



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

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For a Hearing on

**“Building an Immigration System Worthy of American Values”**

Submitted to the

**Senate Judiciary Committee**

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My name is Ahilan T. Arulanantham. I am a Senior Staff Attorney at the ACLU Immigrants' Rights Project and the Deputy Legal Director of the ACLU of Southern California. 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.

I have spent much of the last twelve years advocating on behalf of immigrants defending themselves against deportation while they are locked in our Nation's immigration prisons. During that time I, along with others at the ACLU, have filed cases to challenge many different unlawful practices, but each one has sought to fulfill the same basic constitutional promise that our Nation's founders made over two hundred years ago: that no "person" – not "citizen" – would be deprived of liberty without due process of law. Too often our immigration enforcement system does not live up to that promise, and the results are devastating, not only to the immigrants themselves, but also to their spouses and children - many of whom are American citizens and lawful residents - and to all of us who love this country, our Nation of immigrants.

## **I. Introduction**

The gap between our founders' promise and the reality of our immigration enforcement system begins in our immigration courts. The Supreme Court held more than one hundred years ago that deportation proceedings must be conducted consistently with the principles of fundamental fairness.<sup>1</sup> But that requirement often goes unfulfilled. The failings begin with a pernicious legal fiction: deportation is always considered a civil penalty, and therefore deportation hearings lack virtually all of the protections associated with criminal punishment, despite the potentially life-or-death consequences at stake for many immigrants. As a result, immigrants have no right to a prompt bail hearing, and in many cases no right to a bail hearing at all. They have no right to a speedy trial, and never go before a jury. Their cases are not presided over by a judge as we commonly think of judges – they are adjudicated by administrative law judges who serve at the pleasure of the Attorney General.

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<sup>1</sup> *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903) (holding that non-citizen facing deportation was entitled under the Fifth Amendment to "all opportunity to be heard upon the questions involving [their] right to be and remain in the United States").

Perhaps worst of all, the government recognizes no right to an appointed attorney in deportation proceedings for *anyone* – no matter how incapable of understanding the proceedings they are, no matter how complex their case, and no matter how serious the consequences of wrongful deportation may be. The depth of the injustice created by this feature of the system cannot be understated. Every day in our immigration courts trained Department of Homeland Security (DHS) attorneys argue for the deportation of unrepresented people who are unable to defend themselves adequately. Some of them have serious mental disabilities that make it impossible for them to understand the charges against them. They will be deported without the benefit of legal representation even though they may have lived here for decades and face separation from their U.S. citizen family members, the only support system they have ever known.

Every day, people who speak and read no English also present their claims for asylum with no legal representation, even though they have no understanding of our refugee laws, and even though they could face persecution or torture if deported. Even *children* suffer this fate – going before immigration judges on a daily basis with no attorney to assist them, while trained DHS prosecutors argue for their deportation. Surely a fair immigration system that reflected American values would give judges the power to appoint attorneys in cases such as these, rather than allowing 84% of prisoners in immigration jails to go unrepresented.<sup>2</sup>

An immigration system that upholds our values must also give judges the power to consider each potential deportation on an individualized basis, in order to decide if the drastic measure of banishing someone from our shores, sometimes forever, is actually appropriate. Immigration Judges or their equivalent had such authority for much of the twentieth century – and exercised it wisely – but their discretion was undermined by draconian provisions in legislation enacted almost twenty years ago, primarily the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Today, immigrants routinely face *mandatory* deportation as a result of offenses that the criminal justice system does not consider serious enough to justify a prison sentence. Virtually all controlled-substance crimes, minor theft offenses, and other crimes that in a fair system would not result in deportation at all can render individuals subject to mandatory deportation – beyond the reach of a judge’s discretion, no matter how compelling their equities.

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

Even people who served in our Nation’s military or are the sole caretakers of American citizen children *must* be detained and deported under our harsh immigration laws. As a result, the mandatory detention and deportation regime has had devastating consequences for our families and communities, and in particular on many U.S. citizen children.<sup>3</sup>

The legal fiction by which deportation does not constitute punishment appears even more absurd once an immigrant enters the immigration prison system, where DHS incarcerates people while their immigration cases are presented to the courts.<sup>4</sup> These prisons are technically civil detention centers, rather than criminal incarceration facilities, but that distinction disappears inside their locked walls. Just like other prisoners, immigration detainees sleep in locked cells wearing prison jumpsuits, unable even to hug their loved ones for months or years on end because they are not allowed “contact” visits. As DHS correctional expert Dr. Dora Schriro explained in a report published in October 2009, “[w]ith only a few exceptions, the facilities that [Immigration and Customs Enforcement (ICE)] uses to detain aliens were built, and operate, as jails and prisons to confine pre-trial and sentenced felons.”<sup>5</sup>

Members of the public commonly assume that these prisons are reserved for the worst of the worst – violent “criminal aliens” serving long sentences, or perhaps undocumented recent border crossers who will shortly be deported. In fact, nothing could be further from the truth. Over 30,000 people each day, and about 400,000 each year, are locked up in immigration prisons. Many of the inmates are lawful permanent residents or others with a legal status that DHS lawyers are trying, often unsuccessfully, to strip away.

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<sup>3</sup> American families have been separated in devastating numbers: between July 2010 and September 2012, 23 percent of those deported—204,810 individuals—were parents of U.S. citizen children. From a snapshot survey taken in 2011, at least 5,200 children were in foster care as a result of their parents’ deportation. Seth Freed Wessler, *Nearly 205K Deportations of Parents of U.S. Citizens in Just Over Two Years*, COLORLINES, Dec. 17, 2012, available at [http://colorlines.com/archives/2012/12/us\\_deports\\_more\\_than\\_200k\\_parents.html](http://colorlines.com/archives/2012/12/us_deports_more_than_200k_parents.html); Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System, Applied Research Center, Nov. 2011, <http://arc.org/shatteredfamilies>

<sup>4</sup> An immigration system that upholds our values must also increase the percentage of deportation cases that go before a neutral judge – now, more than half of those deported never even see a courtroom. Doris Meissner et al., *Immigration Enforcement in the United States: The Rise of a Formidable Machinery*, Migration Policy Institute, (Jan. 2013), available at <http://www.migrationpolicy.org/pubs/enforcementpillars.pdf>

<sup>5</sup> In October 2009, correctional expert Dr. Dora Schriro, who served as DHS Secretary Napolitano’s Special Advisor on ICE Detention & Removal and as Director of the ICE Office of Detention Policy and Planning (ODPP), presented DHS with her comprehensive report, *Immigration Detention: Overview and Recommendations*, available at <http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf>, 2-3.

Nearly half the people in immigration prisons have never been convicted of any crime, and all of those who have been convicted finished serving their sentence *before* being transferred to immigration custody. They remain imprisoned only because they are immigrants. Many other immigration prisoners are refugees who have never been charged with any crime, having fled from Sri Lanka, Indonesia, Guatemala, and other countries torn by civil strife, only to be imprisoned upon arrival in our country while we process their asylum applications (even as we hold ourselves out as a beacon of freedom for those fleeing persecution). But our federal government imprisons them in a sprawling network spread across the country, run not only by DHS, but also by a mix of private prison companies and local police and sheriff's departments.

My testimony today expresses the ACLU's strong support for immigration reform that will reflect our Nation's founding promise. Our immigration laws should treat each person who aspires to enter and remain in this country with the dignity, respect, and fairness they deserve and our Constitution requires.

## **II. Jose, Melida, Raymond, and Warren**

Today's hearing is about building an immigration system worthy of our values. I begin by sharing a few stories that exemplify how our system falls short in that regard:

Jose Antonio Franco-Gonzalez is a 32-year-old son of two lawful permanent residents. Eleven of his twelve siblings live in the United States, and all of them either have or are in the process of obtaining legal status. His three eldest brothers are already United States citizens.

Jose has moderate mental retardation; a condition defined by an IQ level of between 35 and 55. He did not learn to speak until he was six or seven years old. He does not know his own birthday or age. He has trouble recognizing numbers and counting, and cannot tell time.

On April 16, 2004, Jose was arrested in conjunction with a fight where he was accused of throwing a rock. Four months later he pled guilty to a charge of assault with a deadly weapon (non-firearm), although his criminal attorney explicitly declined to join in the plea. He was sentenced to 365 days in jail. When his sentence was complete, the government transferred Jose from criminal to immigration custody and began removal proceedings.

A few weeks later, a psychiatrist evaluated Jose and determined that "he had no clue as to what type of court Your Honor presided over, what the possible outcomes might be, or how to defend himself at trial. Diagnostically, he has a Severe Cognitive

Disturbance, probably life-long, secondary to development disability. In view of this, it is impossible for him to stand trial.” But this determination did not entitle Jose to the appointment of an attorney. Instead, on June 6, 2005, an immigration judge ordered the administrative closure of Jose’s removal proceedings, citing his inability adequately to represent himself, and he was sent back to his detention cell, where he remained for the next *four and a half years*. Despite the fact that there were no open removal proceedings against him, Jose remained incarcerated without an attorney or a release hearing.

Only after his case came to the attention of pro bono attorneys in December 2009 was Jose set for a hearing before a judge. Even then, DHS did not agree to release him. Only after we filed a federal lawsuit challenging his nearly five-year detention was Jose finally able to return to the care of his family.

Jose’s deportation case remains pending, but the fundamental defect in our system that produced the horrific miscarriage of justice he suffered remains in place. While Jose now has pro bono representation in his deportation case, our government still lacks any system for ensuring that people who are unable to adequately represent themselves are appointed legal representation. The federal government spent what we estimate, based on ICE detention cost averages, to be nearly \$300,000 imprisoning Jose. With that same money, it could have hired more than one lawyer to represent not only Mr. Franco, but dozens of other immigrants who also deserve a fair day in court.

While appointing lawyers for those who obviously need them would drastically improve our immigration justice system, we also must restore the power of judges to consider each individual’s case on its own merits. Take, for example, Aaron (a pseudonym), a long-time lawful permanent resident of the United States who faces deportation to Haiti for one conviction from 2005 for selling \$20 of marijuana to an undercover policeman. Although he was only required to serve 45 days in jail for the crime, it is deemed an “aggravated felony” under amendments to the immigration laws enacted in 1996, and therefore bars him even from seeking any discretionary relief from removal – including asylum.

As a result, the present immigration law renders Aaron’s deportation mandatory, and virtually certain. The law ignores the fact that Aaron has lived in the United States for nearly fifteen years, and that he lived with and supported his long-term U.S. citizen girlfriend, their two-year-old U.S. citizen daughter, and her three U.S. citizen children. Nor does it make any difference that Aaron’s girlfriend suffers from sickle-cell anemia and cannot work, or that their young American daughter carries the sickle-cell anemia gene and is in poor health. Every day the children ask their mother “when is Daddy

coming home?” but no one has the heart to tell them the answer under our current immigration laws: never.<sup>6</sup>

The law governing incarceration of immigrants while their cases remain pending in the immigration courts is also extremely harsh and often irrational. Consider the case of Melida Ruiz, a 52-year old grandmother who was imprisoned for seven months at the Monmouth County Jail in New Jersey. Ms. Ruiz is a longtime lawful permanent resident with three U.S. citizen children and two U.S. citizen grandchildren. ICE officers came to her home and arrested her in the spring of 2011. Under the draconian “mandatory detention” provisions enacted in 1996, Ms. Ruiz could not be released from immigration prison because she had a nine-year-old misdemeanor drug possession offense for which she had not even been required to serve any jail time. This drug possession offense was her only conviction during the thirty years she had lived in the United States.

Ms. Ruiz obviously posed no danger to anyone or flight risk, and she was eligible for various forms of discretionary relief from removal. Yet under DHS’s interpretation of the immigration detention laws she could not be released while her case remained pending. It did not matter that she was the primary source of support for a number of American citizens, including her mother who suffers from Alzheimer’s disease, her 17 and 11-year-old daughters, and her 5-year-old granddaughter.

It took the immigration courts seven months to adjudicate Ms. Ruiz’s case, during which she remained in prison. When she finally received her day in court, the Immigration Judge granted her application for cancellation of removal, emphasizing 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 reunited with her family, but her story compels us to ask why her family had to endure seven months of hardship before that day could come, and why taxpayers spent approximately \$34,650 to keep her locked up.<sup>7</sup>

While just over half of the people in immigration prisons have criminal convictions – many just as minor as Ms. Ruiz’s drug possession offense – many others have no criminal history at all. Yet they too spend months, and sometimes years, behind bars.

