Written Statement of the American Civil Liberties Union Before the United States Commission on Civil Rights

Hearing on

The State of Civil Rights at Immigration Detention Facilities
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The American Civil Liberties Union (ACLU) welcomes this opportunity to submit testimony to the U.S. Commission on Civil Rights on "The State of Civil Rights at Immigration Detention Facilities."

For nearly 100 years, the American Civil Liberties Union (ACLU) has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. The ACLU takes up the toughest civil liberties cases and issues to defend all people from government abuse and overreach. With more than a million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C., for the principle that every individual's rights must be protected equally under the law, regardless of race, religion, gender, gender identity, sexual orientation, disability, or national origin. Consistent with that mission, the ACLU established the National Prison Project in 1972 to protect and promote the civil and constitutional rights of incarcerated people. Since its founding, the Project has challenged unconstitutional conditions of confinement and over-incarceration at the local, state and federal level through public education, advocacy and successful litigation. The Immigrants' Rights Project (IRP) of the ACLU, founded in 1987, engages in a nationwide program of litigation, advocacy, and public education to enforce and protect the constitutional and civil rights of immigrants. The ACLU's Washington Legislative Office (WLO) conducts federal legislative and administrative advocacy to advance the organization's goals.

The ACLU submits this testimony to highlight our concerns with conditions of confinement in Department of Homeland Security Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE) detention facilities, and provide recommendations to reform a sprawling immigration jail network that violates applicable law and neglects basic human rights every single day.

I. Introduction

Although it barely existed before the early 1980s, the immigration detention system – comprising both ICE and CBP detention – has grown enormously in the last two decades.[1] Between FY 1995 and FY 2013, ICE's average daily detention population more than quadrupled, and the number of people passing through ICE detention each year increased from 85,730 to 440,557.[2] In the past several months, the ICE detention system swelled even further with the addition of nearly 3,000 new family detention beds.[3] CBP, which operates its own short-term detention facilities, has experienced enormous growth in the past decade; although the agency does not publish a list or count of detention facilities, the number of people employed by CBP has grown by approximately 50 percent in the past decade.[4]

[1] *See* American Civil Liberties Union, "The U.S. Immigration Detention Boom," https://www.aclu.org/immigrants-rights/frontline-map-us-immigration-detention-boom.
[2] Doris Meissner, et al., Migration Policy Institute, *Immigration Enforcement in the United States: The Rise of a Formidable Machinery*, at 126 (Jan. 2013), *available at* http://www.migrationpolicy.org/pubs/enforcementpillars.pdf; John F. Simanski, Dep't of Homeland Security, Office of Immigration Statistics, *Annual Report, Immigration Enforcement Actions: 2013*, (Sept. 2014) http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf
[3] *See* discussion in Part II *infra.*
[4] *See* Meisner, *supra* note 2.

ICE detention is intended to be civil and non-punitive: its purpose is not to punish, but simply to secure appearance at immigration proceedings and transport for removal when applicable.[5] Nevertheless, ICE detention facilities overwhelmingly consist of jails and jail-like facilities, about half of which are owned and operated by local sheriff and police departments, not by ICE.[6] Additionally, about 60 percent of ICE's detention facilities are operated by private, for-profit prison companies—an industry that has fought against public accountability for its actions while accumulating a long and disturbing history of abuse, neglect, and misconduct.[7]

The average length of stay in ICE detention is about one month, but this statistic masks major variations based on whether a detained individual chooses to fight deportation – or gets a hearing. A full 83 percent of non-citizens removed from the United States never receive the opportunity to see a judge;[8] their very brief time in detention brings the system-wide average length of stay down considerably. According to data from Syracuse University's TRAC project, the shortest average stays (4 days) are for those who agree to a "voluntary return" to their home countries. Those who are ordered removed by an immigration court remain in detention nearly seven times longer: an average of 27 days (at a cost exceeding $160 per person, per day). Ironically and unjustly, the people who fight and win their immigration cases (i.e., those who are ultimately ordered released based on a judge's decision that they are legally entitled to remain in the United States – many of whom are asylum seekers who have fled persecution in their home countries or longtime U.S. residents with deep community ties) typically remain in detention the longest, with an average stay in detention of 131 days.[9] And many are detained for far longer.[10]

A significant subset of detainees are subject to prolonged detention of six months or longer, many without even receiving a bond hearing to determine whether their detention is justified by an individualized danger or flight risk. According to ICE data released to the ACLU in response to a Freedom of Information Act request, on January 2, 2012, there were an estimated 2,995

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[5] Dora Schriro, *Immigration Detention Overview and Recommendations*, at 2-3 (Oct. 6, 2009), *available at* http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf

[6] Human Rights First, *Jails and Jumpsuits: Transforming the U.S. Immigration Detention System—A Two-Year Review*, at 7-12 (Oct. 6, 2011), *available at* http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Jails-and-Jumpsuits-report.pdf.

[7] *See, e.g.*, Grassroots Leadership & Justice Strategies, *For-Profit Family Detention: Meet the Private Prison Corporations Making Millions by Locking Up Refugee Families* (Oct. 2014), *available at* http://grassrootsleadership.org/sites/default/files/uploads/For-Profit%20Family%20Detention.pdf; American Civil Liberties Union, *Warehoused and Forgotten: Immigrants Trapped in Our Shadow Private Prison System* (June 2014), *available at* https://www.aclu.org/sites/default/files/assets/060614-aclu-car-reportonline.pdf; Sentencing Project, *Too Good to Be True: Private Prisons in America* (Jan. 2012), *available at* http://sentencingproject.org/doc/publications/inc_Too_Good_to_be_True.pdf; American Civil Liberties Union, *Banking on Bondage: Private Prisons and Mass Incarceration* (Nov. 2011), *available at* https://www.aclu.org/files/assets/bankingonbondage_20111102.pdf.

[8] American Civil Liberties Union, *American Exile: Rapid Deportations that Bypass the Courtroom*, at 11 (Dec. 2014), *available at* https://www.aclu.org/sites/default/files/assets/120214-expeditedremoval_0.pdf.

[9] Transactional Records Access Clearinghouse, Syracuse University, "Legal Noncitizens Receive Longest ICE Detention," June 3, 2013, http://trac.syr.edu/immigration/reports/321/.

