

Mandatory Detention, Prolonged Detention, and Indefinite Detention of Noncitizens in the Custody of the Department of Homeland Security¹

I. Introduction

There are approximately 22,000 people in immigration detention on any given day in the United States.² It is estimated that by fall of 2007, this number will rise to 27,500.³ Those subject to this detention include U.S. Citizens, long-time Lawful Permanent Residents, veterans, and vulnerable populations. Immigration Detention has not always been the primary enforcement strategy relied upon by the Department of Homeland Security (DHS). In 1954, the Immigration and Naturalization Service (INS) announced that it was abandoning the policy of detention except in rare cases when an individual was considered likely to be a security threat or flight risk.⁴ A reluctance to impose needless confinement is consistent with the concepts of Individual Liberty and Due Process, long recognized and protected in the American legal system, and by international human rights standards.

Sweeping changes in immigration laws in 1996 drastically increased the number of people subject to mandatory detention, prolonged detention, and indefinite detention. DHS's increasing reliance on detention as an enforcement strategy has meant that many individuals have been unnecessarily detained for prolonged periods without any finding that they are either a danger to society or a flight risk. Additionally, where actual physical removal is impeded by diplomatic relations between the U.S. and certain countries, individuals from those countries have been subject to indefinite detention, despite attempts by the U.S. Supreme Court to limit the Government's ability to indefinitely detain individuals.⁵

This briefing paper explores legal provisions and practices that result in the mandatory detention, prolonged detention, and indefinite detention of non-citizens in the United States, as well as the effects of the same on detainees and their families. This paper seeks to demonstrate that these types of detention violate the human rights of non-citizens in the U.S.

¹ This briefing was submitted by the Florence Immigrant and Refugee Rights Project and the American Civil Liberties Union on April 18, 2007.

² Statement of Wesley Lee, Acting Director of Detention and Removal Operations at ICE, before the Senate Judiciary Committee. June 7, 2005.

³ Bill of Rights Defense Committee. Source: <http://www.bordc.org/threats/detention.php>. See Also, "Immigration Enforcement Benefits Prison Firms", Meredith Kolodner, New York Times, July 19, 2006. <http://www.truthout.org/cgi-bin/artman/exec/view.cgi/62/21244>.

⁴ Mark Dow, *American Gulag, Inside U.S. Immigration Prisons*, 6-7. University of California Press (2004).

⁵ *Zadvydas v. Davis*, 533 U.S. 678 (2001).

II. Mandatory and Prolonged Detention

The U.S. Government detains over 230,000 people a year – more than triple the number of people in detention just nine years ago.⁶ Currently, non-citizens detained by the Department of Homeland Security are held in several different types of facilities, including “service processing centers”, for-profit prisons, and federal prisons and county jails.⁷ One of the prime causes of the expansion in immigration detention is new legislation, enacted in 1996, that requires mandatory detention of many noncitizens in removal proceedings, without any individualized determination that they pose a danger or a flight risk that would actually justify such detention. This section focuses primarily on Section 236(c) of the Immigration and Nationality Act, which requires the mandatory detention, pending removal proceedings, of virtually any noncitizen who is placed in removal proceedings on criminal grounds,⁸. The term “mandatory detention” is also often used to refer to detention of non-citizens who are placed in “expedited removal” proceedings,⁹ or classified as “arriving aliens.”¹⁰ In fact, the immigration statute does not actually require their detention, but rather permits their release on “parole.”¹¹ In practice, however, because they are not entitled to review of their custody by an immigration judge, their detention is essentially mandatory.¹²

The Application and Expansion of Mandatory Detention

The 1996 Anti-terrorism and Effective Death Penalty Act (AEDPA) and the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) resulted in a dramatic expansion of grounds upon which non-citizens could be subject to mandatory detention. AEDPA required the mandatory detention of non-citizens convicted of a wide range of offenses, and IIRAIRA further expanded the list of offenses for which mandatory detention was required.¹³

⁶ “Detention and Removal of Illegal Aliens,” Office of Inspector General, DHS, April 2006. Also, www.ice.gov, August 7, 2006.

⁷ Catholic Legal Immigration Network, Inc., Advocacy Topics, Resource: <http://www.cliniclegal.org/Advocacy/detention.html>

⁸ INA §236(c) also applies to non-citizens charged with deportability or inadmissibility on terrorism grounds.

