criminals in FY 2008. This includes 1,215 aliens convicted of homicide; 5,557 aliens convicted of sexual offenses; 40,448 aliens convicted for crimes involving drugs; and 36,166 aliens convicted for driving under the influence. ICE also continues to make progress in the removal of other enforcement priorities. As such, 96 percent of all ICE's removals fell into a priority category – a record high.

In order to maintain control at our nation's borders, ICE prioritizes the identification and removal of recent border crossers and conducts targeted enforcement operations with the U.S. Border Patrol. Attempts to cross the Southwest border illegally have decreased 49 percent over

the past four years, and are 78 percent lower than what they were at their peak. In many ways, these historic results along the Southwest Border are attributable to the joint efforts of U.S. Border Patrol agents and ICE officers and agents, and the emphasis ICE places on the removal of recent border crossers.

ICE has been implementing a range of smart, effective reforms to the immigration system that allow our agency to focus its enforcement resources on individuals who pose a danger to national security, a risk to public safety, or otherwise represent enforcement priorities. ICE has established formal written prosecutorial discretion guidance for ICE law enforcement personnel and attorneys regarding their authority to exercise discretion when appropriate. The relevant directives clearly state that the exercise of discretion is inappropriate in cases involving individuals who pose a clear risk to national security; serious felons, repeat offenders, or individuals with a lengthy criminal record of any kind; known gang members or other individuals who pose a clear danger to public safety; and individuals with an egregious record of immigration violations. This guidance also directs the favorable exercise of prosecutorial discretion to ensure that victims of and witnesses to crimes are properly protected.

To further enhance ICE's prioritized approach, on December 21, 2012, ICE issued new guidance to state and local law enforcement partners governing the use of detainers in our nation's criminal justice system. The guidance sets forth a uniform, transparent and effective manner for regulating their use in cases arising out of the Criminal Alien Program, Secure Communities, 287(g) agreements, and other ICE enforcement efforts. Moreover, consistent with ICE enforcement priorities, the guidance outlines the types of cases where detainers should be issued. These include cases involving felony convictions or felony charges; three or more prior misdemeanor convictions; misdemeanors involving violence, sexual abuse or other serious

conduct; or cases that pose significant risks to national security, border security, or public safety. Conversely, the new policy limits their use in cases involving individuals arrested for minor misdemeanor offenses such as traffic offenses, which do not reflect a danger to public safety, and will help to ensure that available resources are focused on apprehending convicted felons, repeat immigration offenders and other ICE priorities. It is applicable to all ICE enforcement programs and strategies. ICE will continue to evaluate its enforcement policies, operations and programs to ensure that they are focused on our highest priorities, making adjustments when necessary.

Also reflective of ICE's commitment to smart, effective immigration enforcement are the major reforms we have made to the immigration detention system. Beginning in August 2009, these reforms address many of the concerns raised about ICE's immigration detention system, while allowing ICE to maintain adequate detention capacity to carry out our immigration enforcement responsibilities. To help effectuate these reforms, in 2009, ICE established its Office of Detention Policy and Planning, which oversees day-to-day detention reforms while designing a new detention system that aligns with our nation's values. ICE also conducted a nationwide deployment of a new automated Risk Classification Assessment instrument to improve transparency and uniformity in detention custody and classification decisions reflecting the agency's civil enforcement priorities, this assessment contains objective criteria to guide decision making, regarding whether an alien should be detained or released, and if detained, the alien's appropriate custody classification level. It also requires ICE officers to determine whether there is any special vulnerability that may impact custody and classification determinations. ICE continues to look for ways to ensure that the health and safety of aliens in our custody are protected, by increasing our oversight of detention facilities and improving the conditions of confinement within the detention system.

All of the above successes highlight the effectiveness ICE's overall effort to establish clear enforcement priorities that smartly focus agency resources.

Recent Releases of Certain Aliens

As the Committee knows, we are coming to the end of a Continuing Resolution (CR). This CR funded ICE to maintain a yearly average daily population of approximately 34,000 individuals. In early February, ICE was maintaining an average daily population in excess of 35,000 individuals, including many who did not require detention by law.

These detention levels exceeded Congressional appropriations, and with the strong possibility of sequestration, ICE officials managed the detention population in order to ensure that ICE could operate within the appropriations provided by Congress. Notably, these budget constraints are now further compounded by the reductions required by sequestration, which represents a nearly $300 million cut to our budget that we must absorb over the remaining seven months of the fiscal year.

In reducing detention levels, we took careful steps to ensure that national security and public safety were not compromised by the releases. All release decisions were made by career law enforcement officials following a careful examination of the individual's criminal and immigration history ensuring that the focus remains on detaining serious criminal offenders and others who pose a threat to the national security or public safety. Every individual released was placed on an alternative form of ICE's supervision, and all released individuals remain in removal proceedings.

I regret that the timing of our releases caught many by surprise and we would be happy to brief your staffs further on this issue. The releases were a direct result of ICE's efforts to stay

within its detention budget in light of the CR and sequestration. Going forward, ICE will continue to manage its budget in a prioritized manner, ensuring that the focus remains on serious criminal offenders and others who pose a threat to public safety.

CONCLUSION

Thank you again for the opportunity to testify today, and I would now be pleased to answer any questions.

Mr. GOODLATTE. Thank you, Director Morton.

I will recognize myself to begin the questioning.

Of the more than 2,200 detainees that have been released so far, several hundred are criminal aliens who have been convicted of crimes such as theft, fraud, and other crimes perpetrated on people

in our society. Was the decision to release detained illegal and criminal immigrants a unilateral decision made by you?

Mr. MORTON. It was a decision made by the career officials in the Agency, and in particular, Mr. Mead and our chief financial officers. I support their decision completely, and to the extent that your question asks was it made by anybody outside of the Agency, the answer is a categorical no.

Mr. GOODLATTE. Did you coordinate with any officials at DHS headquarters in making the decision to release potentially dangerous illegal immigrants?

Mr. MORTON. None whatsoever.

Mr. GOODLATTE. Do you even have the authority to act unilaterally with respect to releasing thousands of detained illegal immigrant aliens?

Mr. MORTON. Well, first of all, the answer is yes. The authority, by statute, rests with me and the officers of Agency. In fact, other than the Secretary, we are the only individuals in the department with that authority.

Mr. GOODLATTE. And you are saying that a decision to release 2,200 people for this purpose, whatever the purpose may have been, whether it is to save money or for other reasons, had no communications with the higher department to which ICE is an agency that you report.

Mr. MORTON. That is correct. These decisions were made inside the Agency for budgetary reasons.

Mr. GOODLATTE. I have in front of me a memorandum dated December 8, 2010 that you submitted to Secretary Napolitano under the subject matter, expanding expedited removal to felons unlawfully in the United States, where you set forward the purpose of making that request, the background for making the request, your discussion about the request, and at the bottom, your recommendation below which is a signature line for the approval of the Secretary. Is that standard procedure for you and others in agencies within the Department of Homeland Security for making decisions regarding changes in policy at the department?

Mr. MORTON. That was a recommendation to the Secretary about possible ways to streamline removal efforts, and that one had to do with expedited removal. So that was specific.

Mr. GOODLATTE. I understand, but why would the decision in that case have required you to make that request of the Secretary and the decision here to release onto our streets, as opposed to the expedited removal and deportation, 2,200-plus people? In fact, we have seen documents that suggest that the plans are to release several thousand more onto our streets without any approval from Secretary Napolitano.

Mr. MORTON. The regulatory authority for expedited removal is set by the Secretary, not by the Agency, unlike detention releases. ICE has the exclusive detention authority within the department.

Mr. GOODLATTE. So you are saying that if you want to increase the deportation of people outside the country and expedite that, you have to seek the approval of the Secretary, but if you want to release the same people back onto the streets of the United States where they can commit more crimes, you do not have to seek the Secretary's approval for that purpose.

Mr. MORTON. No, that is not what I am saying. I am saying that if I wish to change the rules for expedited removal, I have to go to the Secretary with that proposal. That authority does not rest exclusively with the Agency. And that was about a very specific statutory and regulatory power that is not held exclusively by ICE.

Mr. GOODLATTE. I understand that with the exception of custody operations, ICE was operating under the presidential budget, not at the budget set by Congress under the continuing resolution. As a result, all the other accounts in ICE carried a balance of $240 million for the year and $120 million for the past 6 months. Additionally, your CFO indicated that ICE carried forward $100 million to $120 million in user fee balances.

Can you tell us why ICE did not ever submit a reprogramming request to Appropriations which can be handled at the Committee level rather than releasing detained illegal immigrants? Is it not true that both ICE and DHS could issue reprogramming requests to cover the costs of these released detainees?

Mr. MORTON. We can seek reprogramming requirements. That is absolutely true, Mr. Chairman. And we did not in this instance.

I am trying to live within the appropriations that Congress gives us. Our single largest appropriation is for custody operations. And we were trying to live within our budget, recognizing that we had to go the full year. We did not have a full-year appropriation. We only had 6 months. Sequester was coming, and we play it very tight to the vest in every operation that we did other than custody operations where it was important enough and we operated at a level above what we were appropriated for much of the fiscal year. And I did not want to rob Peter to pay Paul. My view is that we need to maintain the operations of the Agency. I do not want to furlough people, and I need to make rational judgments across the PPA's that we are given by the Appropriations Committee.

Mr. GOODLATTE. The Appropriations Committee is very used to dealing with excess expenditures necessitated by changed circumstances and do respond and do respond quickly to those requests.

But I am pleased that you acknowledged that you could have done that and dipped into surplus funds from fees or from other funds carried over from other operations of the department rather than releasing criminal aliens onto our streets.

And I will ask unanimous consent to enter the following documents in the record: a letter to Secretary Napolitano from Senator Grassley and I requesting specific information on the detainees released as a result of sequestration. We expect ICE to respond to this request for information.

A letter from the Pinal County Sheriff, Paul Babeu, stating that on February 23, 2013, Immigration and Customs Enforcement processed and released 207 illegal immigrants from the ICE Eloy facility in Arizona on this date alone. Of the 207, a total of 48 had been charged or convicted with either manslaughter, child molestation, aggravated assault, weapon offenses, forgery, drug offenses, or other serious crimes.

And third, a memo from Director Morton to Secretary Napolitano requesting the expansion of expedited removal to felons unlawfully in the United States, which I referred to earlier.

Without objection, those will be made a part of the record.
[The information referred to follows:]

Congress of the United States
Washington, DC 20515

February 27, 2013

Via Electronic Transmission

The Honorable Janet Napolitano
Secretary
U.S. Department of Homeland Security
Washington, DC 20528

Dear Secretary Napolitano:

The March 1 sequestration deadline means each federal agency and Department that is not-exempted shall reduce its budget so as not to violate the required spending caps established under the Budget Control Act of 2011. On January 31, 2013, you wrote to Chairwoman Mikulski of the Senate Appropriations Committee outlining how sequestration would impact the Department of Homeland Security (Department).

We are concerned about reports that the Department is already taking action to implement sequestration by releasing criminal aliens from detention facilities and seriously putting the safety of the public at risk. Some reports suggest that as many as 10,000 detainees across the country will be released in the near future in order for ICE to reduce its average daily detention population from 34,000 - a Congressionally mandated requirement- to 25,000. According to information obtained by Congress, ICE is "mass releasing" aliens convicted of fraud, theft, or drunk driving offenses, as these aliens are not considered to be subject to mandatory detention. According to other reports, illegal aliens who are documented gang members and those who have been arrested for but not convicted of a serious crime are also being released. Additionally, it is reported that fugitives and aliens with final removal orders are also being released. According to information we have obtained, many of these aliens are being released on simple recognizance.

In a letter to Chairwoman Mikulski dated January 31, 2013, you vaguely detailed the impact sequestration would have on the Department, stating that it would not be able to maintain current staffing levels or immigration detention and removal operations. Specifically, you stated that, "[e]ven in this current fiscal climate, we do not have the luxury of making significant reductions to our capabilities without placing our Nation at risk."

On Monday, in a public statement, you said, "I don't think we can maintain the same level of security at all places around the country with sequester as without sequester." On Tuesday, at the Brookings Institution, you claimed that sequestration "will have to affect our core critical mission areas."

Your Department was given detailed planning guidelines by the Office of Management and Budget (OMB) to implement sequestration in such a way to "reduce risks and minimize impacts on the agency's core mission in service of the American people." On January 14, 2013, OMB Deputy Director for Management Jeffrey Zients issued a memorandum for the heads of all Departments and Agencies (hereinafter OMB Memo) regarding planning for uncertainty in FY 2013.[1] That memorandum laid out a series of guiding principles for preparing plans for sequestration. Specifically, the memorandum recommends: (1) using flexibility to reduce operational risks and impacts on the agency's core mission, (2) identifying and addressing operational challenges that could have a negative impact on the agency's mission or impact life, safety, or health concerns, (3) identifying the appropriate means to reduce workforce costs, (4) reviewing grants and contracts to determine where cost savings may be achieved, (5) utilizing flexibility such as reprogramming and transfer authority, and (6) maintaining adherence to the requirements in the Worker Adjustment and Retraining Notification (WARN) Act.[2] The OMB Memo also instructed all agencies to work with OMB prior to taking any budget action in advance of sequestration and required each agency to "submit draft contingency plans for operating under sequestration for review."[3]

While the administration is clearly embarking on a campaign to scare the public and Congress about the realities of budget reductions, it is clear that you have not planned adequately for the March 1 sequestration. Despite the rhetoric, it is alarming that you have already taken steps and made decisions that go against the Department's core mission, and at best, appear to be poorly reasoned and contrary to the OMB memo. The Department has decided to release criminal aliens into the population even though detention beds are below their average daily requirement of 34,000. Releasing criminal aliens and failing to utilize the detention beds that Congress has mandated is an abrogation of the Department's Mission to ensure the safety and security of Americans.

While the Department released illegal alien detainees into the population on the basis of cost cutting, we find this decision particularly troubling because the Department has carried or will carry forward billions of dollars in fiscal years 2012 and 2013. Last year, the Department announced an unobligated balance of over $8 billion. The Office of Management and Budget projected that at the end of fiscal year 2013, the Department would have more than $9 billion in unobligated funds.

Simply blaming budget reductions as a means to turn a blind eye toward the national security of the American people is a dangerous plan and one that calls into question the Department's preparations for sequestration. To better understand how the Department will better confront sequestration and reduce operational challenges that could affect the life, safety or health of the American people, we ask that you provide responses to the following questions:

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[1] Memorandum from Jeffrey D. Zients, Deputy Director for Management, Office of Management and Budget, to the Heads of Executive Departments and Agencies (Jan. 14, 2013) (on file with the Senate Judiciary Committee).
[2] *Id.* at 2.
[3] *Id.* at 3.

(1) When did this policy take effect on releasing illegal and criminal aliens due to the sequestration and how many illegal and criminal aliens have been released under the policy? How many illegal immigrants do you expect to release under this policy?
(2) What agency officials were involved in making that decision to release criminal aliens and what type of cost analysis was used to justify the release?
(3) What categories of aliens are being released? Are suspected gang members, aliens convicted of fraud, theft or drunk driving offenses being released? Are fugitives and aliens with final removal orders also being released?
(4) How many of these aliens are released on recognizance, ankle bracelets, or with other reporting requirements?
(5) Provide a copy of all draft contingency plans for operating under sequestration developed pursuant to the January 14, 2013, OMB Memo and/or those submitted to OMB for review.
(6) Your letter to Chairwoman Mikulski indicates that the Department would not be able to maintain current staffing levels of Border Patrol Agents and the Customs and Border Protection Officers as mandated by Congress. Specifically, what activities will be diminished by these agents? Aside from personnel cuts, what programs and activities of the Customs and Border Protection will be impacted and how?
(7) Your letter to Chairwoman Mikulski indicates that the Department would not be able to sustain current detention and removal operations or maintain the 34,000 detention beds mandated by Congress? Specifically, what enforcement operations will be scaled back or ceased? How many of the 34,000 detention beds will not be used? Of those currently detained, how will you determine who is released?
(8) Missing from your letter was a detailed analysis of whether the Department has continued a hiring freeze since the passage of the Budget Control Act of 2011. I ask that you provide a detailed list of the number of individuals hired by the Department since the passage of the Budget Control Act. Further, provide a breakdown of the number of individuals hired since January 1, 2013.
(9) What impact, if any, will sequestration have on conference spending by the Department? Will there be a blanket prohibition on conferences in lieu of furloughs? If not, why not?
(10) What impact, if any, will sequester have on executive travel? Given the OMB Memo recommendation to "use any available flexibility to reduce operational risks and minimize impacts on the agency's core mission," will the Department eliminate or significantly curtail non-mission travel by the Department? If not why not? Provide any cost analysis of savings sought through a reduction in travel in light of sequester.
(11) What impact, if any, will sequestration have on the use of Department vehicles by employees for commuting to and from work given the pending budget shortfalls?
(12) Will the Department move to recover any of the $17 billion in unspent funds and reallocate them to mission-critical activities? If not, why not? How will the billions in unobligated balances be treated?
(13) Please provide a detailed explanation of cuts that will reduce wasteful, duplicative and ineffective programs.

Given the end of the week deadline for sequestration, we ask that you provide this information as soon as possible, but no later than March 7. In the event your response requires transmitting classified information, please contact House Judiciary Committee Counsel, Dimple R. Shah, at 202-225-3926 or Senator Grassley's staff, Kathy Nuebel Kovarik, at 202-224-3744 to make the proper arrangements to ensure security of documents.

Sincerely,

Bob Goodlatte
Chairman
House Committee on the Judiciary

Charles E. Grassley
Ranking Member
Senate Committee on the Judiciary

Pinal County Sheriff's Office

March 18th, 2013

National Sheriff's Association
Attn: President Sheriff Larry Amerson
1450 Duke Street
Alexandria, VA 22314
Fax: 703-838-5349

Re: *Release of Criminal Illegals Across America*

Dear Sheriff Amerson,

I am asking for the support of my fellow Sheriff's on an issue which has the potential to affect every community across America. The issue shouldn't be considered a political issue for anyone but rather a national security - public safety emergency. The NSA is known as the key leader on critical criminal justice and homeland security issues. I am asking that the NSA assist our office and all of the Sheriffs' across America in obtaining the information we need from Immigration Customs Enforcement in order to protect the citizens we have been elected to serve.

Due to public pressure, Immigration Customs Enforcement *(ICE)* has admitted they released over 2,000 illegals from detention facilities throughout the United States and they plan to release another 3,000 more this month. According to Director Morton of ICE, over 30% of those released already have criminal records here in the United States. Two of the detainees released from the ICE detention facility in my County have past criminal charges for manslaughter and others who were released had been charged or convicted with drug smuggling *(cartels members)*, narcotics trafficking, forgery, weapons offenses, child molestation, aggravated robbery, aggravated DUI and aggravated assault against peace officers. Equally concerning is the fact ICE released from their custody, *"Level 1"* offenders which are the most dangerous classification of any offender ICE has.

Recidivism is always high among those released from custody and now there is no doubt it will be even higher amongst these individuals as they are not even legal U.S. citizens. We may never know how high the recidivism rate is on these criminal illegals because they refuse to provide law enforcement with their names, criminal histories, security threat or locations.

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So far the only information we have received is through Whisleblowers who came forward and provided me with the information. Since then, I have attempted but have been unsuccessful in obtaining any information from ICE Officials, Secretary Napolitano or President Obama.

The terrorist attacks on the United States of America on September 11th, 2001 were the most devastating to ever occur on U.S. soil. On November 27th, 2002 the National Commission on Terrorist Attacks Upon the United States, also known as the 9/11 Commission was formed. The Commission acknowledged there are some real security interests which must be kept in secrecy but these concerns must be weighed against other pertinent concerns such as transparency:

> *"The culture of agencies feeling they own the information they gathered at taxpayer expense must be replaced by a culture in which the agencies instead feel they have a duty to information—to repay the taxpayers' investment by making that information available."*

Below is a chronology of events to better help you understand the magnitude of this public safety issue.

On Saturday, February 23rd, 2013 Immigration Customs Enforcement employees who work as Detention Removal Officers were called into work and 207 illegals were processed and released from the ICE Eloy facility on this date alone. Of the 207, a total of 48 of them had been charged or convicted in the United States with either manslaughter, child molestation, aggravated assault, weapon offenses, forgery, drug offenses and or other serious crimes.

Whistleblowers including ICE Supervisors, ICE employees, U.S. Border Patrol Supervisors and employees immediately reached out and informed me about what they were being ordered to do by ICE Administration in Washington, D.C. Employees knew what they were being ordered to do was unethical and completely contrary to their sworn oath to protect the American public.

Employees had serious concerns about the clear public safety threats this would cause to the American public because many of the detainees being released have criminal records and they were being ordered to give them court dates as distant as two to three years away from their release date.

Upon learning this information, I immediately contacted senior staff members at ICE in an attempt to confirm the information he was being told by whistleblowers, to determine who made the decision, where the detainees were being released too, and a list of their names, criminal histories and security risks. All attempts to obtain information were refused and the only information he continued to receive was through whistleblowers.

After failing to be given any information from ICE Officials, on February 26th, 2013 I sent out the attached News Release notifying the public of the release of over 500 criminal illegal detainees from detention facilities in Pinal County. ICE had attempted to release all of the criminal illegals under secrecy. Later that day, ICE acknowledged the release but said it was "*only a few hundred nationwide.*"

As public pressure mounted, ICE later admitted they released over 2,000 illegals from detention facilities throughout the United States and planned to release another 3,000 more this month.

After this information went public, ICE officials had supervisors attend briefings and also sent emails to employees threatening employees who released information on this matter to a third party would be disciplined and possibly terminated.

On February 28th, 2013 I sent the attached letter to Secretary Napolitano formally asking for the same information. Still as of today, I haven't heard back but have heard from ICE supervisors, she will not be providing our office the information we requested.

On March 4th, 2013 I faxed and sent by mail, the attached letter to Congressman Issa *(Chairman of the Oversight and Government Reform Committee)* requesting a congressional inquiry and oversight hearings to investigate the recent mass release of more than 2,000 criminal illegals from ICE custody.

On March 5th, 2013 Congressman Issa announced that he will be launching a formal investigation into this matter.

On March 14th, 2013, ICE Director John Morton told members of Congress during his testimony, in fact 629 of the released detainees had criminal records here in the United States. Ten of which were *"LEVEL ONE"* offenders which are the most dangerous classification of any detainee in ICE custody. Director Morton said, the ten are back in ICE custody yet he has still refused to provide local law enforcement agencies any information.

My office has not been notified if the ten who were rearrested include the two released from the Eloy ICE facility who had been charged with manslaughter, or the ones who were charged with molesting children, weapon offenses or aggravated assault.

Thank you for your consideration on this matter.

Respectfully,

Paul Babeu, Sheriff
Pinal County, Arizona

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NEWS**RELEASE**

Pinal County Sheriff's Office • 971 Jason Lopez Circle
Florence, Arizona 85132 • 520-866-5208 • Fax: 520-866-5195

FOR IMMEDIATE RELEASE
Tuesday, February 26, 2013

CONTACT: Director of Administration, Tim Gaffney, 520-705-8124

Paul Babeu, Sheriff

Thousands of Criminal Illegals Being Released

Pinal County, Ariz – Sheriff Paul Babeu blasted the Washington gridlock regarding the *"Sequester Budget Battle"* and says it is already harming public safety in Arizona by ICE's mass release of hundreds of illegals and plans for the release of nearly 10,000 more criminal illegals from prison.

Many of these ICE detainees are held at private facilities, which are contracted to house criminal illegals. ICE reportedly plans to reduce their available beds to 25,700 from their current 34,000. Sheriff Babeu said, *"Clearly, serious criminals are being released to the streets of our local communities by this mass budget pardon. These are illegals that even President Obama wants to deport. This is insane that public safety is sacrificed when it should be the budget priority that's safeguarded."*

ICE agents were paid overtime Saturday and Sunday to release over 500 detainees in Pinal County alone. These criminal illegals were scheduled for deportation, yet now they receive a pardon and once again become the problem of local law enforcement and a burden to the state of Arizona. The President predicts a doomsday scenario and his plans are already being implemented.

Sheriff Babeu concluded, *"President Obama would never release 500 criminal illegals to the streets of his home town, yet he has no problem with releasing them in Arizona. The safety of the public is threatened and the rule of law discarded as a political tactic in this Sequester Battle."*

-30-

Pinal County Sheriff's Office

February 28, 2013

Secretary Janet Napolitano
Department of Homeland Security
U.S. Department of Homeland Security
Washington, D.C. 20528

Re: *Release of Illegal Immigrants*

Dear Secretary Janet Napolitano,

I'm writing to formally request information about the hundreds of criminal illegals who were released from custody and set free in Pinal County this week. I am requesting detailed information about the identity, criminal history, and threat assessment on every single criminal that your agency released under your recent budget pardon. I have already requested this information from your staff here in Arizona, however it has been denied.

You can't have it both ways! Your office now says these are low risk and non-violent criminals, yet Director John Morton, yourself, and President Obama have consistently argued that ICE lacks the funds to house all criminal illegals and you only focus your limited financial resources to identify, imprison, and deport the worst 34,000 of the estimated 11 million illegals here in the United States. This is the same group that we are talking about here and the same criminal illegals that even you and President Obama has said you wanted to deport.

Protocol and logic should have required your staff to formally notify me, as the top law enforcement official in the county where this occurred, about this mass release of hundreds of foreign criminals into my county and elsewhere, yet regrettably this never happened. Even as the constitutionally elected Sheriff, I do not have any authority to release inmates or detainees in my jail without judicial action. The silence from ICE in failing to answer if any judge was involved with this release or the change of the terms of their detention is what we in law enforcement call a clue.

Supervised release for any foreign criminal is laughable. What incentive do criminal illegals have to report in to the authorities or for them not to cut off their ankle bracelet? What is the worst punishment would they face - deportation? Recidivism rates are extremely high for any incarcerated individual, yet this population will be higher. Those who were released had no prior notice of being set free, which is important for each of them, as well as your staff to assist in preparing for transition into the community and to ensure some safety net. They lack the money, family support, and ability to get a job - not just because they have a criminal record, but because they're NOT U.S. citizens. This mass release is a recipe for disaster. Future victims of likely crimes will hold you and your administration responsible.

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In an effort to mitigate the threat to the public's safety, I again formally request the names, location provided for their supervised release, criminal charges for detention and their criminal history.

Your immediate attention and response is requested.

Respectfully,

Paul R Babeu

Paul Babeu, Sheriff
Pinal County, Arizona

971 Jason Lopez Circle Building C * P.O. Box 867 * Florence, AZ 851232
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Pinal County Sheriff's Office

March 4, 2013

U.S. Congressman Darrell Issa
Committee on Oversight and Government Reform
2347 Rayburn House Office Building
Washington, DC 20515
Fax: 202-225-3303 and 202 225-3974

Re: *Congressional Investigation Request*

Chairman Issa,

I'm writing to formally request a congressional inquiry and oversight hearings to investigate the recent mass release of more than 2,000 criminal illegals from ICE custody. No prior notice was given to any local, county, or state law enforcement official about this action, which presents obvious dangers to our communities that we are entrusted to protect. I have repeatedly requested that ICE and Homeland Security Secretary, Janet Napolitano, provide myself and other law enforcement officials the detailed information about the identity, criminal history, and threat assessment of every single criminal that ICE has released. To date, this information has been repeatedly denied by ICE and I've been told that this information shall not be forthcoming.

Several whistle blowers, who currently serve as federal agents and supervisors and were directly involved in releasing these criminal illegals have appealed to me in an attempt to thwart ICE's plans to release more than 5,000 criminals into the streets. Our initial statements alerting the public to this situation sparked a public outcry, which halted ICE's further plans to release an additional 3,000 criminals. ICE initially denied the allegations about a mass criminal prison release, then later admitted to a couple hundred and days later acknowledged that 303 were released from four facilities in Pinal County, Arizona. We later confirmed that ICE had concealed information and there were more than 2,000 criminals released, yet they continued to maintain that they only released *"low risk and non-violent offenders."*

This last talking point on *"low risk and non-violent offenders"* was intentionally designed to mislead the public and to alleviate fears over the obvious safety concerns that would be present, if convicted felons and illegals charged with violent criminal offenses were in fact released. As initially feared, I now believe serious criminals have been released into our communities across America. Just here in Pinal County facilities, I have received information that many illegals who were released have the following criminal convictions; weapon offenses, smuggling, narcotics trafficking, forgery, aggravated assault against police officers, and child molestation. Though serious, it is not to be outdone by the release of two criminals with past charges for manslaughter.

Nearly all the information that I have received from these federal agents has proved true and extremely accurate, which strikingly contrasts with the denials and eventual dribble of partial truths by ICE officials and White House spokesman Jay Carney, who stated *"the government had released a few hundred"* of the roughly 30,000 illegal immigrants held in federal detention pending deportation proceedings. Carney said the immigrants released were *"low-risk, noncriminal detainees."*

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Director John Morton, Sec. Napolitano, and President Obama have consistently argued that ICE lacks the funds to house all criminal illegals and therefore only focus their limited financial resources to identify, imprison, and deport the worst 34,000 of the estimated 11 million illegals here in the United States. You don't have to be a detective to figure out that ICE would NOT waste their precious financial resources, limited law enforcement personnel and prison beds on low risk and non-violent criminals.

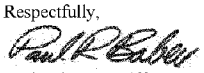
In addition, many have raised the question of the presumed legal authority of ICE to release and change the terms of custody for thousands of criminal illegals. The silence from ICE on this matter is a clue. ICE and Sec. Napolitano have failed to answer this charge and to confirm if any judge was involved with this mass prisoner release and to change the terms of their detention. ICE leaders should be forced to testify under oath about their false statements, refusal to provide notice and relative information to affected law enforcement agencies.

ICE should also be required to justify their latest concept of supervised release for foreign criminals. What incentive do criminal illegals have to report in to the authorities or for them not to cut off their ankle bracelet and flee? What is the worst punishment would they face - deportation? Recidivism rates are extremely high for any incarcerated individual, yet this population will be higher. This mass release shall prove to be a disaster, where future victims of likely crimes will rightly hold ICE responsible.

Any assistance you may be able to lend in requiring ICE to provide myself and all local, county, and state law enforcement with the names, location provided for their supervised release, criminal charges for detention, and their criminal history would be greatly appreciated.

Lastly, I'm concerned for the whistle blowers who now fear for their jobs. ICE staff is now receiving e-mails and personal briefings by supervisors warning them against the release of any information to anyone outside their agency. They have now been told that any release of information outside ICE shall result in disciplinary action up to and including termination. These latest tactics have created an environment of fear and intimidation that is hostile for the whistle blowers and other federal agents who would like to do the right thing, yet they are afraid to lose their job and their federal pensions.

Respectfully,



Paul Babeu, Sheriff
Pinal County, Arizona

cc:

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241 Russell Senate Office Building
Washington, D.C. 20510-0303
Fax: 202-228-2862

U.S. Senator Jeff Flake
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Office of the Director

U.S. Department of Homeland Security
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Washington, D.C. 20536

DEC 0 8 2010

U.S. Immigration and Customs Enforcement

MEMORANDUM FOR: Janet Napolitano
Secretary

FROM: John Morton
Director

SUBJECT: Expanding Expedited Removal to Felons Unlawfully in the United States

Purpose:

This memorandum outlines a proposal for the Department of Homeland Security (DHS) to expand the application of expedited removal (ER) to certain aliens found anywhere in the United States who have been convicted of a felony offense. The authority to apply ER to such persons exists by statute, provided they have been physically present in the United States for fewer than 2 years and are present without having been admitted or paroled, but this extension of ER would require a formal designation by the Secretary of Homeland Security revising current DHS policy, and an appropriate notice in the Federal Register. At present, DHS policy restricts the application of ER to aliens encountered at ports of entry (mandated by statute), plus aliens encountered within 100 air miles of the border and 14 days of entry, and aliens who arrived in the United States by sea.[1]

U.S. Immigration and Customs Enforcement (ICE) seeks this expanded authority to further its efforts to promote public safety through the prompt identification and removal of criminal offenders unlawfully in the United States. The removal of criminals is the agency's highest immigration enforcement priority but is limited by the agency's detention resources and inefficiencies in the administrative removal process of the Executive Office for Immigration Review. Because of these limitations, absent an expansion of ER or a marked increase in the number of immigration judges, ICE will be unable to handle the growing number of criminal aliens it encounters without a budget increase or statutory reform.

Importantly, ICE proposes to extend the application of ER only to felons unlawfully present in the United States and not to misdemeanants, although the statute is broad enough that it would be possible to cover misdemeanants, or indeed any entrant without inspection present for fewer than

[1] Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(a)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68924 (Nov. 13, 2002); Designating Aliens For Expedited Removal, 69 Fed. Reg. 48877 (Aug. 11, 2004). The statute excludes from ER Cubans who arrive by air at a port of entry. INA § 235(b)(1)(F); *see also* INA § 235(b)(1)(A)(iii)(II). The discretionary expansions of ER applicability issued to date also explicitly except citizens and nationals of Cuba.

2 years. Broader expansions of the application of ER at this time, however, would raise additional policy concerns and probably trigger wider resistance or criticism. Additionally, any changes, including the one proposed, will raise constitutional due process concerns and present some litigation risk.

Background:

Section 235 of the Immigration and Nationality Act (INA) directly applies ER to all arriving aliens determined to be inadmissible for fraud or lack of proper documents. INA § 235(b)(1)(A)(i). It also authorizes DHS, in the sole and unreviewable discretion of the Secretary, to apply ER to aliens who have not been continuously physically present in the United States for the 2-year period immediately prior to a determination of inadmissibility if they are present without admission or parole. INA § 235(b)(1)(A)(iii).

An ER order is issued after a careful officer interview and is not considered final until reviewed and approved by a supervisor. 8 C.F.R. § 235.3(b)(7). There is no further hearing or review unless the alien expresses a fear of persecution or torture or the intent to apply for asylum, in which case the alien is referred for an asylum officer interview. 8 C.F.R. § 235.3(b)(4). If the officer finds that the alien has a credible fear of persecution, the alien is referred for removal proceedings before an immigration judge. 8 C.F.R. § 208.30(f). Although the potential statutory scope of ER is broad, by policy DHS presently applies ER beyond its statutorily mandated application to arriving aliens only to (1) aliens encountered within 100 miles of the border and within 14 days of their unlawful entry,[2] and (2) aliens who arrived by sea.[3]

Because of these policy limitations, ICE is not currently authorized to apply ER to the majority of criminal aliens who fall within the statute's permissible discretionary scope. Instead, ICE removes such aliens through the traditional immigration court process under INA section 240. This process can be lengthy and can involve prolonged detention and appeal. For example, aliens subject to ER are typically detained and removed within 12.75 days, while aliens subject to INA section 240 proceedings are detained and removed within 43.2 days.

Discussion:

Expanding ER to felons present in the United States for fewer than 2 years would advance ICE's focus on identifying, apprehending, and removing convicted criminals.[4] Expanding ER would substantially reduce detention costs, the amount of time an alien spends in custody prior to removal, and the potential for protracted litigation in individual cases. The proposal would allow the Executive Office for Immigration Review and ICE's Office of the Principal Legal Advisor to focus more resources on the cases of lawful permanent residents and aliens living in the country for an extended period. If those cases are adjudicated more quickly, lawful permanent residents will spend less time uncertain about the outcome of their cases, and aliens in removal proceedings will generally spend less time in detention.

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[2] 67 Fed. Reg. 68924.
[3] 69 Fed. Reg. 48877.
[4] Under this proposal, ER would not be applied to covered aliens convicted of aggravated felonies, because they are already subject to an expedited procedure, administrative removal, authorized by INA § 238.