[10] Raymond Soeoth was detained for 2 ½ years before winning his case. *Soeoth v. Mukasey*, 278 F. Appx. 748 (9th Cir. 2008); Baskaran Balasundaram, was detained for 2 years. *Balasundaram v. Chadbourne*, 716 F.Supp.2d 158 (D. Mass. 2010). For other examples, see Appendix to Written Statement of the ACLU, Ahilan T. Arulanantham, For a Hearing on "Providing for the Detention of Dangerous Aliens," May 24, 2011, *available at* https://www.aclu.org/files/assets/Testimony_of_Ahilan_Arulanantham_FINAL.pdf

individuals in ICE custody who had been subjected to 180 or more days of immigration detention.[11] Given the significant deprivation of liberty involved, and the value of having a uniform rule in this area, the ACLU is engaged in litigation to establish that the immigration detention statutes should be construed to require bond hearings before an immigration judge for all individuals who are held in detention for more than six months, and that due process requires that at such hearings the government bear the burden of showing that continued detention is justified.[12]

Another component of immigration detention that has seen increased scrutiny in recent years is the short-term detention facilities that CBP maintains near the southwest border and at ports of entry. Such facilities are intended for short-term detention of 72 hours or less while CBP personnel determine where to send a person next. However, stays in CBP holding facilities have often exceeded this time period, and numerous NGO and media reports have documented disturbingly inhumane conditions of confinement in these facilities.[13] Notably, CBP has not made public the agency's total bed capacity or its detention standards, and, unlike ICE, CBP has no centralized oversight entity at headquarters to ensure that all individuals held in CBP custody are treated humanely and fairly.

Finally, large numbers of non-citizens are also incarcerated in the Department of Justice ("DOJ") Marshals Service (USMS) and Federal Bureau of Prisons (BOP) facilities for two federal immigration crimes, 8 U.S.C. § 1325 (illegal entry), and 8 U.S.C. § 1326 (illegal re-entry). Strictly speaking, this is not immigration detention, and outside the scope of this hearing, but we would like to register our serious concerns about the criminalization of migration through these prosecutions, and the conditions in which individuals charged and convicted of these crimes are held. In the past decade, a sharp rise in prosecution of these offenses has created a significant population incarcerated for what are formally criminal offenses, even though the underlying conduct is indistinguishable from civil violations that in the past would have led only to civil removal proceedings. The FY 2013 average daily population of people charged with or convicted of immigration offenses in USMS custody was 14,768,[14] and the population of people in BOP custody for immigration offenses was 19,100.[15] Our recommendations for responding to the abuses in BOP's Criminal Alien Requirement (CAR) prisons, which are operated exclusively by private prison companies, are in our June 2014 report, *Warehoused and Forgotten: Immigrants Trapped in Our Shadow Private Prison System*. [16]

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[11] Data in possession of the ACLU. Of those, at least 798 detainees were likely held in mandatory detention under 8 U.S.C. § 1226(c), which means they had received no individualized determination at all that their detention was necessary, not to mention a bond hearing. An additional 119 detainees were potentially subject to prolonged detention under § 1226(c), but their database records were incomplete and lacked sufficient information to determine conclusively the statute under which they were being detained. An estimated 1,007 of the detainees were subject to long-term, post-final-order detention under 8 U.S.C. § 1231. These individuals also were being subjected to prolonged detention without bond hearings to determine if such detention was necessary

[12] *See Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013); ACLU, *Rodriguez v. Robbins* case information page, https://www.aclu.org/immigrants-rights/rodriguez-et-al-v-robbins-et-al.

[13] *See* discussion in Part III *infra*.

[14] Data in possession of the ACLU. U.S. Marshals Service response to ACLU FOIA request, March 2014.

[15] E. Ann. Carson, Bureau of Justice Statistics, U.S. Department of Justice, *Prisoners in 2013*, at 17 T.15 (Sept. 2014), *available at* http://www.bjs.gov/content/pub/pdf/p13.pdf.

[16] American Civil Liberties Union, *Warehoused and Forgotten: Immigrants Trapped in Our Shadow Private Prison System* (June 2014), *available at* https://www.aclu.org/sites/default/files/assets/060614-aclu-car-reportonline.pdf.

While the ACLU's focus in this statement is on conditions of confinement, we are also concerned about the massive expansion of immigration detention that has led to unnecessary incarceration of hundreds of thousands of individuals who pose little or no danger or flight risk, most recently manifested in the extraordinarily rapid expansion of family detention that began in summer 2014. Until the problem of excessive use of detention is addressed, and procedures are put in place to ensure that detention is only used as a last resort, abuses will continue. The most direct and immediate path to creating a truly civil and humane immigration detention system—and to controlling the burdensome costs of this system—is to end the overreliance on immigration detention for individuals in civil removal proceedings, particularly when effective and far more humane alternatives to detention exist, and to curtail the criminalization of immigration violations.

II. ICE Detention

Despite the civil, non-punitive purpose of immigration detention and the Obama Administration's oft-cited 2009 pledge to transform ICE detention into a "truly civil detention system,"[17] ICE relies on an overwhelmingly penal model of incarceration. Correctional expert Dr. Dora Schriro, who served as Department of Homeland Security (DHS) Secretary Janet Napolitano's Special Advisor on ICE Detention and Removal highlighted this reality in her comprehensive review of the ICE detention system released in 2009. The report noted:

> With 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. ICE relies primarily on correctional incarceration standards designed for pre-trial felons and on correctional principles of care, custody, and control. These standards impose more restrictions and carry more costs than are necessary to effectively manage the majority of the detained population.[18]

Informed by documents obtained by the ACLU in federal court through Freedom of Information Act (FOIA) litigation, the *New York Times* reported in 2010 that ICE "officials . . . used their role as overseers to cover up evidence of mistreatment, deflect scrutiny by the news media or prepare exculpatory public statements after gathering facts that pointed to substandard care or abuse."[19] The agency had even lost track of how many detainees died in its custody.[20] The *Washington Post* published a four-part series titled "Careless Detention: Medical Care in Immigrant Prisons," which concluded with an examination of the ACLU of Southern California's successful work to stop forcible drugging of detainees for deportation.[21] The *Post* collaborated with CBS News's

[17] *See, e.g.*, Nina Bernstein, *U.S. to Reform Policy on Detention for Immigrants*, N.Y. TIMES, August 5, 2009, *available at* http://www.nytimes.com/2009/08/06/us/politics/06detain.html?pagewanted=all; Human Rights Watch, *Jails and Jumpsuits*, *supra* note 6 at 4-6.

[18] Dora Schriro, *Immigration Detention Overview and Recommendations*, at 2-3 (Oct. 6, 2009), *available at* http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf

[19] Nina Bernstein, *Officials Hid Truth of Immigrant Deaths in Jail*, N.Y. TIMES, Jan. 9, 2010, *available at* http://www.nytimes.com/2010/01/10/us/10detain.html?pagewanted=all

[20] Nina Bernstein, *Officials Say Detainee Fatalities Were Missed*, N.Y. TIMES, Aug. 17, 2009, *available at* http://www.nytimes.com/2009/08/18/us/18immig.html.