⁹ Expedited Removal is a procedure whereby certain individuals deemed to be inadmissible are automatically removed from the U.S. without an opportunity to see an immigration judge, unless they are found to have a credible fear of return to their home countries. Codified at 8 C.F.R. 235.3(b).

¹⁰ An Arriving Alien, defined in 8 C.F.R. 1001.1(q), generally refers to one who applies for admission at a port of entry. Immigration Judges are not authorized to redetermine the custody of those classified as Arriving Aliens. 8 C.F.R. 1003.19(h)(2)(i)(B).

¹¹ See 8 U.S.C. 1182(d)(5) (authorizing release on “parole” of noncitizens seeking admission).

¹² See generally Briefing Paper on detention of asylum seekers in expedited removal.

¹³ “Analysis of Immigration Detention policies”, ACLU, August 18, 1999, <http://www.aclu.org/immigrants/detention/11771leg19990818.html>

As a result of these changes, minor drug offenses -- such as possession of marijuana or other controlled substances, or possession of paraphernalia -- as well as minor theft or other property-related offenses, can result in mandatory detention. Indeed, even individuals who never served any time in prison for their offenses can find that they are suddenly subject to mandatory detention when they are placed in removal proceedings.¹⁴

Mandatory Detention violates Due Process

Mandatory detention results in a loss of liberty that is total and severe, and often as great as or greater than the punishment imposed for past criminal convictions.¹⁵ By depriving individuals of any opportunity to demonstrate their suitability for release, mandatory detention violates a principle fundamental to our legal system – that people cannot be deprived of liberty without due process of law.¹⁶ The policy of mandatory detention strips Immigration Judges of the authority to determine during a full and fair hearing whether or not an individual presents a danger or a flight risk. Instead, certain convictions (and in some cases, merely the admission of an offense) automatically trigger mandatory detention, without affording noncitizens an opportunity to be heard as to whether or not they merit release from custody.

The United States Supreme Court has held that “the Due Process Clause applies to all persons within the United States” regardless of the legality of their presence, and that “Freedom from imprisonment - from government custody detention or other forms of physical restraint, lies at the heart of the liberty that Clause protects”.¹⁷ Yet, mandatory Detention deprives immigration judges – and even the DHS itself – of the authority to order an individual’s release even when it is clear that the individual poses no danger or flight risk that would warrant such detention, and even when release of the individual would clearly serve the public interest, for example by preventing further harm to U.S. Citizen children and other family members. Nonetheless, in 2003, the Supreme Court upheld the constitutionality of INA 236(c), finding that mandatory detention for the “brief period” of removal proceedings did not violate due process.¹⁸

¹⁴ In some cases, individuals receive suspended sentences or a withholding of adjudication. While such orders are meant to mitigate penalties for defendants, they carry the same immigration consequences as regular sentences imposing jail or prison time. In some states, such as Utah, defendants are sentenced to indeterminate sentences (ie. 0-5 years). In immigration proceedings, the higher end of such sentences are considered dispositive in determining immigration consequences of those convictions. An individual who was issued an indeterminate sentence of 0-5 years but served no actual jail time could be subject to the same immigration consequence as one who served the full 5 years

¹⁵ Brief of Amici Curiae, on behalf of Citizens and Immigrants for Equal Justice(CIEJ), et al., In the Supreme Court of the United States, *Demore v. Kim*, (hereafter CIEJ Amicus Brief), page 5.

¹⁶ CIEJ Amicus Brief, page 17.

¹⁷ *Zadvydas v. Davis*, 533 U.S. 678 (2001)

¹⁸ *Demore v. Kim*, 538 U.S. 510 (2003). Notably, the Court found that most removal proceedings were completed in an average of 45 days. In addition, the Court’s holding was based on the fact that the individual in the case had conceded deportability. In fact, many people who are subject

Mandatory Detention Applies to those convicted of nonviolent offenses

Numerous people are subject to mandatory detention, who are neither a flight risk nor a danger to the community. An individual who is eligible for relief, has strong community ties, and is convicted of a non-violent offense, (ie. possession of drug paraphernalia or shoplifting), would likely not be considered a flight risk nor a danger to the community, but could still be subject to mandatory detention.