Expanding Expedited Removal to Felons Unlawfully in the United States
Page 3

On the other hand, any expansion of ER will generate criticism, based both on the asserted risk of applying it to aliens not covered by the ER statute, and on claims that ER does not provide sufficient procedural protection. DHS will counter such concerns, first, by emphasizing that the change is limited to convicted felons. Consequently, the subjects will ordinarily be identified through our existing links to the criminal justice system, which already provide for careful advance inquiry into immigration status, rather than through other processes that might pose greater risk of misidentification. Second, ICE will make sure that implementation provides full opportunity for the individual to be heard, in the course of well-established officer interviews consistent with the careful procedures already widely used for ER.

Expanding ER will therefore require ICE to develop and conduct rigorous training for immigration officers, draft clear policies and procedures, and adhere strictly to those policies and procedures. To manage the roll-out of an expanded ER program, ICE could select regions, ideally based on the level of Secure Communities deployment. For instance, ICE could begin with Virginia, Texas, and Florida—three of the states fully covered by Secure Communities.

Recommendation:

I recommend that DHS expand the use of ER to eligible aliens of any nationality (except Cubans) apprehended anywhere within the United States within 2 years of entry without inspection, who have been convicted of a felony. To ensure that this expansion is done in a thoughtful and deliberative way, I further propose that ICE begin the expansion in Texas, Virginia, and Florida. To accomplish this, ICE would work closely with DHS Office of General Counsel, DHS Policy, U.S. Citizenship and Immigration Services, and the Department of Justice, as well as build upon the existing ER training and policies already in place for U.S. Customs and Border Protection.

Please indicate your decision below:

Approve _____ Disapprove _____

Modify _____ Needs more discussion _____

Mr. GOODLATTE. My time has expired.

And I now recognize the gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman.

The Agency, Director Morton, has been accused of releasing thousands of detainees from its custody to score political points in ad-

vance of sequestration. But based on what we have learned over the past week, it looks more like ICE was forced to tighten its belt beginning in January because it had been spending excessively throughout the fall to detain thousands of people more per day than its budget would allow.

Can you put some further explanation onto this assertion?

Mr. MORTON. Yes, Mr. Conyers. Let me just start out by setting the context here. There are about 350,000 people in immigration proceedings at any given time. The vast majority of those people are not detained, and that is by statutory design, that is, congressional design. Congress has directed the Agency to detain certain individuals by mandate. Those cases are known as mandatory detention. There are certain criminals and certain non-criminals that we must detain. And the rest of the system is designed for consideration of release on conditions. The Agency has that power, and it is also overseen by immigration judges who may redetermine the Government's initial decisions by ICE.

So the idea that, simply because a person is in the country unlawfully or they have a criminal conviction, they are detained is not true. In fact, the use of detention is the exception to the rule, given the number of people that are in proceedings. There are 350,000 people at any given time. We have resources on the very best of days for about 34,000 to 35,000 people, and many of those people are not even in formal immigration proceedings. They are border cases through expedited removal.

So we have to manage our budget, and our levels go up and down. Sometimes we are above 34,000; sometimes we are below. Sometimes we do not have enough space to take a particular person into detention, so we place them on an alternative to detention, a bracelet, a monitor or they have to call in. They are on an order of supervision. They have a bond. 150,000 people are on bonds right now in immigration proceedings. Some of them have criminal convictions; some of them do not. And that is by statute. That is by congressional design. It is exactly like the criminal justice system. In fact, the detention system for immigration actually has mandates that you do not see in the criminal justice system.

Mr. CONYERS. That is a very thorough explanation that I find quite reassuring.

You have been doing an outstanding job as Director for how long now?

Mr. MORTON. I am about to come to the end of my fourth year. I will be the longest serving head of the agency ICE has ever had.

Mr. CONYERS. Well, that is great.

Can you explain how during the months of October, November, and December ICE was detaining 2,000 or 3,000 more people on any given day than it could afford through its budgetary circumstances to detain?

Mr. MORTON. Yes, sir. So at the end of last year, we were operating at a very high operational tempo, in large part because one of the things I have tried to do: provide the Border Patrol much greater detention support. And so, for example, we are detaining on any given day 6,000 to 7,000 people in Texas for the Border Patrol, and we are then formally removing them through the ICE powers instead of simply voluntary returns.

That meant that at the end of the fiscal year, we were operating at quite a high level of detention, 36,000. If we had had full-year funding, we could have adjusted over time to make sure that we ended the year at 34,000 on average using whatever funds that we had. This particular year, we had a CR, and 2 to 3 months into that CR, it became clear that we were not going to have a good sense of what the remaining funding would be for the year, and it also became clear that sequester might, in fact, be a reality for us. And we had to do, as you said, some belt tightening. It meant releasing certain people so that we could live within our budget.

Everybody remained in proceedings. Everybody is on some form of supervision. Our intent is still to remove them from the United States. We are reviewing all of the cases continually. If we made a mistake or there are new circumstances that suggest that somebody should come back into our custody, they will. And as the Chairman has already noted, we have made a handful of decisions already to return people to our custody, both level 1 and level 2 offenders.

Mr. CONYERS. Thank you very much.

I have been permitted one quick question as my time has expired. But we are only a few days away from the end of the CR, and we are more than 2 weeks into sequestration. Can you tell us any more about your budgetary outlook today?

Mr. MORTON. I cannot, Mr. Conyers. I obviously hope that Congress passes a budget for ICE by March 27. I understand where some of the concerns come from. I understand that people wonder about some of the releases. I recognize that we are dealing in an extraordinary circumstance, where we had a CR for 6 months. We have a mandate from Congress to have a certain level of appropriated beds, and on top of that, we have a sequester from this very same United States Congress that says reduce your budget by 5 percent. And our single largest appropriation of $2 billion is for custody operations.

The next largest appropriation we have is for domestic investigations, and when I say domestic investigations, I mean operations along the Southwest border to go after drug dealers, alien smugglers, child pornographers, child exploitation. That is when I talk about robbing Peter to pay Paul. These are very real decisions that we have to make at the Agency, and we do the very best we can in a circumstance where our funding is uncertain at best.

Mr. CONYERS. Thank you, Director Morton, and thank you, Chairman, for the additional time.

Mr. GOODLATTE. I thank the gentleman.

The Chair now recognizes the former Chairman of the Committee, the gentleman from Texas, Mr. Smith, for 5 minutes.

Mr. SMITH. Thank you, Mr. Chairman.

Director Morton, under the Immigration and Nationality Act, aliens not subject to mandatory detention may be released on bond if, one, they do not pose a danger and, two, are likely to appear for any future proceeding.

In addition to immigration law, you have the Office of Management and Budget directive to avoid actions that would, "raise life, safety, or health concerns."

Under the document you gave us marked "sensitive material," you say that you released 629 individuals in the criminal category. 159 of those individuals had either been convicted of or charged with a felony or multiple misdemeanors. Do you not consider those individuals to be a threat to the safety of the American people?

Mr. MORTON. I am, obviously, concerned about people who engage in criminal offenses in the United States while here unlawfully. That is why I have placed——

Mr. SMITH. But are the individuals who have been charged or convicted with a felony or multiple misdemeanors not a threat to the American people?

Mr. MORTON. That is too simple a representation. If I might, Mr. Smith, let me give you a real example of one of the level 1 offenders we have released.

Mr. SMITH. No. You are changing the subject on me. Do you want to answer my question or would you prefer not to?

Mr. MORTON. It depends on the case. Generally speaking, I think that criminal offenders should be the Agency's highest priority, but people have different circumstances. If you have a 40-year-old conviction, then that is different.

Mr. SMITH. Let me answer the question—let me answer the question on behalf of the American people. I think the American people think that your releasing individuals convicted or charged with a felony or multiple misdemeanors is a threat to their safety.

Now, these individuals whom you did release—did they all post bond?

Mr. MORTON. Not all of them. The law allows us to release people on various types of supervision.

Mr. SMITH. What percentage were released on bond?

Mr. MORTON. I do not know the percentage. We are working to have an exact breakdown. We put about 180 individuals on the highest form of release, which is alternatives to detention.

Mr. SMITH. I understand that.

Let me follow up on a point that the Chairman made a while ago and that was his question about why you did not use the user fees in your reserve account which amounts to tens of millions of dollars and why you did not request from the appropriators the permission to reprogram. Your response was you wanted to live within your budget. But that does not have anything to do with living within your budget. If you redirect those funds to prevent you from releasing these individuals, you would still live within your budget. You are not asking for more money. You are just asking to transfer money from one department or account to another, and I do not understand why you did not do that if that would have enabled you to—prevented you from having to release these, I would call it, dangerous individuals.

Mr. MORTON. So there are two issues. There is one using the funds that we were appropriated, and then the user fees of some unobligated balances.

Mr. SMITH. Right.

Mr. MORTON. We are——

Mr. SMITH. Whether you spend those fees or not has nothing to do with whether you balance your budget. That is the point. You could have used those fees and still claimed to balance your budget.

Mr. MORTON. No. We could have sought a reprogramming from the Committees.

Mr. SMITH. Why did you not?

Mr. MORTON. Because as I said, we want to live within the budget we were given. Our goal——

Mr. SMITH. But even if you had used those other funds, you would have been living within the budget and you might have done a whole lot to protect the American people from dangerous individuals.

Mr. MORTON. No. I did not want to rob Peter to pay Paul from within the Agency's budget.

Mr. SMITH. Yes, I know. But that is my point. You are taking from one and putting it to another. That is not spending additional money. Robbing Peter to pay Paul is not going outside your budget. It is using the same amount of money. But we are going to disagree on that. I just think that you did not actually answer the question.

Last year, you all requested, I think, detention beds for 1,200 fewer than Congress provided. If you need more detention space, why did you not request more detention beds?

Mr. MORTON. So the President's budget asked for 32,800 detention beds.

Mr. SMITH. Right. Congress provided 1,200 more, the 34,000.

Mr. MORTON. And it also asked for an increase in alternatives to detention with language that would have allowed us to go back and forth, and supplement the hard beds, if we needed.

Mr. SMITH. If funding were not a consideration, how many detention beds could you use?

Mr. MORTON. Well, funding obviously is a consideration. We are at the highest level we have ever had——

Mr. SMITH. I know. The question was how many would you need if you wanted to provide total safety to the American people.

Mr. MORTON. I am not trying to be difficult. You can only answer that question if you factor in alternatives to detention and how quickly can we move people through the system.

Mr. SMITH. No, that was not my question. Do you have any idea, any concept of how many beds you would need if you were to satisfy all demands?

Mr. MORTON. If I were to satisfy all demands——

Mr. SMITH. Legitimate demands.

Mr. MORTON. If I were to satisfy all demands, you would be looking at an ICE with a budget that would be unsustainable. As you and I know——

Mr. SMITH. No, no. How many beds would you need?

Mr. MORTON. How many beds would I need to detain and remove 11 million people from the United States or more?

Mr. SMITH. No. That was not my question. How many do you need to do to fulfill your job. In other words, you have 34,000. How many more would you need?

Mr. MORTON. I mean, again that begs the question of what is my job and is my job to remove every single person who is here in the United States——

Mr. SMITH. Mr. Chairman, I do not think I am getting a direct answer. So I am afraid I will have to yield back.

Mr. GOODLATTE. The gentleman yields back.

At the beginning of the hearing, I was not under the impression that the Chairman of the Subcommittee on Immigration and the Ranking Member had opening statements. In fact, they did and they both graciously agreed to put those in the record. But I wanted to jump ahead to recognize them in thanks for their forbearance on their statements. So I will now recognize the gentlewoman from California, Ms. Lofgren, for 5 minutes.

Ms. LOFGREN. Well, thank you, Mr. Chairman, and I agree that it was more important to go directly to the testimony than to hear our opening statements.

I think part of the problem here, the confusion was the Secretary of Homeland Security's statement, and I think the way it was taken was not that there was an overspending problem in the custody element but that somehow this was in reaction to the discussion of sequester. And then people felt, well, you know, we are being threatened, and if we go through sequester, then this will happen. And it just created a very bad impression. And I think that is part of what we are trying to deal with here, a misimpression that was created by that statement.

If I understand—the Appropriations Committee gets, I think, almost constant reports on how many people are in detention and removal, and we have access to them as well. They give the number of people in custody who have gone through the system, not just the people who are in custody at midnight, which I think reflects the numbers that you gave to us in looking at this. And I would ask unanimous consent to put these into the record.

Mr. GOODLATTE. Without objection, so ordered.

[The information referred to follows:]

ICE Weekly Bedspace Numbers - Detention and Removals						
Record Date	Daily Count as of Record Date	Average Daily Population of ThroughPut			Report Month	Due Date
		FYTD	MTD	Week-Ended		
October 1, 2012	36,800	35,278	36,800	36,708	October	10/5/2012
October 8, 2012	36,357	36,578	36,578	36,547	October	10/12/2012
October 15, 2012	36,821	36,602	36,602	36,628	October	10/19/2012
October 22, 2012	36,472	36,507	36,507	36,303	October	10/26/2012
October 29, 2012	35,878	36,291	36,291	35,614	October	11/2/2012
October 31, 2012	**35,530**	**36,237**	**36,237**	**35,360**	**October**	**11/9/2012**
November 5, 2012	35,578	36,050	34,888	35,051	November	11/9/2012
November 12, 2012	34,619	35,857	34,874	34,864	November	11/16/2012
November 19, 2012	36,097	35,808	35,107	35,508	November	11/23/2012
November 26, 2012	35,949	35,750	35,170	35,338	November	11/30/2012
November 30, 2012	**35,662**	**35,747**	**35,240**	**35,505**	**November**	**12/7/2012**
December 3, 2012	35,909	35,723	35,243	35,503	December	12/7/2012
December 10, 2012	35,902	35,691	35,347	35,392	December	12/14/2012
December 17, 2012	35,672	35,655	35,326	35,296	December	12/21/2012
December 24, 2012	34,460	35,585	35,173	34,800	December	1/4/2013
December 31, 2012	**35,223**	**35,516**	**35,061**	**34,678**	**December**	**1/4/2013**
January 7, 2013	35,892	35,500	35,291	35,291	January	1/11/2013
January 14, 2013	34,944	35,471	35,173	35,055	January	1/18/2013
January 21, 2013	33,305	35,373	34,748	33,898	January	1/25/2013
January 28, 2013	33,850	35,284	34,522	33,845	January	2/1/2013
January 31, 2013	**33,160**	**35,241**	**34,426**	**33,527**	**January**	**2/8/2013**
February 4, 2013	33,660	35,169	32,962	33,206	February	2/8/2013
February 11, 2013	33,236	35,050	32,907	32,876	Februaruy	2/15/2013
February 18, 2013	32,307	34,925	32,766	32,544	Februaruy	2/22/2013
February 25, 2013	31,859	34,802	32,641	32,320	March	3/1/2013
February 28, 2013	**30,707**	**34,728**	**32,475**	**31,509**	**March**	**3/8/2013**
March 4, 2013	30,899	34,614	30,293	30,636	March	3/8/2013
March 11, 2013	31,788	34,474	30,985	31,380	March	3/15/2013

Source: IIDS v1.12 as of March 14th, 2013 as provided by the Statistical Tracking Unit.

IIDS is a data warehouse that contains dynamic data extracts from the Enforcement Integrated Database (EID).

All data updated on 03/14/2013 (IIDS v. 1.12 run date 03/14/2013; EID as of 03/11/2013).

The 03-04-2013 Facility List provided by CMD was used for this report, with detainee data through 03/04/2013 (IIDS data pull on 03/04/13; EID extract from 03/02/13).

Detention data excludes those in MIRP and ORR facilities and USM Prisoners.

The Daily Count and Average Daily Population are based on an admission into a detention facility.If a SUBJECT enters a detention facility and stays for any amount of time, that is counted as a day. If the SUBJECT stays more than one day, the last day that the subject leaves is not counted as a day. If a person is booked and released to more than one detention facility in the same day, each of those BOOKINGS (admission into a facility) will count as a new day. The ADP is the number of billable days for a given time period, divided by the number of days in that time period.

ICE Weekly Alternatives to Detention Active Population Count				
Record Date	**Daily Count as of Record Date**	**Average Daily Population**		**Report Month**
		FYTD	**MTD**	
October 1, 2012	23,153	23,153	23,153	October
October 8, 2012	23,123	23,148	23,148	October
October 15, 2012	23,136	23,148	23,148	October
October 22, 2012	23,104	23,147	23,147	October
October 29, 2012	23,005	23,119	23,119	October
October 31, 2012	**22,978**	**23,109**	**23,109**	**October**
November 5, 2012	22,887	23,083	22,924	November
November 12, 2012	22,843	23,044	22,876	November
November 19, 2012	22,462	22,984	22,780	November
November 26, 2012	22,327	22,909	22,670	November
November 30, 2012	**21,756**	**22,849**	**22,581**	**November**
December 3, 2012	21,474	22,978	21,754	December
December 10, 2012	21,761	22,696	21,764	December
December 17, 2012	21,786	22,614	21,769	December
December 24, 2012	21,722	22,541	21,758	December
December 31, 2012	**21,666**	**22,476**	**21,742**	**December**
January 7, 2013	21,445	22,408	21,512	January
January 14, 2013	21,015	22,329	21,362	January
January 21, 2013	20,545	22,220	21,100	January
January 28, 2013	20,395	22,117	20,937	January
January 31, 2013	**20,396**	**22,075**	**20,885**	**January**
February 4, 2013	20,406	22,023	20,392	February
February 11, 2013	20,474	21,942	20,448	February
February 18, 2013	20,511	21,876	20,472	February
February 25, 2013	20,658	21,821	20,516	February
February 28, 2013	**20,915**	**20,825**	**20,766**	**February**
March 4, 2013	20,953	20,793	20,947	March

Source: All numbers are aggregated from BI's Daily Count Full Service and Technology Only reports.

Ms. LOFGREN. For example, for September 30, it was 35,271. For October 31, it was 36,233. So as a matter of fact, you could go through. It was in excess of 34,000 every single day there was a report. And so it looks to me like you had an overspending problem that needed to be corrected.

Here is the question. In our use of alternatives to immigration detention, is our standard substantially different than what is being used in State courts with people who are actually arrested for crime? For example, in Santa Clara County, we release people on ankle bracelets all the time because we need them to appear and the failure to appear rate is low. Is our standard much different than a locality?

Mr. MORTON. It is not. We have a system that Congress has designed that operates just like the criminal justice system. There are decisions that have to be made as you go through immigration proceedings which, by the way, are not penal. They are administrative—as to whether or not someone should be detained. The Agency has a fair amount of discretion to set that initially, and then it is reviewed by judges, just as in the criminal justice system, who can set bond, can order you released, and in fact, do. That is the norm of the system is most people are released.

Might I just say one thing on your comment with regard to the Secretary?

Ms. LOFGREN. Sure.

Mr. MORTON. The Secretary was talking about the potential effects of sequester. Obviously, that was a consideration for us. She was entirely correct in suggesting that sequester would have a significant effect on our ability to maintain the detention levels that had been appropriated to us. And again, I think she was trying to express the real concern——

Ms. LOFGREN. Well, if I may, I am not suggesting any ill motive on her part. I just think the way it was reported created a lot of suspicion, and that is why we are here trying to dispel those suspicions if there are facts to support that.

You know, one of the things that I am mindful of—we know from the Department of Justice that the single most common Federal felony prosecution in America today—what do you think it is? It is not drugs. It is reentry after removal. That is a felony conviction. And it is the most commonly prosecuted Federal offense in the system. Obviously, we are not for people reentering after removal, but if that is the felony conviction, it certainly poses a different type of concern than if somebody is convicted of a crime of violence or something of that nature.

Do you have the stats on if there were felons released, was it reentry after removal? Do you have the data on that?

Mr. MORTON. We do. There were some immigration offenses, though not many. Most of the level 2s were either multiple misdemeanants or non-violent felons who did not qualify for an aggravated felony. Even of the four level 4s that are on the street, Ms. Lofgren, they are cases that are really challenging. I tried to give Mr. Smith an example and if I might give you an example.

One individual who was released in Arizona has a conviction for theft offenses and drug offenses, and at first glance you might say, okay, what is ICE doing? That individual is 68 years old. They are

a lawful permanent resident, and they have been a lawful permanent resident for 44 years, and an immigration judge made a determination that that person was not a danger to the community. And that just goes to show you these are hard calls that have to be made on a case-by-case basis, and that is exactly what we have done.

Ms. LOFGREN. Alright.

Just one final question. The fee account has been mentioned, and you indicated you did not want to rob Peter to pay Paul. What use are those fees going to be made to, and could you not have taken the Operation in Our Sites funding and put it instead into detention?

Mr. MORTON. So two things are going on. When I say that I do not want to rob Peter to pay Paul, I do not want to look to the other large appropriations to maintain detention funding above and beyond the appropriation that is given to us. Why? For very simple reasons. Our biggest appropriation is custody operation. Our second biggest appropriation is domestic investigation. And to put that into context, that means going after child pornographers, drug dealers, alien smugglers, export control violations, and that is an important part of the Agency's work.

Ms. LOFGREN. So you could have gone after the Operation in Our Sites funds.

Mr. MORTON. I could have moved funds from our investigations, including those that you had some concern about. Yes, I could have. I did not elect to do that.

The user fees are historical unobligated balances, and we are considering how to deal with that. They have certain restrictions on how they can be spent. They are not dedicated solely to detention funding, and that is something that we want to explore.

Ms. LOFGREN. I see my time has expired. I thank the Chairman and yield back.

Mr. GOODLATTE. I thank the gentlewoman.

And the gentleman from South Carolina, the Chairman of the Immigration Subcommittee, Mr. Gowdy, is recognized for 5 minutes.

Mr. GOWDY. Thank you, Mr. Chairman.

Mr. Morton, I will tell you from this vantage point, it does look like the decision to release detainees was a political determination and not a monetary determination. It appears to me that the release of detainees was part of a sequester campaign that included the fictional firing of teachers, the closing of the White House for student tours, the displacement of meat inspectors, and now we are going to release some aggravated felons onto the street.

Now, I have counted six times you have said you did not want to rob Peter to Paul. I do not want Peter or Paul to rob one of our fellow citizens because you guessed wrong on who to release.

So what is a level 1 violator?

Mr. MORTON. A level 1 offender—first, I obviously disagree with your characterization about these being political——

Mr. GOWDY. Well, that is fine. You can use your time to disagree with my characterization. Do not use mine.

What is a level 1 violator?

Mr. MORTON. With regard to level 1 offenders, they are aggravated felons, as defined by Congress.

Mr. GOWDY. And how many were released?

Mr. MORTON. There are four presently.

Mr. GOWDY. How many were released?

Mr. MORTON. Eight were released. We have four presently.

Mr. GOWDY. And what went wrong with the other four?

Mr. MORTON. What is that?

Mr. GOWDY. Why were there eight released and only four currently?

Mr. MORTON. So two were released when the computer records were not correct, and we went back and we looked at them and we brought them back in. One was a mistake.

Mr. GOWDY. What kind of mistake?

Mr. MORTON. Just where the instructions to the field were not carried out correctly.

Mr. GOWDY. Alright. So if it is $122 a day to house four level 1 aggravated felons, then releasing them saves you what? About $600 a day?

Mr. MORTON. Each day. That is right.

Mr. GOWDY. You cannot find $600 anywhere else in your budget?

Mr. MORTON. We make determinations on a case-by-case basis. We have got to——

Mr. GOWDY. Can you find $600 somewhere else in your budget?

Mr. MORTON. The question is whether that $600 is well spent on those people or someone else, and when it comes to somebody who has been a 44-year lawful permanent——

Mr. GOWDY. I am not talking about the 44. Was he a level 1?

Mr. MORTON [continuing]. And they are 68 years old——

Mr. GOWDY. Was he a level 1? Was he a level 1, Mr. Morton?

Mr. MORTON. He is a level 1 offender.

Mr. GOWDY. He was one of the four that you released?

Mr. MORTON. Yes, he is released. That is right.

Mr. GOWDY. Mr. Morton, who made the decision to release detainees as part of your effort to comply with sequestration?

Mr. MORTON. The determination was made by Mr. Mead, the Executive Associate Director for Enforcement and Removal Operations, in consultation with the chief financial officer.

Mr. GOWDY. Who is John Sandweg?

Mr. MORTON. Mr. Sandweg works for the Secretary.

Mr. GOWDY. Were there any conversations with him?

Mr. MORTON. Not that I am aware of.

Mr. GOWDY. Were there any conversations with the Secretary?

Mr. MORTON. Not that I am aware of. I think the Secretary has noted that she was surprised and regretted the timing of notification, and I agree with that.

Mr. GOWDY. If the release of aggravated felons does not rise to the level of something that the Secretary of the Department of Homeland Security should know about, what does rise to the level?

Mr. MORTON. Listen, we release people every day, and the idea that we are going to review every single person that is released——

Mr. GOWDY. Do you release thousands of people every day?

Mr. MORTON. We release thousands of people every month. We operate in a system—we had 470,000——

Mr. GOWDY. But you do not blame it on sequestration, do you, Director Morton?

Mr. MORTON. What is that?

Mr. GOWDY. You do not blame it on sequestration when you release the others. It is not part of this strategy to get the public fired up that mayhem is upon us, that we are closing the White House for tours, that we are firing teachers in West Virginia. We are going to have to release level 1 aggravated felons because of sequestration.

Mr. MORTON. First of all, that was never said. And the system allows for the release on supervision of people going through immigration proceedings. We are not detaining people for penal reasons, solely for purposes of removal. And as I have said, the vast majority of people in proceedings by statutory design are not mandatory detention——

Mr. GOWDY. Who are level 2 violators, offenders?

Mr. MORTON. They are either multiple misdemeanants or felons that Congress has defined as something other than——

Mr. GOWDY. And DUI would be a misdemeanor. Right?

Mr. MORTON. DUI——

Mr. GOWDY. First offense? How about second offense?

Mr. MORTON. It depends on State law, but most times——

Mr. GOWDY. Well, how about the States where you release people? Did you release any recidivist drunk drivers?

Mr. MORTON. Yes.

Mr. GOWDY. How many?

Mr. MORTON. I do not have the exact number, but we have released many individuals who had DUI offenses.

Mr. GOWDY. Repeat offender DUI.

Mr. MORTON. Repeat offender DUIs. Most of them were single offenders, but some would be DUIs. I would note for the record, Mr. Gowdy, Congress has not provided that a DUI is a ground of removal. In fact, most misdemeanors are not a ground of removal. It is the Agency, by Agency policy, that factors that in. I cannot order you removed for having committed a DUI——

Mr. GOWDY. No, you cannot, Director, but you certainly can request a programmatic rescheduling so you can move money around. And this notion that you do not want to rob Peter to pay Paul—you could have easily done that. You could have found $600 to keep these level 1 violators from being released and do not act like you could not have.

With that, Mr. Chairman, I would ask unanimous consent to move in a document titled "Addressing CR Issue through March 31st and Sequestration" from U.S. Immigration and Customs Enforcement.

Mr. GOODLATTE. Thank you.

Without objection, so ordered.

[The information referred to follows:]

Mr. GOODLATTE. The Chair now recognizes the gentleman from Virginia, Mr. Scott, for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman.

Director Morton, there is a belief around here that budget cuts have nothing to do with your ability to perform your responsibilities. In fact, tax cuts have nothing to do with the budget. And so you have to just work with us on this.

Is there an appropriate ratio for safety between staff and detainees?

Mr. MORTON. Yes.

Mr. SCOTT. And if there is a budget cut, how does that affect that ratio?

Mr. MORTON. Well, obviously, we have to maintain the facilities with the appropriation that we have. Were we to furlough individuals, that would affect our ability to apprehend and detain and remove people safely. I have indicated that my intention is to not furlough any of our officers.

Mr. SCOTT. Well, if you have less budget, you will have less people, and therefore, you can retain fewer people. Is this arithmetic?

Mr. MORTON. It is. The basic arithmetic is the single largest appropriation that Congress gives us is for custody operations, and the sequester directs us to take a 5 percent cut to that custody operations. That is roughly $110 million. And I cannot find that level of resource——

Mr. SCOTT. Well, I think what some are trying to tell you is that you can maintain a ratio with less money. But if you have less money, you have less people, and therefore you can detain fewer detainees. And we are talking arithmetic. It is not philosophy.

A lot of the focus on the people released has been on their prior offenses. Can you explain to me what the recidivism rate—what the crime rate for those who have been released has been?

Mr. MORTON. So far, I am not aware of any recidivism. Obviously, we are reviewing all of these cases. We maintain——

Mr. SCOTT. Excuse me. Of all the people you have released, how many crimes have been committed?

Mr. MORTON. None that I am aware of so far. Obviously, it is a short period of time. We constantly review that.

Mr. SCOTT. Well, criminal courts let people out on bail, and obviously some commit crimes. But you are unaware of any that have committed crimes?

Mr. MORTON. Out of these 2,228, no. Listen, Mr. Scott, obviously we release people every day on some form of supervision. The statute provides that. Can I promise that every single one of those people is going to behave all year long? I cannot. We make the best judgments that we can.

Mr. SCOTT. You cannot do it any more than a criminal court can promise that people let out on bail——

Mr. MORTON. Of course, not. I was a Federal prosecutor for many years before I came to the immigration enforcement business, and the exact same decisions are made. In fact, the immigration law is a little stronger. We have mandates in immigration law where in the criminal justice system there are only presumptions for certain detention cases.

Mr. SCOTT. A suggestion has been made that your travel and entertainment budget would be sufficient to offset some of this. How much is your budget for travel and entertainment?

Mr. MORTON. It is a tiny fraction of what would be necessary to cover this.

Mr. SCOTT. So you could not cover these expenses by reducing travel and entertainment?

Mr. MORTON. No. And we are doing that as part of the sequester. We have gone to mission critical only. No conferences. Our training is mission critical. The entire budget of the Agency, outside of do-

mestic investigations and ERO, is $633 million, out of $5.8 billion. The math simply will not work with that remainder.

Mr. SCOTT. And you have talked about a 68-year-old. Is the cost of detaining a 68-year-old, including health care, more or less than the average $122 a day?

Mr. MORTON. Well, I would say I do not know this particular 68-year-old, but generally speaking, obviously we have some additional health considerations with people who are older.

Mr. SCOTT. Thank you, Mr. Chairman. I yield back.

Mr. GOODLATTE. I thank the gentleman.

The gentleman from Alabama, Mr. Bachus, is recognized for 5 minutes.

Mr. BACHUS. Thank you.

Director Morton, one thing that disturbs me is this thing that I was supplied by ICE. It says, detention release is solely for budget reasons. Why would it not say detention reasons based solely on national immigration detention policy?

Mr. MORTON. We are trying to be clear and accurate with everybody as to the releases that were for budget reasons only. We are releasing people all of the time, and I do not want people to think that we are mixing in people one way or the other. Again, the system calls for release every day.

Mr. BACHUS. Okay. My point is this says that these 2,600 individuals were released solely for budget reasons.

Why would you have not looked at 26,000 individuals in detention and found—it could have been 10,000 that you could have released? I mean, you should never release someone for budget reasons, solely for budget reasons. Would you not agree with that?

Mr. MORTON. No. We have to manage our budget every year.

Mr. BACHUS. Something more important than budgets is the immigration detention policy. I mean, that is what you are here to enforce, not to incarcerate people. You are here to try to determine how many people should be detained.

Mr. MORTON. No. My principal job is, on the immigration side—and people forget that there is a lot about ICE that is not about immigration enforcement. But focusing on the immigration enforcement, my job is to do the best I can to remove people who are here unlawfully from the United States, not to detain them, to remove them.

Mr. BACHUS. Right, okay. I think the immigration policy of the United States is to—as far as detention goes, is to detain people where there is not a reasonable alternative. Would you agree with that?

Mr. MORTON. Generally, that is the way the statute is set up.

Mr. BACHUS. Or you mentioned mandatory detentions also. But out of that 26,000—what I am saying you said these detention releases were made for budget reasons, and there is really no threat to public safety as a result of those.

Mr. MORTON. I said that——

Mr. BACHUS. Or very little.

Mr. MORTON [continuing]. We focused the releases on those people that we felt posed the least—the threat to public safety was not a significant risk.

Mr. BACHUS. But why?

Mr. MORTON. But what you are getting at is—if your question is do I have enough people, do I have enough resources to detain and remove 11 million people, the answer is no.

Mr. BACHUS. No, no. My question is perhaps are you overusing detention.

Mr. MORTON. At the beginning of the year, we were maintaining a higher level of detention than we were appropriated for over an annual——

Mr. BACHUS. No, no. Let's not talk about dollars and cents. Let's talk about individuals who are being detained. Surely instead of doing a cost analysis, why do you not do a risk assessment on that population, those being detained? How many of them could be released to family members? How many of them periodically would check in, even some maybe GPS? Although I would think that there are ties with the United States. You know, we have got some that have been adopted as children. I do not think they are going to run away. Are some of those mandatory detentions that you could recommend to Congress they not be?

I am just saying it looks to me like maybe there is an overuse of detention by this Administration. Now, I know that totally—would you agree? Okay. If these people are not public safety risks, if they are not violent, if they do not have a criminal history, if they are not repeat offenders, if they are going to show up for proceedings, why are they detained at all? I mean, surely out of this 26,000, you could have found 3,000 or 4,000 that—are there not 3,000 or 4,000 that would not——

Mr. MORTON. I think your basic sentiment, which is detention should be made based on risk of flight and——

Mr. BACHUS. Well, public policy, and that ought to be risk of flight, you know, violent offenders. I consider DUI's—I would say DUI.

But what I am saying—this almost to me is that you are saying we have got too many people in detention.

Mr. GOODLATTE. Would the gentleman yield?

Mr. BACHUS. Yes.

Mr. GOODLATTE. In the report prepared by the Committee staff, there is a statistic in there that shows that 770,000 people who were released did not return for their deportation——

Mr. BACHUS. I understand that, but I would say this. You could look at most of those people and there are predictors of whether you——

Mr. GOODLATTE. We are trying to deport them. If you release them and they never show up for their deportation proceeding, they are probably not getting deported.

Mr. BACHUS. Well, what I am saying—and I am not arguing, but if I accept—and I think most of these people are probably not going to go back. If they do go back, they are coming back legal or illegal.

What the Chairman is saying is that 40 percent of those people that are not detained in the first place do not reappear for their removal hearing. And you know, include someone that does not show up—you know, maybe detain them. But if they were never released or if they were released and showed back up and they are not a flight risk and they are not a threat to public safety—and I

will go to budget now—why are we spending $164 a day on it? I am just saying——

Mr. GOODLATTE. The time of the gentleman has expired.

Mr. BACHUS. This maybe is not the message here, but maybe there is an overuse of detention.

Ms. LOFGREN. Would the gentleman yield?

Mr. GOODLATTE. The time of the gentleman has expired.

The Chair recognizes the gentlewoman from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. Let me thank you very much to the Chairman and Ranking Member for this informational hearing.

Director Morton, I have always thought of your basic commitment to the security of this Nation and might I say that I appreciate the work that your office does, the work that you all do in Washington, D.C. And I know that if I might use a certain American phraseology, you are caught between a rock and a hard place.

So I would like to pointedly just restate what I thought you said and that is you are responding to the sequester, which is an across-the-board 5 percent cut, which resulted in $110 million that you had to address, and that most of your appropriations comes into the custodial appropriations.

So I am going to answer my own question. Then I am going to pose it to you. Obviously, we need a policy change that balances the responsibilities of ICE between custodial and other work, which then generates the employment or the FTE's that you may need to do other things, human trafficking, issues that I am very interested in.

But I also appreciate the fact that in the recent order of, I guess a year, the executive emphasized to your office to prioritize individuals who could be, in essence, at a lower priority for detainment.

So when we mention this issue of detaining persons, I think it is important to note that you are following a policy supported somewhat by law that either Congress has set over the years through immigration policy. I think that should be clear.