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

60 Minutes, resulting in a broadcast segment featuring extensive "evidence that immigrants are suffering from neglect and some don't survive detention in America."[22]

ICE has never met its stated goal of operating a truly civil detention system, as defined most simply by the types of facilities used to detain immigrants in removal proceedings. Indeed, according to statistics from a recent Government Accountability Office (GAO) report, 228 of the approximately 250 detention facilities used by ICE still house ICE detainees in the same facilities as prisoners who are awaiting trial on criminal charges or serving sentences for criminal convictions—sometimes even in the same housing units.[23]

Perhaps the single greatest impediment to reaching this goal is the sheer size of the system. The system could be dramatically shrunken—and many contracts with county jails and jail-like facilities cancelled—if ICE invested far more robustly in effective alternatives to detention rather than immigration detention. Such alternatives are more humane and far less costly than detention.[24] However, ICE's ability to do so is constrained by its failure to dedicate enough of its Enforcement and Removal Operations budget to alternatives detention, and by two other factors. First, Congress irrationally mandates that ICE maintain an arbitrary 34,000 detention beds regardless of operational needs.[25] While the requirement to "maintain" a certain number of detention beds does not—and, properly construed, should not—mean that ICE must utilize that detention space, the requirement makes it more difficult for ICE to devote sufficient resources to alternatives. Second, the government's overbroad interpretation of who is subject to "mandatory detention" under the relevant immigration statutes (an interpretation that the ACLU is currently challenging through litigation) makes it impossible for large numbers of people to even go before a judge to request release on bond, combined with its limited interpretation of what kinds of "custody" are statutorily permissible for this population, places unnecessary limits on ICE's use of alternatives to detention.[26] Together, these policies make the immigration detention system

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[22] Scott Pelley, "Detention in America." (Feb. 11, 2009), available at http://www.cbsnews.com/stories/2008/05/09/60minutes/main4083279.shtml

[23] U.S. Government Accountability Office, *Immigration Detention: Additional Actions Needed to Strengthen Management and Oversight of Facility Costs and Standards*, GAO-15-153, at 9 (Oct. 2014), *available at* http://www.gao.gov/assets/670/666467.pdf. ICE refers to jails holding such mixed populations as "non-dedicated" facilities. The 228 non-dedicated facilities consist of 72 non-dedicated Intergovernmental Service Agreement ("IGSA") facilities owned by state and local governments or private prison companies and authorized to house detainees for over 72 hours, 71 non-dedicated U.S. Marshals Service ("USMS") Intergovernmental Agreement ("IGA") or contract facilities authorized to house detainees for over 72 hours, 31 non-dedicated IGSA facilities authorized to house detainees for 72 hours or less, and 54 USMS IGA/contract facilities authorized to house detainees for 72 hours or less. *Id*.

[24] *See* ACLU Fact Sheet on Alternatives to Immigration Detention, (Oct. 2014), *available at* https://www.aclu.org/immigrants-rights/aclu-fact-sheet-alternatives-immigration-detention-atd. This fact sheet includes a brief description of the single alternative to detention that has been funded by ICE, as well as community support programs that are not currently funded by ICE but are being piloted in cooperation with ICE.

[25] *See* ACLU, Written Statement of the American Civil Liberties Union for a Hearing on "The Release of Criminal Detainees by U.S. Immigration and Customs Enforcement: Policy or Politics?" submitted to the U.S. House of Representatives Committee on the Judiciary, at 5-6, Mar. 19, 2013, *available at* https://www.aclu.org/files/assets/aclu_statement_for_3_19_house_judiciary_committee_hearing_on_immigration_enforcement_final_3_18_13.pdf.

[26] Sarah Mehta, Locked Up: Class-Action Lawsuits Challenge Mandatory Detention of Immigrants (Aug. 8, 2013), https://www.aclu.org/blog/immigrants-rights/locked-class-action-lawsuits-challenge-mandatory-detention-immigrants.

unnecessarily large and constrain the ability of the administration to actually achieve its stated goal of civil detention reform.

The 2011 PBNDS

ICE's first major step toward the goal of creating a truly civil detention system was developing the 2011 Performance-Based National Detention Standards (2011 PBNDS), in the wake of sustained media exposure of gross human rights violations in ICE detention and Dr. Schriro's critical report. The 2011 PBNDS are not perfect, and contain several important shortcomings.[27] In many respects, they are also less protective of the rights of individuals in detention than the American Bar Association's model standards for civil immigration detention.[28] Nevertheless, uniform and speedy implementation of these standards is necessary to provide fair and humane treatment to ICE detainees, and represents an important first step toward establishing a truly civil immigration detention system.[29]

The pace of implementation of the 2011 PBNDS has been disappointing. In October 2014, the GAO concluded that significant variations continue to exist in the more than 250 different facilities used by ICE for immigration detention: different facilities are governed by multiple older generations of ICE's detention standards, ICE has not documented the reasons why it uses different standards across facilities, and significant inconsistencies exist in the oversight mechanisms that ICE uses in different facilities.[30] The GAO reports that almost half of ICE's beds, which constitute 85 percent of the facilities ICE relies on, are still subject to older detention standards rather than the PBNDS 2011.[31] Though ICE officials told GAO that they had planned to request that all over-72-hour facilities with an average daily population of 150 or higher implement the 2011 PBNDS by the end of FY 2014, they have not met that goal.

Sexual Abuse and Assault

Sexual abuse and assault continues to be a serious, pervasive problem in immigration detention facilities. A 2013 report by the Government Accountability Office examined 215 allegations of sexual abuse and assault in ICE detention facilities from October 2009 through March 2013 and

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[27] *See* ACLU, Written Statement of the ACLU for a Hearing on "Holiday on ICE: The U.S. Department of Homeland Security's New Immigration Detention Standards," Submitted to the House Judiciary Subcommittee on Immigration Policy and Enforcement, Mar. 28, 2012, *available at* https://www.aclu.org/files/assets/aclu_detention_standards_hearing_statement_final_2.pdf. In particular, the PBNDS medical and mental health care provisions do not completely or consistently comply with accepted correctional standards of care; the PBNDS sexual assault and abuse provisions are not fully PREA-compliant; the PBNDS limitations on the use of segregation are insufficient; and the PBNDS provisions on restraints and use of force actually reverse progress made in ICE's earlier 2008 PBNDS. *Id*. at 3. As discussed below, however, the promulgation of PREA regulations by DHS and the adoption in 2013 of a laudable policy directive regulating the use of solitary confinement in ICE detention facility have addressed some of these deficiencies without directly amending the flaws in these areas in the PBNDS 2011.

[28] *See* American Bar Association, ABA Civil Immigration Detention Standards (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/immigration/abaimmdetstds.authcheckdam.pdf.