Mr. Okeke is a Nigerian citizen who came to the US as an infant, was convicted of a single offense of possession of less than one ounce of cocaine in 1999, at the age of nineteen, and served a six-month sentence. He was then transferred to INS custody and held under 1226c. An outstanding high school athlete who had acceptance letters from 3 colleges and no other criminal history, he ultimately won cancellation of removal. INS waived appeal and he was released. Nonetheless he was detained for 6 months in immigration custody without any opportunity to show that he presented neither a danger nor a flight risk.¹⁹

Mandatory Detention applies to Permanent Residents and U.S. Citizens

Many who are subject to the provisions of mandatory detention are long time permanent residents who know far more about the country from which they are facing removal --the United States --, than the country to which they are facing removal. Indeed, the stronger their family, community, and property ties to the U.S., the greater the impact of their detention and absence. Although Lawful Permanent Status does not terminate when one is detained, but only when a final order of removal is entered against an individual, lawful residents can be mandatorily detained until there is a final resolution in their case.

Mandatory detention even extends to U.S. citizens. That is because, for those who are not born in the US, proving U.S. citizenship is a legally and factually intensive process, requiring documentation of their own and their families history over many years.²⁰ U.S. Citizenship may be acquired or may exist in derivative form and therefore legally complex determinations must be made in order for citizenship to be established. Mandatory detention policies often prevent a Citizen's ability to gather proof of citizenship at all, or in an expedited manner. Even in cases where individuals were born in the U.S.,

to mandatory detention do not concede deportability and have meritorious challenges to removal. Moreover, mandatory detention extends far beyond the brief period contemplated by the Supreme Court in *Demore*. Thus, in the aftermath of *Demore*, a number of courts have distinguished *Demore* on these bases, to strike down mandatory detention.

¹⁹ Example taken from Brief of Amici Curiae, *Demore v. Kim*, page 17.

²⁰ CIEJ Amicus Brief, page 11.

verification of this citizenship can be burdensome and can take months or more, during which individuals may remain detained.

Mr. V was born in the U.S., in the State of Utah. At age 19, returning from a visit to Mexico, he tried to legally enter the U.S. by presenting an original birth certificate to border patrol at the U.S.-Mexico border in Nogales, Arizona. He was verbally insulted by Border Patrol officers who locked him in a room and told him that he would be detained until he admitted Mexican citizenship. Mr. V, after hours of coercion and confinement, falsely admitted that he was a citizen of Mexico, and was immediately deported to Mexico. Subsequently, Mr. V attempted admission into the U.S., this time by bringing his father to the Port of Entry and was successfully admitted as a U.S. Citizen. Years later, Mr. V was placed into DHS custody as a result of a conviction that subjected him to mandatory detention. He again raised the issue of his U.S. Citizenship, providing the Government and the Courts with copies and originals of his U.S. birth certificate. The Government, despite promises to expeditiously verify Mr. V's birth in the U.S., delayed the case for roughly 4 months, before removal proceedings were terminated and Mr. V was released.

Mandatory Detention results in the Detention of People Fleeing Persecution and breaches the obligations of the United States to Asylum Seekers

The United States, along with more than 130 other countries, has agreed to be bound by international treaties that seek to protect refugees by guaranteeing their right to apply for asylum. These include the 1951 United Nations' convention relating to the Status of Refugees and the 1967 United Nations' Protocol relating to the Status of Refugees.²¹ The Refugee Act of 1980 enshrined these international obligations in U.S. domestic law.²²

Mandatory Detention provisions, including the placing of individuals in Expedited Removal, subject asylum seekers to prolonged and unwarranted detention, despite their not presenting any danger or flight risk. This can result in re-traumatization for torture survivors and others who are escaping past persecution. For example, many asylum seekers have lost family members, friends, and colleagues to violence or been tortured by prison guards or police officers. Detention, then, can evoke the very conditions that these individuals fled.²³ Mandatory Detention leads to the unnecessary incarceration and confinement of individuals who fled dangerous situations to seek protection in the U.S., who have well-founded fears of persecution and torture in their home countries, and whose asylum applications will ultimately be granted.

²¹ "The Needless Detention of Immigrants in the United States," CLINIC, August 2000. <http://www.cliniclegal.org/Publications/AtRisk/atrisk4.pdf>

²² "The Needless Detention of Immigrants in the United States", page 3.