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<sup>6</sup> Notes from emails and phone calls with “Aaron’s” attorney, Susan Pai, on 3/15 and 3/18, on file with the ACLU.

<sup>7</sup> Case information provided by attorney Leena Khandwala, from the Law Offices of Claudia Slovinsky, on file with the ACLU.

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

Even though Reverend Soeoth posed no danger or flight risk, had never been arrested or convicted of any crime, and had the right to continue litigating his case in both immigration and federal court, he spent over two-and-a-half years in an immigration prison while the courts decided whether or not to reconsider his asylum claim. During that time, he never received a hearing before an Immigration Judge to determine whether his detention was justified. Instead, the decision on whether or not to release him was left to DHS officials who did not even interview him, let alone conduct a hearing. Unsurprisingly, they concluded after each review that he should remain detained, leaving Reverend Soeoth separated from his wife, his community and his congregation. Because his wife could not maintain the store that the couple had jointly run, she was forced to shut it down – all because our government would not give him a 15-minute bond hearing in front of an Immigration Judge.

In February 2007, after we filed a petition in federal court to obtain a bond hearing for Reverend Soeoth, the court ruled in our favor. After two-and-a-half years in detention, he finally received a bond hearing and was ordered released by an Immigration Judge. He has lived in his community – back with his wife and his congregation – ever since, without doing harm to anyone. He ultimately returned to his position as a congregational leader, won the right to reopen his case, and will likely be granted asylum.

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

Like many Gulf War veterans, Warren returned from the war with symptoms that were only later diagnosed as Post-Traumatic Stress Disorder (PTSD). His sister recalls that she “was shocked to see how much Warren had changed.” He was anxious, had



recurring nightmares about killing people, and would wake up in a cold sweat. He became withdrawn and thought about suicide constantly.

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

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

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

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Each of these individuals has suffered injustice at the hands of our immigration enforcement system. Below we describe several easy-to-accomplish legal changes that would bring greater fairness to that system, and should be included in Congress' immigration reform.

### **III. Legal Principles**

Efforts to bring the immigration system into conformity with our Nation's values and constitutional requirements should focus on four areas:

·*First*, we must ensure legal representation for immigrants who are unable to represent themselves adequately in deportation cases, and we must give Immigration Judges authority to appoint counsel whenever necessary to ensure fair proceedings.

·*Second*, we must restore the authority of judges in the system – both Immigration Judges and federal judges – in several ways. We must ensure that more cases go before Immigration Judges before deportations occur, and give those judges authority to consider all the equities – both positive and negative – for each individual facing deportation. We must also ensure robust judicial review of Immigration Judge decisions in federal courts.

·*Third*, we must significantly limit the extent to which we imprison people while the courts process their deportation cases. This will require both an end to irrational mandatory incarceration and the provision of prompt bond hearings before Immigration Judges for people subject to prolonged imprisonment while their deportation cases are pending.

·*Finally*, for those who remain in immigration prisons despite these reforms, we must work to achieve truly civil detention centers by dramatically improving conditions of confinement. No one should be subject to inhumane conditions of detention, regardless of why they remain imprisoned.

#### **a. Ensuring Legal Representation in Immigration Courts**

One of the most critical reforms for ensuring fairness in our immigration system is the provision of legal representation to those who are unable adequately to represent themselves. As any immigration lawyer or judge knows all too well, immigration law is notoriously technical and continually changing – comparable to the tax code in its complexity, as federal judges have often observed.<sup>8</sup> Given that DHS is represented by a trained immigration prosecutor at every removal hearing in immigration court, several federal courts have recognized that, in at least some cases, the immigrant must also be represented in order to ensure fair proceedings.<sup>9</sup>

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<sup>8</sup> *Castro O’Ryan v. INS*, 847 F.2d 1307, 1312 (9<sup>th</sup> Cir. 1987).

<sup>9</sup> *United States v. Campos-Asencio*, 822 F.2d 506, 509 (5<sup>th</sup> Cir. 1987) (holding that “an alien has a right to counsel if the absence of counsel would violate due process under the fifth amendment” because, in some cases, “the laws and regulations determining [an alien’s] deportability [a]re too complex for a pro se alien”) (citing *Partible v. INS*, 600 F.2d 1094, 1096 (5<sup>th</sup> Cir. 1979)); *Aguilera-Enriquez v. INS*, 516 F.2d 565, 568 n.3 (6<sup>th</sup> Cir. 1975) (“[W]here an unrepresented indigent alien would require counsel to present his position adequately to an immigration judge, he must be provided with a lawyer at the Government’s expense. Otherwise ‘fundamental fairness’ would be violated.”); see also *Lin v. Ashcroft*, 377 F.3d 1014, 1034 (9<sup>th</sup> Cir. 2004) (holding in the context of unaccompanied minors in immigration proceedings that “[a]bsent a minor’s knowing, intelligent, and voluntary waiver of the right to counsel, the IJ may have to take an affirmative role in securing representation by competent counsel.”)

The appellate court decisions recognizing that legal representation may be required in at least some immigration cases are consistent with basic constitutional principles involving the right to appointed counsel in civil cases. While the Supreme Court has recognized categorical rules requiring appointed counsel in all criminal cases where the defendant is sentenced to prison and, similarly, in the civil context of juvenile delinquency proceedings,<sup>10</sup> in other civil contexts the Court has adopted a case-by-case approach. In those areas, which include parole revocation proceedings, parental termination proceedings, and civil detention as a sanction for contempt of court, judges must determine whether or not appointed counsel is necessary in any given case by balancing several factors, including the interests at stake for the litigants and the complexity of the proceedings.<sup>11</sup>

Despite what common sense and this robust body of precedent tell us the Constitution requires, the immigration courts have no system for providing legal representation to immigrants who cannot afford it, even if their need for assistance is plain as day. I have spent the last three years working to fix this defect in our system just for one particularly vulnerable group – people with serious mental disabilities within the immigration prison system in Washington State, California, and Arizona.<sup>12</sup> DHS detains hundreds such people on any given day, but refuses to provide them attorneys if no pro bono attorney can be found. The human cost of this failure is devastating. People like Mr. Franco and others literally become lost in our immigration prison system, wasting years of their lives because we fail to accommodate their needs.

These cases also undermine the integrity of the immigration court system as a whole. Consider Ever Francisco Martinez-Rivas, a lawful permanent resident of the United States with a long history of schizophrenia and other psychiatric disabilities. He was convicted after a fight with his stepfather, for which DHS now wants to deport him. The Immigration Judge wanted to ensure fairness in his courtroom, so he ordered Mr. Martinez's case dismissed after no lawyer was found to take the case despite months of delay. But DHS appealed, leaving Mr. Martinez to defend by himself the decision finding him unable to proceed. That absurd travesty of justice was resolved only because Mr. Martinez happened to be a plaintiff in our federal lawsuit, and the federal judge ordered the government to find him a lawyer or dismiss its deportation case.

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<sup>10</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that appointed counsel is a fundamental right essential to a fair trial under the Sixth and Fourteenth Amendments); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (extending *Gideon* to all cases involving incarceration as punishment); *In re Gault*, 387 U.S. 1, 41 (1967) (requiring appointed counsel in juvenile delinquency proceedings);

<sup>11</sup> *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (parole revocation proceedings); *Lassiter v. Dep't Soc. Serv.*, 452 U.S. 18 (1981) (parental termination proceedings); *Turner v. Rogers*, 131 S. Ct. 2507 (2011) (civil contempt proceedings).

<sup>12</sup> *Franco-Gonzalez v. Holder*, CV 10-2211-DMG (C.D. Cal.).

There should not be serious dispute about the need for appointed legal representation for people with serious mental disabilities in deportation cases. The National Association of Immigration Judges has highlighted “the serious need for reform and resources in this area.” As they explained, “[counsel] level the playing field in our proceedings and help us assure that justice is served in each and every matter that comes before us.”<sup>13</sup>

Immigration Judges recognize that individuals with severe mental disabilities face insurmountable obstacles in navigating the immigration system without counsel. As judges know, such individuals are often unable to provide the court with even basic information like place and date of birth, or contact information for their family, if they have any. Others have valid claims to remain in the United States, but are unable to articulate those claims due to their disabilities. The need for reform to ensure legal representation for such individuals is obvious and overdue.

Besides the clear harm to these individuals, their families, and the integrity of our immigration justice system, we must also consider the financial cost of the present approach. Information obtained from the government in the *Franco* litigation shows that DHS identified, for the three covered states, approximately 50 people in the last year who Immigration Judges determined to be unable adequately to represent themselves, and therefore in need of lawyers. During that 12-month period, DHS spent over \$450,000 detaining those 50 plaintiffs *after* they were identified as unable to represent themselves. In other words, DHS spent nearly half a million dollars to detain people it could not proceed against because they had no lawyers, while the government searched in vain to try to locate lawyers to represent them. A single lawyer’s salary – at an annual cost of about \$50,000 – could have paid for the representation of *all* of those people.<sup>14</sup>

People with serious mental disabilities are not the only group clearly deserving of legal representation in immigration court. Remarkably, DHS also conducts removal proceedings against *children* without providing them attorneys. Although the government has taken significant steps to try to ensure that all children obtain pro bono counsel, and many do, it remains true that children proceed in immigration court every day without attorneys. A system that reflects America’s values would not leave children helpless and alone before the courts while a trained DHS prosecutor argues for their removal. And the same is true for people who assert claims to U.S. citizenship in their deportation proceedings, people who have made credible claims that they will face persecution or torture in their home countries, and others who deserve legal representation given the stakes involved and the complexity of their cases.

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<sup>13</sup> Letter of January 11, 2012 to the House of Representatives, on file with the ACLU.

<sup>14</sup> This information is based on documentation provided by the government to counsel for the Plaintiffs in *Franco*, on file with the ACLU.

For these and other reasons, the American Bar Association (ABA) concluded that in immigration courts “[t]he lack of adequate representation diminishes the prospects of fair adjudication for the non-citizen, delays and raises the costs of proceedings, calls into question the fairness of a convoluted and complicated process, and exposes non-citizens to the risk of abuse and exploitation by ‘immigration consultants’ and ‘notarios.’”<sup>15</sup> The disparity in justice is particularly apparent in asylum cases. Asylum-seekers who have legal representation are three times as likely to be granted asylum.<sup>16</sup> That grim statistic reflects an obvious truth: in too many cases, asylum-seekers who fled to the United States from far-away lands to escape torture or persecution in their homeland cannot effectively present their claims in immigration court without legal assistance. In expedited removal cases, which truncate proceedings by denying immigrants the opportunity to appear before an immigration judge, the disparity is even starker: only 2 percent of unrepresented asylum claimants were granted relief as opposed to 25 percent of represented claimants.<sup>17</sup>

Just as in the cases of people with serious mental disabilities, the failure to provide legal representation to individuals with strong claims for relief results in a waste of government resources. An Office of Inspector General study concluded that 23% of all case continuances in removal cases were granted by Immigration Judges to allow the immigrant time to find an attorney, while another 21% were granted to allow the immigrant time to prepare. These continuances averaged 53 and 66 days each, respectively. For detained cases, each such continuance cost the taxpayer between \$8,745 and \$10,890. In other words, just a few continuances in one case cost as much money as a single attorney who could represent dozens of people each year.<sup>18</sup>

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<sup>15</sup> ABA Commission on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*. (2010), 5-8, available at <http://new.abanet.org/immigration/pages/default.aspx>. The ABA has used the term “notario fraud” as an umbrella description of a variety of methods by which “[i]ndividuals who represent themselves as qualified to offer legal advice or services concerning immigration or other matters of law, who have no such qualification, routinely victimize members of immigration communities.” Notarios have the equivalent of a law license in many Latin American countries and get easily confused with notaries in the United States.

<sup>16</sup> Human Rights First, *U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison* at 8 (2009) available at <http://www.humanrightsfirst.org/pdf/090429-RP-hrf-asylum-detention-sum-doc.pdf>.

<sup>17</sup> *Reforming the Immigration System*, *supra*, at 5-9.