[29] As discussed below, however, some of the 2011 PBNDS's shortcomings have been addressed through the promulgation of regulations and other guidance.

[30] *See* GAO-15-153, *supra* note 23, at 28-44.

[31] *Id*. at 28.

found that detained individuals face severe challenges in reporting abuse.[32] Even when individuals do report allegations, many local ICE offices fail to inform headquarters as required.[33]

There has been one significant recent sign of progress: In early 2014, DHS finalized its long-awaited regulations implementing the Prison Rape Elimination Act ("PREA"). The standards require that all DHS facilities and all contract facilities holding immigration detainees comply with the PREA regulations. These regulations set forth a zero-tolerance policy for any sexual abuse of immigration detainees; establish mandatory training for all staff; and require that every facility undergo at least one outside audit for PREA compliance every three years. The regulations also establish oversight and limitations on the use of isolation on vulnerable detainees and alleged victims of sexual abuse; prohibit cross-gender searches of women; and, of particular importance to transgender and intersex detainees, they prevent examination solely for the purpose of determining genital characteristics.[34] Full and prompt implementation of these regulations is necessary to protect the safety and dignity of immigrants in DHS custody.

Unfortunately, it is unclear when such implementation will be completed. The regulations state that ICE will "endeavor to ensure" that dedicated facilities (i.e., facilities that hold exclusively ICE detainees) adopt the standards within 18 months of issuance, but set forth no similar plan for implementation at non-dedicated facilities (i.e., facilities that hold a mixed population of ICE detainees and other prisoners, which include almost half of all ICE beds). Additionally, DHS's comments indicate that implementation at private prisons and county jails will likely not occur until ICE or the facility initiates the negotiation of other substantive contract modifications (for example, a change in the bed-day rate or the adoption of the 2011 PBNDS).[35] Finally, for the 71 U.S. Marshals Service contract facilities that ICE utilizes for detention (which account for 19% of ICE's total bed space),[36] DHS appears to assume that the DOJ PREA standards apply, but it is unclear whether DHS intends to take any responsibility for ensuring that audits are conducted or otherwise verifying compliance.[37] If DOJ, and in particular USMS, does not share the same understanding and does not itself take responsibility for ensuring these audits are conducted, then it means that nobody is taking on this responsibility.

Solitary Confinement

In March 2013, a front-page *New York Times* article described the widespread and inappropriate use of solitary confinement in ICE detention.[38] This led to significant congressional interest in reforming the use of solitary confinement in ICE detention, and the final version of the Senate's 2013 comprehensive immigration reform bill included a section limiting the use of solitary

[32] Government Accountability Office, *Immigration Detention: Additional Actions Could Strengthen DHS Efforts to Address Sexual Abuse*, GAO-14-38 (2013), *available at* http://www.gao.gov/assets/660/659145.pdf.
[33] *Id*.
[34] *See* Dep't of Homeland Security, Standards to Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities, 79 FED. REG. 13100 (Mar. 7, 2014), *codified at* 6 C.F.R. Part 115.
[35] 79 FED. REG. at 13111.
[36] GAO-15-153, *supra* note 23, at 9.
[37] 79 FED. REG. at 13111.
[38] Ian Urbina & Catherine Rentz, *Immigrants Held in Solitary Cells, Often for Weeks*, N.Y. TIMES, Mar. 23, 2013, *available at* http://www.nytimes.com/2013/03/24/us/immigrants-held-in-solitary-cells-often-for-weeks.html?pagewanted=all&_r=0.

confinement in immigration detention.[39] In September 2013, ICE issued a new segregation policy directive establishing stricter policies and procedures for the use and monitoring of solitary confinement in ICE detention facilities.[40] Specifically, the new policy substantially increases ICE headquarters' monitoring of solitary confinement and sets important limits on its use, especially for vulnerable populations such as individuals with mental disabilities and alleged victims of sexual assault. If strictly enforced throughout the ICE detention system – including at county jails and contract facilities constituting more than half of the system – ICE's new policy could represent significant progress in curtailing this inhumane practice.

The key question, however, is whether the monitoring process is working as contemplated, and whether ICE is using the information it now collects to reduce solitary confinement. This question remains unanswered. Although the policy creates robust internal reporting mechanisms, including quarterly compilation reports on the use of solitary confinement, ICE has not made any information publicly available that would allow Congress, NGOs, or other government agencies to evaluate the agency's progress in implementing the directive. This information must be made publicly available. It is also especially important that the agency re-commit to avoiding the use of segregation for people with mental health issues, and ensure that anyone in segregation receive appropriate medical and mental health care, including appropriate monitoring to determine whether their condition is deteriorating while in solitary confinement.

Other Systemic Problems

Many ICE detention facilities are located in areas far from detainees' families, and often in places that lack immigration attorneys. Etowah County Jail in Gadsden, Alabama, is one of the most notorious examples. Located a two-and-one-half hour drive from Atlanta and more than six hours from the New Orleans field office that supervises it, Etowah is isolated from lawyers who specialize in immigration law; there are no nearby legal or other service providers who have been able to provide legal orientation or "know your rights" programs at the facility.[41] Since July 2011, the facility has primarily held men who are expected to remain in immigration custody for a long period of time, often because of diplomatic problems between the United States and their home countries that keep them in limbo for months or years.[42] Many could petition the courts to release them from custody based on this state of limbo, but the lack of access to immigration attorneys in the area makes it extremely difficult for detainees at Etowah to successfully navigate the process.[43]

In many detention facilities, limited and expensive telephone access compounds such isolation. The ACLU is currently litigating a class action lawsuit in Northern California to secure adequate telephone access for detainees, so that they can contact attorneys and pro bono legal service providers and collect evidence in support of their immigration cases while in detention.[44] Calls from these facilities are subject to temporal and technical barriers that make it difficult to

[39] S.744, 113th Congress, § 3717 (2013).
[40] U.S. Immigration and Customs Enforcement, Policy Directive 11065.1: Review of the Use of Segregation for ICE Detainees (Sept. 4, 2013), *available at* http://www.ice.gov/doclib/detention-reform/pdf/segregation_directive.pdf.
[41] Detention Watch Network, *Expose & Close: Etowah County Jail, Alabama*, at 3-4 (Nov. 2012), *available at* http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/expose-etowahnov12.pdf.
[42] *Id*. at 3.
[43] *Id*. at 3-4.
[44] *See Lyon v. U.S. Immigration & Customs Enforcement*, 300 F.R.D. 628 (N.D. Cal. 2014).

communicate with attorneys and government agencies, and are often prohibitively expensive—ranging from $3.75 to $9.50 for a ten-minute long-distance call within California.[45]

Medical and mental health care is another longstanding and ongoing area of concern. One of the medical detention reforms that ICE began in response to sustained criticism was to direct ICE's Office of Detention Oversight (ODO) to conduct an investigation each time a detainee dies in custody. However, such investigations—while laudable—are no guarantee of humane care. For example, in April 2012, a 46-year old man detained at the GEO-operated Denver Contract Detention Facility died of a heart attack.[46] The subsequent ODO investigation concluded that the detention facility had "failed to provide [the detainee] access to emergent, urgent, or non-emergent medical care:" in particular, GEO failed to properly train its nursing staff on the use and maintenance of the medical equipment supplied to them and improperly waited nearly an hour to telephone 911 after a code blue emergency was first announced.[47] The subject-matter expert retained by ICE ODO as part of the investigation concluded that the staff's unfamiliarity with the relevant protocol, failure to administer appropriate cardiac medication, and delays in transporting the patient to a higher level care facility all may have been contributing factors to his death.[48] Yet today, some 400 detainees are still held at this facility.