²³ "The Needless Detention of Immigrants in the United States", page 7.

Mandatory Detention obstructs access to legal assistance

Detention impairs an individual's ability to obtain counsel and present cases in removal proceedings, which are highly adversarial proceedings. Approximately ninety percent of DHS detainees go through removal proceedings without representation.²⁴ Despite the adversarial and legally complex nature of removal proceedings and the severe consequences at stake, detainees are not afforded appointed counsel. This is explored further in the Briefing Paper regarding Due Process and Access to Legal Counsel.

Detention impacts an individual's ability to earn income thereby also impeding the ability to retain counsel. To make matters worse, DHS can transfer detainees hundreds or thousands of miles away from their home cities without any notice to their attorneys or to family members. Noncitizens are often detained in particularly remote locations such as Oakdale, Louisiana or Florence, Arizona. Many private attorneys can be discouraged from taking cases where clients are detained in remote locations. Onerous distances, inflexible visitation schedules and advance notice scheduling requirements by facilities are all obstacles that impede a detainees' ability to secure legal assistance.

Detention severely impairs the right of a respondent in removal proceedings to present evidence in her or his own defense. Extensive documentation is often required to highlight an individuals' equities including family ties, employment history, property or business ties, rehabilitation or good moral character. Obtaining originals or copies of documents from family members, administrative agencies, schools, and hospitals, can be burdensome for anyone, but often impossible for detained Respondents. Access to mail and property is often limited and can also create significant obstacles for detainees.

Mandatory Detention results in the abandonment of meritorious claims

Faced with the prospect of mandatory and prolonged detention, detainees often abandon claims to legal relief from removal. Mandatory detention operates as a coercive mechanism, pressuring those detained to abandon meritorious claims for relief in order to avoid continued or prolonged detention and the onerous conditions and consequences it imposes.

Mandatory detention leads to detention that is often neither brief nor determinate, and claim adjudication can be complicated and lengthy. An appeal to the Board of Immigration Appeals by either party extends the period of mandatory detention for many additional months. A petition for review to the U.S. Court of Appeals also extends mandatory detention, often for a period of years. A noncitizen is subject to mandatory detention even after being granted

²⁴ CIEJ Amicus Brief, page 20, *citing* Elizabeth Amon, *INS Fails to See the Light*, National L.J., March 5, 2001 at A1.

relief by the immigration judge, simply upon the filing of a notice of intent to appeal by Government counsel.

In fact, it is often the most meritorious cases that take the longest to adjudicate. Often the cases subject to the continuing appeals are cases where individuals may have the strongest ties to the U.S. and risk the severest consequences if removed.

Mandatory Detention devastates families and affects the broader community as well

In addition to the devastating effect that mandatory detention has on detained individuals, the policy has an overwhelmingly negative impact on the families of detainees, many of whom are often citizens of the United States.

Those who will eventually be removed are prevented from tying up their affairs and making preparations with their families for departure, to the detriment of the wider community.²⁵ Mandatory detention keeps them from fulfilling responsibilities they have to family members, to employers, and to a wider community that may rely on them for various reasons. Children who rely on parents for basic needs can suffer trauma and severe loss and injury from the sudden, prolonged, and sometimes permanent absence of that parent. The absence of a family member can result in irreparable economic and other injury to an entire family structure. Additionally, there may be health conditions and medical situations specific to certain families, none of which can be considered, if a detainee is subject to mandatory detention.

Mandatory detention, therefore has significant effects on US Citizen or Permanent Resident children, spouses, mothers, fathers, brothers, sisters, grandparents, and other family. Families consistently bear the psychological, geographic, economic, and emotional costs of detention.

Mandatory Detention Applies to Individuals who are not Deportable

Immigration laws are known for being particularly complex. A determination of whether or not mandatory detention applies turns on an analysis of the immigration classification and consequence of certain criminal offenses. These classifications depend on careful legal analysis of not only immigration laws but state and federal criminal statutes.

The definition of “aggravated felony”, a classification triggering mandatory detention, is one of many classifications that is not statutorily defined, and is therefore constantly changing, and constantly being challenged in U.S. Courts. It may take a non-citizen subject to mandatory detention months and sometimes years to ultimately prove that he or she was not even deportable.