So let me ask some specific questions. One, there are about 771 that you released in the State of Texas, 240 in Houston. Can you give me a sense of what the offenses of those individuals were? It is my first question. I will let you answer that, along with any comment on the policy. And I am going to interrupt you because I have some other questions if you do not mind. Thank you.

Mr. MORTON. On Houston, there were 134 non-criminals and then there were no level 1 offenders whatsoever in Houston or the State of Texas. That is true for almost every State represented here today. In fact, that is true for most level 2s as well. In Houston, we had 59 level 3 and 47 level 2.

With regard to your comment on the policy and the statute, you are right. At any given moment, about a half to two-thirds of the people that we detain are mandatory detention. Congress has just told us people in these categories must be detained. And the rest are discretionary. And that has largely built up over time to be a policy focused on criminal offenders, recent border entrants, or people who have seriously gamed the system.

Again, you have to look at people's individual circumstances. It is why immigration enforcement is so challenging. It is very easy

to make simple statements about non-criminals, simple statements about criminals. But then you realize sometimes a criminal can mean somebody who is 28 years old and they have committed a terrible sexual assault, and sometimes it can mean somebody who is 68 years old, has been here for 44 years, is a lawful permanent resident, people who have children. And that is why it is challenging, and our officers have to make those decisions every day, the best they can on the facts they have, and you cannot make sweeping generalizations or determinations either by statute or by policy.

Ms. JACKSON LEE. Well, the question has become bipartisan, Director Morton, on this issue of whether we are detaining too much. I appreciate both the Chairman and the Ranking Member, I am going to offer that we do a bipartisan bill that further assists you in codifying what was done by an executive order because my next line of questioning is, as someone who deals with these issues, I am concerned about detaining people that, frankly, obviously are being hurt.

For example, a young man by the name of Marco—and I would like to get a response—was someone who was held for 4 months. He was innocent. Nothing more than he was someone who came here and not being documented, had not done any offense. He was here, left behind. His father was deported. He was the only support for his family. He is being held. We spent 4 months holding him. No offense, nothing.

Another woman was a victim of domestic violence, and she had been denied asylum and refugee status. We held her while she was trying to get bond counsel.

My question to you is—as you well know, the American Civil Liberties Union are in our offices about these individuals. They are probably level 0 to a certain extent in terms of not being offensive.

Can you just tell me how you can work better on these kinds of cases and work better with the ICE regional offices which, with all of their great service, sometimes detains, detains, detains?

Mr. MORTON. I am happy to look into the two particular cases, and I will ask the staff to do that.

The broader challenge is using the resources that Congress gives us for detention as wisely as we can. And a big part of the answer, frankly, I think is comprehensive immigration reform. You are right. The Agency is between a rock and a hard place a lot of times. We are charged with removing 11 million people from the United States and that number is obviously beyond our capability and appropriations to carry out, and for many of the very long-term residents, frankly it does not make any sense either as a matter of policy.

So what do we do? We take the appropriations that we get, which is enough for about 400,000 removals a year, and we try to focus those removals as best we can on priorities that make sense for the country.

Mr. GOODLATTE. The time of the gentlewoman has expired.

Ms. JACKSON LEE. Thank you.

Mr. GOODLATTE. We have a vote pending, but we are going to try to get one more question in, and so the Chair recognizes the gentleman from Virginia, Mr. Forbes, for 5 minutes.

Mr. FORBES. Thank you, Mr. Chairman.

Mr. Morton, you have testified that the decision to release this 2,228 individuals was yours and yours alone, that you had no suggestion, conversation, memo, order, or communication of any kind from anyone outside the Agency. Is that your testimony here today?

Mr. MORTON. That is right.

Mr. FORBES. Once you have made a decision of that magnitude, did you communicate that to the Secretary, anyone on behalf of the Secretary, to OMB, anyone working for OMB, or anyone at the White House or working for the White House after that?

Mr. MORTON. No. The——

Mr. FORBES. Just yes or no, Mr. Morton. I do not have much time.

Mr. MORTON. The answer to that is no. And I have said I regret both with regard to——

Mr. FORBES. That is alright. I just need the facts on that.

The other thing that Mr. Gowdy pointed out, the reason this is so suspicious is not just the act, but the timing of the act. We know that OMB had issued gag orders on many agencies not to talk about sequestration. We know the Department of Defense had that. And you issued this decision in February when the campaign to talk about sequestration was undertaken by the President.

But I want to take you back to December and November of 2012. You bragged about the fact you have been there for 4 years. As you know, sequestration was passed in August of 2011. You had a year or so to look at that. Every mathematical fact and statistic that you have would have been exactly the same in November and December. In fact, no one in this room knew that sequestration was going to be postponed from January 1 to March 1 until January 1.

Why did you not make this decision in November or December of last year?

Mr. MORTON. First of all, the principal decisions were made by the career officials. It was not my personal decision.

Mr. FORBES. Why did they not make them in November or December of last year?

Mr. MORTON. I supported and approved this decision, but the decision itself was made by the people who run——

Mr. FORBES. But why did they not do it last year? All the same statistics, all the same monetary budgetary issues, everything was present last year that was present in February of this year, and yet you waited to February to make that decision.

Mr. MORTON. Where are we? We are at an average of 34,000 beds.

Mr. FORBES. You were at the same averages last year.

Mr. MORTON. That is right, but it goes up and down all of the time.

Mr. FORBES. No, no. But that projection was the same last year. You are not in a cyclical point in December where you could not project this was going to be the same kind of forecast, could you?

Mr. MORTON. Last year, we had a full-year appropriation——

Mr. FORBES. I am talking about December of last year, Mr. Morton. You had the same exact appropriations that you are looking at now.

Mr. MORTON. December of the fiscal year prior to this one.

Mr. FORBES. Of 2012. Let me move on because the bottom line is you do not have an answer for that.

Let me ask you this question and see if you have an answer for this one. On the individuals, this 2,228 people you released, were any of them members of a violent criminal gang?

Mr. MORTON. I think there are two cases, at least one that I know of, that when we went back and looked at the information, there was a gang affiliation. That person is——

Mr. FORBES. Do you ask the individuals that you are detaining whether they are members of a violent criminal gang or not?

Mr. MORTON. We try wherever we can to——

Mr. FORBES. No, no. That is not my question. I mean, is that part of your questioning? Do you have that information on the people that you released?

Mr. MORTON. I do not know if we ask each and every person we detain.

Mr. FORBES. So then you cannot really answer for the 2,228. All you can say is that you know that two of these individuals had a gang affiliation, but you do not know whether any of the other 2,228 had a gang affiliation or not?

Mr. MORTON. I cannot speak to every person we detain. No, I cannot.

Mr. FORBES. So then it is possible that we released someone who was here illegally who had been charged or convicted with a crime and could have voluntarily been part of a violent criminal gang. You would not know that.

Mr. MORTON. On the convictions, yes, we would.

Mr. FORBES. I said charged or convicted.

Mr. MORTON. Yes. So I am saying on convictions, we would. On just general gang affiliation, I cannot say that we would know——

Mr. FORBES. Let me ask you this question. On the aggravated felonies that you talked about, I am looking at the list here, and I am just running through a couple of them. But no one on that list was charged or convicted with murder, rape, or sexual abuse of a minor, were they?

Mr. MORTON. They were not.

Mr. FORBES. Was anyone charged or convicted of illicit trafficking in a controlled substance?

Mr. MORTON. There were some with drug offenses. The individual I mentioned earlier who is 68 and a lawful permanent resident.

Mr. FORBES. Were any of them involved in child pornography?

Mr. MORTON. Not of the ones that I am aware of that were released, no.

Mr. FORBES. So of the 2,228, you can testify that none of them were involved in child pornography?

Mr. MORTON. To the best of knowledge, I can testify the answer is no.

Mr. FORBES. Well, to the best of your knowledge just means that you do not have any knowledge of it now. Have you reviewed that or can you testify that none of them were?

Mr. MORTON. I can tell you that I have reviewed the summaries of all 2,228. I have not looked at the actual conviction records personally on such a number. I have not looked at every——

Mr. FORBES. Can you answer me this question? Because my time is about out. What time frame are these individuals to report back where somebody can actually lay eyes on them and say that we know that they are complying? Give us those time frequencies and what percentage of them have started reporting back.

Mr. MORTON. It depends on what sort of release you are put on. If you are on ATD, it can be as often as every week, and plus you have your bracelet. So it is constant monitoring. If you are on an order of supervision, it can depend. It can be monthly. It can be weekly. It can be quarterly. The same is true of an order of recognizance. Obviously, with a bond, you are dealing with a financial obligation that you must address. There is some combination of the two, too. We have the power to——

Mr. FORBES. So some of them you have as far as——

Mr. GOODLATTE. The time of the gentleman has expired.

Mr. FORBES. I will yield back.

Mr. GOODLATTE. I thank the gentleman.

Director Morton, we will have to stand in recess for a vote. So the Committee will reconvene as soon as the votes conclude.

[Recess.]

Mr. GOODLATTE. The Committee will reconvene.

And the Chair recognizes the gentleman from Georgia, Mr. Johnson, for 5 minutes.

Mr. JOHNSON. Thank you, Mr. Chairman.

Mr. Morton, in your department's 2012 and 2013 budget requests, did you oppose the inclusion of statutory language mandating ICE to maintain a level of at least 34,000 detention beds per day or per night?

Mr. MORTON. The President's budget did call for a lower number, 32,800, and called for a level of flexibility that was ultimately not adopted by the Appropriations Committee.

Mr. JOHNSON. Now, is the 34,000 detention beds that were passed or were mandated by this Congress—are those mostly in the private, nonprofit prison system?

Mr. MORTON. It is a mix of——

Mr. JOHNSON. It is not private, nonprofit, but private, for-profit prison system.

Mr. MORTON. Yes, sir. It is a mix. We run a very small number of facilities ourselves.

Mr. JOHNSON. How many beds?

Mr. MORTON. I would say maybe in our facilities a maximum of a couple of thousand.

Mr. JOHNSON. So you have got 32,000-plus that are housed in private, for-profit, corporate-run prison facilities. Is that correct?

Mr. MORTON. Not entirely. We also contract with State and local governments.

Mr. JOHNSON. If those beds are unfilled, is there still a requirement that the Federal Government pay the private contractor?

Mr. MORTON. Yes. Many of our contracts require a minimum floor, and then depending on the particular contract, obviously if

we use more of the minimum floor, we pay for that as well. We do our very best not to have empty beds.

Mr. JOHNSON. It is kind of like you want to fill the beds up so that you will not be paying for something that you are not using. Is that not correct?

Mr. MORTON. That is correct. Obviously, if Congress appropriates us money, we need to make sure that we are spending it on what it was appropriated for.

Mr. JOHNSON. And so we got a guaranteed payment to private, nonprofit corporations like Correction Industries of America, among others. Excuse me. Yes, Corrections Corporation of America, which is the largest private prison company in the country.

Now, you do, in law, have the flexibility to provide alternatives to detention to certain classes of detainees. Is that not correct?

Mr. MORTON. Yes, sir.

Mr. JOHNSON. You have the right to release them on bond.

Mr. MORTON. Yes, sir.

Mr. JOHNSON. And that is in fact what you did with the 2,228 persons that were released, which is the subject of this hearing. Correct?

Mr. MORTON. That is right, and we do that every day with other people as well.

Mr. JOHNSON. Now, how much does a detention bed cost per day?

Mr. MORTON. It depends on where you are in the country, but on average, we calculate it is $122 a day.

Mr. JOHNSON. I have heard reports of up to $166 a day for housing, health care costs, and guard costs.

Mr. MORTON. That is correct, particularly if we are, for example, in the Northeast. If you are detaining people in New York City, it obviously costs a lot more than it costs to detain somebody elsewhere.

Mr. JOHNSON. Well, using the average $166 a day times 34,000 detainees, we are guaranteeing to the private prison industry about $5.6 million per day—$5.6 million per day. Are you familiar with that?

Mr. MORTON. Well, again, I would note that there are other partners that we work with. We have State and local governments that provide us and then we do have some of our own contracted detention facilities. But do we have a dedicated appropriation for those beds? Yes.

Mr. JOHNSON. It is about $5 million a day.

Are you familiar with the ALEC group, the American Legislative Exchange Council, which proposes State laws that enable States to fill the prison beds that we are discussing today?

Mr. MORTON. I am not, sir.

Mr. JOHNSON. You are not? But you would not be surprised if Corrections Corporation of America was a member of ALEC, along with thousands—70 percent of the legislators in the country. Would you be surprised to learn that?

Mr. MORTON. I am just not aware of that particular group. I am aware of——

Mr. JOHNSON. So you are unaware of a mandate from corporations to the Federal Government to supply them with a fixed number of beds—i.e., profit—per day. And we do not even monitor these

private corporations in terms of the health, safety, and well-being of the detainees.

Mr. GOODLATTE. The time of the gentleman has expired.

Mr. JOHNSON. Thank you, Mr. Chairman.

Mr. GOODLATTE. I thank the gentleman.

The Chair recognizes the gentleman from Iowa, Mr. King, for 5 minutes.

Mr. KING. Thank you, Mr. Chairman, and thanks, Director, for your testimony here.

I am looking at some numbers that I heard earlier in the testimony, 2,228 detainees released, and of those, 1,599 non-criminals. Can you tell me if any of the non-criminals had orders of removal?

Mr. MORTON. I do not believe so, but we can check. But my initial assessment would be they do not.

Mr. KING. And of the 629 criminals, how many of those had orders of removal?

Mr. MORTON. I do not believe any of them had final orders of removal, although there was one case that involved somebody who had very severe mental issues, and that one person may have had an order and is the subject of some litigation that we are involved in.

Mr. KING. Could you tell me how many of the 1,599 non-criminals and the 629 criminals fit under the category of mandatory detention?

Mr. MORTON. None of the individuals that the field was directed to release could be mandatory detention. As I noted earlier, in further review, we have determined that there were some cases released that should have been mandatory detention when we looked at the record, and we pulled those in. But as a general rule, obviously a mandatory detention case must be detained.

Mr. KING. That is roughly 8 or 10? That is the kind of number we are talking about that may have been mandatory detention that were released?

Mr. MORTON. There will be four out of the level 1 offenders that we brought back in, and there will be—out of the level 2s, I think there will be less than a few dozen brought back in for a variety of reasons.

Mr. KING. But you would not have granted a release of anyone knowingly in the list of those who were mandatory detainees?

Mr. MORTON. No. That would be unlawful.

Mr. KING. So, therefore, that list that I heard from Mr. Forbes, murder, rape, sexual abuse, drug trafficking—you said a yes to drug trafficking. Would that not fit under the category of mandatory detainees?

Mr. MORTON. So there is some drug offenses—so, for example, possession—that are not mandatory detention in every case. Drug trafficking, depending on the State law——

Mr. KING. There were no drug traffickers released?

Mr. MORTON. Not that I am aware of.

Mr. KING. Okay, and no firearms traffickers either that you know of or——

Mr. MORTON. No firearms traffickers.

Mr. KING. Or money launderers?

Mr. MORTON. No money launderers.

One point to be clear on. Separate from these budgetary releases, there are times when we must release someone with a serious criminal record based on a Supreme Court case that says that if the Government is unable to remove people, we may not detain them indefinitely.

Mr. KING. Not making that the issue, though, it is your position—and I hear it here clearly—that you would not knowingly release anyone who is a mandatory detainee other than giving deference to the Supreme Court case.

Mr. MORTON. Yes.

Mr. KING. And with the request of the letter that was issued by Chairman Goodlatte and Senator Grassley for the list and the details of those who fit within those categories I have mentioned of the 2,228, you will provide that at their request?

Mr. MORTON. We have already provided a summary to the Committee, and we are happy to continue to work on further details. Just to give some flavor to it, Mr. King, occasionally we will deal with someone who has terminal cancer or, you know, there is an extraordinary circumstance. But generally, when the Congress says that something is mandatory, we view it as mandatory.

Mr. KING. Well, I appreciate that.

And when you looked at your options of releasing these 2,228 into the streets of which 629 are criminals, what was the rationale? If you needed to free up your budget, why did you not just go ahead, those who were adjudicated with deportation, remove them, or accelerate that process so you could remove them and relieve your budget in that fashion, release people into the streets of their home country rather than into the streets of our home country?

Mr. MORTON. We are doing everything we can to remove people. So I do not believe there were any removal cases that were ready to go that we delayed on.

Mr. KING. But why did you not accelerate that as another option rather than releasing people into the streets?

Mr. MORTON. We go as fast as we can. I am not aware of any power that we had to accelerate——

Mr. KING. Did you consider that as something you might want to develop, an ability to accelerate the removal so that you could free up your budget and not release people into the streets?

Mr. MORTON. Well, I am a supporter of trying to make sure that immigration proceedings proceed in a timely fashion. We have number of proceedings that take too long, and if we were to be able to shorten them, I think we could——

Mr. KING. Let me just ask you. If an ICE agent encounters an individual that is unlawfully in the United States, let's say, within a jail and that individual is guilty of less than three misdemeanors, can they arrest that person and place him in a deportation? How would your management deal with an ICE agent like that?

Mr. MORTON. So if the person has less than three misdemeanors, with some exception for drug offenses, most misdemeanors are not an independent ground for removal. Now, if they are here unlawfully, however, that is a ground of removal, and we obviously take into account——

Mr. KING. Do you encourage your agents to do that?

Mr. MORTON [continuing]. Misdemeanor offenses.

Mr. KING. Do you encourage your agents?

Mr. GOODLATTE. The time of the gentleman has expired. I will allow the gentleman to answer the question and then we will move on.

Mr. MORTON. We focus on criminal offenders. It depends on what the underlying record is. I mean, in your scenario where someone has three misdemeanor convictions, generally the presumption would be we take a serious look at that person for removal

Mr. KING. Thank you, Director.

Thank you, Mr. Chairman.

Mr. GOODLATTE. I thank the gentleman.

It is my understanding the gentlewoman from California has a unanimous consent request.

Ms. LOFGREN. Yes, Mr. Chairman. I would like unanimous consent to place into the record statements from nine groups, including the Lutheran Immigration and Refugee Service.

Mr. GOODLATTE. Without objection, those statements will be made a part of the record.

[The information referred to follows:]

WRITTEN STATEMENT OF
THE AMERICAN CIVIL LIBERTIES UNION

For a Hearing on

The Release of Criminal Detainees by U.S. Immigration and Customs Enforcement: Policy or Politics?

Submitted to the U.S. House of Representatives Committee on the Judiciary

March 19, 2013

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I. Introduction

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of more than a half-million members, countless additional activists and supporters, and 53 affiliates nationwide dedicated to preserving and defending the fundamental rights of individuals under the Constitution and laws of the United States. The ACLU's Washington Legislative Office (WLO) conducts legislative and administrative advocacy to advance the organization's goal to protect immigrants' rights. The Immigrants' Rights Project (IRP) of the ACLU engages in a nationwide program of litigation, advocacy, and public education to enforce and protect the constitutional and civil rights of immigrants, including those detained by U.S. Immigration and Customs Enforcement (ICE).

The ACLU submits this statement to the U.S. House of Representatives Committee on the Judiciary on the occasion of its hearing addressing the recently reported release of 2,228 immigration detainees from ICE custody.[1] The ACLU lacks complete information about how release decisions were made in individual cases, and the specific conditions under which detainees were released. However, ICE Director John Morton testified last week before the House Appropriations Homeland Security Subcommittee that the releases "focused on aliens who were not subject to mandatory detention and . . . did not pose a significant threat to public safety."[2] Of those released, according to Morton, 70 percent had no criminal record at all, and the remaining 30 percent had minor convictions that were not for serious violent crimes.[3] That ICE determined these individuals could safely be placed on supervised release raises a fundamental question, posed among others by Secretary Janet Napolitano herself[4]: why were these individuals detained in the first place?

The ACLU firmly believes that curtailing our immigration prisons is urgently needed as a fiscally responsible measure that would also improve the immigration enforcement system's respect for our nation's fundamental commitments to liberty and due process of law. Releases based on an assessment of who must be incarcerated, as opposed to supervised effectively in the community, are a step in the right direction. Indeed, the ACLU has long contended that ICE is detaining thousands of individuals whose complete loss of liberty is not actually necessary—either because they pose no danger or flight risk, or because alternative forms of supervision are available. These

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[1] Brian Bennett, *Immigration officials admit releasing thousands of detainees*, Los Angeles Times (Mar. 14, 2013), *available at* http://www.latimes.com/news/nationworld/nation/la-na-immigration-releases-20130315,0,5801719.story.

[2] *Immigration Enforcement: Hearing Before the Subcomm. on Homeland Security of the H. Comm. on Appropriations*, 113th Cong. (2013) (statement of John Morton, Director, Immigration and Customs Enforcement (ICE)).

[3] *Id.*

[4] See Jim Avila and Serena Marshall, "Homeland Security Secretary Janet Napolitano Regrets Surprise Announcement of Immigrant Release." ABC News (Feb. 28, 2013), *available at* http://abcnews.go.com/Politics/homeland-security-secretary-janet-napolitano-regrets-timing-immigrant/story?id=18622711 ("When asked why the detainees were in jail in the first place, Napolitano replied, "That's a good question. I've asked the same question myself ... so we're looking into it.").

alternatives serve the government's purposes at significantly less cost to taxpayers and less hardship to immigrants and their communities.

As detailed below, immigration detention is enormously expensive, costing approximately $2 billion in fiscal year ("FY") 2012, at a time of lengthy and persistent fiscal crisis. Yet because ICE's detention budget is tethered to an inflexible mandatory bed quota, this money is largely wasted on locking up 34,000 men, women, and children every day who, in many cases, do not need to be incarcerated to achieve the government's goals. In addition to the serious constitutional concerns raised by the widespread use of unnecessary detention, the bed mandate guarantees the waste of scarce federal budgetary resources. ICE's budget should instead encourage the use of effective alternatives to detention ("ATDs"), which, as long recognized in the criminal justice context, are effective and available to meet the government's interests in preventing flight risk and ensuring public safety—at a fraction of detention's profligate costs.

Reducing detention—through the use of careful risk assessment, appropriate conditions of supervision, and other measures to ensure that ICE limits detention to cases where it is necessary—is critical to fiscal responsibility and will aid in bringing immigration detention into compliance with constitutional requirements. The ACLU therefore recommends that Congress: (1) eliminate any mandate that ICE maintain and fill a fixed number of daily detention beds so that the agency detains only where necessary; (2) permit ICE flexibility to use its detention budget on ATDs that have been proven effective in ensuring appearance for court proceedings and removal, and appropriate additional funds to ATD programs and pilot projects; and (3) prohibit the use of appropriated funds for detention except where ICE has determined, based on a uniform risk assessment, that no condition or combination of conditions of release would be sufficient to address an individual's dangerousness or flight risk, and where this determination is subject to review by an Immigration Judge.

I. The Rapid and Costly Expansion of Immigration Detention Has Been Abetted by Congress's Mandate that ICE Maintain a Specified Bed Count Regardless of Operational Needs, a Quota that is Fiscally Irresponsible and Needlessly Incarcerates Immigrants.

Immigration detention has grown at an irrational and wasteful rate. Over the last 15 years, detention levels have more than tripled—from 85,730 detainees in 1995[5] to an all-time high of 429,247 individuals in FY 2011.[6] In FY 2011, ICE held an average daily population of 33,034 individuals in more than 250 immigration prison facilities nationwide.[7] The men, women, and children ICE put behind bars include survivors of

[5] Doris Meissner et al., *Immigration Enforcement in the United States: The Rise of a Formidable Machinery*, Migration Policy Institute, (Jan. 2013), 126, *available at* http://www.migrationpolicy.org/pubs/enforcementpillars.pdf

[6] John Simanski & Lesley M. Sapp, DHS Office of Immigration Statistics, *Immigration Enforcement Actions: 2011*, 4, *available at* http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement_ar_2011.pdf

[7] ICE Office of Enforcement and Removal Operations, *ERO Facts and Statistics* (Dec. 12, 2011), *available at* www.ice.gov/doclib/foia/reports/ero-facts-and-statistics.pdf

torture, asylum-seekers, victims of trafficking, families with small children, the elderly, individuals with serious medical and mental health conditions, and lawful permanent residents with longstanding family and community ties who are facing deportation because of old or minor crimes for which they have already served their sentences. Notably, almost double the number of people are detained in civil immigration detention every year than are serving sentences in federal Bureau of Prisons facilities for all federal crimes.[8]

This mushrooming detention system is extremely expensive for American taxpayers. Over the years, Congress has steadily appropriated more and more funds to expand immigration prisons—from $864 million eight years ago[9] to $2 billion annually today, an increase of 131 percent.[10] ICE currently spends approximately $122 to $164 each day to detain each person in its custody, or $44,530 to $59,860 per person per year.[11]

The steep rise in ICE detention expenditures corresponds to two key shifts that effectively guarantee tens or hundreds of thousands of individuals will be unnecessarily detained every year. First, mandatory custody provisions enacted by Congress in 1996 have been interpreted by ICE to require incarceration without bond for virtually all noncitizens who are removable because of criminal convictions—including nonviolent misdemeanor convictions for which they may have received no jail sentence.[12] As a result, thousands of immigrants—including many longtime lawful permanent residents—are held without ever being afforded the basic due process of a bond hearing before an independent adjudicator while their deportation cases are being decided.

Moreover, because of ICE's overly expansive interpretation, mandatory detention is being improperly applied to, among others, individuals who have substantial challenges to removal on which they ultimately prevail;[13] individuals who have old convictions and have subsequently demonstrated rehabilitation;[14] and individuals who are

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[8] There were 209,771 prisoners held by federal correctional authorities as of December 31, 2010. In contrast, ICE detained 363,064 individuals that year, and 429,247 in 2011. *Compare* Paul Guerino, Paige M. Harrison, & William J. Sabol, *Prisoners in 2010* (DOJ, Bureau of Justice Statistics, Feb. 9, 2012), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf *with Immigration Enforcement Actions: 2011*, *supra*, at 4.

[9] *Immigration and Customs Enforcement (ICE) Budget Expenditures FY 2005 - FY 2010*, Transactional Records Access Clearinghouse, Syracuse University (2010), *available at* http://trac.syr.edu/immigration/reports/224/include/3.html.

[10] *U.S. Dep't of Homeland Security Annual Performance Report, Fiscal Years 2011-2013* (Feb. 13, 2012), 1036, *available at* http://www.dhs.gov/xlibrary/assets/mgmt/dhs-congressional-budget-justification-fy2013.pdf (requesting $1,959,363,000 for Custody Operations in FY 2013).

[11] National Immigration Forum, *The Math of Immigration Detention: Runaway Costs for Immigration Detention Do Not Add Up to Sensible Policies* (Aug. 2012), 2, *available at* http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf

[12] *See* 8 U.S.C. § 1226(c).

[13] *See* Appendix, *e.g.* Warren Joseph, Alejandro Rodriguez, Ahilan Nadarajah.

[14] Although section 1226(c) limits the application of mandatory custody to persons who are arrested by ICE "when released" from criminal custody, the agency insists that it applies *any time* after an individual's release. *See Matter of Rojas*, 23 I. & N. Dec. 117 (BIA 2001). As a result, ICE applies mandatory detention to individuals who have been leading law-abiding lives in the community for years following

detained for prolonged periods of time—sometimes years—far beyond the "brief" period of detention contemplated both by Congress and the Supreme Court in *Demore v Kim*.[15]

Second, Congress fosters costly over-use of detention by its inefficient and unnecessary micromanagement of ICE detention beds. The FY 2012 DHS appropriations bill increased the number of beds to their current level of 34,000.[16] By barring ICE from employing flexible, fact-based decision-making about custody, the mandatory bed requirement undermines the administration's commitment to reform the civil immigration detention system and incarcerate only those individuals who need to be detained: namely, those who pose a risk to public safety or are a flight risk.

This bed mandate—effectively, a detention quota—has no basis in sound detention management and raises serious due process concerns. No other detention system in the United States, criminal or civil, specifies that a minimum number of individuals be incarcerated. Instead, prudent best practices sensibly afford law enforcement officials the discretion to determine, based on an assessment of individual flight risk and danger, who should be detained. The bed mandate ensures that individuals who pose no significant flight risk or danger will be locked up based on Congress's orders that ICE satisfy its quota. Such detention is wholly unjustified and runs counter to the basic constitutional requirements that civil detention be reasonably related to its purpose,[17] and that "liberty [be] the norm, and detention . . . the carefully limited exception."[18]

Indeed, as a practical matter, the bed mandate severely restricts ICE's discretion over a large portion of its detained population. Although ICE data indicate that, in FY 2011, between 45% and 64% of immigration detainees are designated as "mandatory" on any given day, the remaining 33% to 55% of detainees are detained at the agency's discretion.[19] These individuals generally have no criminal records and are being detained solely on the basis of flight risk. Nothing precludes their release except the government's refusal to set a bond or grant release on recognizance, or the detainees' inability to post a prohibitive bond that has been set.

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completion of their criminal sentences. *See Saysana v. Gillen*, 590 F.3d 7, 17-18 (1st Cir. 2009) ("By any logic, it stands to reason 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."); *see also* Appendix, Errol Barrington Scarlett.

[15] *See Demore v. Kim*, 538 U.S. 510, 513 (2003) (authorizing mandatory detention for a "brief period"); *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 233 (3d Cir. 2011) (due process requires a hearing once the duration of mandatory detention becomes unreasonable); *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005) (8 U.S.C. § 1226(c) only authorizes mandatory detention if removal proceedings are "expeditious").

[16] Consolidated Appropriations Act of 2012, Pub. L. 112-74, 125 Stat. 966 (Dec. 23, 2011), *available at* www.gpo.gov/fdsys/pkg/BILLS-112hr2055enr/pdf/BILLS-112hr2055enr.pdf

[17] *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

[18] *United States v. Salerno*, 481 U.S. 739, 755 (1987).

[19] These statistics are based on data obtained through a Freedom of Information Act request and on file with the ACLU. ICE informed the ACLU that "mandatory" detention in ICE's data reporting refers to individuals who are categorically ineligible for release under 8 U.S.C. § 1226(c) because they are in removal proceedings based on their criminal records, as well as detainees who are in fact eligible for certain forms of discretionary release, but do not receive bond hearings before an Immigration Judge.

Yet under the current ICE budgetary rules mandated by Congress, there is little incentive and no requirement for the agency to consider whether alternative forms of supervision short of incarceration would meet the government's purposes of ensuring an individual's appearance at removal proceedings and at removal if ultimately ordered. The predictable result of mandates that prevent a case-by-case evaluation of detention needs is that—as confirmed by the government's own data—far too many individuals are locked up when they do not need to be. Over the years, much of the justification for mass incarceration has been the need to protect the public from "dangerous criminal aliens." But in practice, those who are detained generally do not fit this profile.

Although immigration detention facilities look like prisons, individuals held there are *not* serving criminal sentences. Indeed, more than half of immigration detainees have never been convicted of any crime.[20] In most cases, 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 entering the country without inspection.[21] And even for those who become ICE detainees due to a previous criminal conviction, the majority of convictions triggering immigration detention are nonviolent and/or minor,[22] and the detainees have already completed serving their criminal sentences. Indeed, ICE itself classifies most immigration detainees as "low custody" or having a "low propensity for violence," and views them as posing no threat to the public.[23]

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[20] According to ICE data, only 46 percent of detainees had a criminal record in FY 2011. MPI, *Immigration Enforcement in the United States*, *supra*, 128 (citing data); *see also* TRAC Immigration, Detention of Criminal Aliens: What Has Congress Bought? (Feb. 11, 2010), http://trac.syr.edu/immigration/reports/224/index.html (reporting, based on ICE data, that the majority of immigration detainees from 2005 through 2009 had no criminal convictions). Moreover, studies repeatedly have shown that immigrants are *less likely* to commit crimes than native-born Americans. *See* Stuart Anderson, *Immigrants and Crime: Perception vs. Reality*, Immigration Reform Bulletin, Cato Institute (June 2010), *available at* http://www.cato.org/pubs/irb/irb_june2010.pdf (discussing studies).

[21] According to DOJ data, a mere 15.5 percent of deportation proceedings in FY 2012 were made up of "criminal cases"—that is, cases based on criminal activities. In contrast, 81 percent of cases involved immigration law violations such as overstaying a visa or entering the country without inspection. *See* TRAC Immigration, *U.S. Deportation Proceedings in Immigration Courts* (Jan. 31, 2013), *available at* http://trac.syr.edu/phptools/immigration/charges/deport_filing_charge.php

[22] According to DOJ data, only 27.5 percent of crime-based deportation cases in FY 2012 were filed based on offenses charged as "aggravated felonies." *See* TRAC Immigration, *U.S. Deportation Proceedings*, *supra*. Similarly, in a report analyzing enforcement data from 1997 to 2007, Human Rights Watch found that some of the most common crimes for which people were deported are relatively minor offenses, such as marijuana and cocaine possession or traffic offenses. Among legal immigrants who were deported, 77% had been convicted for such nonviolent crimes. Human Rights Watch, *Forced Apart (By the Numbers): Non-Citizens Deported Mostly for Nonviolent Offenses* (Apr. 15, 2009). The Office of Immigration Statistics reported that in 2005, 56% of criminal convictions forming the basis for deportations were nonviolent drug or illegal reentry crimes; an additional 14.6% were non-specified but nonviolent crimes. *See* Mary Dougherty, Denise Wilson, and Amy Wu, DHS, Office of Immigration Statistics, *Immigration Enforcement Actions: 2005* (Nov. 2006), Table 4, 5.

[23] *See* Dora Schriro, ICE, *Immigration Detention Overview and Recommendations* (Oct. 2009), 2, *available at* http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf According to more recent ICE data, as of May 2, 2011, 41% percent of ICE detainees were classified as Level 1 (lowest-risk) detainees, while only 19 percent of detainees were classified as Level 3 (highest-risk) detainees. Human Rights First, *Jails and Jumpsuits: Transforming the U.S. Immigration Detention System—A Two Year Review* (Human

Detention is often unnecessary to prevent an immigrant's risk of flight. As set forth below, the criminal justice system has long recognized that alternatives to incarceration in ICE detention facilities, such as telephonic and in-person reporting, curfews, home visits, and electronic monitoring, can ensure appearance at court hearings, and for removal if ordered, at a tenth of the cost of incarceration.[24] Many immigrants are ideal candidates for these alternatives, which Congress should fund and make accessible by ending the ICE detention bed quota.

II. The Prevalence of Unnecessary Immigration Detention

The economic and human costs of overreliance on immigration detention are made evident when we look at the kinds of people subject to immigration detention. What follows are just a few stories of individuals who recently benefited from ICE's release decisions—survivors of domestic violence and torture, longtime residents with nonviolent offenses and U.S. citizen children, and individuals who were deemed eligible for release on bond but remained detained simply because they were unable to come up with the money. As reflected in these examples, ICE routinely detains individuals for whom there is no justification for incarceration, particularly in light of the availability of alternative forms of supervision that would ensure their appearance at removal proceedings. The question Congress should be asking is not why these people were released, but rather why ICE was detaining them in the first place?

1. A domestic violence survivor, Dolores (a pseudonym) is an asylum applicant who had been imprisoned at the Sherburne County Jail in Elk River, Minnesota for nearly two years. She had one conviction for criminal reentry – the result of her fleeing Honduras to escape an abusive boyfriend. Although she posed no danger and was an ideal candidate for supervised release, she languished in immigration detention and suffered immense hardships, unable to maintain contact with her three children and or to get the psychiatric care she desperately needed to deal with the post-traumatic stress resulting from her abuse. During this period Dolores was deprived of all sunlight (apart from the times she was transferred to and from immigration court) and lost one-third of her hair due to anxiety. Meanwhile, her asylum case, based on the domestic violence she suffered, has been pending at the Board of Immigration Appeals for approximately a year. On February 26, 2013, she was released by ICE on conditions of supervision, including wearing an ankle monitor and regular reporting.[25] According to her attorney, she is now living in a women's

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Rights First 2011), 2 (citing data received through a Freedom of Information Act request to ICE, on file with Human Rights First), *available at* www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Jails-and-Jumpsuits-report.pdf

[24] *Math of Immigration Detention*, *supra*, 8.