<sup>18</sup> Office of the Inspector General, *Management of Immigration Cases and Appeals by the Executive Office for Immigration Review*, (October 2012) at 30, available at: <http://www.justice.gov/oig/reports/2012/e1301.pdf>. Further evidence of the cost savings associated with the provision of legal information to pro se detainees comes from the Legal Orientation Program. Funded by the Executive Office for Immigration Review, the program has shown the ability substantially to reduce case processing times, and thereby generate significant savings in detention costs. See EOIR report of April 4, 2012, transmitted on July 2, 2012 by the Department of Justice to the Chairwoman and Ranking Member of the Senate Committee on Appropriations’ Subcommittee on Commerce, Justice, Science, and Related Agencies pursuant to the requirements of the Conference Report accompanying the Consolidated

Immigration Judges should have the authority to decide whether the provision of legal representation is necessary to ensure justice in the cases before them; the Constitution requires no less. Providing such authority would both improve the efficiency of the immigration courts at a time of fiscal restraint and bring our deportation system into line with our values; it should be a top priority in any legislation.

#### **b. Restoring Fairness and Individualized Justice in Deportation Cases**

Asking vulnerable immigrants to defend themselves against trained DHS prosecutors is compounded by another fundamental flaw in our immigration court system. Too often, the law imposes categorical penalties that tie the hands of decisionmakers – both prosecutors and judges – making it impossible for them to tailor outcomes to the individual equities of each case. This lack of individualized consideration is a gross injustice in a system designed to determine when a person should be expelled from the United States.

The Supreme Court has repeatedly taken note of the severity of deportation as a sanction, calling it “the equivalent of banishment or exile,”<sup>19</sup> that “may result ... in loss of both property and life, or of all that makes life worth living.”<sup>20</sup> As Justice Murphy eloquently explained in 1945, “[t]he impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence. A deported alien may lose his family, his friends and his livelihood forever. Return to his native land may result in poverty, persecution and even death. There is thus no justifiable reason for discarding the democratic and humane tenets of our legal system and descending to the practices of despotism in dealing with deportation.”<sup>21</sup> The removal system remains a stark exception to our fundamental constitutional value of proportionality in criminal and civil sanctions. The result has been the deportation of countless long-time U.S. residents for relatively minor offenses or despite compelling and heartbreaking equities, with untold devastation to U.S.-citizen family members and American communities.

Any genuine immigration reform must address this serious defect in how justice is administered in the deportation system, in at least four ways:

*First*, Congress should reform the extraordinarily overbroad deportability grounds in the Immigration and Nationality Act (INA). A conviction for an “aggravated felony” – a true misnomer if there ever was one because such a conviction need not be

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and Further Continuing Appropriations Act, 2012 (P.L. 112-55). While not a substitute for appointed counsel, LOP should be expanded to cover all immigration detention facilities.

<sup>19</sup> *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010)

<sup>20</sup> *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

<sup>21</sup> *Bridges v. Wixon*, 326 U.S. 135, 164 (1945) (Murphy, J., concurring)

aggravated or a felony – leads categorically to removal with only the narrowest of exceptions. Twenty-one subsections of 8 U.S.C. § 1101(a)(43) define the term “aggravated felony,” which has expanded repeatedly since its creation in 1990. An “aggravated felony” can be a misdemeanor, a conviction for which the defendant served no time in prison or jail, any of a large group of non-violent offenses, or a conviction that is years, or even *decades*, old.

An individual convicted of an “aggravated felony” is ineligible for virtually all relief from deportation, including commonly available forms such as cancellation of removal for lawful permanent residents, which is based on length of residence and a demanding standard of hardship to qualifying relatives. If convicted of an aggravated felony, one cannot even apply for such relief. Thus, for lawful permanent residents charged with deportability based on an aggravated felony, removal is almost always certain, regardless of the individual equities and mitigating circumstances surrounding the crime, the extent of rehabilitation, or the hardship to others that would arise from the deportation. This approach forces ICE attorneys and Immigration Judges alike to close their eyes to critical individual circumstances.<sup>22</sup>

*Second*, Congress should reform the INA to restore the power of immigration courts to grant relief based on the equities when an individual is determined to be deportable. Prior to the passage of IIRIRA in 1996, lawful permanent residents who were deemed deportable could nonetheless be permitted to remain in the United States through forms of discretionary relief based upon an immigration judge’s weighing of the equities. IIRIRA eliminated most such forms of relief for lawful permanent residents with aggravated felony convictions, regardless of any individual equities. For example, IIRIRA replaced the relief formerly available under 8 U.S.C. § 1182(c) (“212(c) relief”) with cancellation of removal, 8 U.S.C. § 1229b, which is unavailable to people convicted of aggravated felonies. In IIRIRA, Congress also reduced the discretion of immigration judges to grant discretionary relief to non-LPRs who had resided in the United States and whose removal would cause substantial hardship to themselves or their family members.

Lucia Medina Martinez’s case provides a compelling example of how the limitations on Immigration Judges’ discretionary authority have produced grave harm that is inconsistent with our Nation’s values. Ms. Martinez came to the United States in 1994 when she was 15. She has six U.S. citizen children. In 2004, she married a man and they had four children together. Two years later, Lucia’s daughter from a previous relationship told her that her husband had been molesting her. Distraught, Ms. Martinez

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<sup>22</sup> In addition, an aggravated felony conviction renders a noncitizen ineligible for asylum, and in some cases for nondiscretionary relief such as withholding of removal. One can identify at least nineteen distinct immigration consequences of aggravated felonies. *Ledezma-Galicia v. Holder*, 636 F.3d 1059, 1079 n.24 (9th Cir. 2010).

kicked her husband out and sought the advice of her pastor. Her pastor told her to take her husband back in because “he was the father of four of her children, including a newborn baby, and because he was her husband.” She reluctantly accepted this advice for three weeks, but then sought additional counseling through her church. This time, the counselor, with Ms. Martinez’s permission, contacted the police.

Ms. Martinez’s husband was arrested and sentenced to 15 years in prison, but authorities also charged Ms. Martinez with child neglect because she failed to report the incident earlier. She pled no contest, believing that would allow her children to return to her care as soon as possible, and was sentenced to two days imprisonment as well as probation and community service.

What Ms. Martinez did not know was that her offense carried grave immigration consequences. ICE began proceedings to deport her based on her unlawful presence, and argued that her conviction for child neglect rendered her ineligible for cancellation of removal for non-LPRs. The immigration courts agreed, and the U.S. Court of Appeals for the Eleventh Circuit upheld the agency’s decision.<sup>23</sup> However, the court described its result as “profoundly unfair, inequitable, and harsh” and urged the Attorney General “to closely review the facts of this heartbreaking case once again.” The opinion continued: “Simply put, this case calls for mercy than the law permits this Court to provide. . . . Under the peculiar facts of this case, removing Martinez and her six young children to Mexico, a country in which they no longer have any relatives, would work an extreme hardship on a family that has already been forced to endure domestic abuse, the molestation of a child by her step-father, and the incarceration of a father and husband.”<sup>24</sup>

Federal judges should not have to rubber-stamp patently unjust deportation orders such as this one. Instead, our immigration laws should restore to judges – both at the administrative level and in the federal courts – the power to consider each individual’s equities and to do justice where the circumstances demand it.

*Third*, another serious defect contributing to the unfairness of immigration court proceedings arises from the government’s failure to produce information necessary to the immigrant’s case. DHS attorneys routinely take the view that the government bears no obligation to produce discovery in immigration court, and Immigration Judges are largely powerless to impose sanctions for violations of their orders. In addition, despite the plain language of the INA and the clear holding of *Dent v. Holder*, 627 F.3d 365 (9th Cir. 2011), the ACLU has received reports that DHS attorneys refuse to provide immigration files to detainees unless they file a Freedom of Information Act request, and in some cases refuses to provide files at all except where the litigant claims U.S.

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<sup>23</sup> *Martinez v. U.S. Atty. Gen.*, 413 F. App’x. 163 (11th Cir. 2011).

<sup>24</sup> *Id.* at 168.



citizenship. Congress should exercise its oversight function to ensure that immigration court proceedings are not hampered by such tactics, which both create inefficiency and needlessly conceal information from the judge in whose hands a family's future rests.

*Finally*, restoring individualized justice to the removal system must be accompanied by the constitutional backstop of adequate Article III judicial review. Congress should maintain and restore the power of Article III courts to review removal orders by the Executive Branch, in keeping with the constitutional guarantee of due process, the historic Writ of Habeas Corpus, and separation of powers.

Historically, immigrants facing a loss of liberty have had access to the federal courts to ensure that the government's actions are fair and consistent with the law, and that no one is erroneously detained or deported. In 1996, however, that changed, as Congress drastically restricted judicial review of deportation orders. Although minor improvements were made in 2005, the current laws still severely restrict judicial oversight over the immigration system. A lack of meaningful judicial oversight would be problematic in any area of the law. It is particularly problematic in the immigration sphere, where an individual's liberty is at stake and frequent errors are inevitable due to the lack of counsel, legal complexity, and the overwhelming number of cases handled by each Immigration Judge.

A comprehensive restoration of judicial review would allow the immigration system to be subject once again to the same oversight that exists in other areas of the law – areas where far less is often at stake. Doing so will not only bring our immigration justice system back in line with our history and governing constitutional principles, but will also eliminate unnecessary litigation over the scope of current jurisdictional limitations, which wastes the time and resources of the government and federal courts. Importantly, restoring judicial review would not permit the federal courts to second-guess each decision by an Immigration Judge or the Board of Immigration Appeals. Traditional principles of deference would continue to apply. But under the current system, the federal courts are powerless to correct manifest abuses of the law – even in cases involving longtime lawful permanent residents with U.S. citizen spouses and children. That is unacceptable in a country that prides itself on adhering to the rule of law.

### **c. Limiting ICE's Prison System**

Building an immigration system consistent with our Nation's values also requires that we dramatically limit the inhumane immigration prison system. Most Americans do not realize that DHS runs a vast parallel prison system of its own – known as the immigration detention system – which imprisons hundreds of thousands of people annually in about 250 authorized facilities across the country.

Although immigration detention facilities are generally indistinguishable from prisons,<sup>25</sup> individuals held there are *not* serving criminal sentences. Indeed, 40% or more of immigration detainees have never been convicted of any crime.<sup>26</sup> 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.<sup>27</sup> And even for those whom ICE seeks to deport because of a previous criminal conviction, the majority of convictions triggering immigration detention are nonviolent or otherwise classified as less serious under the immigration laws.<sup>28</sup>

All immigration detainees facing removal for a criminal offense have already completed serving their criminal sentences; they are detained only because they are immigrants. Indeed, ICE classifies most immigration detainees as “low custody” or having a “low propensity for violence,” and views them as posing no threat.<sup>29</sup>

The immigration prison system has exploded over the course of the last two decades. In 2002, the former INS detained 202,000 individuals, already a sizable increase from 85,730 detainees in 1995.<sup>30</sup> By 2011, that number more than doubled

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<sup>25</sup> The Schriro report noted that “[w]ith only a few exceptions, the facilities that ICE uses to detain aliens were built, and operate, as jails and prisons to confine pre-trial and sentenced felons.” Schriro, *supra*, 2-3.

<sup>26</sup> Elise Foley, “No Conviction, No Freedom: Immigration Authorities Locked 13,000 In Limbo.” (Jan. 27, 2012) (“Forty percent of those held by ICE on October 3, 2011 had not been convicted of a crime, nor were they awaiting criminal trial.”). According to ICE data, only 46 percent of detainees had a criminal record in FY 2011. Doris Meissner et al., *Immigration Enforcement in the United States: The Rise of a Formidable Machinery*, Migration Policy Institute, (Jan. 2013), 128, available at <http://www.migrationpolicy.org/pubs/enforcementpillars.pdf>

<sup>27</sup> 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](http://trac.syr.edu/phptools/immigration/charges/deport_filing_charge.php)

<sup>28</sup> 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*.

<sup>29</sup> See Schriro, *supra*, at 2. 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 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](http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Jails-and-Jumpsuits-report.pdf)

<sup>30</sup> Donald Kerwin and Serena Yi-Ying Lin, *Immigrant Detention: Can ICE Meet Its Legal Imperatives and Case Management Responsibilities?* (Migration Policy Institute, Sept. 2009), 7, available at <http://www.migrationpolicy.org/pubs/detentionreportSept1009.pdf> ; 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>

again, to 429,000.<sup>31</sup> Whereas detention beds in FY 2003 numbered 18,000,<sup>32</sup> the current level of 34,000 is an 89% increase, with nearly half of those beds contracted from private prison companies.<sup>33</sup> Immigrants who do not pose any flight risk or public safety concern are routinely detained despite the enormous cost of \$2 billion to U.S. taxpayers annually (up from \$864 million eight years ago).<sup>34</sup>

Congress fosters the costly over-use of detention by its inefficient and unnecessary micromanagement of ICE detention beds. FY 2012 DHS appropriations legislation increased the number of beds to their current level of 34,000.<sup>35</sup> 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 to the community, who should be detained.