²⁵CIEJ Amicus Brief, page 5.

Mr. F, a native and citizen of Mexico, a lawful permanent resident of the U.S., was detained for approximately three and a half years, subject to mandatory detention, for offenses that the Ninth Circuit ultimately found not to constitute deportable offenses. Three and a half-years after being placed into the custody of DHS and charged as having been convicted of an aggravated felony, Mr. F was released by the Department, as it was clear that nothing in his case made him removable and that removal proceedings would ultimately be terminated.²⁶

Even minimal protections currently in place are under threat by recent or pending legislation in a political climate that is hostile towards immigrants

Despite efforts by activists, community members, lawyers, and other advocates to repair the significant damage resulting from legislation introduced in 1996, not only has the legislation or its effects not been reversed or mitigated, but the political climate in the United States has become increasingly anti-immigrant. For example, the Security Through Regularized Immigration and a Vibrant Economy Act of 2007 (STRIVE Act of 2007)²⁷ is just one example of recently proposed legislation that would further expand mandatory detention and indefinite immigration detention. The STRIVE Act would require that DHS significantly increase the number of facilities for the detention of non-citizens, adding a minimum of 20 detention facilities with the capacity to detain an additional 20,000 non-citizens.

In addition, STRIVE would essentially overrule the limitations on indefinite detention outlined by the U.S. Supreme in *Zadvydas v. Davis* by specifically authorizing DHS to indefinitely detain certain non-citizens who have been ordered removed, even when their removal is not reasonably foreseeable. STRIVE would also increase the number of people subject to mandatory detention by further expanding the kinds of crimes that constitute an “aggravated felony” and provide the basis for such detention.

Moreover, even at the state level, the anti-immigrant climate has resulted in legislation that results in increased mandatory detention of non-citizens even before they are in DHS custody. For example, in November 2006, Arizona voters approved Proposition 100, which became effective on December 7, 2006 upon its codification in Arizona Revised Statutes §13-3961. That section now provides that a person who is in criminal custody, shall be denied bail “if the proof is

²⁶ Mr. F detained in Florence, Arizona. Information provided by the Florence Immigrant and Refugee Rights Project, who represented Mr. F in a custody redetermination hearing.

²⁷ H.R. 1645, the Security Through Regularized Immigration and a Vibrant Economy Act of 2007, introduced March 22, 2007 by Representative Luis Gutierrez (D-Ill.) and Jeff Flake (R-Ariz.) Legislative Summaries made available online by the American Immigration Lawyer’s Association (AILA). See: <http://www.aila.org/content/default.aspx?bc=1019%7C6712%7C8844%7C21943>

evident or presumption great” that the person is guilty of a serious felony offense and the person “has entered or remained in the United States illegally.” In addition to the serious due process and equal protection issues this provision raises – by mandating different treatment for non-citizens in criminal proceedings than for citizens – it also virtually insures the eventual transfer of these individuals to DHS custody (even if they are never convicted), further increasing the number of people potentially subject to mandatory, prolonged, and indefinite detention²⁸

III. Indefinite Detention

A 26-year-old Palestinian, Mr. Y was born in Gaza and lived there until the age of 10, when his family moved to Libya. Mr. Y lived in a refugee camp in Libya for 14 years before fleeing to the United States to seek asylum. Upon reaching the United States, he was placed in the Elizabeth Detention Center in New Jersey. He appeared without a lawyer before an Immigration Judge, who denied him asylum in January 2001. Mr. Y had been in INS detention for 1 year following his final order of removal when a pro bono lawyer determined that removal would likely be impossible in his case, since he was a Palestinian lacking documents. Mr. Y sought his release on an Order of Supervision, and in the spring of 2002, when that avenue failed, pro bono counsel filed a habeas corpus petition on his behalf. More than two years later – at which point he had been imprisoned more than four years – the Court of Appeals for the Third Circuit ordered him released under conditions of supervision, until such time as a government is located that is willing to accept him.²⁹

As of March 2005, when the most recent DHS statistics were available, DHS was holding approximately 1,200 individuals in detention after they had been ordered deported. Like Mr. Y, many of these individuals cannot be easily repatriated, for reasons that include lack of proper documentation.³⁰

Indefinite detention is unconstitutional under the laws of the United States, except in the most limited circumstances

In its landmark decision, *Zadvydas v. Davis*, 533 U.S. 678 (2001), the U.S. Supreme Court held that indefinite immigration detention of noncitizens who have been ordered deported but whose removal is not reasonably foreseeable would raise serious constitutional problems. Emphasizing that “the

²⁸ While this proposition may have been intended to deny bail to persons who are not in lawful status, it is egregiously worded to also deny persons who may have *entered* illegally, but who subsequently gained lawful status, including citizenship.