Exploitive labor practices are another source of concern. In May 2014, a front-page *New York Times* article detailed how ICE and its contractors rely on a massive workforce of detainees to clean and maintain the facilities where they are detained—and typically pay them 13 cents per hour or less for this work. This below-minimum-wage workforce helps keep ICE's excessively large detention system afloat by reducing the cost of maintaining detention facilities by at least $40 million per year.[49] Although the existence of a work program is often beneficial to detained individuals (if nothing else, to break up the enforced idleness and monotony of detention) and helps ensure safety inside a facility, the exploitive nature of existing labor programs is troubling. Detained individuals who provide labor to their jailers should receive fair wages and protection from unsafe working conditions.

Family Detention

ICE's first experiment with large-scale detention of families was in 2006 when it opened the 512-bed T. Don Hutto facility in Texas, operated by CCA, a for-profit private prison company. The ACLU and the University of Texas School of Law filed suit to challenge deplorable conditions in the facility that included requiring children to wear prison garb, providing them with only one hour of outdoor recreation each day Monday through Friday, prohibiting them from keeping food and toys in their cells, and threatening to separate them permanently from their parents if they misbehaved.[50] Other organizations exposed similarly inhumane conditions

[45] ACLU of Northern California, Press Release, "ACLU Sues ICE Over Unfair Telephone Policy" (Dec. 19, 2013), *available at* https://www.aclunc.org/news/aclu-sues-ice-over-unfair-telephone-policy.
[46] Files in possession of the ACLU. ICE OPR Office of Detention Oversight, Report of Investigation, Case No. 201207288, Detainee Death Review, at 1 (Oct. 16, 2012).
[47] *Id*. at 18.
[48] *Id*. at 16.
[49] Ian Urbina, *Using Jailed Migrants as a Pool of Cheap Labor*, N.Y TIMES, May 24, 2014, *available at* http://www.nytimes.com/2014/05/25/us/using-jailed-migrants-as-a-pool-of-cheap-labor.html.
[50] ACLU, Press Release, "ACLU Challenges Illegal Detention of Immigrant Children Held in Prison-Like Conditions," (Mar. 6, 2007), *available at* https://www.aclu.org/immigrants-rights/aclu-challenges-illegal-detention-immigrant-children-held-prison-conditions.

faced by children and their mothers at Hutto.[51] The incoming Obama administration announced an end to this cruel experiment in 2009, and converted Hutto into an adult detention facility. In making this announcement DHS noted that immigration detention must be implemented "thoughtfully and humanely," targeting only those who pose a serious risk of flight or danger to the community.[52]

In June 2014, however, the Obama administration abruptly reversed course and developed family detention plans of unprecedented scale – from fewer than 100 beds in May to more than 3,000 in a few short months. [53] The vast majority of these family detention beds will be in the hands of private, for-profit prison companies—including CCA, the same company that previously ran Hutto as a family detention facility. This reversal came in the wake of a large influx of Central American migrants at the Southwest border, some of them parents with children. The administration claimed that the expansion would deter future migrants by "sending a message" of tough enforcement. The administration's strategy included two principal components: first, expansion of the number of families detained (principally mothers with children under the age of 18); and second, a blanket policy to deny release to these detained families even when they pass a credible fear screening which entitles them to pursue their asylum claims before the immigration court, and even when they have family members in the country who are ready to provide them with support and a place to live.

DHS opposing immigration bond in detained family cases: In its pursuit of "detaining and deporting" newly arrived Central American families, most of whom are fleeing brutal violence, DHS has adopted a policy of refusing to set bond or other conditions of release for nearly all detained families, even those who pass their credible fear interviews – a threshold adjudication for asylum. In bond redetermination hearings before the immigration court, DHS is arguing that families must be kept locked up as a matter of national security in order to deter other families from coming to the United States.[54] The use of such deterrence-based arguments to justify detention of bona fide asylum seekers -- including young children -- constitutes an egregious abuse of the government's immigration detention authority, which is intended to be civil, not punitive. The principal purpose of immigration detention is to ensure appearance at removal proceedings, and at removal if ultimately ordered. Secondarily, immigration detention serves to protect the public from individuals who pose a danger.[55] Most of the families for whom DHS is categorically denying release have strong asylum cases -- often based on severe domestic violence or threats from gangs. They also have family members who have agreed to sponsor them and ensure their appearance at their immigration court proceedings. Thus, they pose little or

[51] *See* Women's Refugee Commission and Lutheran Immigration & Refugee Service, *Locking Up Family Values: The Detention of Immigrant Families* (Feb. 2007), *available at* http://womensrefugeecommission.org/joomlatools-files/docman-files/famdeten.pdf.
[52] Nina Bernstein, *U.S. to Reform Policy on Detention for Immigrants*, N.Y. TIMES, Aug. 5, 2009, *available at* http://www.nytimes.com/2009/08/06/us/politics/06detain.html?pagewanted=all (quoting John Morton, Assistant Secretary of Homeland Security)..
[53] David McCabe, "Administration to close immigration detention center at month's end," *The Hill* (Nov. 18, 2014), *available at* http://thehill.com/news/administration/224626-administration-to-close-immigrant-detention-center.
[54] Women's Refugee Commission and Lutheran Immigration & Refugee Service, *Locking Up Family Values, Again: A Report on the Renewed Practice of Family Immigration Detention*, at 19 (Oct. 2014), *available at* http://womensrefugeecommission.org/resources/document/1085-locking-up-family-values-again.
[55] *Zadvydas v. Davis*, 533 U.S. 678 (2001)

no flight risk or threat to public safety that would justify DHS's categorical denial of release on bond or other conditions.[56]