[25] According to a newspaper article about Dolores's case, she was awakened by ICE officials on February 26, 2013 and told "You're very expensive to have here in jail. The budget isn't good and you've got to go." Allie Shah, "Immigrant held in Sherburne County jail glad to 'breathe fresh air'" Star Tribune (Mar. 3, 2013), *available at* http://www.startribune.com/local/194713181.html?refer=y

shelter.[26] ICE would have paid an estimated average of $80 per day to the Sherburne County Jail for Dolores's detention. Thus, her two-year detention cost taxpayers approximately $58,400.[27]

2. Marco (a pseudonym), a 20-year-old Mexican national who came to the United States on his own four years ago in order to provide for his mother and younger siblings, was imprisoned by ICE for four months at the Keogh-Dwyer Correctional Facility in Sussex, NJ, even though he posed no danger or flight risk. Marco's father abandoned his family when Marco was a young child. For the last four years Marco has been working in New York in order to pay for his siblings' schooling and necessities. In October 2012, Marco was, he says, wrongfully arrested at his place of employment when an undercover officer allegedly bought marijuana from someone else on the premises. Shortly thereafter Marco was transferred to ICE custody.

   Although early on in his case, the District Attorney's office was clear that it had no intention of proceeding with the charges against Marco – and although, based on his father's abandonment and other circumstances, Marco is eligible to obtain legal immigration status through the Special Immigrant Juvenile process – ICE nonetheless detained him without bond. In December, Marco obtained immigration counsel and received a bond hearing. On January 30, 2013 – at which point Marco had already been detained for more than three months – an Immigration Judge approved his release on a $5,000 bond. Marco was in the process of trying to collect the money to post bond when, on February 25, 2013, ICE released him, subject to the requirement that he report after each of his court hearings, which he has done. Taxpayers spent an estimated $13,500 for Marco's four-month detention.[28]

3. Victoria (a pseudonym), a domestic violence survivor from Mexico who has lived in the United States since 2000, was detained at the Eloy Detention Center in Arizona for two years and four months, even though she poses no danger or flight risk and is pursuing relief from removal in the form of both asylum and cancellation of removal. Her asylum claim is based on the domestic violence she suffered and would face if returned to Mexico; her cancellation claim is based on the hardship her deportation would cause to her nine-year-old U.S. citizen daughter. Although denied relief by the immigration court, her case is pending on appeal before the U.S. Court of Appeals for the Ninth Circuit, which issued a stay of removal until her case is finally decided. Prior to her detention, Victoria worked steadily and took care

[26] *See id.* and email to ACLU from attorney Sarah Brenes (Mar. 7, 2013).
[27] Paul Rignall, "Jail food: County switches to another provider," Star News (Oct. 5, 2012), *available at* http://erstarnews.com/2012/10/05/jail-food-county-switches-to-another-provider/
[28] This figure is based on an estimate from a Newark Star Ledger article which showed that ICE paid approximately $108/day per detainee to the Essex County Correctional Facility in New Jersey. Figures for the Keogh-Dwyer Correctional Facility are unknown. *See* Eunice Lee, "ICE detainee release due to sequester raises ire of advocates: 'Why were they ever detained?'" Newark Star Ledger (Feb. 28, 2013) *available at* http://www.nj.com/news/index.ssf/2013/02/why_were_they_detained_at_all.html

of her U.S. citizen daughter. She has two convictions for nonviolent offenses, for which she received probation and no jail time.

On August 7, 2012 – at which point Victoria had already been in immigration detention for nearly two years without a bond hearing – she finally appeared before an Immigration Judge who granted her release on a $6,000 bond. Her family was unable to raise the money, so she remained imprisoned another seven months until March 2, 2013, when she was released by ICE under conditions requiring her to wear an ankle monitor and check-in weekly. She is now home living with her daughter and lawful permanent resident husband. Figures from 2010 show that the cost of detention per day at Eloy was $65.[29] Victoria's two years and two months of detention therefore cost taxpayers at least $55,000.

4. In Florida, nine female asylum seekers, six of whom are domestic violence survivors, were recently released from Broward Transitional Center in Pompano Beach, Florida. One had been detained for nine months, the others for between five months and six days. None had any criminal convictions apart from one who had a conviction for driving without a license. All were released on conditions of supervision, including regular reporting and, in some cases, ankle monitors. ICE paid GEO Group to detain these women and taxpayers spent an estimated $127,592 to detain this group of asylum-seekers who are survivors of domestic violence and in some cases torture.[30]

While we have no way of knowing whether these detainees are representative of the recent releases, their stories are far from unique. Rather, the above cases—as well as the additional cases included in the appendix—represent only a fraction of the many individuals subjected to unnecessary immigration detention when they pose neither a danger or flight risk, or could be released on alternative conditions of supervision.

III. Alternatives to Detention Save Vast Sums of Money While Ensuring Court Appearances and Protecting Public Safety.

ICE's own Alternatives to Detention ("ATD") program has been very successful in ensuring that immigrants appear for removal proceedings. BI Incorporated, the company with which ICE contracts for its Intensive Supervision and Appearance Program II ("ISAP II"), has reported 99% attendance rates at immigration court hearings.[31] Earlier pilot programs like the Vera Institute's Appearance Assistance Project

[29] ACLU of Arizona, *Immigration Detention in Arizona* (Feb. 24, 2010), *available at* http://www.acluaz.org/sites/default/files/documents/Detention%20in%20Arizona%20One-Pager%202-24-10.pdf, 2.

[30] All of these women were helped by Americans for Immigrant Justice.

[31] *See* ISAP II 2011 Annual Report (in 2011, ICE referred 35,380 participants to ISAP II, ICE's ATD intensive supervision appearance program that in its "full service" option produced a 99.4% attendance rate at all Immigration Judge hearings and a 96.0% attendance rate at the final court decision); ISAP II 2010 Annual Report (in 2010, ICE referred 25,778 participants to ISAP II ; "full service" option had a 99% attendance rate at all Immigration Judge hearings and a 94% attendance rate at the final court decision).

(AAP) had similar appearance rates. Even for those with criminal records, ATDs were effective in ensuring a greater than 90% appearance rate.[32]

Alternatives to detention are also widely used by the federal and state pretrial systems, with both the federal system and several states authorizing detention only when no conditions of release are sufficient to protect against danger or flight risk, and employing a presumption of release on the least restrictive conditions of bail.[33] As in the immigration context, ATDs in the pretrial detention setting have proven to be effective in preventing danger to the community or flight risk pending proceedings. For example, according to Department of Justice ("DOJ") statistics, among federal defendants granted pretrial release during fiscal years 2008-10, only 4% were rearrested for a new offense (felony or misdemeanor) and 1% failed to make their court appearances.[34] State ATD programs report similarly low rates of recidivism and flight. One example involves Harris County, Texas, where the pretrial services program reported only a 5% failure to appear rate and a 3.3% rearrest rate in 2011.[35]

Moreover, ATDs save tremendous amounts of taxpayer money, costing ICE less than $15 per person per day,[36] as opposed to the $122 to $166 per person per day required for incarceration. Not surprisingly then, experts from across the political spectrum have recommended using ATDs to cut costs while still ensuring high appearance rates. For example, the Council on Foreign Relations' Independent Task Force on U.S. Immigration Policy concluded that alternatives to detention can "ensure that the vast majority of those facing deportation comply with the law, and at much lower costs."[37] The Heritage

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[32] Eileen Sullivan et al., *Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program, Final Report to the Immigration and Naturalization Service*. (Aug. 1, 2000), 6, *available at* www.vera.org/content/testing-community-supervision-ins-evaluation-appearance-assistance-program; see also Alfonso Serrano F., "ICE Slow to Embrace Alternatives to Immigrant Detention." New America Media (Apr. 10, 2012) ("In 2010, for example, government programs that provided alternatives to detention resulted in a 93.8 percent appearance rate for immigration hearings. And in 2009, the government's electronic monitoring programs yielded a 93 percent appearance rate, while its enhanced supervision reporting program resulted in a 96 percent compliance rate.").

[33] *See* 18 U.S.C. § 3142(e), (c)(1)(A); *see also, e.g.*, Cal. Penal Code § 1270(a) (2012); Tex. Code Crim. Proc. Ann. art. 17.40; 725 Ill. Comp. Stat. 5/110-2 (2012); Conn. Gen. Stat. § 54-63b; Ky. R. Crim. Pro. 4.12; Or. Rev. Stat. § 135.245

[34] DOJ, Bureau of Justice Statistics, *Pretrial Release and Misconduct in Federal District Courts, 2008-2010* (Nov. 2012), 13 tbl. 11(Nov. 2012), *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=4535

[35] Pretrial Services of Harris County, Texas, *2011 Annual Report*, 20-21, *available at* http://www.harriscountytx.gov/CmpDocuments/59/Annual%20Reports/2011%20Annual%20Report-0410.pdf. *See also, e.g.*, Partnership for Community Excellence, *Pretrial Detention & Community Supervision: Best Practices and Resources for California Counties* (San Francisco County reported less than a 3% failure to appear rate and a 0% long-term recidivism rate for its pretrial program), *available at* http://caforward.3cdn.net/7a60e47e7329a4abd7_2am6iyh9s.pdf; James Austin et al., The JFA Institute, *Florida Pretrial Risk Assessment Instrument* (2012) (in samples from five Florida counties in 2011, 6.5% failure to appear rate and 8.4% rearrest rate), *available at* http://www.pretrial.org/Setting%20Bail%20Documents/FL%20Pretrial%20Risk%20Assessment%20Report%20(2012).pdf

[36] *Math of Immigration Detention*, supra, 8; *see also* Press Release, Alternatives to Detention for ICE Detainees, ICE, Oct. 23, 2009, at 9.

[37] Jeb Bush, Thomas F. McLarty III, and Edward H. Alden, Council on Foreign Relations, *U.S. Immigration Policy*, Independent Task Force Report No. 63 (2009), 29.

Foundation also recognized the importance of ATDs to "bring costs down" and recommended that more be done "to identify the proper candidates for ISAP-like programs" and that "[o]ther commonsense programs should be analyzed and, if effective, expanded."[38] One estimate suggests that even if the most expensive ATD program were used to monitor detainees who have no violent criminal histories—the overwhelming majority of ICE detainees—"the agency could save nearly $4.4 million a night, or $1.6 billion annually, an 82% reduction in costs."[39]

Indeed, in its strategic plan for FY 2010-14, ICE recognized "the value of enforcing removal orders without detaining people" and committed to developing "a cost-effective Alternatives to Detention program that results in high rates of compliance."[40] Moreover, in its FY 2013 Budget Request, DHS sought "flexibility to transfer funding between immigration detention and the ATD program."[41] However, to date, ICE's ATD program is still dwarfed by the immigration detention system.[42] ICE requested only $72 million for ATDs in FY 2012, compared to $1.9 billion for detention operations,[43] and requested $111.6 million for FY 2013, compared to another $2 billion for detention operations.[44] Most importantly, citing its congressionally-imposed bed mandate discussed above, ICE has *not* used ATDs to reduce its overall level of detention, but merely as a supplement to its detention practices.

Finally, along with being costly and inefficient, ICE's overreliance on detention where alternatives are available raises serious due process concerns. Under federal law, pretrial detention is typically imposed only where the government demonstrates before an impartial adjudicator "that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community."[45] Yet in the immigration detention system, the burden is reversed. Detention is treated as the default rule and release the exception, with immigration detainees—who are overwhelmingly unrepresented by counsel—bearing the burden of proving that they pose no danger of flight risk. Moreover, for many categories of detained immigrants, ICE engages in no case-by-case detention assessments whatsoever.

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[38] Matt Mayer, Heritage Web Memo 3455, "Administrative Reforms Insufficient to Address Flawed White House Immigration and Border Security Policies." (Jan. 10, 2012), *available at:* http://www.heritage.org/research/reports/2012/01/administrative-reforms-in-immigration-and-border-security-policies

[39] *Math of Immigration Detention*, *supra*, 2.

[40] ICE, *ICE Strategic Plan FY 2010-2014* (2010), 7, *available at* www.ice.gov/doclib/news/library/reports/strategic-plan/strategic-plan-2010.pdf

[41] Written testimony of ICE Director John Morton for a House Committee on Appropriations, Subcommittee on Homeland Security hearing on The President's Fiscal Year 2013 budget request for ICE, *available at* http://www.dhs.gov/news/2012/03/08/written-testimony-us-immigration-and-customs-enforcement-ice-director-house

[42] As of January 22, 2011, there were 13,583 participants in the Full Service program, in which contractors provide the equipment and monitoring services along with case management, and 3,871 participants in the Technology-Assisted (TA) program, in which the contractor provides the equipment but ICE continues to supervise the participants. FY 2012 Budget Justification, 43.

[43] DHS, U.S. Department of Homeland Security Annual Performance Report FY 2011-2013, 3-4.

[44] *See id.* at 35, 53.

[45] 18 U.S.C. § 3142(e)(1).

Instead, the agency treats detention as "mandatory," and does not even consider alternative conditions of custody that are properly calibrated to an individual's flight risk or dangerousness to ensure effectiveness. ICE's practice is contrary to all other civil and criminal detention contexts and raises serious Due Process problems.

IV. Recommendations

In order to curtail the government's wasteful and unnecessary reliance on immigration detention, the ACLU makes the following recommendations:

- Congress should direct ICE to reduce costs by utilizing alternatives in place of unnecessary detention (not as a supplement to existing levels of detention). Thus, Congress should (1) eliminate language requiring a specific number of detention beds to be maintained or filled, and (2) permit ICE flexibility to shift funds from detention to more cost-effective yet reliable ATDs.

- Congress should appropriate additional funds to ATD programs that have been proven to ensure appearances for court proceedings and removal, including funds for pilot projects to test ATD programs.

- Congress should prohibit the use of appropriated funds to detain an individual unless ICE has determined, through a uniform risk assessment tool,[46] that no condition or combination of conditions of release would be sufficient to address an individual's dangerousness or flight risk, and where this determination is subject to review by an Immigration Judge. Such a requirement is fiscally prudent as well as constitutionally sound, and would bring the immigration detention system in line with the standards applied for federal pretrial detainees under the Bail Reform Act of 1984.

The existing ICE detention system, by failing to mandate proper risk assessments and consideration of alternatives to detention, guarantees the wasteful and expensive incarceration of men, women, and children who pose no public safety danger or flight risk. ICE's releases from detention of people like those described in this statement's appendix demonstrate how flawed incarceration decisions had become. Congress should require reform of custody determinations aimed at preventing unnecessary detention and the wasteful use of taxpayer dollars. In addition to reversing the ballooning growth of the immigration detention budget, such reform would redress some of the immigration detention system's worst constitutional infirmities.

[46] In July 2012, ICE began implementing its automated Risk Classification Assessment that "contains objective criteria to guide decision making regarding whether an alien should be detained or released, and if detained, the alien's appropriate custody classification level." ICE, Detention Reform Accomplishments, *available at* http://www.ice.gov/detention-reform/detention-reform.htm. These assessments should be applied to all individuals already in ICE custody, including "mandatory" detainees, as well as those being considered for detention. ICE does not use risk assessment to evaluate the possibility of using ATDs for "mandatory" detainees, even though there is nothing prohibiting the placement of "mandatory" detainees under other secure forms of custody, such as electronic monitoring, rather than requiring their incarceration.

APPENDIX: EXAMPLES OF UNNECESSARY DETENTION

Detainees Recently Released By ICE

Anna (a pseudonym) has lived in the United States for 23 years. She is a survivor of domestic violence and has applied for immigration relief to stay in the United States through Cancellation of Removal and a U Visa. Anna has four U.S. citizen children but was detained at Eloy Detention Center in Arizona for 19 months based on two misdemeanors from five years ago, for which she completed all probation requirements. Although the Immigration Judge granted her bond, Anna was unable to pay the $9,500 to be released and was incarcerated away from her family while fighting her case. Since her release on February 25, 2013, Anna is back living with her children and has been complying with all the conditions of her release including checking in with ICE.

Carmen (a pseudonym), fled to the United States from her home country seeking safety from an abusive domestic partner. Carmen was also fleeing from another assailant who had brutally attacked her with a machete and almost taken her life. Apprehended at the border in Texas, she was detained at Florida's Broward Transitional Center (BTC) in 2012, and placed in removal proceedings where she applied for asylum.

Due to the extensive trauma Carmen suffered, she began to display symptoms of PTSD and depression. Carmen's condition was so severe that the medical staff at BTC identified her as a domestic violence survivor and made arrangements for Carmen to seek therapy at a local domestic violence shelter.

After Carmen had been incarcerated for more than six months, American for Immigrant Justice (AI Justice) requested that ICE release her. AI Justice provided documentation to her deportation officer that Carmen had family members in the U.S. who were able and willing to support Carmen throughout the pendency of her asylum case. Though it was evident that Carmen's continued detention was exacerbating her pre-existing trauma, Carmen was not released.

When released in late February, Carmen had been detained for 9 months, at a cost of about $30,000 because ICE paid an average of $124-$164 per day to the private prison company GEO Group to detain Carmen, an asylum seeker with no criminal history who is a survivor of domestic violence and torture.

Carmen reports that when she was released from BTC ICE put an ankle-monitoring device on her. Carmen then travelled out of state to live with her family members who have been waiting to assist and support her. When Carmen reported to ICE in that state the ankle-monitoring device was removed and she is monitored via regular home visits and telephonic reporting.

Dolores (a pseudonym), a domestic violence survivor and asylum applicant, was held in the Sherburne County Jail in Elk River, Minnesota since May of 2011. After fleeing Honduras to escape an abusive boyfriend, Dolores was arrested and imprisoned for

reentry, her only criminal conviction. When Dolores was transferred to immigration custody almost two years ago, she suffered immense hardships. She was unable to get the psychotherapy she needed for her post-traumatic stress due to the abuse, and she was unable to maintain regular contact with her three children. She lost one-third of her hair due to all the anxiety she suffered. The detention center she was in had no outdoor space, so Dolores had not seen the sun, aside from transfers to and from immigration court, for almost two years.

While detained, Dolores was seeking asylum and her case has been pending at the Board of Immigration Appeals for approximately a year. She was awakened in detention by ICE officials on February 26, 2013 and told "You're very expensive to have here in jail. The budget isn't good and you've got to go." She was released under conditions of supervision, including wearing an ankle monitor and complying with other reporting requirements. She is currently living in a women's shelter.

John (a pseudonym), was detained at Florence Detention Center in Arizona since January 28, 2013. He is married to a U.S. citizen and has two U.S. citizen children. John has no criminal history and has lived in the United States for 14 years. He has been in removal proceedings before an Immigration Judge and is eligible to adjust his status to lawful permanent residence through his U.S. citizen wife. Since his recent release on February 25, 2013, John has returned to his family. He is complying with all of the conditions of his release.

Marco (a pseudonym), is a 20-year-old Mexican national who came to the United States on his own four years ago in order to provide for his mother and younger siblings. He was imprisoned for four months at the Keogh-Dwyer Correctional Facility in Sussex, NJ, even though he posed no danger or flight risk. Marco's father abandoned his family when Marco was a young child. Hence, for the last four years Marco has been working in New York in order to pay for his siblings' schooling and necessities.

In October 2012, Marco was, he says, wrongfully arrested at his place of employment when an undercover officer allegedly bought marijuana from someone else on the premises. Shortly thereafter, Marco was transferred to ICE custody. Although the District Attorney's office was clear that it had no intention of proceeding with the charges against Marco – and although, based on his father's abandonment and other circumstances, Marco is eligible to obtain legal immigration status through the Special Immigrant Juvenile process – ICE nonetheless detained him without bond.

In December, Marco obtained immigration counsel and received a bond hearing. On January 30, 2013 – when Marco had been detained for more than three months – an Immigration Judge approved his release on a $5,000 bond. Marco was in the process of trying to collect the money to post bond when, on February 25, 2013, ICE released him, subject to the requirement that he report after each of his court hearings, with which he has complied.

Robert (a pseudonym), a long-term lawful permanent resident who is severely disabled from childhood polio, was subject to mandatory detention at the Eloy Detention Center in Arizona for more than two years based on a nonviolent conviction from more than ten years before. Before his detention, Robert lived with his family, including his U.S. citizen spouse, parents, and siblings. While he was detained, Robert became a father to a U.S. citizen daughter. On December 4, 2012, Robert finally was given a bond hearing and granted release on a bond of $10,000. He was, however, unable to raise the money and therefore stayed in detention until his release on February 23, 2013. Since that time, he has returned home to his family and complied with all the conditions of his release.

Victoria (a pseudonym), a domestic violence survivor from Mexico who has lived in the United States since 2000, was detained at the Eloy Detention Center in Arizona for two years and four months, even though she poses no danger or flight risk and is pursuing both asylum and cancellation of removal. Her asylum claim is based on the domestic violence she suffered and would face if returned to Mexico; her cancellation claim is based on the hardship her deportation would cause to her nine-year-old U.S. citizen daughter.

Although denied relief by the immigration court, her case is pending on appeal before the U.S. Court of Appeals for the Ninth Circuit, which issued a stay of removal until her case is finally decided. Prior to her detention, Victoria worked steadily and took care of her daughter. She has two convictions for nonviolent offenses, resulting in probation and no jail time. On August 7, 2012 – when Victoria had been incarcerated for nearly two years without a bond hearing – she finally received a hearing before an Immigration Judge who granted her release on a $6,000 bond. Her family was unable to raise the money, so she remained imprisoned another seven months, until March 2, 2013, when she was released by ICE under conditions of supervision which require her to wear an ankle monitor and check-in weekly. She is now home living with her daughter and lawful permanent resident husband.

Other Examples of Unnecessary Detention Unrelated to the Recent Releases

M.B. 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 making his case 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) because 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 decision, and the Board of Immigration Appeals reversed it, beginning a ten-year legal struggle.

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 proceedings. ICE released Mr. B in January 2009. At that time, due to inadequate management of his psychiatric disability while in immigration detention, Mr. B was deemed by doctors to be psychotic. After extensive treatment, Mr. B has regained his ability to think rationally and function well. 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.

Aurora Carlos-Blaza, a citizen of the Philippines, lawfully entered the United States 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 in order 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, 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. DHS*, 535 F.3d 942 (9th Cir. 2008). An Immigration Judge granted Ms. Blaza release on a $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.

R.C., a native and citizen of Ireland, entered the United States as a lawful permanent resident in 1955 at the age of five. 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 and released. He now lives in Queens, New York with his brother. Mr. C had to celebrate his 60th birthday in detention.

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 was two perfunctory reviews of his administrative file in which 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. 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 after being released, the government continued to argue that he should be detained without a bond hearing. Mr. Diouf eventually won his immigration case and was granted a U Visa. He works as a car salesman.

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 the Gulf 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 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 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 ATF, 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.

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."

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 Sri Lankan Army soldiers who arrested him and accused him of belonging to 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. 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 lawful 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 ICE 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 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. The *New York Times* criticized not only the way Mr. Ng was treated, but also the fact that he was detained in the first place.

Lobsang Norbu, a Buddhist monk from Tibet, fled China after he was 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 in 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. Mr. Norbu is currently living in a Tibetan group home on Long Island, New York and working at a restaurant. He was granted adjustment of status.

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 misdemeanor drug possession when he was 24. Mr. Rodriguez was denied release by 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 in 2007 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.

Melida Ruiz, a 52-year-old grandmother, was detained for seven months at Monmouth County Jail in New Jersey before she was finally released after winning her case. A longtime lawful permanent resident of the United States, with 3 U.S. citizen children and 2 U.S. citizen grandchildren, she was arrested by ICE officers at her home in the spring of 2011. She was placed into mandatory immigration detention based on a misdemeanor drug possession offense from nine years before for which she had not even been required to serve any jail time, and which was her sole conviction during thirty years of living in the United States.

Although Ms. Ruiz was eligible for various forms of discretionary release from removal, and posed no danger or flight risk, and although she was the primary support for her U.S. citizen mother who suffers from Alzheimer's disease, her 17-year-old and 11-year-old daughters, and her 5-year-old granddaughter, she was nevertheless forced to endure seven months of immigration incarceration. While she was in detention, her 17-year-old daughter gave birth to a boy.

Prior to her incarceration by ICE, Ms. Ruiz had worked full-time as a roofer with the United Union of Waterproofers and Allied Workers from 1996 until an accident in 2009, which left her with severe back and neck pain, pain which was aggravated to such extent while she was in detention that at one point her doctor feared she would require surgery to avoid paralysis. In granting her application for cancellation of removal, the Immigration Judge emphasized the "substantial equities in [her] favor" including her "work history, tax history and property ownership" as well as the fact that her family "would suffer significant hardship if she were deported." The Immigration Judge also found that, despite the one conviction from 2002 which was "out of character," Ms. Ruiz has been "a law abiding resident of the United States and a stalwart positive force for her family and friends." ICE chose not to appeal the decision. Ms. Ruiz is now once again reunited with her family but at considerable emotional and financial cost, not to mention the approximately $28,595 that the taxpayers spent for her detention.

Errol Barrington Scarlett is a longtime lawful permanent resident from Jamaica who has lived in the United States for over thirty years. The government subjected him to mandatory detention for five years without a bond hearing at various detention facilities even though he had successfully reentered society for a year and a half after his release from incarceration and before ICE took him into custody. He had found employment with his brother's real estate business and had been enrolled in a drug treatment program for over a year. Nonetheless, DHS placed him in removal proceedings and subjected him to mandatory detention. After a Federal District Court ordered that he was entitled to a bond hearing, he was released on bond.

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 prevailed on a 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 at 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 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.

Despite this stinging rebuke, the government continued to pursue Saluja's removal and 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. 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.

March 13, 2013

The Honorable Bob Goodlatte
Chairman, U.S. House of Representatives Committee on the Judiciary
The Honorable John Conyers Jr.
Ranking Member, U.S. House of Representatives Committee on the Judiciary
Members of the Committee
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable Patrick Leahy
Chairman, Senate Committee on the Judiciary
The Honorable Chuck Grassley
Ranking Member, Senate Committee on the Judiciary
Members of the Committee
U.S. Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Members of the House and Senate Judiciary Committees,

We the undersigned organizations, working to ensure civil liberties and human rights in our communities, urge you to support the Department of Homeland Security Immigration and Customs Enforcement's (ICE) efforts to increase efficiencies and fiscal accountability by releasing individuals who do not need to be detained under responsible immigration and fiscal policy.

At the end of February, ICE confirmed that it was releasing people from its custody as part of a plan to reduce the detained population. ICE's decision to reconsider when detention is necessary and to start releasing people from detention when there is no need to detain, is a step in the right direction on many levels. First and foremost, it means fewer people have to endure the indignities of imprisonment. Substandard medical care, physical, verbal and sexual abuse, lack of outdoor recreation, lack of access to legal services, and limited contact with family or the outside world, are just some of the hardships that pervade the experience of being detained. Second, detention is extraordinarily and unnecessarily expensive, costing approximately $164 per person per day, or nearly $60,000 per person for a year. In the last year, ICE custody operations cost American taxpayers nearly $2 billion. By reducing reliance on physical detention, the government can greatly reduce unnecessary costs. Third, there are proven alternatives to detention that meet the agency's needs while being far more cost effective and humane. As ICE noted in its statements about the releases, alternative methods for supporting individuals to

appear for their immigration hearings can cost as little as $12 a day and are extremely effective in ensuring compliance with immigration procedures and orders. Releasing individuals on their own recognizance or on bond costs the U.S. government even less. In FY 2010, ICE's ATD programs resulted in a 93.8 percent appearance rate for immigration hearings. Other models and pilots have had even higher compliance rates. Alternatives to detention also allow individuals to continue to work, to care for themselves and their families, and to access legal services to help with their immigration court cases. Finally, releasing parents who have been shown to qualify for release or alternatives to detention prevents children from ending up in our state foster care systems and saves our communities.

Several members of Congress have criticized ICE for utilizing alternatives to detention, claiming that the agency is releasing people who pose a threat to public safety. ICE has confirmed publicly that no one was released who presented a safety threat and that it continues to evaluate custody decisions to ensure public safety. When evaluating our nation's detention system, it is important to remember that while some immigrants in ICE custody have past criminal convictions, most do not, and those who do have already served their sentences. Furthermore, the overwhelming majority of those immigrants with past criminal convictions committed minor, non-violent offenses that did not threaten the safety of any other person.

The sole legal purpose of immigration detention is for ICE to ensure that individuals appear for their court proceedings and comply with a final order of deportation. This goal can be met through far less costly and more humane alternatives. Congress should support the use of smarter and more consistent methods of determining when detention is necessary and releasing people from detention who need not be detained. Additional steps towards reforming immigration detention should include:

1. **Eliminating the detention bed quota.**

Congress has directed ICE to maintain 34,000 detention beds --each day--, and DHS strives to fill all of these beds each day. Quotas are antithetical to criminal law enforcement policy and, similarly, do not belong in immigration enforcement. No corrections system in the U.S. operates with quotas or target population levels. The deprivation of liberty is a serious matter that cannot be based on a quota rather than on justified need. DHS must have flexibility in how it spends its custody and enforcement budget based on determined needs. Congress must therefore clarify that ICE need not detain persons who would not otherwise be detained in order to fill a minimum number of detention beds.

2. **Reducing the detention budget and increasing funding for community-based programs.**

In its FY 2013 budget, the White House asked for a reduction in the detention budget, an increase in funding for alternatives programs, and the flexibility to use detention funds for alternatives where appropriate. Congress should honor this request and explicitly permit

flexibility in how ICE uses its detention funding, allowing ICE to divert detention dollars to programs that rely on effective, cheaper, and more humane, forms of custody.

3. Repealing all mandatory detention laws and restoring discretion over custody.

In FY 2011, approximately 45-64% of people in immigration detention on any given day were subject to mandatory detention. Mandatory detention, as prescribed in several sections of the Immigration and Nationality Act, requires that ICE hold certain categories of people in custody without access to the basic due process of a bond hearing. Congress should amend these statutes to restore discretion to the Department of Homeland Security and the Department of Justice to evaluate whether detention is necessary based on an assessment of flight risk and threat to public safety for every individual apprehended, including those subject to mandatory custody, and to make custody determinations subject to judicial review.

We, the undersigned organizations, urge you to support these efforts to reform the immigration detention system so it may operate in a more fiscally sound and humane manner in accordance with our values as a nation that stands for liberty and justice. If you have any questions, please contact Emily Tucker, DWN Director of Policy and Advocacy, etucker@detentionwatchnetwork.org.

Sincerely,

National Organizations:

American Civil Liberties Union
Americans for Immigrant Justice
American Friends Service Committee
American Immigration Council
American Muslim Voice
Communities in Action
Cuentame
Detention Watch Network
Ella Baker Center for Human Rights
Grassroots Leadership
Human Rights Defense Center
Immigrant Defense Project
Immigrant Legal Resource Center

Lawler & Lawler
Lutheran Immigration and Refugee Service
National Center for Transgender Equality
National Immigrant Justice Center
National Network for Immigrant and Refugee Rights
Rights Working Group
The Advocates for Human Rights
The Alliance for a Just Society
United We Dream Network
Unitarian Universalist Service Committee
Women's Refugee Commission

State and Local Organizations:

African Services Committee, NY
American Gateways, TX
Austin Immigrant Rights Coalition, TX
Baurkot & Baurkot, NY
Boston New Sanctuary Movement, MA
Breakthrough, NY
Coalicion de Lideres Latinos-CLILA, GA
Colorado Immigrant Rights Coalition, CO
Colorado Progressive Coalition, CO
Conversations with Friends, MN
El Refugio Ministry, GA
Families for Freedom, NY
Fanm Ayisyen Nan Miyami, Inc., FL
First Friends of New Jersey and New York Corp, NJ
Florida Coastal School of Law's Immigrant Rights Clinic, FL
Florida Immigrant Coalition, Inc., FL
Florida New Majority, FL
Georgia Detention Watch, GA
Illinois Coalition for Immigrant and Refugee Rights, IL
Immigrant Law Center of Minnesota, MN
Immigrant Rights Clinic, Washington Square Legal Services, NY
Interfaith Coalition on Immigration, MN
Jesuit Social Research Institute/Loyola University New Orleans, LA
La Raza Centro Legal, CA
Massachusetts Immigrant and Refugee Advocacy Coalition, MA
New Sanctuary Coalition, NY

New York Immigration Coalition, NY
No More Deaths, AZ
Northern Manhattan Coalition for Immigrant Rights, NY
One Horizon Institute, KY
Political Asylum/Immigration Representation Project, MA
Rocky Mountain Immigrant Advocacy Network, CO
Sisters of Mercy, Mid-Atlantic Justice Office, PA
Sisters of Mercy, West Midwest Community, NE
Sisters of Notre Dame de Namur, CA
Survivors of Torture, International, CA
Tennessee Immigrant and Refugee Rights Coalition, TN
Texans United For Families, TX
The Benedictine Sisters of Baltimore, MD
The Immigration Justice Group – Central Baptist Church of Wayne, PA
The Reformed Church of Highland Park, NJ
University of Maryland Carey School of Law Immigration Clinic, MD
Washington Community Action Network, WA
Washington Defender Association's Immigration Project, WA
WeCount!, FL
Who Is My Neighbor? Inc., NJ

Cc:

The Honorable Janet Napolitano, Secretary, U.S. Department of Homeland Security

The Honorable John Morton, Director, U.S. Immigration and Customs Enforcement

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Deputy Executive Director

Testimony of the American Immigration Lawyers Association

Submitted to the
Committee on the Judiciary of the U.S. House of Representatives

Hearing on March 19, 2013

"The Release of Criminal Detainees by U.S. Immigration and Customs Enforcement: Policy or Politics?"

The American Immigration Lawyers Association (AILA) submits the following testimony to the Committee on the Judiciary. AILA is the national association of immigration lawyers established to promote justice and advocate for fair and reasonable immigration law and policy. AILA has over 12,000 attorney and law professor members.

The number of immigration detainees has more than doubled over the last 10 years and more than tripled over the last 15 years – from 108,454 in 1996 and 204,459 in 2001 to 429,247 in 2011. Spending on detention has increased exponentially as well, from $864 million seven years ago to $2.02 billion today.

The restraint of an individual's liberty is one of the most consequential government powers. No one should be deprived of their liberty except as a last resort. But every day, thousands of people – including asylum seekers and those with no criminal convictions – are detained by Immigration and Customs Enforcement (ICE) though they pose no flight risk or threat to public safety. According to recent ICE data, as of May 2, 2011, 41% of immigrants in detention were classified at the lowest possible risk level.

ICE *should* be releasing from institutional detention those individuals who should never have been detained in the first place. Spending billions of taxpayer dollars to needlessly detain immigrants who could successfully and safely be released is a poor use of limited resources. Immigration detention costs U.S. taxpayers between $122 and $164 per day. Furthermore, the conditions of immigration detention fall well below appropriate standards for civil confinement.

Instead of detention, ICE has a range of other tools at its disposal to ensure court appearances, including setting a bond, releasing individuals on their own recognizance, and using alternatives to detention (ATD). Each of these options costs far less than institutional detention and imposes fewer restraints on liberty. The ATD programs ICE currently operates cost as little as $14 per day and are grossly underutilized.