²⁹ *Yassir v. Ashcroft*, (3d Cir. August 2004); *see also* Catholic Legal Immigration Network, Inc., http://www.cliniclegal.org/content_pind.shtml

³⁰ Catholic Legal Immigration Network, Inc., http://www.cliniclegal.org/content_pind.shtml

Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent," and that "freedom from imprisonment-from government custody, detention or other forms of physical restraint-lies at the heart of the liberty that [the Fifth Amendment's Due Process] Clause protects," the Court held that even noncitizens who have been ordered removed have a due process interest in being free from indefinite detention.³¹ In light of the serious constitutional problems that would be caused by subjecting noncitizens who cannot be removed to indefinite, potentially permanent, detention, the Supreme Court construed the immigration statute as authorizing detention only for the period of time reasonably necessary to effectuate removal, presumptively six months.³²

Prior to *Zadvydas*, the government had a policy of detaining individuals from countries such as Laos, Vietnam, Iraq, Cuba, Iran, and the former Soviet Union. even when there was virtually no chance they would actually be removed. The government often referred to these individuals as "lifers," in recognition that their detention was indefinite and potentially permanent. In the aftermath of *Zadvydas*, new regulations were promulgated in order to comply with the Supreme Court's decision. Under these regulations, If DHS cannot remove an immigrant within the 90-day removal period, the government is supposed to provide a post-order custody review to determine if the individual can be released. If the individual remains in detention six months after the removal order became final, another custody review is to be conducted. Moreover, once, it is determined that removal is not reasonably foreseeable, the individual is supposed to be released under conditions of supervision.

Unfortunately, many problems plague the post-order custody review process. For example, some detainees never receive notice of their 90-day or six-month custody reviews, and therefore do not have the opportunity to submit documentation in support of their release. Others never receive timely custody reviews at either the 90-day or six-month mark. In addition, decisions to continue detention are often based on faulty reasoning and erroneous facts, ignore the law outlined by the Supreme Court in *Zadvydas v. Davis*, or are essentially "rubber stamp" decisions that fail to cite any specific evidence in support of their conclusion. Frequently, the decisions ignore documentation (including letters from the detained individual's consulate) that prove that there is no significant likelihood of removal in the reasonably foreseeable future. In other cases, the DHS has failed to present evidence of the likelihood of removal and instead it inappropriately blames detainees for failing to facilitate their own removal.

³¹ *Zadvydas v. Davis*

³² *Id*

Indefinite detention creates a 'legal limbo' for hundreds of immigrant detainees and their families.

Immigrants indefinitely detained are left uncertain of their status, their rights and their futures. Indefinite detention also subjects the families of detained immigrants to the agony of not knowing when their loved one will be released or removed. Detention, without a release date in one's future, further exacerbates existing mental health problems and re-traumatizes individuals who have been subjected to torture in their home countries.

Immigrants who cannot be repatriated to their home countries because ICE cannot remove them are unjustly punished because the U.S. does not have good relations with those countries.

DHS is non-compliant with current regulations

Recent government reports reveal that ICE is non-compliant with regulations governing the review of post-order cases. In March 2007, the Department of Homeland Security's Office of Inspector General (OIG) released its report reviewing the Immigration and Customs Enforcement's (ICE) compliance with the two U.S. Supreme Court rulings on indefinite detention.³³

ICE's own rules require "custody reviews" to take place at the 90- and 180-day mark, and for detainees to be released under ICE supervision if prompt deportation is not possible. The OIG study, "ICE's Compliance With Detention Limits for Aliens With a Final Order of Removal From the United States," found that the "required custody decisions were not made in over 6 percent of cases [it reviewed], and were not timely in over 19 percent of cases."