The ACLU filed a nationwide class-action lawsuit in December 2014 to challenge the Obama administration's blanket no-release policy for asylum-seeking mothers and children in family detention.[57] Each family named in the lawsuit was found by an immigration officer or judge to have a credible fear of persecution. Yet, instead of letting these families stay with their relatives or sponsors as they await their asylum hearings, as DHS has typically done in the past, the agency categorically denied them release on bond or other conditions of release. The complaint charges that the Obama administration's blanket no-release policy is a violation of the immigration detention statute and implementing regulations, as well as the Fifth Amendment of the U.S. Constitution.[58]

DHS and Immigration Courts pursuing fast-track deportations of children and families, including those without counsel: Administration officials, including DHS Secretary Jeh Johnson have repeatedly stated that their ultimate goal is to deport Central American children and families as quickly as possible, and thereby deter others from coming.[59] To this end, DHS and the immigration courts placed these groups at the front of the immigration-court queue, with strict time limits on prosecutors and judges to charge and adjudicate these cases . The administration's overzealous pursuit of deportations has resulted in the deportations of families and children who, unrepresented by counsel,[60] have no meaningful opportunity to present their asylum claims before they are ordered removed to countries where they may face extreme danger.[61]

Detained families have been subjected to an "expedited removal" procedure in which they have been ordered deported without even seeing an immigration judge, and in many cases, without access to counsel, legal rights information, or even child care during critical proceedings. In August 2014, the ACLU and other immigrants' rights advocates sued the government for denying a fair deportation process to families who have fled Central America. The suit charged the administration with enacting a new strong-arm policy to ensure rapid deportations by holding detained families to a nearly insurmountable and erroneous standard to prove their asylum

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[56] *See* Declaration of Michelle Brane, Ex. 1 to Memorandum in Support of Amended Motion for Preliminary Injunction (Dkt. No. 9), *R.I.L.R. v. Johnson*, No. 1:15-cv-00011 (JEB) (D.D.C. Jan. 8, 2015); Declaration of Barbara Hines, Ex. 4 to Memorandum in Support of Amended Motion for Preliminary Injunction (Dkt. No. 9), *R.I.L.R. v. Johnson*, No. 1:15-cv-00011 (JEB) (D.D.C. Jan. 8, 2015).

[57] *See* ACLU, Press Release, "ACLU sues Obama administration for detaining asylum seekers as intimidation tactic," (Dec. 16, 2014), *available at* https://www.aclu.org/immigrants-rights/aclu-sues-obama-administration-detaining-asylum-seekers-intimidation-tactic.

[58] *See id.*

[59] Julia Preston, Detention Center Presented as Deterrent to Border Crossings, N.Y. TIMES, Dec. 15, 2014, *available at* http://www.nytimes.com/2014/12/16/us/homeland-security-chief-opens-largest-immigration-detention-center-in-us.html?_r=0. Homeland Security officials instead have proposed that people seeking to escape persecution in Central America apply at an "in-country refugee program." Department of Homeland Security, Statement by Secretary Johnson Regarding Today's Trip to Texas, Dec. 15, 2014, *available at* http://www.dhs.gov/news/2014/12/15/statement-secretary-johnson-regarding-today%E2%80%99s-trip-texas.

[60] Transactional Records Access Clearinghouse, "Representation for Unaccompanied Children in Immigration Court" (Nov. 25, 2014), *available at* http://trac.syr.edu/immigration/reports/371/.

[61] ACLU Press Release, "Groups Ask Federal Court to Block Deportation Hearings for Children without Legal Representation" (Aug. 1, 2014), *available at* https://www.aclu.org/immigrants-rights/groups-ask-federal-court-block-deportation-hearings-children-without-legal.

claims.[62] In October 2014, the ACLU and other groups filed Freedom of Information Act litigation to compel the release of documents regarding the use of the expedited removal process against families.[63]

The administration's policies are also placing children at risk. In August 2014, the ACLU and other immigrants' rights groups went to court seeking to prohibit the government from deporting Central American children unrepresented by counsel. The court declined to intervene after the government promised to provide more time for children to find representation, but the government has continued to order the removal of Central American children, including those with no counsel.[64] Many of these children are likely to face violence, rape, and even death upon return.[65]

III. CBP Detention

In recent years, immigrants and U.S. citizens alike have not received basic protections while in short-term CBP custody, including in holding cells at Border Patrol stations, checkpoints, ports of entry, and secondary inspection areas. The scale of the system is unknown, the standards governing conditions not public, and oversight authority within the agency unclear. Complaints of CBP misconduct regularly include verbal and physical abuse, denial of medical care, inadequate food and water, due process violations, exposure to extreme temperatures, bright lights and inadequate space or bedding making sleep impossible, extreme overcrowding, and permanent confiscation of personal items (including legal documents, medication and personal identification). A major 2013 University of Arizona study for which 1,113 recent deportees were interviewed in 2010, 2011, and 2012 found that 45% of respondents reported not receiving sufficient food while in U.S. custody, 37% reported denial of medical attention, and 39% reported confiscation of personal property, including money and identity documents.[66] In the past three years alone, many media and NGO reports have documented cases that are consistent with these findings.[67]

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[62] ACLU, Press Release, "Groups Sue U.S. Government over Life-Threatening Deportation Process against Mothers and Children Escaping Extreme Violence in Central America," Aug. 22, 2014, *available at* https://www.aclu.org/immigrants-rights/groups-sue-us-government-over-life-threatening-deportation-process-against-mothers.

[63] *Id.* Since August 2014, the ACLU has also gone to court to challenge the deportation of several individual families who received expedited removal orders as a result of these unfair procedures.

[64] *See* [Proposed] Second Amended Class Action Complaint, *J.E.F.M. v. Holder*, No. 2:14-cv-010126-TSZ (W.D. Wash. Oct. 21, 2014), *available at* https://www.aclu.org/sites/default/files/assets/dkt_86-1_exhibit_a_proposed_second_amended_complaint.pdf.

[65] *Supra* note 62.