The massive expansion of immigration prisons has been fueled by the assumption that incarceration is necessary to ensure removal. Yet alternative forms of supervision are available that would allow the government to deport detainees who lose their cases, without the same economic and human costs. However, despite the civil, non-punitive purpose of immigration detention and statements by the Administration recognizing that purpose, ICE continues to rely on an overwhelmingly penal model of incarceration, including prolonged and mandatory detention policies at odds with due process, humane treatment, and fiscal responsibility.

#### **d. Ending Prolonged Detention Without Bond Hearings**

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<sup>31</sup> DHS Office of Immigration Statistics, *Immigration Enforcement Actions: 2011*. (Sept. 2012), 4, available at [http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement\\_ar\\_2011.pdf](http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement_ar_2011.pdf)

<sup>32</sup> DHS, Office of Inspector General, *Detention and Removal of Illegal Aliens*. (Apr. 2006), 5.

<sup>33</sup> Detention Watch Network, “The Influence of the Private Prison Industry in the Immigration Detention Business.” (May 2011), 1, available at <http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/PrivatePrisonPDF-FINAL%205-11-11.pdf>

<sup>34</sup> DHS FY 2012 Budget Justification, ICE Salaries and Expenses, 938, available at <http://www.dhs.gov/xlibrary/assets/dhs-congressional-budget-justification-fy2012.pdf>; *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> By adding 1200 beds to the administration’s request, Congress’s enacted budget added expenditures of \$54 to \$72 million.

<sup>35</sup> 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](http://www.gpo.gov/fdsys/pkg/BILLS-112hr2055enr/pdf/BILLS-112hr2055enr.pdf)

Under DHS's interpretation of the immigration laws, thousands of individuals like Reverend Soeoth and Warren Joseph face years of imprisonment in the immigration detention system while their cases are pending. Most of them never even receive a bond hearing at which they can *ask* a judge to determine whether they need to be locked up.

The rules governing release from immigration prison while cases are pending are critically important because of the time it can take to resolve an immigration case. While some cases are decided quickly, many others can take years to finish, often because of systemic failures for which DHS and DOJ are largely responsible. The backlog of immigration cases in the immigration court system reached a historic high in September 2012 and is currently more than 23 percent higher than at the end of FY 2010.<sup>36</sup> In FY 2012, cases were pending an average of 531 days on the immigration court docket.<sup>37</sup> Immigration court case receipts that year topped more than 410,000 matters, with 36 percent of completions being detained cases.<sup>38</sup>

While the Constitution requires that there be some judicial review of deportation cases, the time required for judicial review often adds more than a year to the process.<sup>39</sup> Thus, immigrants routinely lose years of their lives waiting for their cases to finish. Even if they win before the Immigration Judge, they can remain imprisoned for years while DHS litigates an appeal. One of my clients was imprisoned for more than four-and-a-half years despite having won twice before the Immigration Judge.

The Supreme Court addressed immigration detention pending completion of removal proceedings several years ago, ruling in *Demore v. Kim* that the detention without bond hearings of immigrants convicted of certain crimes was constitutional where such detention was "brief" and the detainee had conceded deportability.<sup>40</sup> In reaching that conclusion, the Court relied on data establishing that the vast majority of immigration detentions, or 85 percent, lasted an average of 47 days or less, while the remaining 15 percent lasted approximately 5 months because they involved an administrative appeal.<sup>41</sup>

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<sup>36</sup> TRAC Immigration, Immigration Court Backlog Continues to Inch Upward in January (Feb. 13, 2013), available at [http://trac.syr.edu/immigration/reports/latest\\_immcourt/#backlog](http://trac.syr.edu/immigration/reports/latest_immcourt/#backlog)

<sup>37</sup> TRAC Immigration, Immigration Court Backlog Continues, *supra*.

<sup>38</sup> EOIR FY 2012 Statistical Year Book, A1-A2, available at <http://www.justice.gov/eoir/statspub/fy12syb.pdf>

<sup>39</sup> See *INS v. St. Cyr*, 533 U.S. 289, 300 (2001) (holding that some judicial intervention is "unquestionably" required in deportation cases); Judicial Business of the U.S. Courts, Table B-4C Median Time Intervals for Merit Terminations of Administrative Agency Appeals, (2012), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/B04CSep12.pdf> (reporting median time of 13.3 months from filing to final disposition of administrative agency appeals)

<sup>40</sup> See 538 U.S. 510, 513 (2003); 8 U.S.C. § 1226(c).

<sup>41</sup> *Demore*, 538 U.S. at 529.

A snapshot look at immigration detentions some eight years later reveals that the amount of time spent in immigration prison has greatly increased. Although the average detention length for FY 2011 was 29 days,<sup>42</sup> as of January 2, 2012, 3,427 individuals in ICE custody had spent more than 90 days behind bars; 2,952 individuals had been incarcerated for six months or longer, and 844 for one year or more. Some individuals whose cases remained pending had been detained as long as four or five years. In one published Ninth Circuit case, an individual spent *seven years* in immigration detention before he ultimately won his case.<sup>43</sup>

While the Supreme Court has yet to address such prolonged detentions, the lower courts have largely found that due process requires bond hearings for immigrants who face the threat of prolonged detention.<sup>44</sup> These courts have recognized that individuals in DHS custody have a profound liberty interest in avoiding years of incarceration while their immigration cases remain pending. Because of the weighty liberty interest involved, due process requires that civil immigration detention be reasonably related to its purpose of ensuring appearance for removal, and also that such detention be accompanied by adequate procedural safeguards to ensure that this purpose is served in each imprisoned immigrant's case.<sup>45</sup>

The existing immigration detention system fails to satisfy these constitutional requirements. Immigration court proceedings are often delayed because immigrants have no right to appointed counsel, and immigrants are often incarcerated in remote locations where they cannot obtain representation. Many of these individuals pose no flight risk or

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<sup>42</sup> <http://www.ice.gov/doclib/foia/reports/ero-facts-and-statistics.pdf>

<sup>43</sup> ICE data obtained through the Freedom of Information Act and on file with the ACLU; *Casas-Castrillon v. DHS*, 535 F.3d 942 (9th Cir. 2008).

<sup>44</sup> See, e.g., *Casas-Castrillon*, 535 F.3d at 950; *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005) (both construing § 1226(c) as only authorizing detention for “expeditious” removal proceedings in order to avoid the serious constitutional problem of prolonged mandatory detention); *Diouf v. Napolitano*, 634 F.3d 1081, 1091 (9th Cir. 2011) (construing § 1231 to require a bond hearing at six months, when detention becomes “prolonged”); *Ly v. Hansen*, 351 F.3d 263, 271-72 (6th Cir. 2003) (construing § 1226(c) as only authorizing mandatory detention for the period of time reasonably needed to conclude proceedings promptly); *Welch v. Ashcroft*, 293 F.3d 213, 224 (4th Cir. 2002) (holding, prior to *Demore*, that “[f]ourteen months of incarceration . . . of a longtime resident alien with extensive community ties, with no chance of release and no speedy adjudication rights” to be impermissible); *Diop v. ICE/Homeland Security*, 656 F.3d 221 (3d Cir. 2011) (holding that Section 1226(c) authorizes detention without a bond hearing for only a reasonable period of time); *Flores-Powell v. Chadbourne*, 677 F. Supp. 2d 455, 468-71 (D. Mass. 2010) (construing § 1226(c) to implicitly require that removal proceedings be completed within a reasonable period of time; if not, detention can only continue after an individualized determination of flight risk and dangerousness); *Alli v. Decker*, 644 F. Supp. 2d 535, 539 (M.D. Pa. 2009) (noting “the growing consensus . . . throughout the federal courts” that prolonged mandatory detention raises serious constitutional problems).

<sup>45</sup> *Zadvydas v. Davis*, 533 U.S. 678, 690-91 (2001); *Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011); *Diouf v. Napolitano*, 634 F.3d 1081, 1092 (9th Cir. 2011).

danger to public safety, yet frequently, like Reverend Soeoth and Warren Joseph, they never receive a bond hearing to determine whether their detention is even necessary. They may well have substantial challenges to removal from the United States — indeed, Reverend Soeoth and Mr. Joseph both won their cases — yet they are forced to endure years of incarceration as the price for pursuing their legal right to live in this country.

Indeed, government data recently disclosed to the ACLU through discovery in *Rodriguez v. Robbins*,<sup>46</sup> a class action in the Central District of California, suggests that individuals with the strongest cases are the most vulnerable to prolonged incarceration. An analysis of approximately 1,000 individuals detained six months or longer in the Los Angeles area shows that more than 70% applied for relief, and approximately a third won their cases. The data also confirm that detention length increased for class members who prevailed in their cases. Individuals who won their cases faced an average detention length of 320 days, for those with only immigration court proceedings, and 509 days for those who prevailed before the BIA—periods that stretch far beyond the one-and-a-half to five months the Supreme Court contemplated for removal proceedings in *Demore*.<sup>47</sup>

Currently the government subjects several groups of immigrants to long-term imprisonment while their cases are being decided without providing them the basic due process of a bond hearing. The government takes this position even though nothing in the immigration statutes authorizes long-term detention without immigration judge review in run-of-the-mill immigration cases. Such prolonged incarceration raises serious due process concerns.

Contrary to what many observers assume, the problems arising from extended detention are not limited to immigrants whose criminal records subject them to mandatory custody. DHS also interprets the existing laws to foreclose bond hearings for many people with no criminal history.

For example, I represented a Sri Lankan Tamil torture victim whose first name I share—Ahilan Nadarajah—who managed to escape Sri Lanka and sought asylum in our country. He was stopped at the border and detained for nearly five years despite being granted asylum twice, because the government repeatedly appealed his victories and kept him locked in detention. The prolonged detention of asylum-seekers is particularly tragic, as it leads to the re-traumatization of individuals who have already suffered torture and persecution.<sup>48</sup> Ahilan was released only after the U.S. Court of Appeals for the Ninth

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<sup>46</sup> 2:07-cv-03239-TJH-RNB (C.D. Cal.)

<sup>47</sup> *Demore*, 538 U.S. at 529.

<sup>48</sup> See generally, Physicians for Human Rights and the NYU/Bellevue Center for Survivors of Torture, *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers* (June 2003); see

Circuit, speaking through a unanimous and ideologically diverse panel, ruled that his detention was unlawful because of its length, and because there was almost no chance the government would remove him in light of the Immigration Judge’s rulings in his case.

We know that asylum-seekers typically have no criminal history, and often have relatives lawfully present in the United States. Yet under current detention policies, even those who win asylum, withholding of removal, or relief under the Convention Against Torture from an Immigration Judge may be detained for years while the government appeals their cases. Similarly, lawful permanent residents (LPRs) often have strong legal claims and deep ties to our country, including U.S. citizen spouses, children, and parents. Nonetheless, Immigration Judges are currently prohibited from granting bond to such asylum-seekers and returning LPRs, thus ensuring that many of them will remain detained for months, or even years, while their cases remain ongoing, even if they present no flight risk or danger to the community.

Another client of mine, a Senegalese computer engineer named Amadou Diouf, spent nearly two years in detention while his case dragged on, even though he was married to a United States citizen and had been convicted of only one crime—possession of less than 30 grams of marijuana, which is not a deportable offense. DHS charged him with overstaying his visa, but their custody review process nonetheless found him unsuitable for release based on his marijuana conviction and lack of family ties. Again, he was released only after a federal judge ordered that he be given a bond hearing. He ultimately won his immigration case.

The Ninth Circuit’s opinion in Mr. Diouf’s case, issued by another unanimous and ideologically diverse panel of judges, explained clearly why bond hearings before Immigration Judges are an important procedural protection that we must not abandon: “Diouf’s own case illustrates why a hearing before an Immigration Judge is a basic safeguard for aliens facing prolonged detention . . . . The government detained Diouf in March 2005. DHS conducted custody reviews . . . in July 2005 and July 2006. In both instances, DHS determined that Diouf should remain in custody pending removal because his ‘criminal history and lack of family support’ suggested he might flee if released. In February 2007, however, an Immigration Judge determined that Diouf was not a flight risk and released him on bond. If the district court had not ordered the bond hearing on due process grounds, Diouf might have remained in detention until this day.”<sup>49</sup> This is but one example of the federal courts’ wider recognition that there is “no evidence that Congress intended to authorize the long-term detention of aliens without providing them

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*also Human Rights First, In Liberty’s Shadow: U.S. Detention of Asylum Seekers in the Era of Homeland Security*, 33-34 (2004).