Furthermore, the OIG study found that ICE failed to provide detainees with prior notice of custody reviews, information about how they can cooperate in removal efforts, or decisions that clearly explain why supervised release has been denied. OIG attributed many of these failures to inadequate staffing at local ICE Field Office levels, and at the ICE Headquarters level, which leads to insufficient oversight of local custody decisions.

These non-compliance issues are of special concern given recent legislative proposals in the US House of Representatives that would expand the category of individuals subject to indefinite detention, eliminate the safeguards put in place by the Supreme Court of the U.S. and limit judicial review of indefinite detention cases³⁴. Without the ability to comply uniformly to the current regulations on post-order review and release there can be no reasonable

³³ http://www.dhs.gov/xoig/assets/mgmttrpts/OIG_07-28_Feb07.pdf

³⁴ H.R. 1645, the Security Through Regularized Immigration and a Vibrant Economy Act of 2007 (STRIVE Act of 2007) introduced March 22, 2007 by Representative Luis Gutierrez (D-III.) and Jeff Flake (R-Ariz.)

expectation that that ICE has the capacity to handle the cases of individuals subject to any expansion. As stated in the OIG report, "There are weaknesses and potential vulnerabilities in the POOCR process that cannot be easily addressed with ICE's current oversight efforts. These deficiencies will directly affect ICE's ability to manage the projected growth in its caseload caused by DHS' planned enhancements to secure the border."³⁵

III. International Law and Standards³⁶

The U.S. has signed and ratified the International Covenant on Civil and Political Rights (ICCPR). Article 9 of the ICCPR states that "everyone has the right to liberty and security of person," and that "no one shall be subject to arbitrary arrest or detention." Article 9 further states that "It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment." It would appear then that international law that is binding on the U.S. explicitly prohibits mandatory detention laws that do not permit a judicial determination of danger or flight risk. As such, current U.S. practices violate international law.

The right to liberty is also recognized and protected in the Universal Declaration of Human Rights.³⁷ The Body of Principles for the Protection of All persons under Any Form of Detention or Imprisonment states that a person who is detained shall be brought before a judicial or other authority provided by law promptly after his arrest and that such authority "shall decide without delay upon the lawfulness and necessity of detention."³⁸ The freedom from arbitrary arrest or imprisonment is recognized by several international human rights documents including the American Convention on Human Rights³⁹, and is violated by a policy of both mandatory detention and indefinite detention.

IV. Recommendations

- a) Mandatory Detention should be eliminated; DHS should be required to make individualized determinations of whether or not a noncitizen presents a danger to society or a flight risk sufficient to justify their detention.

- b) All DHS detention decisions should be subject to review by an Immigration Judge, ie. Immigration Judges. should be given jurisdiction to redetermine

³⁵ OIG Report at p. 9.

³⁶ This section includes a brief discussion of applicable international legal standards and is by no means an exhaustive discussion.

³⁷ Universal Declaration of Human Rights, Art. 3, December 10, 1948, U.N.G.A. res. 217 A(III).

³⁸ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 37, U.N.G.A. res. 43/173 of December 9, 1988.

³⁹ American Convention on Human Rights, Art. 7(3), adopted at the Inter-American Specialized Human Rights conference, November 22, 1969.

- the custody of any non-citizen detained in DHS custody, including those classified as Arriving Aliens, and those with final administrative orders of removal.
- c) The Department of Homeland Security should aggressively pursue alternative to detention such as supervised release.
 - d) Where detention is necessary, The Department of Homeland Security should aggressively pursue alternative forms of detention, including home detention, community-run shelters, and half-way houses.
 - e) The Department of Homeland Security must comply with the Supreme Court's decision in *Zadvydas v. Davis* and *Clark v. Martinez*: Individuals who cannot be returned to their home countries within the foreseeable future should be released as soon as that determination is made, and certainly no longer than six months after the issuance of a final order.
 - f) All indefinite detainees must have access to timely and fair post-order custody reviews.
 - g) Upon release, such individuals should be released with employment authorization, so that they can immediately obtain employment.
 - h) To address concerns related to flight risk or dangerousness, the DHS should aggressively pursue re-integration programs for indefinite detainees. Such programs would significantly mitigate any risk of danger to the community or of flight, and are less costly than detention.