[66] *See* University of Arizona report, *In the Shadow of the Wall: Family Separation, Immigration Enforcement and Security*, p. 24 (March 15, 2013), a*vailable at* http://las.arizona.edu/sites/las.arizona.edu/files/UA_Immigration_Report2013web.pdf

[67] *See* Cindy Carcamo and Richard Simon, *Immigrant groups complain of 'icebox' detention cells*, L.A. TIMES (Dec. 5, 2013), *available at* http://www.latimes.com/nation/la-na-ff-detention-centers-20131206,0,2076586,full.story#axzz2mgEXgFJa; Rachael Bale, *Detained border crossers may find themselves sent to 'the freezers'*, Center for Investigative Reporting (Nov. 18, 2013), *available at* http://cironline.org/reports/detained-border-crossers-may-find-themselves-sent-to-freezers-5574; Eric Lipton and Julia Preston, *As U.S. Plugs Border in Arizona, Crossings Shift to South Texas*, N.Y. TIMES (June 16, 2013), *available at* http://www.nytimes.com/2013/06/17/us/as-us-plugs-border-in-arizona-crossings-shift-to-south-texas.html?_r=0&pagewanted=all; No More Deaths. *Crossing the Line: Human Rights Abuses of Migrants in Short Term*

Need for Greater Oversight

CBP has a long record of abuse along the border, in short-term holding facilities, and in the interior—and of failing to respond to complaints about these abuses. Current DHS oversight mechanisms, including the Office of Inspector General (OIG) and the DHS Office for Civil Rights and Civil Liberties (CRCL), are insufficient for responding to individual complaints and providing redress. Specifically, CRCL is an internal policy office whose primary focus is advising the Department on civil rights issues. Similarly, OIG only addresses a small portion of complaints, frequently transferring inquiries back to CBP for investigation, in spite of serious conflict of interest concerns. [68] Other DHS components, including U.S. Citizenship and Immigration Services (USCIS) and the Transportation Security Administration (TSA), have Ombudsman offices as an external mechanism to respond to community complaints. An Ombudsman's office serves the important function of receiving individual complaints, investigating them, and when appropriate, providing redress. For these reasons, the ACLU believes that CRCL needs broader authority for its investigations—including subpoena powers—and that there needs to be an Ombudsman's office with authority over CBP.

Additionally, CBP needs to create an internal office responsible for CBP detention operations, planning, and oversight. The absence of a single office to coordinate these functions is a major organizational gap within CBP.

Sexual Abuse and Assault

After DHS issued its final PREA rule, CBP set up an internal PREA working group and appointed an interim coordinator for the prevention of sexual assault. However, CBP remains in

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Custody on the Arizona Sonora Border (September 2008), *available at* http://www.nomoredeaths.org/Abuse-Report-Crossing-the-Line/View-category.html; Binational Defense and Advocacy Program, Northern Border Initiative, *Human Rights Violations of Mexican Migrants Detained in the United States*, May 2010-2011 (Jan. 2012), *available at* http://www.lawg.org/storage/documents/Mexico/informe-violaciones-derechos-humanos-pdib-27marzo12.pdf; Kino Border Initiative, *Documented Failures: The Consequences of Immigration Policy at the U.S.-Mexico Border* (Feb. 13, 2013), *available at* http://www.jesuit.org/jesuits/wp-content/uploads/Kino_FULL-REPORT_web.pdf (One in four migrants surveyed alleged abuse at the hands of the Border Patrol, more than double the rate of reported abuse by Mexican police, criminal gangs, or any other source.); No More Deaths, *A Culture of Cruelty: Abuse and Impunity In Short-term U.S. Border Patrol Custody* (2011), *available at* http://nomoredeaths.org/cultureofcruelty.html (No More Deaths conducted interviews with 12,895 individuals released from Border Patrol custody. Of those, 10 percent reported physical abuse by CBP agents, including sexual assault, use of chokeholds, and hitting and kicking of detainees, while 13 percent reported verbal abuse, including the use of racial slurs. Only 20 percent of people in custody for more than two days reported receiving food, while the vast majority of those in need of emergency medical care or medications reported being denied treatment. Children reported denial of water at a higher rate than adults.); Amnesty International, *In Hostile Terrain: Human Rights Violations in Immigration Enforcement in the US Southwest* (2012), *available at* http://www.amnestyusa.org/sites/default/files/ai_inhostileterrain_final031412.pdf; Washington Office on Latin America, *Beyond the Border Buildup: Security and Migrants Along the U.S.-Mexico Border* (Apr. 2012), http://www.seguridadcondemocracia.org/administrador_de_carpetas/biblioteca_virtual/pdf/beyondborderbuildup_wola.pdf

[68] Government Accountability Office, GAO-13-59, *Border Security: Additional Actions Needed to Strengthen CBP Efforts to Mitigate Risk of Employee Corruption and Misconduct*, (Dec 4, 2012); *Unresolved Internal Investigations at DHS: Oversight of Investigation Management in the Office of the DHS OIG: Hearing Before the Subcomm. on Government Organization, Efficiency and Financial Management of the H. Comm. on Oversight and Government Reform*, 112th Cong. 2 (2012) (Statement of Rep. Todd Russell Platts, Chairman), http://oversight.house.gov/wp-content/uploads/2012/10/2012-08-01-Ser.-No.-112-171-SC-Gov-Orgs-Unresolved-Internal-Investigations-at-DHS.pdf.

the very early stages of developing a PREA implementation plan. Given CBP's record of abuse and the late date on which the agency began its PREA planning process, the agency should prioritize the development and provision of formal, comprehensive PREA training for its staff, as well as seeking independent PREA audits for all CBP detention facilities as soon as possible.

CBP Detention Standards

CBP is currently reviewing its standards governing CBP detention facilities. In this review, it will be important, *inter alia*, to ensure these standards fully incorporate the requirements of the DHS PREA rule; require dissemination of legal rights information in commonly-spoken languages; provide adequate telephone access to consular officials, lawyers, family members, and non-governmental organizations; set enforceable policies for identifying and processing credible fear claims of asylum-seekers; and mandate minimum conditions for detention, including the provision of adequate nutrition, appropriate environmental conditions, and medical care.

Criminal Prosecutions of Immigrants

By choosing to indiscriminately refer border crossers for criminal prosecution for illegal entry or reentry after removal, CBP wastes taxpayer dollars and unnecessarily funnel migrants into the already-overcrowded criminal justice system for what is essentially a civil violation. There is no evidence that such prosecutions effectively deter reentry. The Migration Policy Institute has noted that for border crossers with strong family and economic ties to the United States "even… high-consequence enforcement strategies [criminal prosecutions] may not deter them from making future attempts."[69] And a University of Arizona study tracking 1,200 people deported via Operation Streamline found that when it comes to re-entry there is no statistically significant difference between those who went through Operation Streamline prosecutions and those who did not.[70] CBP should refer for § 1325 and § 1326 prosecution only those individuals who have separate convictions for serious, violent felonies, and whose sentences for those felonies were completed within the previous five years.