<sup>49</sup> *Diouf v. Napolitano*, 634 F.3d 1081, 1092 (9th Cir. 2011).

access to a bond hearing before an immigration judge.”<sup>50</sup> Congress should seize the moment of immigration reform to make provision of prompt bond hearings before Immigration Judges an explicit, universal requirement.

#### **e. DHS’s Erroneous Interpretation of Mandatory Custody**

A majority of people in immigration prisons are subject to the mandatory custody provisions enacted by Congress in 1996, which have been interpreted by DHS 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.<sup>51</sup> Thousands of immigrants—including many longtime LPRs like Warren Joseph—are routinely imprisoned without ever being afforded the basic due process of a bond hearing before an immigration judge.

DHS currently misapplies the mandatory custody laws in three key ways, at great cost to American taxpayers and tremendous hardship to detainees and their families:

·*First*, DHS improperly incarcerates without individualized consideration immigrants with substantial challenges to removal that would ultimately allow them to remain in the country lawfully. Section 1226(c) requires the detention of noncitizens who are “deportable” or “inadmissible” on designated criminal grounds for the pendency of their removal proceedings. In *Matter of Joseph*,<sup>52</sup> the BIA established the standard for this custody determination, holding that an individual is “deportable” or “inadmissible” within the meaning of section 1226(c), and thus subject to mandatory lock-up, merely when the government *charges* removability on a ground triggering the statute. In order to obtain a bond hearing, a noncitizen detained under section 1226(c) must demonstrate that it is “substantially unlikely that the [government] will prevail on a charge of removability specified in” section 1226(c)<sup>53</sup>—effectively, that the charges are frivolous.<sup>54</sup>

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<sup>50</sup> *Casas-Castrillon, supra*.

<sup>51</sup> 8 U.S.C. § 1226(c). 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.

<sup>52</sup> 22 I. & N. Dec. 799, 800 (BIA 1999).

<sup>53</sup> *See id.*

<sup>54</sup> *See* Julie Dona, *Making Sense of “Substantially Unlikely”: An Empirical Analysis of the Joseph Standard in Mandatory Detention Custody Hearings* 5 (June 1, 2011) (forthcoming in *Georgetown Immigration Law Journal*), available at <http://ssrn.com/abstract=1856758> (reviewing *Joseph* decisions between November 2006 through October 2010 and finding that the BIA construes the “substantially unlikely” standard “to require that nearly all legal and evidentiary uncertainties be resolved in favor of the [government]”).



This nearly insurmountable standard—which one federal appeals judge has characterized as “egregiously” unconstitutional<sup>55</sup>—has resulted in the unnecessary and costly detention of individuals with substantial challenges to removal (many of whom prevail on those challenges). These include both individuals who have strong challenges to the charges against them, as well as individuals, like Warren Joseph, who have strong claims to discretionary immigration relief that would allow them to keep or obtain lawful permanent residence. As a result, individuals who later prevail in their cases suffer mandatory detention for months, or even years, at enormous cost to taxpayers.

·*Second*, DHS subjects immigrants to mandatory detention based on old crimes—in some cases, crimes that took place well over a decade ago. Section 1226(c) requires DHS to take custody of noncitizens who are deportable or inadmissible based on certain designated offenses “when the alien is released” from criminal custody for those offenses. The overwhelming majority of federal courts to consider the issue have construed section 1226(c) not to apply where DHS takes custody of individuals months or years after their release from criminal confinement for an offense covered by the statute.<sup>56</sup> However, pursuant to the BIA’s decision in *Matter of Rojas*,<sup>57</sup> DHS applies mandatory detention to individuals it arrests *at any time* after their release from criminal custody, vastly expanding the mandatory incarceration of individuals who have been at liberty for years leading productive lives in the community.

·*Third*, DHS takes an overly narrow view of the statute’s requirement that immigrants be kept in “custody,” guaranteeing the wasteful and unnecessary detention of individuals who pose no flight risk or danger. In contrast to other provisions of the

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<sup>55</sup> *Tijani*, 430 F.3d at 1246 (Tashima, J., concurring).

<sup>56</sup> *See, e.g., Kot v. Elwood*, 2012 WL 1565438, at \*8 (D.N.J. May 2, 2012) (holding that § 1226(c)(1) applies only to noncitizens detained at the time of their release from criminal custody for their specified removable offense); *Nunez v. Elwood*, 2012 WL 1183701, at \*3 (D.N.J., Apr. 9, 2012) (same); *Ortiz v. Holder*, 2012 WL 893154, at \*3 (D. Utah Mar. 14, 2012) (same); *Christie v. Elwood*, 2012 WL 266454, at \*8 (D.N.J. Jan. 30, 2012) (same); *Rosario v. Prindle*, 2011 WL 6942560, at \*3 (E.D.Ky. Nov. 28, 2011), *adopted by* 2012 WL 12920, at \*1 (E.D.Ky. Jan. 4, 2012) (same); *Parfait v. Holder*, 2011 WL 4829391, \*6 (D.N.J. Oct. 11, 2011) (same); *Rianto v. Holder*, 2011 WL 3489613, at \*3 (D. Ariz. Aug. 9, 2011) (same); *Beckford v. Aviles*, 2011 WL 3444125, at \*7 (D.N.J. Aug. 5, 2011) (same); *Jean v. Orsino*, No. 11-3682 (LTS) (S.D.N.Y. June 30, 2011) (same); *Sylvain v. Holder*, No. 11-3006 (JAP), 2011 WL 2580506, at \*5-6 (D.N.J. June 28, 2011) (same); *Aparicio v. Muller*, No. 11-cv-0437 (RJH) (S.D.N.Y. Apr. 7, 2011) (same); *Louisaire v. Muller*, 758 F. Supp. 2d 229, 236 (S.D.N.Y. 2010) (same); *Gonzalez v. DHS*, 2010 WL 2991396, at \*1 (M.D. Pa. July 27, 2010) (same); *Dang v. Lowe*, No. 1:CV-10-0446, 2010 WL 2044634, at \*2 (M.D. Pa. May 20, 2010) (same); *Monestime v. Reilly*, 704 F. Supp. 2d 453, 458 (S.D.N.Y. 2010) (same); *Khodr v. Adduci*, 697 F. Supp. 2d 774, 778 (E.D. Mich. 2010) (same); *Scarlett v. DHS.*, 632 F. Supp. 2d 214, 219 (W.D.N.Y. 2009) (same); *Bromfield v. Clark*, 2007 WL 527511, at \*4 (W.D. Wash. Feb. 14, 2007) (same); *Zabadi v. Chertoff*, 2005 WL 3157377, at \*5 (N.D. Cal. Nov. 22, 2005) (same); *Quezada-Bucio v. Ridge*, 317 F. Supp. 2d 1221, 1228 (W.D. Wash. 2004) (same). *But see Hosh v. Lucero*, 680 F.3d 375 (4th Cir. 2012) (deferring to *Matter of Rojas*).

<sup>57</sup> 23 I. & N. Dec. 117 (BIA 2001).

immigration laws that expressly reference the “arrest[] and *det[ention]*” of noncitizens pending removal proceedings, section 1226(c) states that the Attorney General “shall take into *custody*” aliens who are inadmissible or removable as a result of their criminal histories.<sup>58</sup> The term “custody” has traditionally been interpreted by the federal courts to include not only physical incarceration but also alternatives to incarceration, such as electronic or telephonic monitoring, reporting requirements, curfews, and home visits.<sup>59</sup> Congress should make clear that the immigration context is no different.

#### **f. Alternatives to Detention: The Common-Sense Solution When Supervision of Immigrants is Needed**

Alternatives to detention are both effective in preventing danger and flight and far less expensive than physical incarceration. ICE should adopt an interpretation of mandatory custody that allows their use for people whom it currently imprisons. ICE’s 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.<sup>60</sup> Earlier pilot programs like the Vera Institute’s Appearance Assistance Project (AAP) had similar appearance rates. Even for those with criminal records, ATDs were effective in ensuring a greater than 90% appearance rate.<sup>61</sup>

Alternatives to detention are also widely used by the federal and state pretrial systems.<sup>62</sup> As in the immigration context, ATDs in the pretrial detention setting have

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<sup>58</sup> Compare 8 U.S.C. § 1226(a) with § 1226(c).

<sup>59</sup> See, e.g., *Reno v. Koray*, 515 U.S. 50, 63-64 (1995) (holding, in sentencing context, that whether an individual is “released” depends on if he remains “subject to [the custodian’s] control,” and not whether he is still subject to “jail-like conditions”).

<sup>60</sup> 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).

<sup>61</sup> 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](http://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.”).

<sup>62</sup> 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

proven 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.<sup>63</sup> 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.<sup>64</sup>

Moreover, ATDs save tremendous amounts of taxpayer money. Detention costs \$164 per person per day, while alternative methods cost, depending on the form of the alternative, approximately \$7 per person per day.<sup>65</sup> Along with causing unnecessary severe hardship to detainees and their families, long-term detention is a huge waste of taxpayer dollars.

DHS understands that its Alternatives to Detention (ATD) program “is a cost-effective alternative to secure detention of aliens in removal proceedings.”<sup>66</sup> Indeed, DHS’s pilot programs for ATDs achieved an appearance rate of 94%, far in excess of the targeted 58%.<sup>67</sup> Alternatives to incarceration in ICE prisons can ensure appearance at court hearings, and for removal if ordered, at a fraction of the cost of imprisonment.

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.”<sup>68</sup> The Heritage Foundation also

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<sup>63</sup>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>

<sup>64</sup> Pretrial Services of Harris County, Texas, *2011 Annual Report*, 20-21, available at <http://www.harriscountytexas.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/7a60c47c7329a4abd7\\_2am6iyh9s.pdf](http://caforward.3cdn.net/7a60c47c7329a4abd7_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](http://www.pretrial.org/Setting%20Bail%20Documents/FL%20Pretrial%20Risk%20Assessment%20Report%20(2012).pdf)

<sup>65</sup> National Immigration Forum, *The Math of Immigration Detention*. (Aug. 2011), 1, available at <http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf>; Testimony of John Morton to the House Appropriations Subcommittee on Homeland Security (Mar. 14, 2013).

<sup>66</sup> DHS FY 2012 Budget Justification, *supra*, 940.

<sup>67</sup> *Id.* at 925.

<sup>68</sup> 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.

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.”<sup>69</sup> 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.”<sup>70</sup>

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.”<sup>71</sup> Moreover, in its FY 2013 Budget Request, DHS sought “flexibility to transfer funding between immigration detention and the ATD program.”<sup>72</sup> However, to date, ICE’s ATD program is still dwarfed by the immigration detention system.<sup>73</sup> ICE requested only \$72 million for ATDs in FY 2012, compared to \$1.9 billion for detention operations,<sup>74</sup> and requested \$111.6 million for FY 2013, compared to another \$2 billion for detention operations.<sup>75</sup> 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.

Expansion of alternatives to detention for all immigrants ICE places in removal proceedings is vital to minimizing the need to incarcerate and isolate immigrants who will be harmed by imprisonment, but pose no public safety or flight risk.

### **g. Conditions of Incarceration: ICE’s Recent History of Neglect and Abuse**

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<sup>69</sup> 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>

<sup>70</sup> *Math of Immigration Detention*, *supra*, 2.

<sup>71</sup> ICE, *ICE Strategic Plan FY 2010-2014* (2010), 7, *available at* [www.ice.gov/doclib/news/library/reports/strategic-plan/strategic-plan-2010.pdf](http://www.ice.gov/doclib/news/library/reports/strategic-plan/strategic-plan-2010.pdf)

<sup>72</sup> 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>

<sup>73</sup> 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.

<sup>74</sup> DHS, U.S. Department of Homeland Security Annual Performance Report FY 2011-2013, 3-4.

<sup>75</sup> *See id.* at 35, 53.