ICE, like every law enforcement agency, should make an individualized determination of risk before confining someone to a detention facility. In fact, it is ICE policy to screen each individual to assess the risk of flight and threat to public safety. ICE's recently-launched Risk Assessment Tool is a step in the right direction. If implemented properly, it will assess the risk level of each individual apprehended, while taking into account the individual's special vulnerabilities.

ICE could do more to expand its use of proven alternatives to detention, and Congress should appropriate more funding for ATD programs. ATD programs are critical to the lives of noncitizens in removal proceedings, many of whose cases drag on for years and who would otherwise be separated from loved ones and isolated from community support, while being deprived of legal representation (over 80% of detained individuals are unrepresented).

Community-based ATD programs should be established by law and funded by Congress. Non-governmental organizations (NGOs) are mission-driven and generate more community resources because of their ability to attract volunteers and donations of goods and services, and have a track record of creating effective community-centered release programs.

Our laws should also ensure that intrusive or intensive forms of supervision are utilized only when necessary. Frequently, ICE improperly uses ATDs on individuals who should be released without any supervision. ATD programs that retain custody over the person, such as electronic monitoring, should be reserved for individuals who do not meet the requirements of other less restrictive release options but who can otherwise be released from jail.

Finally, AILA members are deeply concerned that our immigration laws do not always ensure that a neutral adjudicator can review ICE's initial detention decision in order to determine in each case whether detention is necessary and lawful. As currently applied by ICE, mandatory custody or detention laws automatically deny bond hearings to entire groups of people. These laws deny noncitizens basic due process and must be reformed. Categorical laws that mandate deprivation of liberty – no matter the specific circumstances of a person's case – run afoul of basic principles of fairness and due process.

Immigration officers and judges must have the authority in all cases to consider alternatives to detention for individuals who are vulnerable or pose little risk to communities and to consider in each case whether continued detention is necessary and lawful. Further, ICE should be required to place each individual in the least restrictive setting available, and use alternatives to detention, such as release on recognizance, bond, supervision, or ankle GPS monitors.

human rights *first*

STATEMENT FOR THE RECORD

On

"The Release of Criminal Detainees by U.S. Immigration and Customs Enforcement: Policy or Politics?"

Submitted to the

House Judiciary Committee

March 19, 2013

ABOUT HUMAN RIGHTS FIRST

Human Rights First is an independent advocacy and action organization that challenges America to live up to its ideals. We believe American leadership is essential in the struggle for human rights so we press the U.S. government and private companies to respect human rights and the rule of law. When they don't, we step in to demand reform, accountability and justice. Around the world, we work where we can best harness American influence to secure core freedoms. We know that it is not enough to expose and protest injustice, so we create the political environment and policy solutions necessary to ensure consistent respect for human rights. Whether we are protecting refugees, combating torture, or defending persecuted minorities, we focus not on making a point, but on making a difference. For over 30 years, we've built bipartisan coalitions and teamed up with frontline activists and lawyers to tackle issues that demand American leadership.

Human Rights First oversees one of the largest pro bono legal representation programs for asylum seekers and refugees in the country, working in partnership with and training volunteer attorneys at top U.S. law firms. Together we have helped thousands of persecuted refugees gain the protection they deserve and begin new lives in safety and freedom, winning about 90 percent of our cases.

Based on the experience of our Pro Bono Asylum Legal Representation Program, we advocate for access to asylum, for fair asylum and immigration procedures, and for U.S. compliance with international refugee and human rights law. Every year, thousands of asylum seekers including survivors of torture and genocide; women escaping the threat of "honor killings;" and people persecuted because of race, religion, political views, or sexual orientation seek protection in the United States. But all too often they end up behind bars in immigration detention, left to navigate an immigration system that is daunting even for native English speakers. Human Rights First's extensive research on U.S. detention of asylum seekers and recommendations includes: *How to Repair the U.S. Immigration Detention System: Blueprint for the Next Administration* (2012), *Jails and Jumpsuits: Transforming the U.S. Immigration Detention System – a Two-Year Review* (2011), *U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison* (2009), *In*

Liberty's Shadow: U.S. Detention of Asylum Seekers in the Era of Homeland Security (2004),[1] and *Refugees Behind Bars: The Imprisonment of Asylum Seekers in the Wake of the 1996 Immigration Act* (1999). In fall 2012, we convened a series of public events across the country, "Dialogues on Detention: Applying Lessons from Criminal Justice Reform to the Immigration Detention System," to identify best practices in criminal justice that could help bring needed improvements to U.S. immigration detention policy and practice.[2]

IMMIGRATION DETENTION

Every year, U.S. Immigration and Customs Enforcement (ICE) detains about 400,000 immigrants – including thousands of asylum seekers – in a sprawling system of jails and jail-like facilities across the country at a cost to taxpayers of $2 billion. The government's purpose in detaining immigrants is limited: to ensure that they show up for their removal hearings, and that they comply with removal orders if necessary. Individuals in detention include asylum seekers fleeing persecution in their home country, legal immigrants who overstayed their visas, recent border crossers, and lawful permanent residents with criminal convictions – for which they have already served any sentence – that subject them to mandatory detention or that may make them removable. In 2009, according to the most recent publicly available statistics, 11 percent of ICE's detained population had convictions for UCR Part I Violent Crimes.[3] Almost half have no criminal record at all.[4]

The costs of immigration detention have risen dramatically over the past 15 years, as detention levels have more than tripled—from 108,454 detainees in 1996 to an all-time high of 429,247 in

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[1] Human Rights First, *How to Repair the U.S. Immigration Detention System: Blueprint for the Next Administration* (2012) at *http://www.humanrightsfirst.org/wp-content/uploads/pdf/blueprints2012/HRF_Immigration_Detention_blueprint.pdf*; *Jails and Jumpsuits: Transforming the U.S. Immigration Detention System – a Two-Year Review* (2011) at *http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Jails-and-Jumpsuits-report.pdf*; *U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison* (2009) at *http://www.humanrightsfirst.org/wp-content/uploads/pdf/090429-RP-hrf-asylum-detention-report.pdf*; *Detention of Asylum Seekers: Seeking Protection, Finding Prison* (2009) at *http://www.humanrightsfirst.org/wp-content/uploads/pdf/090429-RP-hrf-asylum-detention-report.pdf*; *In Liberty's Shadow: U.S. Detention of Asylum Seekers in the Era of Homeland Security(2004)* http://www.humanrightsfirst.org/wp-content/uploads/pdf/Libertys_Shadow.pdf.

[2] See http://www.humanrightsfirst.org/our-work/refugee-protection/dialogues-on-detention/.

[3] Dr. Dora Schriro, *Immigration Detention Overview and Recommendations* (Washington, DC: Immigration and Customs Enforcement, 2009), p. 6, available at http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf.

[4] *Jails and Jumpsuits*, p. 2.

fiscal year (FY) 2011. Congress has annually appropriated the funds to sustain and expand the immigration detention system—from $864 million seven years ago to $2 billion today. These dramatic increases have continued—and been maintained—even as criminal justice systems across the country have recognized that effective alternatives to detention can create tremendous cost-savings and more humane outcomes for individuals, while also achieving governmental objectives. Alternatives to detention cost ICE on average $8.88 per day per individual —more than $150 a day less than detention. Meanwhile, ICE's requested budget of almost $2 billion for detention in FY 2013 was 18 times its requested budget of $112 million for alternatives to detention.

ALTERNATIVES TO DETENTION

Alternatives to Detention (ATD) programs generally provide for release from immigration detention with additional supervision measures intended to ensure appearance and compliance. Several successful ATD programs have been tested in the United States over the years, including programs run by the Vera Institute of Justice and by Lutheran Immigration and Refugee Service. These programs documented high appearance rates, and saved government funds by allowing for the release of individuals from more costly immigration detention.

ICE's Alternatives to Detention program is currently provided by BI Incorporated, a private company owned by the publicly traded prison company GEO Group. A full-service program provides "intensive case management, supervision, electronic monitoring, and individual service plans," and a technology-only program uses GPS tracking and phone reporting. BI says its programs help "mitigate flight risk and guide the participant through the immigration court process."[5] According to BI's annual report to the U.S. government, in 2010, 93 percent of individuals actively enrolled in ATDs attended their final court hearings, and 84 percent complied with removal orders.[6]

[5] BI Incorporated, Intensive Supervision Appearance Program II: An Alternatives to Detention Program for the U.S. Department of Homeland Security, (BI Incorporated, CY 2010), pp. 4-5, 17, 21. BI and ICE have named the full-service and technology-only programs together "ISAP II"—a new version of the Intensive Supervision Appearance Program that began as a pilot in 2004.
[6] BI Incorporated, pp. 4, 5, 17, 21.

The International Covenant on Civil and Political Rights (ICCPR), which the United States ratified in 1992, guarantees the right to liberty and the right to be free from arbitrary detention to asylum seekers and other immigrants. The protection against arbitrary detention contained in the ICCPR and other human rights conventions requires an individualized determination that detention is necessary.[7] The guidelines of the U.N. High Commissioner for Refugees and a range of other international authorities have made clear that detention should only be used in limited circumstances, and alternatives to detention should be considered before resorting to detention.

In the criminal justice system, individuals whose cases are pending are routinely put on supervised release programs, or released on bail or recognizance, following individualized assessments of the need to detain. Tim Murray, executive director of the Pretrial Justice Institute, the nation's leading pretrial services organization since 1976, has said "[i]n criminal justice systems across the country, a dramatically growing number of jurisdictions are using scientifically validated risk assessments to identify low risk individuals who can be released pending trial without unduly endangering the community or court processes. Over the past decades, communities served by evidenced-based pretrial services programs have experienced reductions in needless pretrial detention and its staggering fiscal and social costs without a corresponding increase in failure to appear or re-arrest while on release."[8] Steve J. Martin, former General Counsel of the Texas prison system, has stated, "The individuals detained by ICE are exactly the type of folks who should be considered for supervised release, or for release on bail or recognizance. When we deal with pretrial individuals in the criminal context, best practice is to utilize the lowest restrictions possible that will ensure court appearance. It saves money and reserves jail space for those who actually need to be jailed."[9]

During Human Rights First's 2012 Dialogues on Detention, the director of the Santa Clara Office of Pretrial Services reported that independent auditors found that pretrial services saved $26 million for Santa Clara County over the course of six months in 2011.[10] The director of New

[7] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 371
[8] See http://www.humanrightsfirst.org/2013/03/01/sequestration-presents-opportunity-to-reduce-unnecessary-immigration-detention-costs/.
[9] See http://www.humanrightsfirst.org/2013/03/04/napolitano-sets-record-straight-on-ice-detainee-releases-paves-way-for-national-dialogue-about-alternatives/
[10] See http://www.scegov.org/sites/bos/Management%20Audit/Documents/PTSFinalReport.pdf.

Orleans new comprehensive pretrial services program reported that it could potentially save Orleans Parish $1.4 million per year.[11] Indeed, pretrial services and other alternatives to detention have been endorsed as cost-savers by a diverse range of groups including the Council on Foreign Relations Task Force on U.S. Immigration Policy, Heritage Foundation, Texas Public Policy Foundation, Pretrial Justice Institute, Vera Institute of Justice, International Association of Chiefs of Police, and the National Conference of Chief Justices.

ICE should bring its practices into line with human rights standards and incorporate best practice in criminal justice systems and bipartisan reform recommendations by shifting its enforcement resources from detention to alternatives. To realize actual cost-savings for taxpayers, alternatives should be used in place of detention that is unnecessary rather than primarily as a supplement to existing levels of detention.

There is a major obstacle to this policy change, however. The bed "mandate" in the existing Homeland Security appropriations bills precludes the agency from making decisions about detention based on its enforcement priorities, policies, and need. It also makes it impossible for effective alternatives to detention and other increased efficiencies to create cost-savings for taxpayers – an irresponsible approach for the federal government to take when the nation is recovering from a major recession and Washington seeks to reduce federal spending. But without an elimination of the "mandate," the $2 billion annual detention budget will continue to be spent to diminishing effect.

FAIR AND SMART DETENTION PRACTICES: ADDITIONAL REFORMS

Under current U.S. policies, many asylum seekers and immigrants do not have access to prompt court review of their immigration detention, contrary to U.S. commitments to human rights, refugee protection, and basic fairness. For example, the initial decision to detain an asylum seeker or other "arriving alien" at a U.S. airport or border is "mandatory" under the expedited removal provisions of the 1996 immigration law. The decision to release an asylum seeker on parole – or to continue his or her detention for longer – is entrusted to local officials with ICE,

[11] See http://www.humanrightsfirst.org/wp-content/uploads/pdf/nola_dod_fact_sheet.pdf.

which is the detaining authority, rather than to an independent authority or at least an immigration court. Several other categories of immigrants – including lawful permanent residents convicted of a broad range of crimes, including simple drug possession and certain misdemeanors, as well as more serious crimes, and who have already completed their sentences - are also subject to "mandatory" detention, and deprived of access to immigration court custody hearings.[12]

Article 9(4) of the ICCPR provides that "anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court. . . ." The 1951 Refugee Convention and its Protocol, to which the United States has also committed, make clear that refugees should not be penalized for illegal entry, and the United Nations High Commissioner for Refugees 2012 Guidelines on Detention emphasize that those detained should "be brought promptly before a judicial or other independent authority to have the detention decision reviewed" within 24 to 48 hours.[13] In a 2012 report, the U.N. Special Rapporteur on the Human Rights of Migrants stressed that states should provide "automatic, regular and judicial review of detention in each individual case," and the Inter-American Commission on Human Rights specifically called on the United States to ensure that immigration courts be allowed to review release decisions made by immigration officers.[14]

Individuals held in ICE detention wear prison uniforms and are typically locked in one large room for up to 23 hours a day, they have limited or essentially no outdoor access, and they visit with family through a Plexiglas barrier. The U.S. Commission for International Religious Freedom concluded that these kinds of facilities "are structured and operated much like standardized correctional facilities" and are inappropriate for asylum seekers.[15] A 2009 DHS-ICE

[12] See INA § 236(c); 8 CFR § 208.30, 212.5, 235.3, and 1003.19.
[13] United Nations High Commissioner for Refugees, *Detention Guidelines: guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention* (2012) at http://www.unhcr.org/505b10ee9.html.
[14] Inter-American Commission on Human Rights, *Report on Immigration in the United States: Detention and Due Process*, OEA/Ser.L/V/II.Doc 78/10, December 30, 2010, ¶ 139, 418, 529, 431
[15] U.S. Commission on International Religious Freedom, *Asylum Seekers in Expedited Removal Volume II* (2005), p. 189, at http://www.uscirf.gov/images/stories/pdf/asylum_seekers/ERS_RptVolII.pdf; USCIRF, *Expedited Removal Study Report Card: Two Years Later* (2007), p. 5.

report confirmed that "all but a few of the facilities that ICE uses to detain aliens were built as jails and prisons."[16]

In 2009, DHS and ICE committed to shift the immigration detention system away from its longtime reliance on jails and jail-like facilities to facilities with conditions more appropriate for civil immigration law detainees.[17] Since then, ICE has opened two facilities with less-penal conditions and made progress on some other aspects of detention reform. ICE continues, however, to hold the overwhelming majority of its daily detention population in jails and jail-like facilities, with a full 50 percent held in actual jails.

The UNHCR, in its 2012 guidelines on detention, as well as other international human rights authorities, have confirmed that asylum seekers and other immigration detainees should not be detained in facilities that are essentially penal facilities, nor should they be made to wear prison uniforms but should instead be permitted to wear their own civilian clothing.[18] As documented in Human Rights First's 2011 report *Jails and Jumpsuits: Transforming the U.S. Detention System A Two-Year Review*, and discussed during Human Rights First's 2012 Detention Dialogues, many criminal correctional facilities actually offer less restrictive conditions than those typically found in immigration detention facilities, and corrections experts have confirmed that a normalized environment helps to ensure the safety and security of any detention facility. The American Bar Association, at its annual meeting in August 2012, adopted civil immigration detention standards that outline the conditions that should be required in connection with detention of civil immigration detainees.[19] These conditions include proximity to legal services, privacy, freedom of movement within a secure facility, access to outdoor recreation, contact visitation, and the ability to wear one's own clothing.

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[16] Schriro, p. 21.

[17] *Jails and Jumpsuits:* pp. 4-6, at http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Jails-and-Jumpsuits-report.pdf, citing ICE, "Fact Sheet: 2009 Immigration Detention Reforms," at http://www.ice.gov/news/library/factsheets/reform-2009reform.htm; ICE Strategic Plan FY 2010-2014 (Washington, DC: ICE, 2010), p. 6;
ICE, "Fact Sheet: ICE Detention Reform Principles and Next Steps," news release, October 6, 2009, at http://www.dhs.gov/xlibrary/assets/press_ice_detention_reform_fact_sheet.pdf; DHS press conference, October 6, 2009, video recording, http://www.c-spanvideo.org/program/289313-1; and 2009 DHS/ICE Report, pp. 2-3.

[18] UNHCR, *Detention Guidelines.*

[19] See ABA Civil Immigration Detention Standards at http://www.americanbar.org/content/dam/aba/administrative/immigration/abaimmdetstds.authcheckdam.pdf.

To bring its practices into line with human rights standards and incorporate best practices in the criminal justice system, ICE should conduct an individualized assessment of the need to detain, and when detention is necessary, only use facilities with conditions that provide a more normalized environment. Jails or jail-like facilities are inappropriate for civil immigration law detainees, and should not be used by ICE.

RECOMMENDATIONS

To bring U.S. practice into line with human rights standards and incorporate best practice from the criminal justice system, Congress should facilitate a transformation of U.S. detention policy and practice via any immigration legislation, as well as the appropriations process. These changes will save government resources. Human Rights First's *How to Repair the U.S. Immigration Detention System*, a full set of recommendations for reform, is attached to this statement.

Specifically, to implement an effective system of alternatives to detention and reduce unnecessary detention costs, Congress should:

- **Direct DHS to use alternatives in place of more costly detention when it is not necessary, rather than as a supplement to existing levels of detention.** Detention should be used only when the threat to public safety or risk of flight cannot be addressed through less drastic measures.
- **Eliminate language referencing a specific number of detention beds in DHS appropriations bills.** The bed "mandate" precludes the agency from making detention decisions based on enforcement priorities and policies, and the actual need to detain. It also prevents potential cost-savings of millions of taxpayer dollars annually.
- **Allow ICE to exercise its executive authority to allocate the enforcement and removal budget as needed between detention and more cost-effective alternatives to detention.** The administration included this flexibility in its FY 2013 Budget Request for DHS.

- **Prevent unnecessary detention by requiring and overseeing ICE implementation of a validated dynamic risk classification tool nationwide.** ICE should assess eligibility for alternatives to detention in each individual case before resorting to detention, as well as assessing eligibility for ATDs periodically during detention.
- **Reduce costs by recognizing that restrictive measures can constitute custody.** ICE should consider restrictive measures that are sometimes characterized as ATD to constitute custody or detention for the purposes of the mandatory detention laws at INA § 236(c) and § 235(b)(1)(B), and enroll detainees subject to mandatory detention who are otherwise eligible for release (because they pose no public safety risk) into those programs.[20]
- **Support steps to reduce delays in the immigration court system.** Congress, through appropriations for the Department of Justice, should prioritize adequate funding for the immigration courts, which are currently experiencing substantial backlogs and delays. Timely hearings and case resolutions would maximize the cost-savings that can be realized through ATD programs, in addition to advancing justice and fairness.
- **Require the establishment of government-funded community-based models and case management in nationwide system of alternatives to detention**. ICE's alternatives programs should use full-service community-based models that provide individualized case management, increase access to legal and social service providers through meaningful referrals, and provide information about immigration court and case matters.

To address other deficiencies in U.S detention policy and practice, Congress should:

- **Direct the Department of Justice and DHS to revise regulatory language to provide access to immigration court custody hearings for "arriving aliens."** Even with improved parole guidance, the absence of prompt, independent court

[20] See AILA memo, "The Use of Electronic Monitoring and Other Alternatives to Institutional Detention on Individuals Classified under INA § 236(c)," (August 6, 2010), available at: www.nile.org/document.html?id=94. No legal authority directly addresses DHS's discretion to use alternatives to detention for mandatorily detained populations under §236(c), because neither the INA nor any regulations contemplated the use of new tools.

review of decisions to detain arriving asylum seekers and other detained immigrants is inconsistent with U.S. obligations under the Refugee Convention and the International Covenant on Civil and Political Rights.

- **Require DHS to implement standards and conditions in line with the American Bar Association's proposed civil immigration detention standards.** ICE should implement standards based on the ABA's proposed standards that would permit detainees to wear their own clothing, move freely among various areas within a secure facility and grounds, access true outdoor recreation for extended periods of time, access programming and email, have some privacy in toilets and showers, and have contact visits with family and friends. To promote compliance, these standards should be incorporated into contracts and promulgated into regulations.
- **Amend INA §235 and §236 to provide that all detention decisions be made on an individual basis, reviewable by an immigration court.** Congress should revise laws so that an asylum seeker or other immigrant may be detained only after an assessment of the need for detention in his or her individual case, rather than through automatic or mandatory detention.

Thank you for convening this important hearing. Human Rights First looks forward to working with Congress and the Administration to advance reform of the U.S. immigration detention system.

American Friends Service Committee

American Friends Service Committee statement for the Congressional Record pertaining to the House Committee on the Judiciary
Tuesday, March 19, 2013

The American Friends Service Committee (AFSC) is an almost 100-year old faith-based organization grounded in Quaker belief in the dignity and worth of every person. AFSC provides direct legal services, engages in organizing with immigrants and allies including advocacy and movement building throughout the U.S. We directly support immigrants and refugee workers and their communities to organize themselves to raise their issues as a way to affirm their aspirations and needs, and to continue to make contributions to this nation.

Our immigration policy recommendations are grounded in AFSC's history and values as a faith-based organization and in the voices of the communities with whom we are deeply connected. The basis of U.S. immigration policy should be the protection of human rights and equal opportunity. Efforts designed to ensure compliance with immigration laws must also be rooted in these principles of fairness, equality, and protecting the human dignity of all. AFSC calls for an end to the detention and deportation system that has torn apart families, and instead encourages that the human rights of liberty and due process are enforced.

The increasingly militarized U.S. borders continue to undermine the well-being of border communities. Communities with whom we work along the U.S.-Mexico border report a distressing range of ongoing civil and human rights abuses which include racial profiling and harassment by federal law enforcement officials. Since the establishment of border control policies in 1993, at least 7,000 migrants have lost their lives. From 2009-2012, 19 Border Patrol-related killings of border residents and migrants have been reported. Lack of accountability and inadequate oversight of the Border Patrol invites further human rights abuses.

AFSC offers the following policy recommendations:

- Demilitarize the U.S.-Mexico border and cease all enforcement policies and practices that criminalize and punish immigrants.
- Prevent the extension of militarized border operations to the U.S.-Canada border and the interior of the U.S.
- Reduce the excessive numbers of Border Patrol agents while increasing investment in oversight mechanisms for the Office of the Inspector General and other independent investigative bodies.
- Require border enforcement agencies and their agents to comply with local, national, and international laws and civil and human rights along the border region and in the interior of the country.

AFSC urges the Committee to exert visionary leadership and to support new immigration policies that respect the human rights and equal economic opportunity of all in our communities. Thank you for this opportunity to submit testimony.

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FRIENDS COMMITTEE ON NATIONAL LEGISLATION
. . . a Quaker lobby in the public interest

March 18, 2013

Friends Committee on National Legislation statement for the Congressional Record
House Judiciary Committee Hearing
Tuesday, March 19, 2013

The Friends Committee on National Legislation, founded in 1943, is guided by the spiritual values of the Religious Society of Friends (Quakers). Our work on immigration is led by the call for right relationships among people and between individuals and God. We believe that respect for human and civil rights is essential to safeguarding the integrity of our society and the inherent dignity of all human beings. We recognize that governments have an indispensable role in upholding these rights and citizens have the responsibility to make governments more responsive, open, and accountable.

Therefore, we call for humane comprehensive immigration reform. We have seen the degeneration of the U.S. immigration system over the last three decades. Overly punitive laws, in tandem with increased enforcement and an inefficient bureaucracy, have led to systemic violations of rights: indiscriminate raids, detention without due process, worker exploitation, and families separated for years or even decades. Humane immigration reform would restore integrity to the U.S. tradition of welcoming immigrants and provide real solutions to a broken immigration system. We believe that fundamental and comprehensive reform of U.S. immigration policy is needed in order to:

- Create an orderly, equitable, and efficient legal immigration system;
- Enforce employment and labor rights for all workers, regardless of immigration status;
- Protect human and civil rights for immigrants currently living in the United States;
- Support communities with large concentrations of immigrants and facilitate immigrant integration; and
- Align enforcement with humanitarian values.

Evidence indicates that border enforcement has been substantially addressed. The U.S. invests more in immigration enforcement by the Department of Homeland Security than in all other federal law enforcement agencies combined. The militarization of the border, including the construction of physical and virtual fences, does not effectively stem undocumented migration,

yet such policies have desecrated religious sites that are sacred to Native Americans, violated numerous environmental laws and protections, and induced human and civil rights abuses affecting citizens as well as potential immigrants. A functioning and humane legal immigration system will integrate immigrants into U.S. society, reduce pressure on the border, and allow federal agencies to focus on actual national security concerns as well as the illegal trafficking of drugs, arms, and persons across maritime and land borders.

FCNL is also concerned about the civil liberties implications of employer-based enforcement mechanisms – particularly a mandatory E-Verify system that will undoubtedly catch citizens, especially those with foreign sounding names – in their nets. Employer-based enforcement systems that focus on individuals would reach much more widely than other approaches (such as the vigorous enforcement of wage, hour and safety laws). If they are included in reform legislation, they must be balanced by protections of privacy, due process, and fundamental fairness.

Finally, we believe that federal immigration laws should be enforced by federal authorities. ICE ACCESS programs implemented by state and local law enforcement agencies, including the fundamentally flawed 287(g) and Secure Communities programs, create an atmosphere that subtly encourages racial profiling, and interfere with local officers' primary task of promoting the safety and security of communities. Such programs should not be a part of a reformed U.S. immigration system.

We believe that the U.S. government is capable of designing and implementing an equitable and humane immigration system that meets the needs of this nation and demonstrates U.S. leadership in compassion, fairness, and human rights.

Lutheran Immigration and Refugee Service

LIRS Statement for Hearing: "The Release of Criminal Detainees by U.S. Immigration and Customs Enforcement: Policy or Politics?"

House Committee on the Judiciary

March 19, 2013

Lutheran Immigration and Refugee Service (LIRS), the national organization established by Lutheran churches in the United States to serve uprooted people, applauds the Subcommittee for calling today's hearing to examine federal spending on immigration enforcement. LIRS is a strong and tireless advocate for compassionate and humane immigration reform. We firmly believe that any reform of our immigration system must include protections against arbitrary detention and safeguards to ensure enforcement is carried out in a fair, humane, and economically sound manner.

As Congress has deliberated on how to reform America's immigration laws for decades, enforcement of current laws has exponentially expanded. When adjusted for inflation, the government spends 15 times as much on immigration enforcement today ($17.9 billion) as it did in 1986 ($1.2 billion).[1] Much of this price tag can be attributed to a swollen immigration detention system that is perpetuated by Congressional requirements that the Department of Homeland Security maintain 34,000 immigration detention beds each day. Our nation deserves thorough Congressional oversight of an enforcement regime that is not only expensive and arbitrary, but also fails to maximize cost-saving programs that currently exist.

Fundamental human rights principles restrict the use of detention except as a last resort and only when less restrictive alternatives cannot meet the government's objectives, i.e. to ensure that a non-citizen appears for removal proceedings.[2] The United States' current practices of immigration detention deviate from those principles. There is a lack of judicial review and an over-reliance on the arbitrary and often prolonged or indefinite detention of migrants – many of whom 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 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."

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[1] *Immigration Enforcement in the United States: The Rise of a Formidable Machinery*, Migration Policy Institute, http://www.migrationpolicy.org/pubs/enforcementpillars.pdf (January 2013).

[2] *Article 9, International Covenant on Civil and Political Rights*, UN General Assembly, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (March 1976).

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LIRS.org

Since the last time our federal immigration laws were rewritten in 1996, the scale and impact of immigration detention has ballooned. The current fiscal costs of immigration detention are staggering and largely avoidable.

Despite being an expensive and extreme way to ensure appearance at immigration court proceedings, the growth of immigration detention has been steep and continual. Since the last serious debate on immigration reform in 2007, the budget for Immigration and Customs Enforcement's (ICE) detention and removal operations has grown from $1.984 billion to $2.75 billion.[3,4] In the decade since the creation of ICE in 2003, more than 2.5 million individuals have passed through immigration detention facilities.[5] The 34,000 immigrants ICE detains in federal, private, or state and local facilities each day represents a dramatic increase in daily bed space since 1996 when 8,279 beds were available[6,7]. Parallel growth is visible in the total number of migrants who pass through ICE detention annually; in 2010, almost 392,000 migrants were detained as opposed to 108,000 in 1996[8,9]. In fiscal year (FY) 2011 alone, ICE detained an all-time high number of persons- 429,000.[10]

The United States currently spends approximately 24% more money on immigration enforcement activities than on all other federal law enforcement programs combined.[11] The expansion of the immigration detention business has incentivized city and county jails, and the private prison industry to partner with ICE by jailing migrants in their facilities. In 2007, the Corrections Corporation of America (CCA), a private prison company, earned profits of nearly $1.5 billion; 13% of that profit came from ICE contracts.[12]

The ICE Office of the Public Advocate provides a valuable service to family members and communities of detained immigrants.

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[3] *Unlocking Liberty: A Way Forward for U.S. Immigration Detention Policy*, Lutheran Immigration and Refugee Service, www.lirs.org/dignity (October 2011).
[4] *Consolidated Appropriations Act of 2012*, PL 122-74, http://www.gpo.gov/fdsys/pkg/PLAW-112publ74/html/PLAW-112publ74.htm (Dec. 23, 2011).
[5] *The Influence of the Private Prison Industry in the Immigration Detention Business*, Detention Watch Network, http://www.detentionwatchnetwork.org/privateprisons (May 2011).
[6] *Consolidated Appropriations Act of 2012*, PL 122-74, http://www.gpo.gov/fdsys/pkg/PLAW-112publ74/html/PLAW-112publ74.htm (Dec. 23, 2011).
[7] *Unlocking Liberty: A Way Forward for U.S. Immigration Detention Policy*, Lutheran Immigration and Refugee Service, www.lirs.org/dignity (October 2011).
[8] *Security Insecure: The Real Costs, Consequences, and Human Face of Immigration Detention*, ACLU of Georgia and Georgia Detention Watch, http://www.georgiadetentionwatch.com/reports-documents/ (January 2011).
[9] *Unlocking Liberty: A Way Forward for U.S. Immigration Detention Policy*, Lutheran Immigration and Refugee Service, www.lirs.org/dignity (October 2011).
[10] *Immigration Enforcement Actions: 2011*, Office of Immigration Statistics, http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement_ar_2011.pdf (Sept. 2012).
[11] *Immigration Enforcement in the United States: The Rise of a Formidable Machinery*, Migration Policy Institute, http://www.migrationpolicy.org/pubs/enforcementpillars.pdf (January 2013).
[12] *Tom Jawetz statement on Part II of H.R. 1889, Private Prison Information Act of 2007 before the House of Representatives Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security*, ACLU National Prison Project (June 2008).

LIRS was dismayed by language introduced by the Senate Appropriations Committee to eliminate funding to the position of ICE Public Advocate. We strongly urge members of the House Appropriations Committee to decline to endorse language that would eliminate this valuable position. The loss of the Public Advocate position would be a disservice to those held in immigration detention as well as their family members and community members, many of whom are U.S. citizens. The Public Advocate increases efficiencies within ICE by providing a single source of basic information to those affected by immigration enforcement and freeing ICE Deportation Officers to perform their duties.

The composition of ICE's enormous detained population is varied and includes many vulnerable persons. When vulnerable people are detained and families are separated the loss to our communities is immeasurable.

Through LIRS's programmatic work, we have witnessed firsthand the detrimental effects immigration enforcement measures, such as immigration detention, have on individuals, families, and communities. Children grow up while their mother or father is detained, often far from home. Communities are deprived of skilled and committed workers and job creators who often lose their homes and businesses as a consequence of immigration detention, regardless of the outcome of their immigration case.

Individuals detained for immigration purposes by ICE in the United States include those who entered the country in search of meaningful employment and those who overstayed a visa. Some are pregnant women, heads of households, or elderly. Individuals with severe mental health and medical conditions are held every day in immigration custody. Among the most vulnerable are torture survivors, asylum seekers, and victims of human trafficking who come to the U.S. seeking protection. Many current detainees are long-time lawful permanent residents with extensive family, employment, and community ties in the United States. Although many people in immigration detention have potential claims for lawful status, they are detained for months, even years.

Individualized and informed detention determinations are preferable to arbitrary and overbroad detention mandates.

Federal enforcement laws and policies should not use a blanket approach for reaching detention determinations. Such one-size-fits-all enforcement methods have led to more migrants being detained than is necessary to meet the goal of immigration detention—compliance with immigration processes.

ICE has recently developed and implemented nationwide use of a risk assessment tool to reach consistent and informed determinations of when detention is truly necessary and when low-risk migrants should be released or placed in a less-restrictive program.[13] This tool should enable the government to identify which individuals present genuine risks of flight or threats to public safety as

[13] *Unlocking Liberty: A Way Forward for U.S. Immigration Detention Policy*, Lutheran Immigration and Refugee Service, www.lirs.org/dignity (October 2011).

well as people who may be negatively impacted by detention, such as survivors of torture, domestic abuse victims, and other victims of violence.

An effective risk assessment should also inform the government about the level of risk in individual cases and how to mitigate any 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 model efficient and just governance that is consistent with the spirit of welcome the United States is known to embody.

ICE should continue to monitor the results of this important assessment tool and make adjustments as necessary to best tailor detention determinations to the mission of the agency while maximizing cost-effective release and supervision options.

There are proven and effective alternatives.

LIRS supports increased use of alternatives to detention, which range in cost from a few cents a day to an average of $22 a day and allow migrants to reunite with family members and contribute to their communities while undergoing immigration proceedings.[14] Potential alternatives to detention include release on the individual's own recognizance, parole, bond, or enrollment in an alternatives to detention (ATD) program. Unfortunately, ICE has not maximized the use of release and supervised release options and its failure to do so is responsible, at least in part, for the rapid increase in detention numbers.

ATDs are not novel or untested. They are routinely used in the criminal justice system and have been commonplace in immigration enforcement for over a decade. The Immigration and Naturalization Service—the predecessor to ICE before the Department of Homeland Security was formed—created the Alternatives to Detention unit in 2002. Appearance rates in immigration proceedings for those released into an ATD program average over 90%, making these options a practical, humane, and economical alternative to detention.[15]

While ATD programs employ a wide variety of technologies and forms of supervision to ensure the individual appears for his/her immigration proceedings, ICE relies heavily on electronic monitoring and other intrusive forms of supervision. When properly applied, as in the case of populations that require high-level supervision, electronic monitoring may be an effective, cost-saving program. However, ICE commonly uses these devices on individuals who do not need a high level of supervision and should instead be released on recognizance, bond, or parole or be enrolled in a less restrictive ATD program. Electronic monitoring devices impose substantial burdens, making it extremely difficult for the individual to participate in daily activities. For example, some individuals

[14] *Unlocking Liberty: A Way Forward for U.S. Immigration Detention Policy*, Lutheran Immigration and Refugee Service, www.lirs.org/dignity (October 2011).
[15] Ibid.

have been required to charge their ankle monitors, which do not always function properly, every day for approximately two hours during which time they must sit connected to an electrical outlet.