IV. Recommendations

Recommendations regarding ICE detention

- ICE should act promptly to ensure that all facilities authorized to hold ICE detainees for 72 hours or longer will fully implement the 2011 PBNDS, PREA, and ICE's 2013 Segregation Policy Directive. Specifically:
    - ICE should apply the 2011 PBNDS to all facilities – including jails and contract facilities - authorized to hold adult ICE detainees over 72 hours by the end of FY 2015, unless such compliance would require substantial capital improvements. In such cases, the facilities should be required to comply after being given a

[69] Marc R. Rosenblum and Doris Meissner, Migration Policy Institute, "The Deportation Dilemma: Reconciling Tough and Humane Enforcement," at 43 (April 2014), *available at* http://www.migrationpolicy.org/research/deportation-dilemma-reconciling-tough-humane-enforcement.
[70] National Public Radio, "Is Operation Streamline Worth Its Budget Being Tripled?," Sept. 5, 2013, http://www.npr.org/2013/09/05/219177459/is-operation-streamline-worth-its-budget-being-tripled

reasonable period of time and, if necessary, funding, to construct such improvements. If the facility is unable or unwilling to implement the 2011 PBNDS, ICE should terminate its contract.

- Move swiftly to implement the PREA rule in all ICE-run facilities, and end the use of any jail or contract facility that does not comply with either the DOJ PREA rule or the DHS PREA rule within one year of the effective date of the DHS rule.

- ICE should rigorously oversee compliance with its 2013 segregation directive and hold accountable any facilities – including jails and contract facilities – that do not comply with the directive's requirements;

- ICE should regularly release data to Congress and the public related to the use of solitary confinement in ICE facilities.

- The Government Accountability Office (GAO) should investigate ICE's efforts to ensure that segregation is used only when necessary and in compliance with policy, and evaluate whether ICE headquarters responds effectively when the policy is not properly implemented at the field office or facility level.

- The U.S. Commission on Civil Rights should investigate what ICE has done to ensure 2011 PBNDS implementation across the ICE detention system, and make recommendations for a firm timeline for completion.

- ICE should end its overreliance on immigration detention, and expand the use of effective and more humane community-based alternatives to detention (with case management), except where detention is absolutely necessary.

- Congress should eliminate the immigration detention bed quota from annual appropriations bills.

- ICE should reject the detention of families as an immigration enforcement tool, abandon its no-bond policy, and ensure that every parent and child receives an individualized assessment of the need to detain. The detention of families and children must only be used as a last resort, for the shortest period of time possible.

- ICE should cancel its contract for family detention at Dilley, and return Karnes to its prior function as a facility for adults only. Additionally, ICE should update its 2007 Family Residential Standards to incorporate the strongest protections from each of the 2011 PBNDS and the 2007 *In re Hutto* settlement.

Recommendations regarding CBP detention

- DHS should create an office responsible for CBP detention operations, planning, and oversight;

- DHS should publicly release comprehensive information on the location and capacity of CBP short-term detention facilities, including average daily populations in each location;

- DHS should require CBP to comply with policies that provide NGOs and media access. These policies should be modeled after the directive issued by ICE, "Stakeholder Procedures for Requesting a Detention Facility Tour and/or Visitation," and ICE's Performance-Based National Detention Standard (2011) 7.2 "Interviews and Tours";

- DHS should create an online detainee locator for individuals in CBP custody, analogous to the system in place for individuals in ICE detention;

- DHS should create enforceable standards applicable to all CBP short-term custody facilities and hold rooms. These standards should address, *inter alia*:

    - Minimum conditions for detention, including the provision of adequate nutrition, appropriate environmental conditions, and medical care;

    - Dissemination of legal rights information in commonly-spoken languages;

    - Access to lawyers, consular officials, family members, and non-governmental organizations; and

    - Enforceable policies for identifying and processing credible fear claims of asylum-seekers.

- CBP should move swiftly to implement the PREA rule in all CBP facilities and hold rooms, including prioritizing the development and provision of formal, comprehensive PREA training for its staff and promptly seeking independent PREA audits for all CBP facilities and hold rooms.

- The Government Accountability Office (GAO) or DHS Office of Inspector General (OIG) should issue a semi-annual report, including information regarding:

    - All current short-term custody locations;

    - The extent to which current DHS regulations and inspections ensure humane treatment at short-term custody locations;

    - Compliance with existing basic minimum detention standards;

    - Violations of basic minimum detention standards at existing short-term custody locations; and

    - Recommendations for ensuring humane conditions in CBP short-term custody facilities.

- CBP should refer for § 1325 and § 1326 prosecution only those individuals who have other convictions for serious, violent felonies, and whose sentences for those felonies were completed within the previous five years.

Recommendations regarding immigration detention generally

- The U.S. Commission on Civil Rights should review PREA compliance in all ICE and CBP facilities and hold rooms, including jails and contract facilities, with special attention to USMS contract facilities identified as being subject to DOJ PREA standards rather than DHS PREA standards.

- The government should provide immigration judge bond hearings to all detainees after no more than six months of detention, with the government bearing the burden of showing that continued detention is justified.

- A new DHS Ombudsman for Immigration Related Concerns should be created, and this new Ombudsman should have authority over ICE and CBP as well as CIS.

- Funding for the Office of Inspector General and Office for Civil Rights and Civil Liberties should be increased to reflect oversight needs and should be proportional to increases in CBP and ICE enforcement personnel.

- Congress should grant CRCL subpoena authority, with appropriate due process protections.

- CRCL should be required, under reasonable timeframes, to notify all complainants of the outcomes of investigations, including findings of fact, conclusions of law, and a description of a remedy for each violation found.

- Authority should be delegated to CRCL to discipline DHS employees it believes have acted improperly, to provide individual redress, and to compel policy changes.

- DHS should create a single multilingual on-line portal and telephone number through which individuals can file immigration- and border-related complaints; and implement uniform complaint processing that provides complainants with the status and outcomes of their complaints; requires all complaints to be investigated by a neutral decision-maker; and makes complaints and their resolutions accessible on-line, while preserving the privacy and identity of complainants.

V. Conclusion

Finalization of the DHS PREA regulations and ICE's 2013 policy directive on segregation and the 2011 PBNDS all represent significant progress. We hope that CBP's PREA implementation plan and detention standards review will, when completed, be similarly deserving of praise.

Nevertheless, adopting better regulations and policy changes is only the first step in reforming a sprawling detention system the shortcomings of which continue to result in serious inhumane and unconstitutional consequences. ICE's improved policies can only achieve their aims if the agency devotes sufficient resources to implementing them fully, and makes its implementation efforts transparent to the public by being accountable on both progress and problems.

Additionally, DHS must reduce the size of the detention system dramatically. The administration's massive expansion of family detention in 2014 is cruel and unnecessary. The automatic denial of bond hearings to broad swaths of people in detention not only denies a basic element of due process, but results in further overuse of detention. Ending the unnecessary use of detention—and making much greater use of effective, humane alternatives[71]—can assist ICE's detention reform goals by rendering significant numbers of detention facilities unnecessary. Without the need to maintain this excessively large detention system, ICE would have more flexibility and resources to ensure the remaining facilities are able to comply with the agency's current policies and standards.

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[71] *See supra* note 24.