For all the reasons described above, detention within the immigration prison system should be rare, as it is both extremely costly and serves to deprive those incarcerated of their most precious freedoms. There is however a further reason to minimize the use of immigration prisons: because of what happens inside them. As sustained media exposure has revealed in the last five years, immigrants continue to suffer gross human rights violations in immigration detention centers.<sup>76</sup>

Some of the most serious problems have concerned medical care. At one point, the agency lost track of how many detainees died in its custody.<sup>77</sup> (At least 131 ICE detainees have died in custody since October 2003.<sup>78</sup>) The *Washington Post* published a four-part series titled “Careless Detention: Medical Care in Immigrant Prisons,” which concluded with an examination of the horrific practice of forcibly drugging detainees for deportation, which appears to have ended only after an ACLU lawsuit.<sup>79</sup> The *Post* collaborated with CBS News’s *60 Minutes*, resulting in a broadcast segment featuring extensive “evidence that immigrants are suffering from neglect and some don’t survive detention in America.”<sup>80</sup> The *Post* noted in 2008 that the leading cause of death is suicide, adding that care for psychiatric disabilities was grossly deficient: “Suicidal detainees can go undetected or unmonitored.”<sup>81</sup>

Sexual abuse and assault is also a serious problem in immigration detention facilities. Government documents obtained through an ACLU FOIA request reveal nearly 200 allegations of sexual abuse and assault at detention facilities across the country since 2007.<sup>82</sup> Various reports,<sup>83</sup> documentaries,<sup>84</sup> and complaints<sup>85</sup> point to

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<sup>76</sup> Nina Bernstein, “Officials Hid Truth of Immigrant Deaths in Jail.” *New York Times* (Jan. 9, 2010), available at <http://www.nytimes.com/2010/01/10/us/10detain.html?pagewanted=all>

<sup>77</sup> Nina Bernstein, “Officials Say Detainee Fatalities Were Missed.” *New York Times* (Aug. 17, 2009), available at <http://www.nytimes.com/2009/08/18/us/18immig.html>

<sup>78</sup> See ICE, “List of Deaths in ICE Custody.” (Dec. 6, 2012), available at <http://www.ice.gov/doclib/foia/reports/detaineedeaths2003-present.pdf>; “ICE detainee passes away after being rushed to local hospital.” (Jan. 18, 2012), available at <http://www.ice.gov/news/releases/1201/120118lasvegas.htm>; “ICE detainee passes away at Los Angeles-area hospital. Mexican national was being treated for pneumonia.” (Mar. 5, 2012), available at <http://www.ice.gov/news/releases/1203/120305victorville.htm>

<sup>79</sup> Dana Priest and Amy Goldstein (May 11 -14, 2008), available at <http://www.washingtonpost.com/wp-srv/nation/specials/immigration/index.html>

<sup>80</sup> Scott Pelley, “Detention in America.” (Feb. 11, 2009), available at <http://www.cbsnews.com/stories/2008/05/09/60minutes/main4083279.shtml>

<sup>81</sup> Dana Priest and Amy Goldstein, “Suicides Point to Gaps in Treatment: Errors in Psychiatric Diagnoses and Drugs Plague Strained Immigration System.” *Washington Post* (May 13, 2008), available at [http://www.washingtonpost.com/wp-srv/nation/specials/immigration/cwc\\_d3p1.html](http://www.washingtonpost.com/wp-srv/nation/specials/immigration/cwc_d3p1.html)

<sup>82</sup> See <https://www.aclu.org/maps/sexual-abuse-immigration-detention-facilities>

<sup>83</sup> See, e.g., Carrie Johnson, “Immigration Detainees Seek Prison-Rape Protection.” (Dec. 13, 2011), available at <http://www.npr.org/2011/12/13/143638236/immigration-detainees-seek-prison-rape-protection>;

numerous specific examples of abuse. These reported cases evidence a widespread, systemic problem—particularly in light of the many obstacles immigration detainees face in reporting abuse. In January 2012, 28 House members successfully requested that the Government Accountability Office (GAO) investigate these incidents.<sup>86</sup> Many others have doubtless gone unreported by detainees who fear speaking out, have language barriers, or are unable without the help of an attorney to navigate the difficult process.

One example of ICE neglect came in the case of Claudia Leiva Deras, a 27-year-old woman who fled domestic violence in Honduras. She was arrested by police after a 911 call reporting domestic violence, and detained in the Cass County, Nebraska, Jail, which contracts with federal authorities to house ICE detainees.<sup>87</sup> During her four months in custody, she alleges suffering extremely violent physical and sexual assaults by another detainee on an almost daily basis, resulting in physical injuries including bleeding, headaches, abdominal pain, and stomach cramps.<sup>88</sup> Frightened that reporting these constant attacks would result in retaliation from her abuser, Ms. Leiva Deras filed written grievances asking for medical attention, hoping she could tell a doctor what was happening. Her pleas for a doctor were refused.<sup>89</sup> When Ms. Leiva Deras did report the assaults and her injuries, she was still denied a medical examination, STD testing, mental health care, or counseling, in spite of her attorney's requests.<sup>90</sup> After learning that she had been repeatedly raped and beaten under their care, the facility staff offered Ms. Deras

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David Kaiser and Lovisa Stannow, "Immigrant Detainees: The New Sex Abuse Crisis." New York Review of Books blog (Nov. 23, 2011), available at <http://www.nybooks.com/blogs/nyrblog/2011/nov/23/immigrant-detainees-new-sex-abuse-crisis>. For editorials on the topic, see "Protect Detainees Too." Los Angeles Times (Dec. 12, 2011), available at <http://www.latimes.com/news/opinion/editorials/la-ed-prea-20111212.0,2790539.story?>; "A Broken, Dangerous System." New York Times (Dec. 4, 2011), available at <http://www.nytimes.com/2011/12/05/opinion/a-broken-dangerous-system.html?>; "How committed is the Dept. of Justice to ending rape behind bars?" Washington Post (Nov. 25, 2011), available at [http://www.washingtonpost.com/opinions/how-committed-is-justice-dept-to-ending-rape-behind-bars/2011/11/22/gIQAiuz5wN\\_story.html](http://www.washingtonpost.com/opinions/how-committed-is-justice-dept-to-ending-rape-behind-bars/2011/11/22/gIQAiuz5wN_story.html)

<sup>84</sup> *PBS Frontline: Lost in Detention* (Oct. 18, 2011), available at

<http://www.pbs.org/wgbh/pages/frontline/race-multicultural/lost-in-detention/transcript-11/>

<sup>85</sup> National Immigrant Justice Center, "Mass Civil Rights Complaint Details Systemic Abuse of Sexual Minorities in U.S. Immigration Detention ." (Apr. 13, 2011), available at

<http://www.immigrantjustice.org/issues/stop-sexual-abuse-detained-immigrants>

<sup>86</sup> January 4, 2012 letter available at

[http://polis.house.gov/UploadedFiles/010512\\_GAO\\_Detention\\_Letter.pdf](http://polis.house.gov/UploadedFiles/010512_GAO_Detention_Letter.pdf)

<sup>87</sup> *Leiva Deras v. Brueggemann*, No. 4:2012cv03000 (D. Neb. Jan. 3, 2012), Complaint at 1-2, available at [http://www.aclunebra.org/images/attachments/Leiva\\_Deras\\_Complaint.pdf](http://www.aclunebra.org/images/attachments/Leiva_Deras_Complaint.pdf).

<sup>88</sup> *Id.* at 3-4.

<sup>89</sup> *Id.* at 4.

<sup>90</sup> *Id.* at 4-5.



nothing but a Tylenol; on a medical round, she was told that no doctor's appointment would be scheduled: "Immigration doesn't pay for that. You're not outside."<sup>91</sup>

Ms. Deras, who eventually won her case and became a lawful permanent resident, is not the only woman to escape violence in her home country only to become the victim of sexual assault while in ICE custody.<sup>92</sup> By incarcerating immigrants who need not be kept in prison to ensure public safety or their appearance at removal hearings, ICE is placing them at risk.

Providing appropriate alternatives to detention is particularly important for populations that are vulnerable to physical and sexual abuse in detention. This population includes those who are or are perceived to be lesbian, gay, bisexual, transgender, intersex (LGBTI) or gender nonconforming. A recent study by the Williams Institute at the UCLA School of Law estimates that 267,000 LGBT adult undocumented immigrants currently live in the United States.<sup>93</sup> For those who end up in immigration detention, the record is sadly replete with examples of serious abuse and isolation.

In December 2011, the ACLU of Arizona filed a federal lawsuit on behalf Tanya Guzman-Martinez, a then-28-year-old transgender woman, who was intimidated, harassed and sexually assaulted while at the Eloy Detention Center.<sup>94</sup> During her eight-month detention at Eloy, Tanya was sexually assaulted twice. The first assault occurred on December 7, 2009 and involved a detention officer who, after repeated harassment, forced Tanya to ingest his ejaculated semen and threatened her with placement in "the hole," longer detention, or being deported back to Mexico if she did not comply with his demands. The second assault took place on April 23, 2010 by a male detainee.

The ACLU of Arizona also reported about Simon, a gay man living with HIV, who was placed in protective custody while detained at Eloy after he told officers that he had been previously assaulted (both in his home country and while detained in the U.S.) and feared for his safety. While housed in protective custody, he was made to wear an

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<sup>91</sup> *Id.*; see also Press Release, ACLU of Nebraska, Offered a Tylenol in Response to Rape in Jail (Jan. 23, 2012), available at <http://www.aclunebraska.org/index.php/immigrants-rights/137-qoffered-a-tylenolq-in-response-to-rape-in-jail>

<sup>92</sup> See Press Release, ACLU of Texas, ACLU of Texas Sues ICE Officials, Williamson County and CCA for Sexual Assault of Immigrant Women (Oct. 19, 2011), available at <http://www.aclutx.org/2011/10/19/aclu-of-texas-sues-ice-officials-williamson-county-and-cca-for-sexual-assault-of-immigrant-women/>; *Doe v. Neveleff*, No. 1:11-cv-00907 (W.D. Tx. 2011), Complaint, available at <http://www.aclutx.org/documents/111019DoevNeveleffFileStampedPublicComplaint.pdf>

<sup>93</sup> Gary Gates, *LGBT Adult Immigrants in the United States*, The Williams Institute (2013), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBTImmigrants-Gates-Mar-2013.pdf>

<sup>94</sup> Complaint for Guzman-Martinez v. Corrections Corporation of America, 2:11-cv-02390-NVW (D.Ariz. 2012), available at <http://www.acluaz.org/sites/default/files/documents/Guzman%20-%20Complaint.pdf>

orange disciplinary jumpsuit and was shackled any time he was taken to court or for visitation.<sup>95</sup> Not only do LGBTI and gender nonconforming immigrant detainees like Tanya and Simon face the trauma of physical and sexual abuse, but they are also often re-traumatized through placement in punitive administrative segregation and subjected to prolonged periods of isolation from family, counsel, and support structures.

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Any serious attempt to bring our immigration enforcement system into conformity with our Nation's values must address ICE's misuse of detention resources to incarcerate individuals who pose no danger or flight risk, which in turn is the best way to control costs and ameliorate deficient conditions of confinement. By barring ICE from employing flexible, fact-based decision-making about custody, the mandatory 34,000 bed requirement undermines the Administration's commitment to reform the civil immigration detention system. In the context of immigration reform, Congress must address the profligate and inhumane immigration prison system: by ending the mandatory bed quota, requiring individual bond hearings for detainees before Immigration Judges, particularly in cases of prolonged detention, and acting to ensure that cost-effective yet proven-reliable alternatives to detention are used to the greatest extent possible.

#### **IV. Conclusion**

The ACLU commends the Committee for its attention to the discord between American values and the immigration system. To respect the Constitution, reforms are urgently needed to ensure legal representation in immigration court; to restore the discretionary authority of judges; to limit significantly the extent to which people are imprisoned; and to achieve truly civil immigration detention centers by dramatically improving conditions of confinement. Congress' legislative work in this area is imperative to address the failings chronicled here and, above all, to show that the sacrifices made by the immigrants profiled, and countless others they represent, are heard in this august precinct—and acted upon.

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<sup>95</sup> *Id.* at 25.



## APPENDIX

### CASE STORIES

The following case stories illustrate the serious civil liberties concerns raised by the immigration enforcement system. The cases below describe the harm to individuals, their families, and the American taxpayer arising from the immigration system's failures to a) ensure legal representation to those who need it, b) provide judges with authority to consider each individual's individual circumstances, and c) limit irrational immigration imprisonment. Unfortunately, every day thousands of noncitizens face injustices similar to those described here because of our draconian immigration enforcement system.