LIRS Recommendations to Congress:

- Require any restriction of liberty to be the least restrictive form of custody necessary and proportionate to meet government interests.
- Ensure access to judicial review of any decision to restrict liberty, including but not limited to the use of detention.
- 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 that cannot otherwise be mitigated.

LIRS is nationally recognized for its leadership advocating 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 question about this statement, please contact Brittney Nystrom, Director for Advocacy, at (202) 626-7943 or via email at bnystrom@lirs.org.

Additional LIRS Resources

- The January 29, 2013 press release on President Obama's speech outlining a vision for immigration reform may be read here: www.bit.ly/VxQHYW
- The January 28, 2013 press release on the release of the bipartisan principles for immigration reform in the Senate may be read here: www.bit.ly/WhPPX2
- LIRS's FAQ's on the Family Immigration System may be read here: www.bit.ly/11fqt2Z
- The December 15, 2011 press release expressing concerns with increased FY 2012 immigration detention spending may be read here: www.bit.ly/XoeHtA
- The October 2011 report, *Unlocking Liberty: A Way Forward for U.S. Immigration Detention Policy*, may be read here: www.bit.ly/VwrNFE

Statement for the Record

House Committee on the Judiciary

"The Release of Criminal Detainees by U.S. Immigration and Customs Enforcement: Policy or Politics?"

March 18, 2013

The National Immigration Forum works to uphold America's tradition as a nation of immigrants. The Forum advocates for the value of immigrants and immigration to the nation, building support for public policies that reunite families, recognize the importance of immigration to our economy and our communities, protect refugees, encourage newcomers to become new Americans and promote equal protection under the law.

The National Immigration Forum thanks the Committee for holding this hearing on the matter of immigration enforcement and alternatives to detention and urges the Committee to look at immigration enforcement as part of broad immigration reform that includes an earned path to citizenship.

One symptom of our broken immigration system is the exorbitant spending wasted on detaining hundreds of thousands of immigrants annually. Physical detention, as costly and severe as it is, should only be used in limited circumstances, such as for holding immigrants whose release would pose a serious danger to the community. For many of the individuals currently in immigration detention, the government could use less expensive alternatives to detention to serve their needs. Billions of dollars could be saved if the government reduced its overreliance on detention and properly allocated resources towards more humane and cost-effective alternative methods of monitoring.

This past month due to what has become known as sequestration, Immigration and Customs Enforcement (ICE), located in the Department of Homeland Security (DHS), began prioritizing detainees, releasing some immigration violators who pose no danger to the community. In the month of February, ICE stated it released 2,228 individuals from ICE custody. However, ICE's overall use of discretion has been limited so far, and resources are still being used to detain and deport aspiring citizens who pose no risk.

Despite a more focused approach for immigration detention by DHS in the last two years, the budget for detention remains very high, with the White House requesting over $5.4 million per day for detention in its FY2013 budget request. The Senate

Continuing Resolution (CR) begin considered this week would spend over $2 billion for the remainder of FY13 and maintain the current requirement of 34,000 detention beds." Two figures are used in calculating the average daily cost of immigration detention per person: $122 per daily bed is the number ICE provides in its FY13 Budget Justification documents for detention costs, but $164 per daily bed includes ICE's operational expenses and salaries associated with detention.

- $1,959,363,000 FY 2013 Presidential annual budget request for custody operations / 365 days in a year = $5.4 million per day.
- $5.4 million per day / 32,800 immigrant detainees = $164 daily cost to tax payers per immigrant detainee.

Detention should not be used as the default approach to enforcing immigration laws. Less wasteful and equally effective alternatives to detention (ATD) exist. They range in cost from as low as 30 cents to $14 a day. If ICE limited its use of detention to individuals who have committed violent crimes, the agency could save nearly $4.4 million a night, or $1.6 billion annually—an 82% reduction in costs. Also, it is important to note that in FY 2010, the last year for which appearance data is available, ATD programs appearance rates for immigration hearings was 93.8 percent. Therefore, an examination of the numbers makes it clear—the dollars spent to detain immigrants do not add up to policy that makes sense.

Fiscal accountability by the Federal Government is critical in our current economy, yet immigration detention continues to raise enormous fiscal concerns. Many non-criminal aliens are still detained in expensive facilities, both local jails paid for by ICE or ICE-contracted detention facilities, when less expensive alternatives that still maintain immigration integrity by ensuring appearance for removal hearings are available. The government must be prudent with its limited resources by detaining only those who actually pose a risk to public safety or have previously demonstrated that they are a flight risk.. Prioritizing the use of scarce resources is the responsible thing to do, is consistent with other immigration policies, and will help accomplish the important objective of promoting national security.

NATIONAL
IMMIGRANT
JUSTICE CENTER
A HEARTLAND ALLIANCE PROGRAM

Statement of Mary Meg McCarthy, Executive Director
Heartland Alliance's National Immigrant Justice Center

Submitted to the House Judiciary Committee
Hearing on the Release of Criminal Detainees by U.S. Immigration and Customs Enforcement

March 19, 2013

Chairman Goodlatte, Ranking Member Conyers, and members of the Committee, thank you for the opportunity to submit testimony for today's hearing.

Heartland Alliance's National Immigrant Justice Center (NIJC) is a nongovernmental organization dedicated to ensuring human rights protections and access to justice for immigrants, refugees, and asylum seekers, through direct legal representation, advocacy, impact litigation, and education. Since its founding 30 years ago, NIJC has safeguarded the rights of non-citizens, particularly those held in immigration detention. Each year, NIJC and its network of 1,500 *pro bono* attorneys provide legal counsel and representation to nearly 10,000 individuals, making it the largest legal service provider for non-citizens. NIJC conducts "Know Your Rights" presentations in immigration detention facilities, operates a detention hotline, and responds to correspondence from detainees throughout the country. In each capacity, NIJC encounters individuals who pose no threat to our communities, and should not be detained.

As co-chair of the Department of Homeland Security (DHS)/Nongovernmental Organization enforcement Working Group, which includes 100 immigrant rights organizations, legal aid providers, and academics, NIJC facilitates ongoing dialogue on issues of immigration enforcement and detention. NIJC is a leading voice within the Midwest Coalition for Human Rights, a network of 56 organizations that promotes and protects human rights in America's heartland. In these and other coalitions, NIJC shares its on-the-ground experience to advocate for policy changes.

It is good policy to create and maintain a cost-effective immigration detention system that respects due process. America has built a massive immigration detention system which unnecessarily detains thousands of individuals daily, including asylum seekers, longstanding community members, children, and many others who pose no threat to society. Detained immigrants do not have access to appointed counsel, and without attorneys or information about their rights, they are particularly vulnerable.

In 2009, the Obama administration announced a series of reforms to create a more "civil" immigration detention system, recognizing that the vast majority of men and women in DHS custody do not have criminal histories and pose no threat to the community. The administration's commitment to create a "truly civil" immigration detention – one that includes sound medical care, adequate oversight mechanisms, and fiscally prudent detention practices – is yet to be realized. Today, I would like to outline three steps that this Committee can take immediately to improve our immigration detention system, particularly in light of the recent sequestration: 1) eliminate the detention bed quota; 2) increase funding for and use of alternatives to detention programs; and 3) give the immigration court system adequate resources and allow judges to review detention decisions.

I. Eliminate the Detention Bed Mandate

Immigration detention is the fastest growing incarceration system in the United States.[1] Each year, DHS spends more than $2 billion to detain more than 400,000 men, women, and children in a patchwork of 250 facilities, including county jails and prisons operated by private corporations. A majority of individuals in immigration detention do not need to be detained and pose no threat to our communities. A *USA Today* report from last month exposed internal U.S. Immigration and Customs Enforcement (ICE) memos pressuring officers to target immigrants without a prior criminal record or with only minor offenses to boost its enforcement statistics.[2]

Several months ago, two Rwandan women came to the United States seeking asylum and were immediately sent to a detention center in Georgia, where they remain detained despite several efforts to have them released. In addition, an NIJC's client remains detained after 18 months, even though he has no criminal record and is a victim of constant harassment in detention because he is gay and acts effeminately. In response to ICE's recent release of detained immigrants across the country, DHS Secretary Janet Napolitano stated, "there were some very, what I would call very low-level, low-risk detainees that could be put in a supervised release program."[3] The reality is that these individuals do not need to be detained. The reality is that we lock them up to meet an arbitrary and costly quota.

DHS and some members of Congress interpret appropriations language to mandate a daily detention level of 34,000—a micro-managing approach that does not exist in any other law enforcement context. The bed "mandate" steers the agency away from making decisions about detention based on its enforcement priorities or true public safety concerns. Instead, this perceived mandate creates an arbitrary quota that unnecessarily drains government resources. It deters DHS from pursuing cost-saving measures, such as alternatives to detention, which ensure individuals' compliance with enforcement policies and provide for an efficient immigration adjudicative process at a fraction of the cost.

DHS should have the flexibility to do its job efficiently and effectively. At a time when the nation is recovering from a major recession and seeking to reduce federal spending, it is irresponsible for Congress to mandate DHS to maintain an unnecessarily costly detention system. Congress must eliminate this mandate.

II. Expand Alternatives to Detention Program

If Congress permits DHS to use money now tied up by the detention bed quota to expand the use of alternatives to detention programs, the agency will be able to fulfill its mission cost-effectively and humanely. The U.S. government spends $164 to detain one person for one day.[4] Existing alternatives to detention programs cost as little as 17 cents per day per person.[5]

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[1] PBS Frontline, "Lost in Detention," (October 18, 2011), available at: http://www.pbs.org/wgbh/pages/frontline/racemulticultural/lost-in-detention/map-the-u-s-immigration-detention-boom/
[2] USA Today, "Immigration tactics aimed at boosting deportations," (February 17, 2013), available at: http://www.usatoday.com/story/news/nation/2013/02/14/immigration-criminal-deportation-targets/1919737/
[3] Politico, "Playbook Breakfast," (March 4, 2013), available at: http://www.politico.com/multimedia/video/2013/03/janet-napolitano-immigrant-detainees-story-not-accurate.html.
[4] National Immigration Forum, "The Math of Immigration Detention: Runaway Costs for Immigration Detention Do Not Add Up to Sensible Policies," (August 2011), available at: http://www.immigrationforum.org/images/uploads/mathofimmigrationdetention.pdf
[5] See http://www.reuters.com/article/2013/03/01/us-usa-fiscal-immigration-idUSBRE92001120130301

Nearly a decade ago, the Australian government's immigration detention system was expanding quickly and becoming more costly, yet the nation was unable to meet the basic needs of its detainees. In just five years, Australia implemented a robust alternatives to detention program, detaining non-citizens only as a last resort. Moreover, the detention of individuals was restricted to a specific length of time and judges would automatically review detention decisions to ensure due process.

While Australia's system is smaller than the U.S. detention system, we urge DHS to incorporate Australia's best practices, which NIJC highlights in its report, *Creating 'Truly Civil' Immigration Detention in the United States: Lessons from Australia*."[6] Congress should also look to successful models in the United States, including programs run by the Vera Institute of Justice and Lutheran Immigration and Refugee Service. Both programs demonstrate high court appearance rates, from 91% to 93%, as well as compliance with deportation orders.[7]

III. Reallocate Resources to the Immigration Court System and Allow Judges to Review Detention Decisions

Immigration detention is civil custody, in which individuals are being held for immigration violations. They are not being punished for criminal conduct, and more than half of immigration detainees have never been convicted of a crime.[8] Of those with criminal convictions, most are nonviolent and/or minor crimes and individuals have already served their sentences.[9] These individuals are held in jail-like settings, but because they are not being charged with crimes, they are denied procedural protections, including access to counsel if they cannot afford an attorney.

To protect due process — and ensure that DHS does not waste money to detain individuals who can be placed alternatives to detention programs — immigration judges should be given the authority and resources to review all detention decisions. Currently, immigration judges can only review bond determination for certain categories of immigrants. Immigration officers, who often are ill-equipped to make this judgment, decide the vast majority of bond determinations. As a result, immigrants are detained for months — and some for years — at great financial cost without ever knowing when they will be released.

Moreover, DHS has needlessly cost taxpayers hundreds of millions of dollars each year by choosing to interpret "custody" as only encompassing physical incarceration — an interpretation not even followed in the criminal justice system. Annually, DHS spends over $2 billion to detain over 400,000 immigrants during their immigration proceedings. DHS takes the position that the majority of the annual detention population is subject to mandatory detention pursuant to provisions of the Immigration and Nationality Act (INA), in particular INA § 236(c), 8 U.S.C. § 1226(c). Under that provision, DHS is required to take into custody non-citizens who have been convicted of certain criminal offenses. While the statutory provision calls for mandatory custody, DHS has interpreted "custody" to mean mandatory, physical detention. This provision alone accounts for likely $1 billion

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[6] National Immigrant Justice Center, "Creating 'Truly Civil' Immigration Detention in the United States: Lessons from Australia," (May 2010), available at: http://immigrantjustice.org/civildetentionreport

[7] Lutheran Immigration and Refugee Services, "Alternatives to Detention Programs, an International Perspective," (June 2009), p. 2 at http://idcoalition.org/lirs-alternatives-to-detention-programsan-international-perspective/

[8] ICE "ERO Facts and Statistics" available at: http://www.ice.gov/doclib/foia/reports/ero-facts-and-statistics.pdf. See Migration Policy Institute, *Immigration Enforcement in the United States*, 128, available at: http://www.migrationpolicy.org/pubs/enforcementpillars.pdf.

[9] TRAC, U.S. Deportation Proceedings in Immigration Courts at http://trac.syr.edu/phptools/immigration/charges/deport_filing_charge.php.

of ICE's detention expenditure. Legislative language is needed to fix this problem and clarify who is subject to physical incarceration.

Providing judges with the legal authority to review the decision to detain individuals and reallocating resources from the detention system to the court system would allow immigration judges to more promptly adjudicate cases and would reduce the number of detained individuals.

Conclusion

It will be virtually impossible to fix the immigration detention system as long as the government continues to arrest and detain record numbers of men and women who pose no threat to society. Eliminating the detention quota, activating alternatives to detention programs, and reallocating funding to improve the immigration court system are three steps Congress must take now to improve the immigration detention system and reduce its financial burden.

DHS's decision to release men and women from immigration detention in preparation for sequestration proves a point that NIJC and many other immigrant rights advocates have made for years: There are far more cost-efficient ways to manage immigration enforcement in the United States. Those who were released now have the opportunity to remain with their families and have better access to legal counsel as they pursue their immigration cases, and they will do so at a great fiscal savings to the U.S. government. We hope that Congress heeds this lesson and NIJC's recommendations as it continues its work to create a new immigration system.

I thank you for the opportunity to present this testimony on the urgent need to reform America's failing detention system. Should you have any questions, please feel free to contact me at mmccarthy@heartlandalliance.org or at 312.660.1351.

STATEMENT FOR THE RECORD
On
"Oversight Hearing: Immigration Enforcement"
Submitted to the
House Judiciary Committee
March 19, 2013

By Americans for Immigrant Justice and Women's Refugee Commission

Americans for Immigrant Justice and the Women's Refugee Commission welcome the House Judiciary Committee's oversight hearing on Immigration Enforcement. The Committee's consideration of the implications of the recent decision by the Immigrant and Customs Enforcement agency (ICE) to release hundreds of low-risk immigrant detainees as a pre-sequester, cost savings measure is well-timed. Given the fiscal crisis now facing the United States, it is prudent to examine whether a Congressional mandate to the Department of Homeland Security (DHS) to fill an explicit number of immigration detention beds on a daily basis is appropriate. In addition to the opportunity to implement a more fiscally sound detention policy increasing the use of cost effective and efficient alternatives, this is an historic opportunity for Congress to realign the immigration detention system with our national values of treating all humans with dignity and respect.

The Immigration Detention System: Quick Facts and Figures
ICE is located within DHS and operates the nation's immigration detention system. In Fiscal Year 2012, the average daily population in ICE facilities was 34,000 with an average cost of $166 per person per day.[1] In Fiscal Year 2010, 392,000 individuals were held in an ICE facility.[2]

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[1] http://news.yahoo.com/immigrants-prove-big-business-prison-companies-084353195.html (" The total average nightly cost to taxpayers to detain an illegal immigrant, including health care and guards' salaries, is about $166, ICE confirmed . . . .")

[2] National Immigration Forum, *The Math of Immigration Detention* 3 (Aug. 2011), http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf.

ICE holds immigrant detainees in three different types of facilities. ICE contracts with a network of 250 state and local jails as well as seven Contract Detention Facilities (CDF). The CDFs are owned and operated by private companies under exclusive contract with ICE while the state and local jails or Intergovernmental Service Agreement Facilities house federal immigration detainees alongside their criminal inmate populations under intergovernmental Service Agreements with ICE. The private prison companies with the majority of all contracts with ICE are Corrections Corporation of America (CCA) and GEO group. In addition, ICE uses six Service Processing Centers which are federally-owned facilities that are operated by ICE staff and/or contractors and which house about 13 percent of ICE detainee population.[3]

Who is Detained by ICE?

Non-citizens enter ICE custody in a number of ways. If they arrive at a port of entry at the border of the United States without proper documentation (such as a valid visa) and express a fear of returning to their home country will be detained pending further legal proceedings. They may be may be apprehended during enforcement sweeps conducted by DHS at their homes or workplaces. Finally, a large segment of the detainee population enters the detention system directly from state or federal criminal custody. This referral from criminal custody to immigration detention is done using "detainers."

While certain immigrants with criminal convictions are subject to mandatory detention, most are eligible for release if they can demonstrate to ICE officials or an Immigration Judge that they are not a flight risk or a danger to the community. Despite fears and concerns over the release of hundreds of immigrants from detention in advance of the sequester, the truth is that most immigrant detainees have no criminal convictions. Indeed, 77 per cent of the individuals detained by ICE through the detainer process have no criminal conviction.[4] The outrage and fear that individuals have expressed at these releases should be targeted at the government officials who have needlessly spent millions of dollars a year to hold hundreds of thousands of non-criminals when less costly alternatives to detention and alternative forms of detention exist.

Broward Transitional Center: A Case Example

These detentions include several current women who were assisted by Americans for Immigrant Justice. One example is Carmen[5] who fled to the United States seeking safety from an abusive domestic partner and another assailant who nearly killed her with a machete. Apprehended at the border in Texas in 2012, she was detained at the Broward Transitional Center (BTC) in Pompano Beach, Florida and placed in removal proceedings where she applied for asylum. As she began to display symptoms of post-traumatic stress disorder and depression, BTC medical staff identified her as a victim of domestic violence and made arrangements for Carmen to seek therapy at a local domestic violence shelter.

After Carmen had been detained for more than six months, AI Justice requested her

[3] http://www.ice.gov/news/library/factsheets/detention-mgmt.htm
[4] http://trac.syr.edu/immigration/reports/310/
[5] The client's name was changed to protect her privacy.

release, providing documentation to her deportation officer that Carmen had family members in the United States who were able and willing to support Carmen throughout the pendency of her asylum case. Both Carmen and her attorney were told by ICE that detainees are not released while their cases are on appeal and so Carmen continued to languish in detention. Carmen was finally released in late February with no explanation. In total, Carmen had been detained for 9 months. At this point, ICE had paid an average of $124-$164 per day to GEO Corporation, which has an ICE contract at BTC, to detain Carmen. Thus, taxpayers paid approximately $30,000 to detain, not a criminal, but an asylum seeker and a domestic violence and torture survivor.

While critics may argue that the failure to release Carmen is a rarity in a larger, well-functioning system, this is not the case. Of the women who contacted AI Justice following their release from BTC in late February, only one had a criminal conviction: for driving without a license. Eight out of 9 had passed a reasonable fear interview, credible fear interview or applied for a U-visa. The ninth woman was a non-criminal, failed asylum-seeker from Haiti who was not subject to removal to Haiti under current Administration policies. While the time spent at BTC ranged from 1 – 5 months, none of these women came directly to BTC. Most were held at detention facilities along the border and transferred at least once before arriving at BTC. These women include:

- Marilu first came to the U.S. about 10 years ago where she met Andres who promised to help her regularize her status. Instead, Andres took her documents, threatened to have her deported and began to rape and beat her regularly. Years after the birth of their son, she escaped from Andres, living with her son and trying to start a new life. She was apprehended for driving without a license, put into removal proceedings and removed to her home country. She was forced to leave her son, Juan, behind in the care of a friend. Back in her country, Marilu worked hard with the hope of bring back Juan when her family began to be threatened by gang members. Fearing for her life, Marilu fled to the U.S. She was transferred to BTC where she expressed a fear of return to her country. Marilu passed her Reasonable Fear interview with an asylum officer. After almost 5 months of detention, she was released and placed on an order of supervision. She is currently in withholding only proceedings and is reunited with her 8-year-old son.

- Maria who fled her home country leaving her three minor children behind to escape her abusive husband. She passed her Reasonable Fear interview with an asylum officer. She was released after almost 5 months in detention. She is currently in withholding only proceedings.

Alternative Forms of Detention and Alternatives To Detention

There are other options for individuals like Carmen, Maria and Marilu who were each held for over 5 months in a penal detention environment. Alternatives forms of detention and alternatives to detention (ATD) have been consistently proven to ensure that

individuals in immigration proceedings appear for hearings and deportation. There are many forms of alternatives including releasing people to a responsible sponsor or family member, with information on when they need to appear before a court (like many pre-trial programs do in our criminal justice system across the country), requiring periodic check-ins with a detention officer or case worker or something more restrictive like house arrest or GPS programs for those who may present a higher risk of flight. Additionally, community support programs are in their early implementation stages for immigration detainees, but have long been used for criminal and delinquent detainees.

ICE runs three ATD programs: Intensive Supervision Appearance Program (ISAP) which employs contractors who monitor participating immigrants using: telephonic reporting, radio frequency, global positioning system, and unannounced home visits; Enhanced Supervision/Reporting (ESR) a contractor-operated program that uses the same monitoring methods as ISAP and Electronic Monitoring (EM) which is operated by ICE and is available to immigrants residing in locations not covered by the ISAP or ESR contracts. EM monitors immigrants using telephonic reporting, radio frequency and global positioning technologies.
Expert studies consistently find ATD yield high compliance rates and are therefore an effective solution to the costs of detention without sacrificing compliance. In FY 2010 the government's ATD programs yielded a 93.8 percent appearance rate for immigration hearings, which exceeded the target rate by 35.8 percent. In 2009, ICE reported appearance rates of 87 percent for ISAP participants, 96 percent for ESR participants, and 93 percent for EM participants.[6]

Carmen reports that when she was released from BTC, she was fitted with an ankle monitoring device through the ISAP office in Miami. Carmen then traveled out of state to live with her family members who have been waiting to assist and support her for months. When Carmen reported to ISAP in that state they removed the ankle monitoring device and ISAP is continuing to monitor her via regular home visits and telephonic reporting.

The average cost of alternatives can vary from 17¢ a day to $44 a day depending on the level of restriction or services provided.[7] At best, this represents a savings of from $80 to $163.83 per person per day over incarceration in immigration detention facilities.

Conclusion
Now is the time to truly embrace alternatives to detention that allow us to implement rule of law more efficiently, for less money and more humanely than outdated and expensive methods of imprisonment. It is an opportunity to benefit from American ingenuity and enter a new age. Some members of Congress have argued that releasing detainees was not necessary as ICE has a surplus in its budget. This is not good fiscal policy. If ICE is able to fulfill its mandate to detain only those individuals who face mandatory detention,

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[6] www.ice.gov/pi/news/factsheets/alternativestodetention.html
[7]

http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/DWN%20ATD%20Report%20FINAL_08-25-2010.pdf

pose a flight risk or pose a danger to the community with less money than it has been authorized to spend, the money should be returned and used for other purposes to reduce the federal deficit.

Congress needs to be held accountable for directing the unnecessary detention of thousands of people at great expense to taxpayers and our communities. The costs of immigration detention go further than the direct cost of paying for prison beds. The use of a penal, prison-based system to detain asylum-seekers, parents, business owners and homeowners has a devastating effect on our communities and economy. We can no longer afford these social, fiscal and civil liberty costs. Instead we should be investing in evidence-based alternatives to detention and alternative forms of detention that allow people to remain with their families and continue to contribute to their communities throughout their immigration proceedings.

See attached case summaries

Case summaries of some women released from BTC around 02/25/2013
Please note that all names are pseudonyms

Emilia fled from her home country, leaving her 4 children behind, in an effort to escape her abusive spouse. Emilia had been hit in the head so many times by her spouse that she frequently has headaches and feels dizzy. She reported her abusive spouse to the police in her home country on three separate occasions. The state even issued a restraining order against him. But Emilia's husband continued to brutally abuse her to no avail. Unfortunately, in her home country, the police often do little to enforce restraining orders and despite her efforts Emilia could not escape her husband's abuse. Finally, Emilia fled to the U.S. to find safety. Emilia was eventually transferred to BTC where she expressed that she had a credible fear of return to her home country. After her credible fear interview, the asylum officer made the determination that Emilia had a credible fear of return. Emilia was then released around 02/25/2013. Emilia's release is in accordance with DHS guidelines that stipulate that asylum seekers who are found to have a credible fear of return should be released and paroled during the pendency of their asylum proceedings.
Arrived at BTC 12/22/2012

Raquel fled her home country, leaving her three minor children behind, to escape her abusive ex-husband. Raquel had been married to her husband for over 20 years, most of which she suffered brutal abuse. Raquel's husband would constantly beat and rape her. He would also abuse their small children. Desperate to escape him Raquel tried to leave him over 15 times but to no avail. Every time she left he would always find her and force her to be with him again. Raquel reported him to the police two separate times and obtained a restraining order against him, she then was able to obtain a divorce. Unfortunately, despite all of her efforts her ex-husband would not accept that Raquel no longer wanted to be in a relationship with him. He continued his threats and abuse until finally Raquel desperately feared for her life and fled to the U.S. seeking safety and protection. Raquel was transferred to BTC where she expressed a fear of return to her home country. Raquel underwent a Reasonable Fear interview (she had previously entered the U.S. and had an old in absentia order- don't know if you want to include that) and was determined to have a reasonable fear of return by an asylum officer. Raquel was released on 02/25/2013 and put on an order of supervision during the pendency of her withholding only proceedings.
Arrived at BTC 01/16/2013

Dana fled to the U.S. to escape dangerous individuals who had murdered her uncle. Dana's grandmother reported the crime to the police in her home country and cooperated with the authorities in an effort to bring the murders to justice. Unfortunately, the individuals were not prosecuted. The individual threatened to kill Dana's entire family for reporting the murder. Fearing for her life, Dana fled to the U.S. Dana was eventually transferred to BTC where she expressed a fear of return to her home country. She was released from BTC around 02/25/2013.
Arrived at BTC 02/19/2013

Ana is an 18 year old indigenous girl from a very rural area of Latin America. She lived a normal quiet life until one day individuals began to exhort her family for money. Being of humble means her family was unable to pay what was demanded of them. Then one day Ana came home from the countryside to see that her father had been murdered and her family home had been burned down. The individuals then began to threaten Ana and her mother and told them that if they reported what happened to the police that they would be next. Fearing for her life, Ana fled to the U.S. Ana was transferred to BTC where she was put into removal proceedings before the immigration judge where she was seeking asylum. She was released around 02/25/2013.
Arrived at BTC01/24/2013

Mary, a victim of the earthquake that decimated Haiti in 2010, came to the U.S. fleeing from the danger and poverty that became her daily existence after she lost her home. Mary was detained at BTC for about 2 months (she underwent the credible fear process and was denied both by the asylum officer and the IJ- she ultimately did not have a strong claim. I don't know if you want to include that, I think its irrelevant since they should not be detaining any Haitians in the first place since their policy is that they are only deporting those with criminal history to Haiti). She was released around 02/25/2013 to her brother who is a U.S. citizen and had been anxiously waiting to assist and support his sister.
Arrived at BTC 12/03/2012

Maria fled her home country leaving her three minor children behind to escape her abusive husband. Maria tried to enter the U.S. twice in an effort to escape her husband's abuse. Maria was eventually transferred to BTC where she finally felt comfortable sharing that she feared going back to her home country due to the domestic violence she suffered at the hands of her husband. Maria underwent a Reasonable Fear interview and was determined to have a reasonable fear of return by an asylum officer. Finally after almost 5 months of detention, she was released around 02/25/2013. She is currently in withholding only proceedings.
Arrived at BTC 09/25/2012

Marilu first came to the U.S. about 10 years ago. Unfortunately, her dream of coming to the U.S. quickly turned into a nightmare. Shortly after her arrival she met Andres. Andres promised to help Marilu regularize her status. Unfortunately, Andres took her documents, threatened to have her deported and began to rape and beat Marilu regularly. As a result of the rapes Marilu became pregnant and gave birth to her U.S. citizen son, Juan. After years of abuse, Marilu was finally able to escape from Andres. She lived with her son and tried to be the best mother that she could. Marilu was eventually apprehended for driving without a license, put into removal proceedings and removed to her home country. Marilu was forced to leave her son, Juan, behind in the care of a friend. Back in her country, Marilu tried to work hard to make a home with the thought of eventually bringing Juan to live with her even though he is a U.S. citizen. Then, Marilu's brother began having trouble with gang members. The gang members began to threaten Marilu and her entire family. Fearing for her life, Marilu fled to the U.S. She was transferred to BTC where she expressed a fear of return to her country. Marilu underwent a Reasonable Fear interview

Mr. GOODLATTE. And the Chair is now pleased to recognize the gentleman from Illinois, Mr. Gutierrez, for 5 minutes.

Mr. GUTIERREZ. Thank you, Mr. Chairman.

Good to have you, Director Morton.

I just want to follow up on these deportations. So how many people were deported in the last calendar year?

Mr. MORTON. About 409,000 people.

Mr. GUTIERREZ. Can you tell us about the last 4 years, deportations during the last 4 years, just general numbers?

Mr. MORTON. General numbers, just a little bit shy of 400,000 on average every year.

Mr. GUTIERREZ. On average each year.

And how is that in relationship to the previous 4 years in terms of actual number of deportations?

Mr. MORTON. Significantly increased.

Mr. GUTIERREZ. Significantly increased. So since you got the job 4 years ago, deportations have significantly increased, and we can demonstrate that through actual numbers.

Mr. MORTON. Yes, particularly for criminal offenders where we have focused most of our effort.

Mr. GUTIERREZ. And what is the reason you believe that you have been able, in spite of the cost for many of us, to be able to achieve that significant increase in deportations?

Mr. MORTON. The Congress of the United States provides us resources to enforce the law. My job as the head of the Agency is to see that those resources are well spent, and Congress has provided us resources that——

Mr. GUTIERREZ. Let me ask you something, Mr. Morton.

Mr. MORTON [continuing]. We can remove about 400,000 people a year.

Mr. GUTIERREZ. Sorry to interrupt you.

So when you started at this job, how many local police departments, governmental agencies had a relationship under Secure Communities and the Federal Government?

Mr. MORTON. When I first started, very few.

Mr. GUTIERREZ. How many today?

Mr. MORTON. Today Secure Communities is in every jurisdiction of the United States.

Mr. GUTIERREZ. In every jurisdiction of the United States.

So during the last 4 years, you have expanded heretofore an almost unknown program, which really is to gather, would you not agree, many of the people that you subsequently put in deportation proceedings?

Mr. MORTON. The Secure Communities program? Yes. And the criminal justice system now allows us a window to that system in a way that was never possible before.

Mr. GUTIERREZ. So we give you money. So you have to have 34,000. Do you feel you have to have 34,000 people in custody every night in a bed? Do you feel you have to have that number?

Mr. MORTON. We have to maintain, on average, 34,000 beds from a budget perspective, and obviously we are not going to have empty beds. Some beds we actually put more than one person——

Mr. GUTIERREZ. But you relayed to us that 40 to 45 percent of everybody currently in some kind of proceeding is not, in the defini-

tion of the Federal Government, a criminal. Is that correct? You gave us a number—and I have tried to calculate—that about 40 to 45 percent—there were 350,000 people approximately where? Define where the 350,000 people are.

Mr. MORTON. In removal proceedings.

Mr. GUTIERREZ. In removal proceedings.

And you also suggested that about 40 percent of them had committed no criminal violation. Is that correct?

Mr. MORTON. That is right. I think the number is probably higher than that even.

Mr. GUTIERREZ. Very good.

But in spite of the fact that they have not committed any criminal violation, we still have astonishingly high, record-breaking numbers of deportations.

Mr. MORTON. The Congress of the United States——

Mr. GUTIERREZ. And Secure Communities has gone from a few parts of the United States to everywhere in the United States of America.

Mr. MORTON. That is right.

Mr. GUTIERREZ. I think to me that demonstrates the need for comprehensive immigration reform. The separation of families and the destruction of families. The fact is you will deport 1,400 people today. You will deport 1,400 people tomorrow and the next day and the next day and the next day until we do comprehensive immigration reform. 250 to 300 American citizen children are going to be left today because of your actions and those of your department without a mom or a dad. The fact is there are thousands of children in foster care and in proceedings of termination of their parental rights. There are 4 million American citizen children who—I have to tell you, Mr. Morton—many times you do not take into consideration as you deport their parents from the United States.

As a matter of fact, everybody likes to talk about the President's order on deferred action, something that I praise and was happy to hear about. But the fact is, is it not true, that you will still deport the parents of those that have gained deferred action?

Mr. MORTON. Deferred action covers the children.

Mr. GUTIERREZ. But not their parents.

Mr. MORTON. It does not cover their parent.

Mr. GUTIERREZ. So we have an executive order that covers the children, but does not cover the parent. Again, we cover the children but not the parents and the corrosive effect that this has.

I will just end with this because the Chairman is so good, and I am going to try to stay right on the number. And that is just to say, look, you should have released those 70 percent of those people a long time ago, according to your own statements that you issued in the summer of 2011 on prosecutorial discretion. I hope you will use more prosecutorial discretion not less prosecutorial discretion so as this Congress finally gets to the work of comprehensive immigration reform we will have fewer families that we need to heal.

Thank you so much, Mr. Chairman.

Mr. GOODLATTE. I thank the gentleman.

The Chair recognizes the gentleman from Texas, Mr. Gohmert, for 5 minutes.

Mr. GOHMERT. Thank you, Mr. Chairman.

And I am grateful to the witness for being here even though I am looking at you through the reporter there. Thank you.

I just got a message from my friend, the Governor of Texas, Rick Perry, indicating that they sort of feel like it would be a good idea that if you are going to release previously convicted criminals, people who are at a high risk for repeat offenses, and that would include multiple DWI's, that they would really like to know that you are about to release those people in their State so they can give their law enforcement a heads up.

Playing football back in high school as a quarterback, the linemen had sometimes what was known as a lookout block. If they screwed up so bad a guy got by them, they would at least have the decency to turn around and yell "look out." That was a lookout block. They did not get their lookout. They did not get the block. They did not get the lookout in Texas.

Are there some requirements that you notify the State and local authorities or State or local authorities when you allow criminals and suspected criminals to go free from detention?

Mr. MORTON. There are no blanket notification requirements.

Mr. GOHMERT. So unless we put it in the law, you do not even give a lookout, here come these folks.

Mr. MORTON. Generally speaking, the notification that we will give is, where we can, through the victim notification system. Remember, we are not part of the——

Mr. GOHMERT. The victim notification, but not necessarily to the local law enforcement or the Governor's office.

Mr. MORTON. That is correct.

Mr. GOHMERT. Because I can assure you if you notify the Governor's office, they are going to let the local law enforcement know. That would be a good place to start, but it sounds like we are going to need to put that in the law.

Well, I tell you I was staggered to hear my friend, Zoe Lofgren, from California talk about the greatest number of convictions, of Federal convictions, that this Administration has are for Federal, which is a felony, reentry after deportation. I was staggered to hear that. And, Mr. Morton, if there is anything that comes out of this hearing that shocks the conscience, it is that the number one biggest problem in this Administration of a Federal felony nature is the reentry by deported illegal immigrants after they have been deported.