#### **Appointed Counsel**

1. ***Jose Antonio Franco-Gonzalez***, an immigrant from Mexico, was not able to speak until he was six or seven, does not know his birthday or age, has trouble recognizing numbers and counting, and cannot tell time. In 2005, while in immigration custody, a government psychiatrist found him incompetent and an Immigration Judge closed his case because he could not understand the proceedings. Unrepresented by counsel, he was remanded back into immigration custody, where he was promptly forgotten. Despite the lack of removal proceedings or other charges against him, he spent another four years behind bars—at a cost of almost \$300,000—before he was found by pro bono attorneys who filed a lawsuit to secure his release.
2. ***Maksim Zhalezny*** is a lawful permanent resident who has significant psychiatric disabilities and is not able to represent himself. Department of Homeland Security (DHS) wants to deport him for two non-violent offenses, but his case has been repeatedly delayed because the judge was not willing to proceed against him without a lawyer. He spent 442 days in immigration detention – at a cost of over \$70,000 – until a federal court ordered the government to provide him an attorney who could argue for his release.
3. ***Mark Lyttle*** is a native-born U.S. citizen of Puerto Rican descent who was deported to Mexico in 2008. Despite Mr. Lyttle's acknowledged mental disabilities (he had previously spent time in a psychiatric hospital), at his immigration court hearing no attempt was made to assess whether he was able to proceed unrepresented. Mr. Lyttle had never been to Mexico and spoke no Spanish. He endured more than four months of living on the streets and in the shelters and prisons of Mexico, Honduras, Nicaragua, and Guatemala.
4. ***Ever Francisco Martinez-Rivas*** is a lawful permanent resident of the United States with a long history of schizophrenia and other psychiatric disabilities. He was convicted after a fight with his step-father, for which the Department of Homeland Security (DHS) now wants to deport him. Because he had no lawyer in his immigration case, the judge ordered the case closed, but DHS appealed. This left Mr.

Martinez having to defend by himself, on appeal, the decision finding him incompetent. The problem was solved only because a federal court ordered the government to find him a lawyer or allow him to stay.

5. **David** (a pseudonym) is a 25-year-old asylee from Nigeria. David fled to the United States after facing extreme religious persecution due to his conversion to Christianity. He witnessed his mother, uncle, aunt, and three young children being burned alive by Muslim gangs in his home country. When he arrived at the U.S. border in March, 2011, David was taken into immigration custody. After two and a half months detained at El Centro, California, David finally had a removal hearing in front of an Immigration Judge where he represented himself without an attorney. David's English was poor and he had a very difficult time detailing his claims. The judge denied David's asylum claim despite the many reports that documented the plight of Christian converts in Nigeria, and despite David's attempts to explain his fear of persecution. In August of 2011, David was able to obtain pro bono counsel from a local law firm, which represented him in his appeal to the Board of Immigration Appeals. Finally, on October 9, 2012, after two remands to the Immigration Judge from the Board of Immigration Appeals, and 19 months in immigration detention, David was granted asylum. The costs the government incurred in vigorously prosecuting David's removal included not only his 19 months of detention (an estimated \$98,400) but also the costs of him seeing a psychologist on a regular basis to deal with his post-traumatic stress, the costs of medication to handle his depression and anxiety, and the costs of government attorneys retained for almost two years to fight to deport David back to Nigeria. If David had been represented by an attorney during his first hearing, his immigration proceedings and his detention would likely have ended much sooner.
  
6. **Julia** (a pseudonym) is an asylum seeker from Ghana. She fled to the United States after being forced to marry a man to pay off her family's debt. The man raped her and abused her. When Julia arrived at the border in May of 2011, she was immediately detained by Immigration and Customs Enforcement (ICE). Even after she passed her credible fear interview, ICE would not release her. ICE demanded proof of her identity but Julia could not obtain any documents from inside detention. In August, 2011, Julia was able to obtain a pro bono lawyer. By this time she had learned that she was pregnant from her rape in Ghana. Within one week, her attorney was able to secure Julia's release from detention. Through phone calls and emails to Julia's family in the United States, her attorney was able to get confirmation of Julia's identity, and ICE agreed to release her. Julia is now continuing to fight her immigration case with the help of her lawyer while she lives with members of her church and her daughter (who was born in January of 2012) in New York. Had Julia been represented by counsel at the commencement of her proceedings, her identity would have been established far sooner and her release earlier, saving the government the cost of several months of detention. Indeed, had she not found counsel when she did, it is unclear how much longer her detention might have been prolonged, at added cost to the government.

7. *Alejandro* (a pseudonym) is a Mexican national. He entered the United States with his Cuban wife and infant daughter in late December 2011 to seek asylum. His wife and daughter were paroled into the United States so that they could pursue adjustment of status under the Cuban Adjustment Act. Alejandro's parole was made subject to a substantial parole bond despite the absence of any factors that would warrant a bond requirement (i.e., criminal record, negative immigration history, flight risk, etc.). Unable to pay the bond, he was detained at the Port Isabel Detention Center in Harlingen, Texas. As the Immigration Judge noted at his removal proceeding, had he been paroled with his family, Alejandro would have been eligible to pursue adjustment to lawful permanent residence as the spouse of a Cuban national, under the Cuban Adjustment Act. Instead, following approximately 4 months of detention and a removal hearing in which he appeared pro se, Alejandro was ordered removed in April 2012.

Alejandro obtained pro bono counsel in August 2012 from the firm of Van Ness Feldman LLP. At that point, he had been detained for approximately eight months and had a pending pro se appeal before the Board of Immigration Appeals (BIA). In addition to filing a brief in support of Alejandro's BIA appeal and seeking administrative closure, his pro bono counsel pursued requests for prosecutorial discretion and parole redetermination through oral and written contacts with the responsible Immigration and Customs Enforcement (ICE) attorney, ICE supervisors, and other ICE officials. The BIA, noting that Alejandro was pro se before the Immigration Judge and that the issue of administrative closure had not been raised below, remanded the case to the Immigration Judge for a decision on the issue. Following the submission of a joint request for administrative closure by Alejandro's counsel and the ICE attorney, the Immigration Judge administratively closed the proceeding in mid-November, 2012. After almost a year behind bars, Alejandro was released from detention in late November, 2012, and is currently pursuing adjustment of status. Had Alejandro been represented by counsel during his initial removal proceeding, a request for administrative closure of the proceeding at that stage would have avoided the cost of more than 9 months of Alejandro's detention and the costs associated with ICE's vigorous prosecution of his removal case, including multiple removal hearings; numerous oral and written responses to Alejandro's counsel's requests for prosecutorial discretion and parole redetermination; and the entire appeals process before the BIA.

### **Lack of Judicial Discretion**

8. *Lucia Medina Martinez* came to the United States in 1994 when she was 15. She has six U.S. citizen children. In 2004, Lucia married a man and they had four children together. Two years later, Lucia's daughter from a previous relationship told her that her husband had been molesting her. Distraught, Lucia kicked her husband out of her house and sought the advice of her pastor about what to do next. Her pastor told her

to take her husband back in because “he was the father of four of her children, including a newborn baby, and because he was her husband.” Lucia reluctantly accepted this advice and did not report the crime to the police. After three weeks, Lucia continued to feel uneasy and sought additional counseling through her church. This time, the counselor, with Lucia’s permission, contacted the police. Her husband was arrested and sentenced to 15 years in prison. Lucia, however, was also arrested under a charge of child neglect for not reporting the incident earlier. She pled no contest believing that would allow her children to return to her care as soon as possible. She was sentenced to two days imprisonment as well as probation and community service.

Although her children were permitted to return home to her, Immigration and Customs Enforcement (ICE) began removal proceedings against Lucia in September of 2007 charging her with unlawful presence. Both the Immigration Judge and the Board of Immigration Appeals (BIA) denied Lucia’s cancellation of removal claim solely because of her conviction for child neglect. Lucia appealed the BIA’s decision to the U.S. Court of Appeals for the Eleventh Circuit, which upheld the BIA’s decision on February 4, 2011, on the grounds that Lucia’s conviction for child neglect constituted a conviction of “child abuse” and thus precluded her eligibility for cancellation of removal. *Martinez v. U.S. Atty. Gen.*, 413 Fed.Appx. 163 (11th Cir. 2011). In issuing his decision, however, Judge Marcus described the result as “profoundly unfair, inequitable, and harsh” and urged the Attorney General “to closely review the facts of this heartbreaking case once again.” *Id.* at 168. He continued:

“The entire basis of Martinez’s child neglect conviction was that she allowed her husband, and the father of several of her children, to return to their home for a period of three weeks on the unambiguous advice of her pastor. . . . Simply put, this case calls for mercy than the law permits this Court to provide. . . . Under the peculiar facts of this case, removing Martinez and her six young children to Mexico, a country in which they no longer have any relatives, would work an extreme hardship on a family that has already been forced to endure domestic abuse, the molestation of a child by her step-father, and the incarceration of a father and husband.” *Id.*

9. **Aaron** (a pseudonym), a long-time lawful permanent resident of the United States, is facing deportation back to Haiti for one non-violent conviction from 2005 for selling \$20 worth of marijuana to an undercover policeman. Although he was only required to serve 45 days in jail for the crime, it is deemed an aggravated felony under immigration law and therefore bars him from any discretionary relief from removal – including political asylum – effectively making his removal mandatory. Aaron has lived in the United States since 1999. Before his current mandatory immigration detention in Florida, Aaron lived with and supported his long-term U.S. citizen girlfriend, their two-year-old U.S. citizen daughter, and her three U.S. citizen children

from previous relationships. Aaron's girlfriend suffers from sickle cell anemia and cannot work. Their young daughter carries the sickle cell anemia gene and is in poor health. All of Aaron's girlfriend's other children also carry the sickle cell trait. Aaron supported all four children and his girlfriend by working as a maintenance helper for the City of Jacksonville. In February 2013, Aaron was arrested for petty theft – for which he received a sentence of two days. After completing his sentence, Immigration and Customs Enforcement (ICE) commenced removal proceedings against him based on his 2005 conviction and placed him in mandatory immigration detention where he has remained for the last month. During his detention, his family has struggled both financially and emotionally. His girlfriend has had to borrow money in order to pay the household bills and the children ask their mother daily, "When is Daddy coming home?" Recently his girlfriend's oldest daughter wrote on the front of their home in black marker, "I miss my Daddy Aaron and I hope he comes home soon." Aaron and his family will suffer even more if he is deported to Haiti. Yet under current laws, his removal is a virtual certainty as there is no room for discretion to look at his individual equities.

10. **Rosa** (a pseudonym), a long time lawful permanent resident and the widow of a U.S. citizen husband, has lived in the United States for more than 18 years. When her three children were all under the age of two, her husband was shot and killed in front of Rosa and the children. Since that time, Rosa has raised the children on her own and supported the family by working as a pawn broker at a pawn shop in Florida. In 2009, Rosa was convicted of five counts of dealing in stolen property – approximately \$1,000.00 worth of items (a television, jewelry, and a laptop). This is her only conviction, and she spent only four days in jail, 92 days of house arrest and eight months of probation, which she successfully completed in 2010. Nonetheless, her conviction will likely be deemed an "aggravated felony" under immigration law, thereby rendering her removal virtually mandatory.

In November of 2012, upon returning from a vacation out of the country Immigration and Customs Enforcement (ICE) commenced removal proceedings against Rosa on the basis of this one conviction. Although her children desperately need her support and presence, Rosa's conviction is likely deemed an aggravated felony, it renders her ineligible for any discretionary form of relief, and will likely prevent her from ever returning to the U.S. Thus she faces the virtual certainty of removal to Colombia, and permanent separation from her family, solely because of this one crime.