Now, as a district judge in Texas, it was an ongoing problem. I had one guy with nine DWI's, never would be deported, was constantly reported to the Federal authorities. This is when Bill Clinton was President. And finally he hit somebody again and he came before my court because that bumped it up to being a felony. So I understand it.

And as I have asked before, when people testify, yes, we took him to the border and released him, I often want to know did you stick around long enough to watch them come across the border, or did you immediately drive away after you had dropped him off. This is a huge problem.

And I am just curious. With each one of these Federal felony convictions, it means we are paying for a prosecutor. We are paying for law enforcement to get these people and then a prosecutor. We

are paying for a defense attorney for them. We are paying for the offices for the prosecutor, the offices for the law enforcement, the offices for the judges, the offices for the appellate courts. And the number one conviction is for Federal felony reentry after they have been deported.

When I start thinking about that fact, it becomes pretty clear the best thing this Administration could do for this country is secure the border so they do not have to keep re-catching the people that have already been deported. To heck with how much a wall costs or drone coverage, whatever it takes, your Administration—and this message should go up to the President. This Administration should do everything they can to secure the border so that the number one source of convictions is no longer felony reentry after you have deported people.

And then you think about the money that would be saved by those who do not have their house burglarized by criminals that have been deported and have come back in, people who have not been raped or cars that are not damaged in traffic accidents by criminals that have been deported. But we do not secure our borders so they come right back in.

So if any message comes out of this, I would implore you, please send a message to this Administration. You want to save money, Mr. President? You want to save money, Secretary Napolitano? Secure the border and we will have all the savings they will ever need. And I appreciate your doing that, if you will. Would you pass a message on such as that?

Mr. MORTON. I would be happy to note your statements here today.

Mr. GOODLATTE. The Chair thanks the gentleman from Texas and recognizes the gentlewoman from California, Ms. Bass, for 5 minutes.

Ms. BASS. Thank you very much, Mr. Chair.

I wanted to follow actually my colleague, Mr. Guiterrez, some of the questions and comments he was raising. I actually come from an area in Los Angeles that is very, very concerned about Secure Communities and the number of detentions that were non-criminal. So maybe you could respond a little bit to that in terms of why people were detained if there were not criminal charges.

And in addition, I wanted to ask you about the children. He made reference to the children whose parents are deported and the ones that are put in the foster care system. Specifically, I wanted to know what happens to them, but I also wanted to know a name of a person in your office that I can have ongoing communication about the children who wind up in foster care.

Mr. MORTON. So we will follow up with you after the hearing for a name. We are actually working on a policy trying to address with Health and Human Services this sort of issue of what do you do with U.S. citizen children when you remove the parents and they have to go into—if they are left here, they go into the child welfare system.

With regard to Secure Communities, we have implemented Secure Communities nationwide, in every jurisdiction. There are frequent criticisms and allegations that we are using it to identify a lot of non-criminal offenders. That I do not think is entirely fair.

It is a very sensible program. We are trying to focus our resources on the criminal justice system.

Occasionally someone will be charged with a criminal offense and they have also been deported from the country before or they also have an outstanding final order. Technically that person is a non-criminal offender because they have yet to be convicted. But I do not think it is reasonable to expect the Agency to ignore the fact that they are in the country here unlawfully, or they have an outstanding final order that they ignored. And in those circumstances, when we identify them through Secure Communities, we will place a detainer on those individuals and we will seek to remove them from the country.

Ms. BASS. In Los Angeles, what was happening was raids, you know, raids of workplaces. And I do not know how a decision is made about that.

Mr. MORTON. Well, I am not aware of raids, as you would describe them, in the last 4 years. The Secretary instituted a new policy for worksite enforcement that has us focused first and foremost on criminal violations by the employers, heightened audits, and an effort to work with the business community to encourage voluntary use of E-verify, which we have done. Last year we had over 3,000 I-9 audits, which was the highest level in the Agency's history. And we have generally not pursued the very large-scale administrative raids you saw previously.

Ms. BASS. You know, I want to give you an example. I was in Miami, Florida with the Foster Youth Caucus, and we were visiting a residential facility for foster youth. And I am from Los Angeles. And on that day, they were getting four kids from Los Angeles who were being sent to Miami to be in residential care. And I guess my concern is that for those parents that do wind up deported, their children could get lost in our system when they could have relatives who are here legally.

Mr. MORTON. We do everything we can to ensure that the children, if they are not going to go home with the parents, are in an appropriate custodial situation. This is a very challenging area. Most of the people that we are talking about, most of the parents, are criminal offenders. Some of the damage has been done long before ICE takes custody of them and the person has been incarcerated for quite some time and a challenging family relationship now exists. And obviously, simply having a child is not a basis for staying in the country lawfully.

Ms. BASS. Oh, sure.

Mr. MORTON. You have committed an offense.

Ms. BASS. Yes, and I am definitely referring to the ones that were not.

But if I could follow up, if I could have my staff follow up with yours to get someone who is looking at that policy with DHS, I would definitely like to be included in that.

Mr. MORTON. Yes, ma'am. We will do so.

Ms. BASS. Thank you.

Mr. GOODLATTE. I thank the gentlewoman.

The Chair recognizes the gentleman from Pennsylvania, Mr. Marino, for 5 minutes.

Mr. MARINO. Thank you, Chairman.

Director, welcome.

Mr. MORTON. Thank you.

Mr. MARINO. Director, you hit the news quite a bit over the last couple of weeks. And it has been reported that you stated that there would be 2,228 illegal immigrants from local jails that would be released for various reasons. I think you followed up saying there may be more released as well.

My question to you is—you know, that was accurate, and I am sure you were responding to precise figures. But do you not think you should have followed up by explaining to the American people we do this on a regular basis and we do release individuals, thousands of them, over several months given the fact that the way it was presented, either you were directed to or you did a little grandstanding on let's make this sound as painful as ever per the sequestration? Now, why would you not follow up and explain to the American people we do this on a regular basis?

Mr. MORTON. As I have said before, I do regret the timing in notification. We should have, as an Agency, done a better job of communicating what we were doing and why we were doing it, both in terms of communications to our oversight committees and generally.

Mr. MARINO. And I do not hold you totally responsible for that. I know you said that you did not have any communications, but I reached down into my heart and then I find it hard to believe that some kind of a wink and a nod was not said across the board that let's make this sound as painful as possible, whether it is in your department, the Justice Department, or Homeland Security or somewhere else. I do have a problem with that.

Also, I received a letter. I am from Pennsylvania, northeast Pennsylvania. I have 15 counties. One of my counties is Pike County, and they house illegal immigrants. They do a great job. They have been recognized for this. And as the letter states—it is dated March 1, 2013 from the commissioners of Pike County. And I am just going to very carefully read two sentences.

As you may know, on behalf of the Department of Homeland Security, Immigration and Customs Enforcement, immigration detainees have been housed in Pike County correctional facility since 1996. And the fact that in stark contrast, these numbers—and they go through to tell the numbers of how many they house and how many they are housing. Detainees housed in Pike County has been steadily declining since before the beginning of this year.

And you said as high as $164 per day to keep an illegal in prison in some situations. In Pike County, it costs $82.50 a day. They do a great job and they really have the cost down. Why not take advantage, more advantage of facilities like this and particularly in Pike County who built a whole new facility just to house these individuals?

Recently the number of detainees has decreased, as I stated to you. But can you account for the decrease since before the beginning of the year of detainees?

Mr. MORTON. Why do we not follow up with you on Pike County?

Mr. MARINO. I would appreciate that.

Mr. MORTON. We run over 250 different facilities.

Mr. MARINO. And I know that. Listen, when someone is asking me do I know everything that is going on in Congress, I have to say, no, I do not know everything that is going on in Congress. And as one prosecutor to another, I know your responsibilities are great.

Here is another question I have for you if I have time. Have you approached the United States attorneys in the respective districts and informed them that these people were going to be released, or were you told not to inform them? Did you have any communications with informing them or not informing them? Because I would find it hard to believe that you did not get some push back from U.S. attorneys on this.

Mr. MORTON. No, we have not notified the United States attorneys' offices of the releases, non-criminal or criminal. But remember, all of these people have been convicted and have served their time. We are talking about detention solely for removal purposes. We are not a penal institution.

Mr. MARINO. I understand that, but do you not think it would hurt morale? I was a former U.S. attorney. I know what my staff went through. I know how hard they worked. I know how they followed these cases through. And then just to simply release these individuals, it has got to be a morale-buster. I know I would have pushed back had I known about it, if I were the U.S. attorney. So you are saying there was no communication there?

Mr. MORTON. No. All I can say is I think from the U.S. attorneys' community perspective, we are prosecuting a record number of cases with them. We are removing a record number of——

Mr. MARINO. Okay, I understand that, sir. My time is limited.

Have you ever received any notification from up the chain that we do not want you picking up any more illegals in this country?

Mr. MORTON. Let me be clear on this. These releases are solely a determination by the Agency——

Mr. MARINO. I understand that. I clearly understand that. But the question was have you received any direction from up the chain not to detain any more illegal aliens in this country.

Mr. MORTON. No.

Mr. MARINO. I yield back. Thank you, sir.

Mr. GOODLATTE. I thank the gentleman.

The Chair recognizes the gentleman from Louisiana, Mr. Richmond, for 5 minutes.

Mr. RICHMOND. Thank you, Mr. Chairman, and thank you to the witness.

As I sit here and ponder my questions and I look at the title, the "Release of Criminal Detainees by U.S. Immigration and Customs Enforcement: Policy or Politics?", it begs the question whether the hearing itself is policy or politics because I have yet to hear someone ask if we are so worried about the releases, how much do you need so you do not have to release people. And you made these releases based on sequester.

If we were asking and we wanted to know what do you need as we do a CR and other things to keep Government going, what do you need so that you do not have to release anybody.

Mr. MORTON. I get asked this question all of the time, and it gets back to a recognition that the Agency is asked to do far more than Congress appropriates or could rationally appropriate to the Agen-

cy. We are in a situation where there are 11 million people, on average, who are here unlawfully, and the Agency has resources to remove about 400,000 a year, which is less than 4 percent. And it is why, at the end of the day, I think bipartisan efforts to come to some level of comprehensive immigration reform is the thoughtful way out. The Agency is never going to be able to detain and remove everybody as a matter of budget, nor does it make sense as a matter of policy.

Mr. RICHMOND. And as the Agency head, how do you plan and budget for a Government that is operating 60 and 80 days at a time, almost like a drunk frat house planning the next party?

Mr. MORTON. It is very difficult. Listen, I am the head of the Agency. I accept all of the criticism of the Agency on its behalf. But I will say we could have done a better job of notifying the Committees and explaining what we were doing. Let's be frank, however, we are dealing with a situation in which we had a 6-month CR, a sequestration imposed on top of that, and as of right now, I do not know what my budget will be for the next 6 months of the year. And the career men and women are doing the best job they can to use the funds that we have been given wisely in an awfully unique budget environment.

Mr. RICHMOND. And I am glad you brought up the fact that you are dealing with the CR's because it has been suggested that this is on you. But let's just take the time since I have been here the last 3 years. Was it your idea to pass a 14-day continuing resolution? Was it your idea to pass a 21-day continuing resolution or a 7-day or a 168-day or a 4-day, a 45-day, a 28-day, a 1-day continuing resolution and a 6-day? How do you adequately plan and run the Government or a branch of Government with CR's that go for that short amount of time? How do you adequately budget for that?

Mr. MORTON. It is very difficult. We err on the side of being conservative, as we have here, to make sure we are not deficient at the end of any given continuing resolution. It is difficult. We are a very large operation. We are taking in over 400,000 people a year, and it has to go on for the full year. And when you are in an environment where you do not know what your budget is going to be, when the various marks in the House or the Senate are different, when you are looking at sequestration, it is a challenge. And you do your best under the circumstances to come up with the right answer.

Mr. RICHMOND. As you went through the releases and as you sit here today, do you think that your department went through the necessary due diligence to make sure that the people who were released posed the least threat to our citizens and our constituents?

Mr. MORTON. The instructions to the field were clear. These decisions were made by career professionals in the field. So we did do the necessary due diligence in the sense of giving out good instructions. But we are going to follow through. This is not something that was done one day. We will continue to review these releases. If we made a mistake, we will take the person back into custody. I do not claim perfection for the Agency in each and every action it makes over a year. And we have made releases on the best judgments we could, on the record that was available, and if we get it

wrong upon review, we will take the person back into custody. We will put them on a different level of detention. We are doing that now.

Mr. RICHMOND. Thank you, Mr. Chairman. I yield back.

Mr. GOODLATTE. I thank the gentleman.

And the Chair recognizes the gentleman from Idaho, Mr. Labrador, for 5 minutes.

Mr. LABRADOR. Thank you, Director Morton. I actually had the privilege of working with ICE for 15 years as an immigration lawyer. We were on the other side, but I know what a difficult job you have and what a difficult job the men and women in your office have.

I do have a question. Was it your idea—just to follow up on the questions. Was it your idea to not pass a budget for 4 years?

Mr. MORTON. Obviously, budget decisions rest with the Congress of the United States.

Mr. LABRADOR. I just want to remind the people on the other side that it has not been this house who has not passed a budget, that it was the Senate that has not passed a budget in 4 years. But that is neither here nor there.

The gentleman from Pennsylvania asked you a line of questions. And the question today, was it policy or was it politics—can you at least understand why this question is being raised? I think you have acknowledged a little bit that you made some mistakes. Can you understand why this question is being raised?

Mr. MORTON. I have acknowledged that our notification of what we were doing with our Committees of oversight could have been better, and I take full responsibility for that as the Agency head. The buck stops with me.

Mr. LABRADOR. So you said the decisions were made by career officers, but you just told us that you had instructions to the field. Why were those instructions sent to the field?

Mr. MORTON. So the underlying decisions were made by career officers, both in the budget office and in ERO. Instructions were given to the field on how to carry out the releases, make sure they are non-mandatory——

Mr. LABRADOR. So these were not field officers. These were career officers in the——

Mr. MORTON. At headquarters.

Mr. LABRADOR. At headquarters in Washington. I just want to make that clear that this was not field officers making decisions. They were getting instructions from your office. Is that correct? Okay.

Now, your budget in 2009 was $4.9 billion. Your budget in 2010—it was $5.3 billion. Your budget in 2011 was $5.4 billion, and your budget in 2012 was $5.5 billion. So in the last 4 years, your budget has actually been raised by at least 10 percent. Is that correct?

Mr. MORTON. That is correct.

Mr. LABRADOR. So you are coming here and telling us that because you have to cut 5 percent of your budget, you cannot do the job that you were doing in 2009, 2010. Is that what you are telling us?

Mr. MORTON. No. I am telling you that we are operating at an all-time high both in terms of detention and the removals that we have——

Mr. LABRADOR. But you just testified that in 2009 and 2010, you were detaining about—you were deporting about 400,000 a year. You were taking credit, which I think you should, for the high numbers of deportation, and you had a budget that was actually less than what your sequestration budget is going to be.

Mr. MORTON. No. Our removals last year were the highest ever.

Mr. LABRADOR. Yes, but in the last 4 years, you have averaged 400,000 deportations, removals. Is that not correct?

Mr. MORTON. I did.

Mr. LABRADOR. And you did it with a budget that was bigger—actually smaller than the budget we are talking about right now with the 5 percent cut.

Mr. MORTON. I gave you an average for the year—for the 4 years. If I were to give you each year, it would be substantially less.

Mr. LABRADOR. So again, in 2009, you had 4.9 which is substantially less than what you have right now even with sequestration. In 2010, you had 5.3, which is about what you are going to have, and you were able to do your job.

Now, as a practitioner, I had an opportunity to work with people in detention quite a bit. I had thousands and thousands of clients. And when I look at these numbers, 2,228 were released, and you sent out this paper that says detention releases solely for budget reasons. But you are telling me that 1,599 of them had no criminal convictions. Is that correct?

Mr. MORTON. That is correct.

Mr. LABRADOR. So was that not something that you were going to do anyway, release the majority of these people regardless of your budget constraints?

Mr. MORTON. No.

Mr. LABRADOR. They were in removal proceedings. Correct?

Mr. MORTON. They are in removal proceedings. We do detain non-criminal immigrants who are, nonetheless, removable from the United States.

Mr. LABRADOR. And if they ask for a release, you make a determination, regardless of what the budget is, whether they should be released or not.

Mr. MORTON. An immigration judge makes that decision.

Mr. LABRADOR. But your field officers have the authority to release these aliens. Correct?

Mr. MORTON. That is correct. We have some discretionary authority ourselves, and then our determinations are reviewed by immigration judges. There are many instances in which we seek to detain somebody and an immigration judge, as you know, disagrees with us and orders us to release the person. And there are also cases that I referred to earlier where, as a matter of court ruling, we must release people, the Zadvydas case in particular.

I will just tell you, in addition to these 2,228 budget releases, we released about 150 individuals for special circumstances. The overwhelmingly largest group were people who were unremovable, Vietnamese, Cubans, people we could not get travel documents——

Mr. LABRADOR. My concern—I think Mr. Marino said it correctly. The way you went about this policy actually scared America instead of making America feel safe because I know you release people every single day, and it seems odd to me that since your single largest appropriation is for custody and detention, that you did not request reprogramming. And if detention is the single largest appropriation, then it follows that it is the highest priority of Congress. And if it is the highest priority of Congress and you know this, then why would you not ask for us to do something about this for reprogramming instead of trying to scare the American people and saying that because of sequestration, we have to release these people that you have the authority to release and have done in the past.

Mr. MORTON. Obviously, I do not agree that we were trying to scare America. We were trying to maintain our budget. And again, we were at the highest level of detention we have ever had and the highest level of removals we have ever had. We release people all of the time pursuant to statute, and we got to make good judgments with the resources we have on how we go about doing that. And that is what we are doing every day. We are going to continue to do it for the rest of the year. We will try to maintain whatever detention levels Congress provides. And it is not so simple when the largest appropriation we have is custody operations, and the next largest is criminal investigations.

Mr. GOODLATTE. The time of the gentleman has expired.

Director Morton, we still have four more Members who want to ask questions. So we have a vote on. We will recess. The gentleman from——

Mr. MARINO. Mr. Chairman, a point of order.

Mr. GOODLATTE. Do you have a unanimous consent request?

Mr. MARINO. Could I have this letter entered as part of the record?

Mr. GOODLATTE. Can you identify it for the record?

Mr. MARINO. Yes. It is the Pike County Commissioners, Pike County, Pennsylvania. The commissioners sent me a letter on some of my questioning pursuant to why Pike County illegal immigrant levels are down.

Mr. GOODLATTE. Okay, thank you. And without objection, that will be made a part of the record.

[The information referred to follows:]

PIKE COUNTY COMMISSIONERS
PIKE COUNTY ADMINISTRATION BUILDING
506 BROAD STREET
MILFORD, PA 18337
570-296-7613
FAX: 570-296-6055

RICHARD A. CARIDI
MATTHEW M. OSTERBERG
KARL A. WAGNER JR.
COMMISSIONERS

GARY R. ORBEN
CHIEF CLERK

THOMAS F. FARLEY, ESQUIRE
COUNTY SOLICITOR

Part of Record

March 1, 2013

Congressman Tom Marino
410 Cannon House Office Bldg.
Washington D.C., 20515

Congressman Marino,

We are compelled to present you with a burgeoning issue which is undeniably detrimentally impacting the Correctional operation in Pike County and to ensure that you are made aware of the significant fiscal impact locally. As you may know, on behalf of the Department of Homeland Security, Immigration Customs and Enforcement, Immigration Detainees have been housed in the Pike County Correctional Facility since 1996. To that end, we have continuously employed significant effort to meet or in many instances exceed all established mandatory federal detention standards. The Department of Homeland Security has espoused a well publicized requirement that these detainees must be housed in safe, clean, efficient and humane conditions of confinement. This fact is ostensibly the basis for the creation of and mandate to adhere to the newly distributed, "Performance based National Detention Standards" which are comprised of forty one (41) specific standards which detail eight hundred and eighty (880) components.

The Pike County Correctional facility has indeed met or exceeded these established detention standards, every year since 1996. The Pike County Correctional Facility has repetitiously received a "Superior" designation as a result of the annual standards compliance inspection. Several times the Pike County Correctional facility, one of hundreds of facilities housing I.C.E. detainees, was the only facility in the country to achieve this designation. In all regards, the Pike County Correctional facility exists as a prototypical correctional operation to house I.C.E. detainees in accordance with all established detention standards. In stark contrast, to these facts, the number of I.C.E. detainees housed in Pike County has been steadily declining, while robust detainee populations are being maintained in correctional facilities in the region which fail to attain established standards.

We contend that it is logical to maintain a relationship which has been forged over many years and has been mutually beneficial to the Federal government, I.C.E. Detainees, and the Citizens of Pike County. We see no validity to the intentional permanent removal of detainees from the Pike County Correctional facility, while significant detainee populations are being maintained elsewhere in sub standard conditions of confinement. Our Warden, Craig Lowe, has spoken to I.C.E. Philadelphia Field Office Director Thomas Decker, and has been advised that

although our detainee population has diminished steadily and significantly, and there is no plan of action, or intention to bolster our detainee population, which may be decreased even further.

In closing, we wish to ensure that you are aware of this fluid situation which has created an undeniable detrimental economic impact in Pike County. My contention is that comprehensive adherence to federal detention standards should equate to the Pike County Correctional Facility being utilized to house its design capacity of I.C.E. detainees. In light of impending sequestration, and the dire fiscal and economic crisis presently being portrayed in our country, should there not be a premium placed upon a facility in your Congressional District which exceeds federal detention standards, provides the superlative conditions of confinement being sought, and does so at a far lower cost per day than many other correctional facilities in our country?

Why would as much as one hundred sixty four dollars ($164.00) per day be spent to house a detainee in a substandard facility, when bed space is abundantly available in Pike County at a cost of eighty two dollars and fifty cents ($82.50) per day? Clearly an option to house criminal detainees appropriately while slashing the cost of detention is available, yet an unprecedented decision was made to release hundreds of criminal illegal aliens into our communities which has undeniably endangered American citizens. We contend that failing to utilize the Pike County Correctional Facility to its fullest potential is a disservice to taxpayers on both a local and national level. We humbly present this argument to you for your examination, and for the benefit of the citizens in your district and the citizens of the United States.

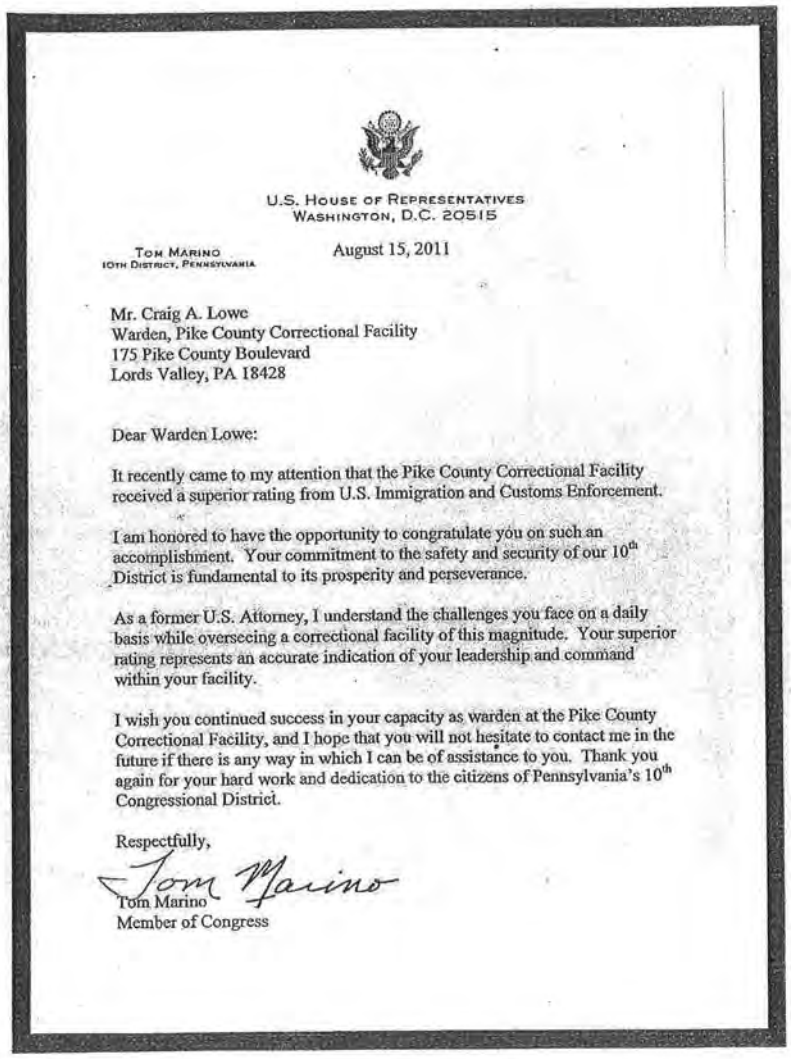
Respectfully,
Pike County Commissioners

Richard A. Caridi, Chairman

Matthew M. Osterberg, Vice Chairman

Karl A. Wagner Jr., Commissioner

Attachment
cc:
Congressman John Boehner (w/att.)
Congressman Lou Barletta (w/att.)
Senator Patrick J. Toomey (w/att.)
Senator Robert P. Casey (w/att.)
Senator Lisa Baker (w/att.)
Governor Tom Corbett (w/att.)
Representative Michael Peifer (w/att.)
Representative Rosemary Brown (w/att.)



U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, D.C. 20515

TOM MARINO
10TH DISTRICT, PENNSYLVANIA

August 15, 2011

Mr. Craig A. Lowe
Warden, Pike County Correctional Facility
175 Pike County Boulevard
Lords Valley, PA 18428

Dear Warden Lowe:

It recently came to my attention that the Pike County Correctional Facility received a superior rating from U.S. Immigration and Customs Enforcement.

I am honored to have the opportunity to congratulate you on such an accomplishment. Your commitment to the safety and security of our 10th District is fundamental to its prosperity and perseverance.

As a former U.S. Attorney, I understand the challenges you face on a daily basis while overseeing a correctional facility of this magnitude. Your superior rating represents an accurate indication of your leadership and command within your facility.

I wish you continued success in your capacity as warden at the Pike County Correctional Facility, and I hope that you will not hesitate to contact me in the future if there is any way in which I can be of assistance to you. Thank you again for your hard work and dedication to the citizens of Pennsylvania's 10th Congressional District.

Respectfully,

Tom Marino

Tom Marino
Member of Congress

Mr. GOODLATTE. The Committee will stand in recess until immediately after these votes.

[Recess.]

Mr. GOODLATTE. The Committee will reconvene and the Chair recognizes the gentleman from New York, Mr. Jeffries, for 5 minutes.

Mr. JEFFRIES. Thank you very much, Mr. Chair.

You know, I am a new Member here, and I think I am generally a pretty optimistic type of person. But oftentimes, many of the themes that we have seen over the last several months within this

institution—and I do not doubt the sincerity of several of our friends on the other side of the aisle. But many of the themes that we see that have been articulated suggest that the sky is falling, and so we are in the midst right now of debating what many of us view as a very draconian budget, that we are told if it does not get passed, the need for such austerity measures are designed to prevent the great United States of America from becoming Greece or Spain and perhaps something worse. The sky is falling.

We also on the Subcommittee had a hearing that I believe was entitled "The Obama Administration's Regulatory War on the Economy," very ominous because the sky apparently is falling, notwithstanding the fact that this Administration has created about 6 million private sector jobs.

And today there is a theme advanced by some—again, I am not questioning the good faith of any Member's views, but the theme is that criminals have been unleashed on the American public. And the question that has been posed is, is this policy or is this politics?

Now, I would note parenthetically that I believe in my reading of the Twenty-Second Amendment, Barack Obama is constitutionally prohibited from even running for office again because he was elected and re-elected. I am not sure how politics could even make their way into this discussion from the electoral context.

But putting that aside, the issue of whether criminals have recklessly been unleashed on the American public is an interesting one. And I gather about 2,228 people are at issue in terms of the release from detention. Is that correct, Mr. Director?

Mr. MORTON. That is correct, sir.

Mr. JEFFRIES. And that release took place between February 9 and March 1. Is that correct?

Mr. MORTON. That is correct.

Mr. JEFFRIES. And I believe you testified earlier today that there is no evidence, as far as you know, that any single one of those individuals, more than 2,000, who was released has engaged in criminal activity subsequent to that release. Is that correct?

Mr. MORTON. Not that I am aware of. That is correct.

Mr. JEFFRIES. Now, of course, that is not to say that someone may not engage in some form of destructive behavior at some point. These things are very difficult to predict scientifically. I am certain that your Agency—and under your leadership, you have attempted to do it to the best of your ability, as prosecutors and judges and people all throughout the American criminal justice system attempt to do.

But if I just might for a moment go through some of the releases that took place at the field offices. It is my understanding that about 342 detainees were released from the Phoenix field office. Is that correct?

Mr. MORTON. Yes. Arizona had 1 level 1, 30 level 2s, 91 level 3s, and 122 non-criminal.

Mr. JEFFRIES. Thank you. I do not know what is going on with this microphone.

Any evidence that a crime wave was unleashed on the people of Phoenix, Arizona?

Mr. MORTON. No. As I said earlier, we only have one level 1 offender on release in Arizona, and that individual is 68 years old and a lawful permanent resident for 44 years.

Mr. JEFFRIES. Okay. There is no documented evidence that the people of Phoenix, Arizona have been ravaged subsequent to the release of these individuals, is there?

Mr. MORTON. There is no indication of a crime wave. We are, obviously, going to pay attention to every single case, and as I said, if a case needs to have a different outcome, we will make that outcome.

Mr. JEFFRIES. 341 people were released from the San Antonio area. Any evidence that a crime wave has taken place subsequent to that release?

Mr. MORTON. Not that I am aware of. We had no level 1 offenders released in the State of Texas at all.

Mr. JEFFRIES. Okay. San Antonio was number 2.

Miami, number 4, 225 folks. Any evidence of a crime wave unleashed on the people of Miami?

Mr. MORTON. So far, we have had no evidence of serious misconduct.

Mr. JEFFRIES. And lastly, Chicago I believe was number 7 on the list. And I would note, interestingly enough, that—and I would like to ask unanimous consent, Mr. Chair, that an article in the Washington Post stated "Chicago's murder rate is finally falling. Can that keep up?" That that be entered into record.

Mr. GOODLATTE. Without objection, so ordered.

[The information referred to follows:]

The Washington Post Print

Chicago's murder rate is finally falling. Can that keep up?

By Dylan Matthews, Updated: March 6, 2013

Homicide rates fall across the country for the past two decades, but in Chicago, that trend has reversed in the past year. In 2012, the city saw 506 homicides, a 16 percent increase over 2011. In January 2013, there were 43 homicides, which, if repeated every other month, would have led to 516 homicides over the course of the year—even more than 2012. But thankfully, that pace didn't keep up. February saw a huge drop, with only 14 homicides reported, the lowest monthly total since 1957.

The Chicago Police Department claims that was achieved through "saturation policing," in which the police department identifies high-crime areas and then focuses districts' energies on them. In February, the CPD identified 10 zones, which account for about 2 percent of Chicago's land area but 10 percent of its violent crimes, and sent 200 officers on overtime patrols in those zones. The approach was a modified version of a policy that Mayor Rahm Emanuel and Commissioner Garry McCarthy had initially abandoned. *update: this paragraph originally cited 600 officers on overtime patrol; it's actually 200 every night. We apologize for the error.*

Former Mayor Richard Daley and Commissioner Jody Weis used two groups, called the Mobile Strike Force (MSF) and Targeted Response Unit (TRU), that had city-wide jurisdiction and were sent in to saturate neighborhoods experiencing spikes in crime; Emanuel and McCarthy broke up those units and dispersed their cops to districts. Those groups were widely criticized as abusive to the communities they arrived in, even if they were seen as effective. The new groups have specific geographic areas, with the hope being that they'll be more responsive to community interests than their predecessors.

Both "saturation units" and the MSF/TRU approach of Daley can be thought of as a form of what criminologists call "hot spot policing." David Weisburd (George Mason / Hebrew University) and John Eck (University of Cincinnati) define "hot spot policing" as "demand[ing] that the police identify specific places in their jurisdictions where crime is concentrated and then focus resources at those locations." That seems like a pretty good description of what Emanuel and McCarthy are up to.

So does it work? Weisburd and Eck identify five randomized controlled trials of hot-spot policing, all of which found positive effects. The Minnesota Hot Spots Patrol Experiment, conducted from June 1987 to June 1988, found that a hot spots strategy resulted in a 6-13 percent reduction in total crime reports. The Kansas City Crack House Raids Experiment, undertaken from November 1991 to May 1992, found an 8 percent net reduction in crime, though those results decayed as the strategy continued. A study in San Diego found that a kind of hot spots policing in which police raids are followed up with visits to landlords to make sure activity has not started up again results in a 60 percent reduction in crime, relative to having no follow-ups with landlords.

But the most interesting studies they highlight focus on a specific kind of hot spot policing, known as "problem-based" policing, which tailors police methods to particular problems (like drug dealing, or gang violence) and tries to incorporate other government services in the process. This is rather different from what Chicago is up to, and likely superior. Both randomized experiments in this area focused on Jersey City, N.J. One found that hot spot policing combined both with target-specific tactics (videotape surveillance of public spaces, confiscating guns stashed in public areas) and with social service intervention (including aid to the homeless, street trash removal, and better enforcement of liquor and housing codes) resulted in significant crime reduction. More interestingly, the second study compared a normal hot spot intervention to one that incorporated local regulatory agencies and "problem-oriented" tactics, and found the latter to be more effective.

There's good evidence to suggest that non-police resources can play an important role in reducing crime rates. The University of Chicago's Crime Lab evaluated a program called "BAM — Sports Edition," which provides 7th-10th grade boys with small group instruction in social and life skills in school, and sports programming after school. The study, which used a randomized design, found that the program reduced violent crime arrests by 44 percent. There's some evidence that good preschool programs can reduce crime rates overall, but it's mixed. Of the two marquee experiments on the topic, the Perry project found significant reductions in crime by age forty, while the Abecedarian project did not find any effects. Then again, the last follow-ups in Abecedarian were conducted when participants were only 21, so it's possible that a gap opened up later on.

The University of Chicago Crime Lab's Jens Ludwig has found that two other policies could be helpful as well in addition to a Chicago-style hot-spot approach. In a paper coauthored with Duke's Phil Cook, he suggests that "gang-based deterrence," in which gangs are collectively held responsible by police and other government and civil society respondents for violence committed by their members, might be more effective than targeting individual perpetrators. The Kennedy School's Anthony Braga, David Kennedy, Anne Piehl, and Lehman College's Elin Waring found that the Boston Ceasefire program, an intervention in the mid-1990s that used a gang-based approach, was associated with reductions in violence, though their evidence is non-experimental and cannot determine what specific parts of the ceasefire program caused the reductions.

Ludwig and Carnegie Mellon's Jacqueline Cohen have also argued that police patrols designed to confiscated illegal guns being carried in the street can be an effective crime policy. Like gang-based deterrence, highly rigorous experimental evidence doesn't exist on this topic, but their analysis of a Pittsburgh program found that it "may have reduced shots fired by 34 percent and gun shot injuries by as much as 71 percent in the targeted areas."

So Chicago's program uses methods that have a solid research body backing them up, but it could be stronger. It could be more tightly coordinated with social service agencies, more specifically tailored to gang homicide in the way suggested by the "problem-oriented" policing model, and combined with educational and other interventions that have also been shown to have effects.