11. **Nazry Mustakim**, a longtime lawful permanent resident, was detained for approximately ten months at the Pearsall Detention Center in Texas, even though he posed no danger or flight risk. Nazry entered the United States as a lawful permanent resident from Singapore with his family in 1992. On March 30, 2011, he was arrested at his home by Immigration and Customs Enforcement (ICE) officers and placed in removal proceedings and mandatory detention based on a 2007 drug conviction for which had been sentenced only to probation. The conviction stemmed from several arrests for drug possession during 2005, a period in Nazry's life when he was

struggling with addiction. He subsequently turned his life around, participated in a faith-based recovery program, and became a devout Christian. He also graduated college, volunteered at his church, ran 12-step recovery programs, worked as a sponsor for recovering addicts, and in 2010, fell in love and married a U.S. citizen, Hope Mustakim. However, when Nazry went to court for his 2005 arrests in March of 2007, he was misadvised that his best option was to plead guilty to felony drug possession and accept the plea bargain of 10 years of probation. Unbeknownst to him, this plea not only made him a convicted felon, but virtually insured his mandatory deportation and detention, since the conviction was deemed an “aggravated felony” -- a bar to virtually any form of discretionary relief. Thus, all of his strong equities were irrelevant – including his active participation in programs at a local treatment center and working as a night monitor for 12-hour shifts at the 54-bed homeless shelter run by the center. Solely by virtue of his conviction, the immigration court was without authority to grant him discretionary relief from removal. Faced with this situation, Nazry’s attorney filed papers with the criminal court challenging his 2007 plea. However, the District Attorney who had prosecuted his case instead found that there was insufficient evidence to try him and dismissed the charges. Thereafter, on February 7, 2012, after ten long months of mandatory incarceration, an Immigration Judge granted Nazry the relief of “cancellation of removal” and he was released from detention. Nazry hopes to apply for citizenship as soon as he is eligible. However, were it not for the fact that the District Attorney allowed him to withdraw his former plea, a judge would have had no choice but to order him removed.

12. **Maria** (a pseudonym) is a domestic violence survivor with no criminal record, and a ten-year-old U.S. citizen son. She currently faces removal from the United States to Mexico based on a prior removal in 2000, when she attempted to enter the United States with a false U.S. birth certificate her now-estranged U.S. citizen husband/abuser gave her. After her removal, Maria unlawfully reentered the United States and was subjected to years of severe and repeated domestic violence by the same man who had urged her to enter the United States with the false document years before. Maria was never criminally prosecuted for using the false birth certificate, but when she applied for lawful permanent resident status under the Violence Against Women Act (VAWA), her application was denied solely because she had tried to enter the country with a false birth certificate, and she was placed in “reinstated” removal proceedings. Maria has separated from her abuser and is dating another U.S. citizen man who would like to marry her. But even if her estranged husband agrees to a divorce, Maria’s use of a false birth certificate thirteen years ago will forever bar her from obtaining lawful permanent resident status. In addition to facing removal, Maria has now lost custody of her son solely because she faces removal, and even though there are reasons to believe that her husband has abused the child in the past. If she is removed, Maria will face permanent separation from her son, as her use of a false U.S. citizen birth certificate prevents her from ever returning to the United States. Furthermore, she fears further violence against her if removed, as she

believes her Mexican-American husband would have his friends in Mexico come after her.

13. **Saan** (a pseudonym), a thirty-year lawful permanent resident of the United States and veteran of the United States Army Reserves, came to the United States as a refugee in the early 1980s. He has five U.S. citizen children for whom he has sole custody and for whom he provides for by working as a baker. In 2002, Saan was arrested for a domestic violence incident arising from a disagreement with his wife. Just days after his arrest, and without adequate advice as to the immigration consequences he might face, Saan pled guilty to two felonies because he believed he needed to take responsibility for his actions. Although these convictions were later reduced to misdemeanors under CA state law, under federal immigration law they were deemed “aggravated felonies.” This meant that when Immigration and Customs Enforcement (ICE) initiated removal proceedings against Saan in 2008 -- when he went to renew his green card -- the Immigration Judge had no authority to grant him discretionary relief from removal, notwithstanding his long residence in the United States, the fact that this was his single significant brush with the law – his only other criminal history being a misdemeanor conviction for driving without a license -- and the other strong equities in his favor. While his removal proceedings were pending, Saan was placed in mandatory immigration detention and his children had to go live with his U.S. citizen sister. During this period, his children were devastated. They had trouble concentrating in school and his youngest daughter went to bed crying every night and slept with Saan’s jacket around her. After approximately five months in detention, the government could not secure travel documents for Saan and in 2009, ICE released him back to his family under conditions of supervision which require regular reporting. Happy as he is to be back home with his family, Saan’s immigration status remains in limbo and he is subject to removal at any point. Moreover, removal will mean permanent separation from his family, as just one aggravated felony effectively bars him from returning to the United States.
  
14. **Adnan Asan** was deported to Macedonia in 2007. Prior to his deportation, Mr. Asan lived in the United States with his wife and children who still remain in this country. In 1984, Mr. Asan pled guilty and was convicted of a narcotics charge. He received three years probation for this crime. Even though he knew of the risks involved, Mr. Asan cooperated with government authorities and testified against the drug conspiracy architects involved in his case. Mr. Asan was assured that he would not be deported for his conviction and he went about rebuilding his life. In 2007, Mr. Asan was picked up by Immigration and Customs Enforcement (ICE) officers and the government initiated removal proceedings against him due to the charge from 1984. Mr. Asan was deported despite his many equities. In 2011, Mr. Asan brought a *coram nobis* petition in the U.S. District Court for Southern District of New York for ineffective assistance of counsel during his case in 1984. Although Judge Haight found himself bound by legal authority to dismiss Mr. Asan’s petition he included in his opinion the following strong footnote denouncing the unfairness of Mr. Asan’s deportation:

“...I have been the District Judge presiding over the underlying criminal case since its inception, and am familiar with the entire record. The case has passed through the stages of indictment, plea, sentencing, and two *coram nobis* petitions, of which this is the second. It began when the United States Attorneys Office for this District conducted an investigation into a major drug conspiracy whose objective was the importation of heroin and other narcotics from eastern Europe into the United States. Mr. Asan, [a]resident in this country, was one of numerous facilitators of that conspiracy, not an architect. Having agreed to cooperate with the Government and plead to a lesser charge, and at considerable personal risk, Mr. Asan gave trial testimony material to the conviction of a number of principal conspirators. When this Court sentenced Mr. Asan on his guilty plea in 1984, the Government spoke with such force and eloquence about the nature, extent and importance of his cooperation that I sentenced him to three years’ probation.

Mr. Asan completed his probation without adverse incident. He continued to live in the United States with his wife and children, leading from all indications a law-abiding and honorable life. In 2007, the Secretary decided to deport Mr. Asan to Macedonia, where a number of drug traffickers against whom he had testified, having served their sentences in this country, were now residing. That decision to deport was based solely upon Mr. Asan’s guilty plea to the lesser narcotics charge in 1983, in compliance with his cooperation agreement. The Secretary decided to deport Mr. Asan after (and notwithstanding) his crucial cooperation with Government prosecutors in a major narcotics case, and after 23 years of law-abiding and productive life in this country as the head of a family. The United States Attorney, in fulfillment of the Government’s promise in the cooperation agreement, wrote to officers in ICE, again describing, praising and emphasizing the value of Mr. Asan’s cooperation with the Government in the underlying case. The Secretary, or those acting in her behalf, replied in substance to the United States Attorney: “We have your letter. It doesn’t make any difference.” This Court, rejecting the first *coram nobis* petition, held that the decision to deport rested with the Secretary and was not subject to judicial review. Mr. Asan was deported.

The Secretary has never sought to justify the agency’s decision to deport Mr. Asan. That is not surprising, since no justification is discernible, given the circumstances of the case. However, the Secretary retains the power she can exercise now. Even amid the multiple demands and responsibilities of her vital office, this case presents an opportunity for the Secretary to pause, choose not to pass by on the other side of the road, and take the executive steps necessary to allow Mr. Asan to rejoin his family in the United States. With all due respect, this Court hopes that these words may come to the attention of the Secretary or other responsible



officers in the Executive Branch, who will act upon them and thereby fulfill the hallowed maxim “Fiat justitia ruat coelum”: “Let justice be done, though the heavens fall.” If in the name of justice Mr. Asan is now permitted to return to this country and his family, there is no reason to suppose that the heavens would then fall, or (to focus upon the Secretary’s particular responsibility) that the security of the Nation would be compromised.” *Asan v. United States*, 2012 WL 5587454, \*20 (S.D.N.Y. Nov. 14, 2012).

### **Prolonged, Mandatory, and Irrational Detention**

15. **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 long time lawful permanent resident of the United States, with 3 U.S. citizen children and 2 U.S. citizen grandchildren, she was arrested by Immigration and Customs Enforcement (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 detention. 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, including the approximately \$28,595 that the taxpayers spent for her detention.

16. **Errol Barrington Scarlett** is a longtime lawful permanent resident from Jamaica who has lived in the United States for over thirty years. After his release from incarceration for a drug possession offense, Mr. Scarlett returned to his family and found employment with his brother’s real estate business. He did not commit any

additional crimes, and was enrolled in a drug treatment program for over a year. A year-and-a-half following his release from incarceration, Mr. Scarlett received a letter from the Department of Homeland Security (DHS) summoning him to their New York office. At that appointment, he was charged with removability based on his drug possession conviction, and was summarily detained without a bond hearing. Mr. Scarlett remained in mandatory detention for the next five years. In 2009, Mr. Scarlett filed a pro se habeas petition, seeking a bond hearing. Concluding that his mandatory detention was contrary to congressional intent and that Mr. Scarlett's prolonged detention raised serious constitutional concerns, the district court granted his petition and ordered a bond hearing, where Mr. Scarlett ultimately won his release. *See Scarlett v. DHS*, 632 F. Supp. 2d 214 (W.D.N.Y. 2009).

17. 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 release, she languished in immigration detention and suffered immense hardships, unable to maintain contact with her 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 over a year.

On February 26, 2013, she was released by Immigration and Customs Enforcement (ICE) on conditions of supervision, including wearing an ankle monitor and regular reporting. According to her attorney, Sarah Brenes, of the Advocates for Human Rights in Minneapolis, she is now living in a women's shelter. 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.

18. ***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 from domestic violence and cancellation of removal due to her nine-year-old U.S. citizen daughter. Her case is pending on appeal before the U.S. Court of Appeals for the Ninth Circuit, which issued a stay of removal until its decision. Prior to her detention, Victoria worked steadily and took care 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 Immigration and Customs Enforcement (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.<sup>96</sup> Victoria's two years and two months of detention therefore cost taxpayers at least \$55,000.

19. 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 reporting and, in some cases, ankle monitors. Immigration and Customs Enforcement paid GEO Group to detain these women; taxpayers spent an estimated \$127,592.<sup>97</sup>
20. **Amadou Diouf** has lived in this country for approximately seventeen years. He entered the United States on a student visa, obtaining a degree in information systems from a university in Southern California. The government initiated removal proceedings against him for overstaying his student visa after he was arrested and charged with possession of a small quantity of marijuana—an offense that did not render him deportable. Nevertheless, Mr. Diouf was detained for over 20 months during the pendency of his removal proceedings, even though he was prima facie eligible for adjustment of status to lawful permanent residence through his marriage and had not been convicted of a removable offense. Notably, the only process Mr. Diouf received during his prolonged imprisonment were two perfunctory reviews of his administrative file in which Immigration and Customs Enforcement (ICE) summarily continued his detention. Ultimately, a federal district court ordered that Mr. Diouf receive a bond hearing before an Immigration Judge where the government was required to show that his detention was still justified. Upon conducting a hearing, the Immigration Judge found that Mr. Diouf did not present a flight risk or danger sufficient to justify detention and ordered his release on bond. Despite this decision and the fact that Mr. Diouf was living on conditions of supervised release without incident since being released, the government continued to argue that he should be detained without a bond hearing. Mr. Diouf subsequently won his removal case and now resides in Southern California.
21. **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

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<sup>96</sup> ACLU of Arizona, *Immigration Detention in Arizona* (Feb. 24, 2010), available at <http://www.acluaz.org/sites/default/files/documents/Detention%20in%20Arizona%20One-Page%202-24-10.pdf>, 2.

<sup>97</sup> All of these women were helped by Americans for Immigrant Justice.

course of duty and received numerous awards and commendations recognizing his valiant service in that war, including returning to battle after being injured and successfully rescuing his fellow soldiers.

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

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

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

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

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

of Immigration Appeals (BIA) affirmed the grant of asylum, and the Attorney General declined further review, giving Mr. Nadarajah refugee status.

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

Mr. Nadarajah presently lives and works in Southern California as a lawful permanent resident. He intends to apply for citizenship shortly.

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

24. **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, Immigration and Customs Enforcement (ICE) insisted on keeping him in detention. He spent over two and a half years in an

immigration detention center while the court decided whether or not to reconsider his asylum claim. During that time, he never received a hearing to determine whether his detention was justified.

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

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

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

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

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

Despite this stinging rebuke, the government continued to doggedly pursue Saluja's removal and to insist on her detention. Indeed, even after the Immigration Judge

granted Saluja asylum in June 2005, the government appealed that decision to the BIA and refused to release Saluja during this process.

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