The problem is that all these cost money. Harold Pollack, co-director of the Crime Lab with Ludwig, suggests that barring a federal program like Community Oriented Policing Services, cities may just not have the resources to do what's necessary. "Many innovative policing strategies are pretty labor-intensive," he says. "In the current budgetary environment, a program such as COPS might be necessary for either hot-spot policing or different community-policing approaches to really take hold." And with the federal government in a budget-cutting mood too, even that may be hoping for too much.

Mr. JEFFRIES. And this article notes that in January of 2013, prior to the release of these people who, I guess in the view of some, threatened the well-being of the American public—there were 43 homicides, which is at the high end. February, interestingly enough, saw a huge drop. Only 14 homicides, the lowest monthly total since 1957. Now, I am not suggesting there is a correlation between that low total and the release of these individuals. But any evidence that the people of Chicago, number 7 on the list, have been forced to endure a massive crime wave as a result of the release of detainees?

Mr. MORTON. No, sir.

Mr. GOODLATTE. The time of the gentleman has expired.

Mr. JEFFRIES. Thank you.

Mr. GOODLATTE. The gentleman from North Carolina, Mr. Holding, is recognized for 5 minutes.

Mr. HOLDING. Director Morton, it is good to see you. We worked together when we were both in the Department of Justice during the Bush administration, and I congratulate you on your promotion in the Obama administration. You always had a reputation for intelligence and professionalism and hard work during the times that I worked with you, and it is good to see you here today.

I want to follow up a little bit on some questions that Mr. Marino asked you earlier.

I assume all these detainees that were released are in various Federal districts. They either came from various Federal districts or were held in various Federal districts. And I understand it is your testimony that you did not consult with individual United States attorneys in those Federal districts when you were releasing detainees that would have come from them. Is that correct?

Mr. MORTON. That is correct, although most of the detainees that we receive on the criminal side are coming from State and local custody, just the sheer volume.

Mr. HOLDING. If I may interrupt—you know, the United States attorney is the chief Federal law enforcement in the district, and they would be your attorneys in each one of the Federal districts. Correct? You seek guidance from the United States attorney's office?

Mr. MORTON. On criminal prosecution matters? Of course.

Mr. HOLDING. And on civil matters.

Mr. MORTON. Yes, although they do not get involved in administrative removal matters.

Mr. HOLDING. But they would. For instance, if you had an EEOC claim or some sort of claim within your Agency, it would be the United States attorney's office who would be your lawyers and give you advice.

Mr. MORTON. They would, indeed. And I am a strong supporter of the United States attorney's office.

Mr. HOLDING. During my tenure as a United States attorney, we worked very closely with ICE. All Federal law enforcement struggles with funding and struggles with covering their mission with the amount of dollars that they have to do it. And I think the motto throughout the law enforcement family is that we just have to do more with less. One of the ways we were always able to work well together is because the RAC's and the SAC's from ICE and other Federal agencies kept us well informed as to what was going on.

I must say I find it incredibly unfortunate that you were not consulting with your individual United States attorneys when you made a decision of this nature. You know, the chief Federal law enforcement officer is charged with enforcing the laws within the district, the Federal laws. And for you to be releasing detainees is unfortunate.

But moving on to budgetary questions, you know, I understand that with the exception of the custody operations, ICE was operating under the presidential budget, not the budget set by Congress

under the continuing resolution. And as a result, all of the other accounts in ICE carried a balance of $240 million for the year and $120 million for the past 6 months. And additionally, your CFO indicated that ICE carried forward $100 million to $120 million in user fee balances.

Again, all Federal law enforcement is juggling and struggling to cover their core missions.

So why didn't ICE ever submit a reprogramming request to the appropriations rather than releasing detained illegal immigrants?

Mr. MORTON. With regard to the appropriations outside of the custody operations, we were pursuing a conservative approach. The reason we were pursuing a conservative approach is because we did not know what our budget would be for the rest of the year, and those funds are what is going to allow us to operate at a substantial level in those accounts for the rest of the year. And I did not want to move monies out of the other accounts. And again, the biggest one we have is domestic investigations. I want to make sure we are doing everything we can on child pornographers and drug traffickers and alien smugglers possible.

With regard to the user fee balance, we would have to get a reprogramming authority to use those funds. They are not available to us except for a very small amount, and there are restrictions on how they are used. And we are considering, as part of how we are going to deal with sequestration and whatever budget we get from Congress in the remaining 6 months of the year, using those user fee balances if we can get approval for them.

I will just note I understand we are below 34,000 right now in terms of our detention levels, but on average we have maintained during the non-sequestration portion of this CR an average balance of 33,925. The Agency was right where it needed to be in terms of what Congress asked of it.

Mr. HOLDING. Thank you, Mr. Chairman.

Mr. GOODLATTE. I thank the gentleman.

The gentleman from Florida, Mr. Garcia, is recognized for 5 minutes.

Mr. GARCIA. How are you doing, Director?

So I have got a few quick questions I want to ask you.

Several times you have made reference to robbing Peter to pay Paul. In real terms, what does it mean? Give me some examples of the kind of investigations and programs that you might need to cut to maintain 34,000 beds and still comply with sequester?

Mr. MORTON. Thank you.

ICE does two things. We are part of the immigration enforcement system, the administrative system, along with CBP and CIS. And we are also the principal criminal investigator for the Department of Homeland Security. In fact, we are the second largest criminal investigative agency in the Government. We have more special agents than we do immigration enforcement officers. And that work is important work. We are out there every day investigating border crimes, transnational crimes, child exploitation, and that work is critical to homeland security and to national security. We are the second largest Federal contributor to the Joint Terrorism Task Forces in the country outside of the FBI itself. Important work, needs to go on, and in my view we should not take and

divert resources from domestic investigations to the detention budget if that would mean fewer child exploitation cases, fewer special agents on the streets, fewer drug trafficking cases.

Mr. GARCIA. ICE has a mandate to maintain 34,000 detainees. How many individuals do you safely feel can be released under alternative detention?

Mr. MORTON. Well, the alternative detention program has an enormous amount of promise, and there is a very high rate of appearance for the full-service model. So long-term I think it is something that Congress should pay a lot of attention to, and I think it could help with some of the budget challenges that the Committee and other Committees are wrestling with.

The trick with alternatives to detention is to make sure that the case is heard quickly. The average cost of alternatives to detention on a full-service model is $7 a day compared to as much as $122 a day for detention. However, if the case takes much, much longer to be heard and decided, eventually you lose the benefit of that much lower rate.

Again, I think it is an important form. It was started back in 2002 during the Bush administration. It makes sense, assuming we can get the cases on ATD heard quickly.

Mr. GARCIA. Director, part of the——

Ms. LOFGREN. Mr. Chairman, there is something wrong with the microphones here.

[Pause.]

Mr. GARCIA. So there was made an allusion that for some reason you were doing this for political machinations. So I want to give an example because we had something happen because of budgetary reasons which have nothing to do with you. And there is a video we wanted to run. Do we have that?

[Video shown.]

Mr. GARCIA. Director, the reason I showed that is because I want the Members of this Committee to understand that you are doing a tough job under circumstances you did not plan for. We clearly did not expect to be here, and it is our responsibility as the Congress to find a way past this and to find agreement among ourselves.

What you are doing you are doing, I would imagine, to make sure you can carry out the duties and responsibilities of your office. Correct?

Mr. MORTON. That is exactly right.

Mr. GARCIA. There was an allusion made you did this same work last time and deported 400,000. You were about at the same number the year before that and I think the year before that. Correct?

Mr. MORTON. That is right.

Mr. GARCIA. I would assume that the first 400,000 were a little bit easier than the second 400,000, than the third 400,000, I would imagine.

Mr. MORTON. It is a challenge for us. We are trying to prioritize our efforts on those that make the most sense.

Mr. GARCIA. Thank you. I will yield back the balance of my time.

Mr. GOODLATTE. I thank the gentleman.

And the Chair recognizes the gentleman from Ohio, Mr. Jordan, for 5 minutes.

Mr. JORDAN. Thank you, Mr. Chairman.

Mr. Garcia, Director, said that there was no way you could plan for this and what was shown to us in the video. Why could you not plan for this?

Mr. MORTON. The challenge this year has been that we have had a 6-month CR. As you know, on March 27, our funding is going to run out. I trust that the Congress of the United States——

Mr. JORDAN. I am talking about sequester. When did sequester become law?

Mr. MORTON. The sequester took effect on March 1.

Mr. JORDAN. No, but when was it passed?

Mr. MORTON. The sequester has been around for quite some time, obviously.

Mr. JORDAN. August 2, 2011, 20 months ago. So the statement that you could not plan for it—I mean, it seems to me you got 20 months to plan for it.

When did your Agency start planning for sequester?

Mr. MORTON. Obviously, I think we, like most people, hoped that sequester would not become reality.

Mr. JORDAN. You cannot plan on hopes. You got to decide. The law said August 2. It said on January 1, 2013, the sequester is going to happen. You got a 2-month reprieve on that. It took place March 1. When did you start planning for what everyone knew the law said? Or is it the practice at ICE not to plan and make decisions based on the law of the land and say, oh, we hope it is not going to happen? When did you start planning?

Mr. MORTON. On the contrary. We are doing what the law requires in a very uncertain environment.

Mr. JORDAN. No, that is not the question. When did the folks at ICE—when did you start planning for a law that was enacted on August of 2011? Did you start August 3, 2011? Did you start sometime in 2012? Did you start March 2, 2013? When did you start?

Mr. MORTON. Remember, most of these releases were due to the CR.

With regard to sequestration, we began to plan in earnest at the beginning of this year.

Mr. JORDAN. So you waited until January of 2013?

Mr. MORTON. We waited until January, 2013——

Mr. JORDAN. So when did you make the decision to release the 2,228 detainees? When was that decision made?

Mr. MORTON. Well, the discussions on that have been ongoing since the beginning of this year. The actual——

Mr. JORDAN. More importantly——

Mr. MORTON [continuing]. Decisions were made——

Mr. JORDAN. Well, let me cut in here. I only got 5 minutes.

When did you decide that you were going to release the 629 who were criminals?

Mr. MORTON. The instructions went out on February 9.

Mr. JORDAN. February 9. And is that the same time you made the decision to release the 10 level 1 felons?

Mr. MORTON. The 8 level 1 felons——

Mr. JORDAN. Or 8 level 1 felons?

Mr. MORTON [continuing]. Yes—were part of that overall decision.

Mr. JORDAN. And do you think maybe if you would have started planning sometime before this year—you had 20 months to get ready for it—do you think maybe we would not have to release 2,228 detainees, 629 who were criminals, 8 who were level 1 felons? But do you not think that is maybe a question the American people would ask? Maybe if you started planning for this, when it actually became the law, maybe we would not have to let 8 felons on the street.

Mr. MORTON. Congress asked us to maintain an average of 34,000 beds over the period of the CR without sequestration, and we did exactly that.

Mr. JORDAN. You keep saying the CR, but in your testimony, you said both CR and sequestration had an impact on this decision.

Mr. MORTON. That is right. The sequestration resulted in a reduction of $300 million to ICE's budget.

Mr. JORDAN. And that is my point. You knew that was going to happen on August 2, 2011. If you maybe planned for it, maybe you would not have to release 8 level 1 felons on the street.

Mr. MORTON. I do not think that——

Mr. JORDAN. You just said a few minutes ago that you did not start planning for this until a few months ago.

Mr. MORTON. I disagree with your characterization that everyone felt that that was going to happen.

Mr. JORDAN. Did you not just say January of this year is when you started planning for the sequester?

Mr. MORTON. I disagree with your characterization that back in 2011, everyone felt that sequestration was going to happen——

Mr. JORDAN. I am not asking how you felt. I am asking what was the law of the land. And is it the practice for the Director of ICE to say, you know, what? We are not going to pay attention to what the law of the land says. We are going to wait because we think it might not happen. We are going to wait and not start to implement this, not start to plan for this until January of 2013, some 18 months later.

Mr. MORTON. We have to make good judgments and balance many uncertainties, one of which was sequester. Another was the CR, and another——

Mr. JORDAN. Who makes the final decision? Who made this decision to let the 8 felons back on the street? Is that your decision or is that someone else in the Department who makes that decision?

Mr. MORTON. No. The actual decisions on each case were made in the field.

Mr. JORDAN. In the field. What does that mean?

Mr. MORTON. That means by our local field officers.

Mr. JORDAN. Do you have to sign off on that?

Mr. MORTON. I do not.

Mr. JORDAN. Mr. Chairman, I yield back.

Mr. GOODLATTE. Will the gentleman yield? Would the gentleman from Ohio yield to me?

Mr. JORDAN. I forgot to do that. I would be happy to yield.

Mr. GOODLATTE. Thank you.

I just want to make the point that when you talk about the CR causing problems for you, you got the funding that you requested

to be able to maintain the mandate of 34,000 beds as a result of that.

Now, you have a 5 percent cut moving forward from March the first to the end of this year. That 5 percent cut, if you were to apply it—and I do not think you should apply it equally across the entire budget of your department, that you could make keeping criminal aliens in detention a priority. But assuming you went ahead with your decision, a 5 percent reduction of 34,000 would be a reduction of about 1,700 people. Now, you have already reduced it by 2,200, and we have a document that has already been admitted into the record that shows a plan to reduce it down to an average daily population of 28,248.

So this is well beyond what sequestration would require you to do, even assuming your policy objective of spreading your costs evenly across the entire department. I would not do that. I would look into these excess funds you have in other areas and use those to keep people in there and not release them onto the streets. If you need to work it down a little bit over time, wait until you have got people who have been processed through the system and been deported rather than putting them back out on the streets in the country.

But it is now an opportunity for, I think, the gentleman from Pennsylvania, Mr. Rothfus, to ask his questions. He is recognized for 5 minutes.

Mr. ROTHFUS. Thank you, Mr. Chairman.

And thank you, Director Morton, for being here today, and thanks for the hard work that you are doing at ICE and all the men and women are working for this country there.

A few questions I am trying to track down. Your written testimony stated that every individual released was placed on an alternative form of ICE's supervision. Is there a standard protocol for the level 1 offenders to have a certain type of alternative form of supervision?

Mr. MORTON. No, although generally a level 1 offender will receive more attention than someone else. Again, it is a case-by-case determination.

Mr. ROTHFUS. What kind of things would you be doing with a level 1 offender once they are released?

Mr. MORTON. Well, let me give you some examples. We would determine do they have any United States citizen children, how old are they, how long have they been in the United States.

Mr. ROTHFUS. Are these individuals given an ankle bracelet, something like that?

Mr. MORTON. Some of them may have an ankle bracelet. Some of them may have a bond. It depends——

Mr. ROTHFUS. So there is no standard protocol for a level 1 offender.

Mr. MORTON. No. The law allows us to pursue various forms of supervision.

Mr. ROTHFUS. You testified on March 14 before the Appropriations Committee's Homeland Security Subcommittee that there were 10, not 8—that there were 10 level 1 offenders that were released. Can you explain the discrepancy in your testimony today?

Mr. MORTON. Yes, I can. So that is correct. We testified that there were 10. As it turned out, when we reviewed every single one of the level 1 offender cases, two of the cases involved misclassification in the computer system and their criminal record was less severe than initially thought, and they were reclassified as level 2 offenders.

Mr. ROTHFUS. So you had eight level 1 offenders, four of whom have been apprehended.

Mr. MORTON. Four of whom are in our custody and four of whom remain——

Mr. ROTHFUS. Do you know where the other four are?

Mr. MORTON. I do, indeed.

Mr. ROTHFUS. And why are they level 1 offenders, do you know?

Mr. MORTON. I do. So there was the gentleman that I referred to earlier who was released in Arizona. He had convictions for theft offenses and drug offenses. He is 68 years old and has been in the country as a lawful permanent resident for 44 years, and an immigration judge found he was not a danger to the community.

There were two other releases from Illinois, larceny and criminal trespass. The individual has three United States children, one with a degenerative eye disease. An immigration judge found he too was not a danger to the community. The second Illinois case involved an immigration offense and misdemeanor offenses. He is 55 years old and has been in the country 34 years.

And the California case involved burglary, vandalism, and a DUI. He is a 23-year resident. Both parents are naturalized United States citizens, and he is on ATD with GPS monitoring 24/7.

Mr. ROTHFUS. Now, you testified that you had no communication with DHS leadership prior to the release of the individuals. Is that correct?

Mr. MORTON. That is correct.

Mr. ROTHFUS. Did anyone at ICE have any discussion with anybody at DHS leadership?

Mr. MORTON. Not that I am aware of.

Mr. ROTHFUS. Any discussion that you or anybody at ICE would have had with anybody at the Department of Justice?

Mr. MORTON. Not that I am aware of.

Mr. ROTHFUS. Any discussion that you or anybody at ICE would have had a discussion with somebody at the White House?

Mr. MORTON. Not that I am aware of.

Mr. ROTHFUS. Did you or anyone at ICE receive any talking points or messaging points from the White House on how to handle budget issues with respect to sequestration?

Mr. MORTON. We have certainly received instructions from the Office of Management and Budget on planning, how to execute sequestration were it to come to pass.

Mr. ROTHFUS. In fiscal year 2012, it looks like the appropriation that was allocated for custody operations was just over $2 billion, $2,500,000,000.

Mr. MORTON. Yes, sir.

Mr. ROTHFUS. Under the CR, that number is continued into fiscal year 2013 to at least March 27, irrespective of the sequester. The President requested $1.9 billion about for fiscal year 2013 for custody operations. Is that correct?

Mr. MORTON. Yes, sir.

Mr. ROTHFUS. Looking at the fiscal year 2012 number of $2,500,000,000, 5 percent of that number is $102 million. So that is the number I think we are looking at today with respect to your concerns of custody—we were talking about $300 million, but the number is really $102 million in the context of custody operations. Correct?

Mr. MORTON. For custody operations, it is a little over $100 million.

Mr. ROTHFUS. And you have already discussed that there is $120 million sitting out there in user fees that is being held.

Mr. MORTON. There is an unobligated balance in one of the user fees. It does not provide for spending in direct terms for custody operations, but it does allow—it could be used for some custodial——

Mr. ROTHFUS. How many meetings did you have with your CFO with respect to how to get through the budget——

Mr. MORTON. Excuse me. I did not——

Mr. ROTHFUS. How many meetings have you had with your CFO with respect to trying to work your way through this budget process?

Mr. MORTON. Oh, numerous.

Mr. ROTHFUS. And when did those meetings start?

Mr. MORTON. So the meetings have been ongoing for the last couple of weeks to make sure that we deal with sequester as it plays out. Obviously, we are still waiting on our funding for the next 6 months, and we want to make sure that we end the year here on March 27 within the appropriations directions that we have, less the money for sequester.

Mr. ROTHFUS. I yield back, Mr. Chairman.

Mr. GOODLATTE. I thank the gentleman.

The gentleman from Texas, Mr. Poe, is recognized for 5 minutes.

Mr. POE. Thank you, Mr. Chairman.

I think I am last. So your day is done with Congress as soon as I am through, I believe.

I want to go through the basics again. This decision was not made by the President. It was not made by the Secretary of Homeland Security, and this decision was not made by you. Is that correct?

Mr. MORTON. That is right. The decision was made by the career officials in ERO and in discussion with the CFO.

Mr. POE. So the financial folks made this decision basically.

Mr. MORTON. And the operational people responsible for it.

Mr. POE. And the people that have been released—you know who these people are. Is that correct? The 2,000-plus. We know who these people are.

Mr. MORTON. We as in the Agency.

Mr. POE. You.

Mr. MORTON. Yes.

Mr. POE. Could you furnish the names and country of origin to the Chairman?

Mr. MORTON. We——

Mr. POE. Could you do that or not? Either yes or no.

Mr. MORTON. Well, with the exception of personal identifying information that by law we are restricted from giving, we are providing——

Mr. POE. But that does not include their names or——

Mr. MORTON. We are happy to provide a summary of the cases, individual cases, and to the extent——

Mr. POE. Let me reclaim my time. I reclaim my time. You can give the names and the country of origin. You can do that. Correct?

Mr. MORTON. Do we know who these individuals are?

Mr. POE. Yes.

Mr. MORTON. Yes, sir.

Mr. GOODLATTE. If the gentleman would yield.

Mr. POE. Yes, I will.

Mr. GOODLATTE. I would just inform the Director. The Privacy Act does not apply to——

Mr. MORTON. I understand if the full Committee or the Chairman makes a request. I understand that.

Mr. POE. So the answer to my question is, yes, you can supply the names of the people and the country of origin to the Chairman if he requests. It is a simple question. You can do that.

Mr. MORTON. If the full Committee were to request it, yes.

Mr. POE. So the decision was made by the financial folks.

Now, my question to you is this. Do you understand, do you see that the way this was handled could scare the American public? I mean, have you got that message yet, or do you think that occurred? I will tell you it occurred in my district. It could not have been handled worse by allowing, all of a sudden, the press to know 2,000 people that are being detained are being released by your Agency, and you did not know about it. So I think it could not have been handled worse. I am not saying it was done on purpose to scare the people. I am saying the result occurred that way, that it did have the effects of scaring the American public.

I sent Secretary Napolitano a letter. She just, of course, did not respond. I gave you a copy of the letter last week or your staff. I would like for you to respond to these questions. I would like this letter filed for the record. I ask unanimous consent. Mr. Chairman, I ask unanimous consent.

Mr. GOODLATTE. Without objection, they will be made a part of the record.

[The information referred to follows:]

TED POE
TEXAS
2nd District

FOREIGN AFFAIRS COMMITTEE
Terrorism, Nonproliferation and Trade Subcommittee - Chairman
JUDICIARY COMMITTEE
Congressional Victims' Rights Caucus - Chairman
Immigration Reform Caucus - Chairman
P.O.R.T.S. Caucus - Co-Chairman

Congress of the United States
House of Representatives
Washington, DC 20515-4302
February 27, 2013

The Honorable Janet Napolitano
Secretary
U.S. Department of Homeland Security
Washington, DC 20528

Dear Secretary Napolitano,

I am very concerned about recent reports of the release of hundreds of detainees from the custody of Immigration and Customs Enforcement, and if such a release did in fact occur, I have serious questions on whether or not it was done lawfully. As Vice Chairman of the Immigration and Border Security committee of the House Judiciary Committee, I would like to request that the Department of Homeland Security provide me with the following information as soon as possible:

1. Who specifically at ICE authorized the release of the detainees?
2. What legal authority was the individual who ordered this release operating under?
3. Does this individual have the authority within the Department of Homeland Security to order such releases, and if so does the individual have to consult with Department of Homeland Security officials prior to making such an order?
4. How many individuals were released? What crimes had they committed?
5. What are the names of these individuals? What is their country of origin?
6. Where were these detainees released? Were the state and local authorities in the communities where the detainees released notified of their release?
7. Specifically, what kind of supervision will the individuals released be under?
8. What is the percentage of ICE detainees who are released from detention on supervision that return for their subsequent hearings?
9. Were any individuals at the Department of Homeland Security or the White House notified of this release prior to it taking place? If not, is it legal for ICE to take such an action on its own?
10. If it is your position that the ICE agent acted according to law, were all administrative procedures followed? If so, which ones?

I look forward to receiving this important information from you as soon as possible.

Sincerely,

TED POE
Member of Congress

Harris County East
1901 Kingwood Drive, Suite 240
Kingwood, TX 77339
Phone: (281) 440-0242
Fax: (281) 440-0252

Washington Office
2412 Rayburn House Office Building
Washington, DC 20515
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710 N. Post Oak Rd, Suite 510
Houston, TX 77024
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Fax: (713) 681-1150

Mr. POE. Thank you.

We have heard a lot about people being released, released, released. And 40 percent do not come back for whatever reason. They do not show up for their deportation hearing—many of those people. Because of budget restraints, because there is not enough room in the inn, the determination is made you are released until your deportation hearing, which may be a year from now or even longer, and 40 percent just do not show up.

Now, I was a judge in Texas for 22 years. I tried only felony cases. If I had a 40 percent non-return of people who were released on bond or pretrial release, they would have had me in jail for that.

So it seems to me we operate under a system where Border Patrol and ICE I think do a good job capturing folks, and then all of a sudden, they are released. And then they go to capture 40 percent of them again because they do not show up for their deportation hearing.

My question to you is this. Since this financial officer made this decision—and you did not make the decision, the Secretary of Homeland Security did not make this decision—can the financial officer just decide—do you think he has or she has the legal authority to release 30,000 of them? Do they have the legal authority? If they had legal authority to release 2,000, does the financial officer have the legal authority to release 20,000 or 30,000? You are a lawyer. Can you answer that question?

Mr. MORTON. I can. First, just to be clear, it was not the chief financial officer. It was the operational leaders of ERO in consultation with the chief financial officer.

Mr. POE. Can this group of people who released the individuals that you did not know about—can they just release 20,000? Do they have the legal authority to do that?

Mr. MORTON. The people who are mandatory detention must be detained.

Mr. POE. That is not most of these people, though, is it?

Mr. MORTON. The 2,228 individuals by definition the instructions were they could not be subject to mandatory detention. About two-thirds of the people in our custody right now are subject to mandatory detention and would need to be detained. Your scenario where we would release 30,000 people is not possible because the law directs us to——

Mr. POE. So they could release a third of them, though.

Mr. MORTON. We could release those people——

Mr. POE. In theory, you could release about a third of them, which is about 10,000.

Mr. MORTON. Those individuals that the law provides discretion for.

Mr. POE. It is a simple yes or no. Do you believe that your Agency has the legal authority without judicial intervention, Federal judge, immigration judge—without judicial intervention, do you have the legal authority to release that one-third, 10,000? Either you do or you do not.

Mr. MORTON. We have the legal authority to release people not subject to mandatory detention.

Mr. POE. And that is a scary thought.

I yield back.

Mr. GOODLATTE. I thank the gentleman.

Director Morton, I want to thank you. You have given 4 hours of your time, and I know it has not been your favorite experience.

But I will tell you that I am very concerned with how this has been handled. To me, here in the Congress, we are in the midst of a very concerted effort on both sides of the aisle, a bipartisan effort, to address the kind of immigration reform that many people in this

country think that we need to have and that you struggle with the problems of our current system every day.

Ms. LOFGREN. Mr. Chairman?

Mr. GOODLATTE. In the midst of this process, for the release, without any notification to the Congress of 2,200 criminal aliens, or a portion of which were criminal aliens, and the planned release, according to documentations here of several thousand more, is not helpful when one of the critical issues that we are going to have to deal with in the Congress is how to convince the American people that if we make the kind of immigration reform that is being discussed, that we provide legal status to millions of people—how will we convince them that this problem will not reset itself, it will not reoccur. What changes can we make? What guarantees can we give the public that our immigration laws will be enforced and we will not have millions of people not lawfully in the country?

Now, you have limited resources to address that and we certainly understand that. You have been given a mandate by the Congress to retain 34,000 people, and to say that lower level officials can automatically, not based upon individual circumstances of the people being detained, but based upon spending measures and the available funds, make this decision without ever even consulting with you, without ever even your consulting with the Secretary of Homeland Security, without ever considering that if the Congress has a mandate and you need the funds to meet the mandate, you should come to the Appropriations Committee and ask for the reprogramming of funds that are available and accessible for you to do that.

I think that given the set of circumstances we are in, it is an unfortunate set of circumstances that we find ourselves in, and this has not been helpful to that process because we have got to build the confidence of the American people that if we do comprehensive immigration reform in some way, shape, or form, we are going to address the enforcement side of this just as aggressively as we enforce the reforming of our legal immigration system and the reforming of what we do with people who are not lawfully here right now.

And I know the gentlewoman from California wanted me to yield to her, and I will do that.

Ms. LOFGREN. I thank the gentleman for yielding.

I think this has been a useful hearing getting the facts out. I do not disagree that this could have been handled in a better way. I think it raised alarms that were unnecessarily raised.

But the issue of a 40 percent failure rate, failure to appear rate, has been raised. That is from a 2007 IG report, and I am wondering if we could ask the department to report what is the current FTA rate, not right this minute, but subsequent to the hearing.

Mr. GOODLATTE. I think that is a fine request. We think there is more recent data, but we would also ask the Director, if that data is available for a more recent period than 2007, to provide that to us, if it is available to you. And if we have additional information, we will provide that to you as well.

I thank the gentlewoman for her question.

And I thank the Director again for his participation here today.

Without objection, all Members will have 5 legislative days to submit additional written questions for the Director or additional materials for the record.

And with that, this hearing is adjourned.

[Whereupon, at 4:56 p.m., the Committee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Material submitted by the Honorable Doug Collins, a Representative in Congress from the State of Georgia, and Member, Committee on the Judiciary

Congress of the United States
Washington, DC 20515

March 7, 2013

The Honorable Janet Napolitano
Secretary
Department of Homeland Security
3801 Nebraska Avenue, NW
Washington, D.C. 20528

Dear Secretary Napolitano,

Over the past few weeks U.S. Immigration and Customs Enforcement (ICE) undertook extraordinary measures to comply with cuts mandated by sequestration. The agency's decision to mass release illegal aliens detained in federal custody under the guise of budget cuts is both puzzling and alarming.

According to internal Department of Homeland Security (DHS) documents obtained by the *Associated Press*, ICE has systematically released over 2,000 illegal aliens since at least February 15. Despite Administration claims that only "non-criminals and other low-risk offenders who do not have serious criminal histories" were released, other reports have detailed a number of criminal aliens released through this maneuver. We are especially concerned that the *AP* report indicates a significant number of illegal aliens were released in Georgia.

Although ICE must cut 5.3 percent of its operating budget because of the sequester, releasing illegal immigrants back into the general public is an inappropriate way to save money and violates the DHS mission of ensuring the safety and security of the American people. Last Monday you said, "We're doing our very best to minimize the impacts of sequester, but there's only so much I can do." We fail to see how releasing 2,000 illegal aliens before sequestration went into effect on March 1 nor plans to release 3,000 more during March (as reported by *AP*), "minimize[d] the impacts of sequester."

In fact, your repeated failure to be forthcoming about the releases gives the impression that the decision was politically motivated. Specifically, when you testified before the Senate Appropriations Committee on February 14 about the impact of sequestration on DHS you spoke of cuts to Border Patrol agents and never mentioned that ICE was going to start releasing detained aliens the next day.

Additionally, we are highly skeptical of your claim that a low-level official orchestrated this extraordinary decision without your knowledge or approval. "Detainee populations and how that is managed back and forth is really handled by career officials in the field," you told *ABC News*.

Furthermore, other Administration officials continue to deceive the public on the severity of this decision. For example, White House spokesman Jay Carney said last Wednesday "a few hundred" illegal aliens were released. Then, on Friday ICE spokesman Brian Hale said, "ICE reviewed its detained population to ensure detention levels stay within ICE's current budget and placed several hundred individuals on methods of supervision less costly than detention."

We believe ICE should prioritize detention of illegal aliens, and find other methods of minimizing the impact of the mandatory sequestration cuts. For example, in 2012, ICE opened up a state-of-the-art detention facility in Karnes City, Texas. This facility contains a library with free Internet access, cable television, an indoor gym with basketball courts, soccer fields, and equipment for beach volleyball. The cost to build this complex was estimated to be over 30 million dollars.

In an effort to better understand how DHS implemented its plan for dealing with sequestration, we respectfully request that you provide detailed responses to the following questions:

(1) When was the decision made to release illegal aliens because of sequestration and what was the timeframe for the releases to occur? If there is a memorandum or other document detailing the specifics of the program, please include a copy.

(2) How many illegal aliens were released in Georgia and how many have criminal convictions? What are the specific crimes committed by the illegal aliens released in Georgia?

(3) ICE spokesman Brian Hale was quoted in the *AP* story as saying, "At this point, we don't anticipate additional releases, but that could change." Has DHS officially ended the program to release illegal aliens because of sequestration or is it only temporarily suspended?

(4) What is the oversight policy for tracking the released illegal aliens? What are the repercussions if an illegal alien violates the terms of his/her release?

(5) How much has DHS reduced its budget by releasing these illegal aliens? What are the costs and details of all "alternatives to detention" employed by ICE?

The Hon. Janet Napolitano
March 7, 2013

(6) Will DHS implement any budget cuts to facility maintenance, equipment maintenance, communications, or travel?

(7) Is there an official DHS policy to reduce the number of detention beds from a Congressionally-mandated 34,000 to less than 26,000?

(8) If DHS gets its budget restored to pre-sequestration levels, will the released illegal aliens be ordered back to detention centers or remain in the general public?

We respectfully request that you provide your responses to these questions no later than March 31, 2013. Thank you in advance for your cooperation and timely attention to this matter.

Sincerely,

Doug Collins
Member of Congress
Ninth District of Georgia

Lynn Westmoreland
Member of Congress
Third District of Georgia

Phil Gingrey
Member of Congress
Eleventh District of Georgia

Tom Graves
Member of Congress
Fourteenth District of Georgia

Paul Broun
Member of Congress
Tenth District of Georgia

Congress of the United States
Washington, DC 20515

March 19, 2013

Dear Secretary Napolitano:

We write in follow-up to our March 7, 2013 letter regarding the decision made by Immigration and Customs Enforcement's decision to mass release illegal aliens in federal custody. On March 14, 2013, ICE Director Morton testified at a House Appropriations Committee hearing that the agency released a total of 2,228 illegal immigrants from local jails "throughout the country" between Feb. 9 and March 1 for "solely budgetary reasons."

Previously, Administration officials, including White House spokesman Jay Carney and ICE spokesman Brian Hale, indicated that only a "few hundred" illegal aliens in federal custody were released. We are very concerned that the administration seems bent on misleading the public on the extent of the ongoing releases. Additionally, the administration initially claimed that those released did not pose a risk to the public. However, at the March 14th Appropriations Committee hearing, Director Morton acknowledged that among the immigrants released were 10 people considered the highest level of offender and numerous others were with multiple drunken driving offenses.

Our concern with this decision continues to intensify. We remain increasingly skeptical that these decisions continue to be orchestrated by low-level officials. In addition to the questions posed in our March 7 letter, we respectfully request that you provide detailed responses to the following questions:

(1) How many illegal aliens have been released from the North Georgia Detention Center in Gainesville? How many additional releases are planned from the North Georgia Detention Center? How much has the North Georgia Detention Center reduced its budget as a result of these releases?

(2) How many illegal aliens have been released from the Atlanta City Detention Center? How many additional releases are planned from the Atlanta City Detention Center? How much has the Atlanta City Detention Center reduced its budget as a result of these releases?

(3) How many illegal aliens have been released from the Irwin County Detention Center? How many additional releases are planned from the Irwin County Detention

Center? How much has the Irwin County Detention Center reduced its budget as a result of these releases?

(4) How many illegal aliens have been released from the Stewart Detention Center? How many additional releases are planned from the Stewart Detention Center? How much has the Stewart Detention Center reduced its budget as a result of these releases?

(5) Were any of the the 10 "level one" offenders released from a Georgia facility? If so, what were the specific crimes committed? Are there any plans to return them to detention?

We respectfully request that you provide answers to these questions, and the questions posed in our March 7 letter, no later than March 31, 2013. Thank you in advance for your cooperation and timely assistance in this matter.

Sincerely,

Doug Collins
Member of Congress
Ninth District of Georgia

Phil Gingrey
Member of Congress
Eleventh District of Georgia

Paul Broun
Member of Congress
Tenth District of Georgia

Lynn Westmoreland
Member of Congress
Third District of Georgia

Tom Price
Member of Congress
Sixth District of Georgia

Jack Kingston
Member of Congress
First District of Georgia

The Hon. Janet Napolitano
March 19, 2013

Austin Scott
Member of Congress
Eighth District of Georgia

Tom Graves
Member of Congress
Fourteenth District of Georgia

cc: John Morton, Director, Immigration and Customs Enforcement