



April 4, 2014

The Honorable Jeh Johnson  
Secretary  
U.S. Department of Homeland Security  
Washington, D.C. 20528

The Honorable Alejandro Mayorkas  
Deputy Secretary  
U.S. Department of Homeland Security  
Washington, D.C. 20528

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**Re: Recommendations to DHS Relating to Immigration Enforcement and Border Safety**

Dear Secretary Johnson and Deputy Secretary Mayorkas:

On behalf of the American Civil Liberties Union (ACLU), I write to congratulate you on your confirmations to lead the U.S. Department of Homeland Security. Under your leadership, the Department will have the opportunity to institute policy reforms that ensure due process, preserve family unity, and protect communities.

We urge you to proceed quickly with the review of the Department's immigration enforcement practices, as families and communities daily struggle and suffer under the threat of deportation. We respectfully submit the following recommendations relating to immigration enforcement and border safety. While these steps would not fully address the pervasive problems in the current system, they would mark significant improvements. All can be pursued wholly within existing executive authority, and should be pursued irrespective of legislative immigration reform and affirmative relief considerations.

**I. Curb Record-Level Deportations**

The Obama Administration has hit a dubious milestone, having deported two million individuals over the course of five years. Many of the individuals deported are among those who would be eligible for relief under the Senate-passed comprehensive immigration reform bill (S. 744) or proposals currently being considered in the House of Representatives. In FY 2013, over 260,000 people were deported through expedited removals or reinstatement, their cases never heard by an immigration judge – a full 70 percent of the total number of people deported that year. Over 65 percent of FY13 removals were people with no criminal history or who had been convicted only of minor misdemeanors such as driving without a license. These sad and shocking statistics are inconsistent with our history as a nation of immigrants, inconsistent with the Department's promise to focus its resources on national security and public safety, inconsistent with due process and fundamental fairness, and inconsistent with the President's commitment to a humane enforcement system.

To help mitigate the destructive impact of mass deportations on communities, family unity, and civil liberties, DHS should take the following steps, which are described in greater detail in the ACLU's "Recommendations to DHS to Address Record-Level Deportations"<sup>1</sup>:

- Replace ICE's overbroad 2011 civil enforcement priorities memo<sup>2</sup> with DHS-wide guidance that significantly limits the priority categories, including by a) eliminating level 2 and 3 offenders from Priority 1; b) narrowing the overbroad level 1 Priority 1, which should not include anyone who has served less than one year's imprisonment completed within the past five years or who has demonstrated substantial evidence of rehabilitation; c) narrowing the vaguely defined Priority 2 ("recent illegal entrants"); and d) eliminating Priority 3 ("fugitives" and immigration violators). The guidance should clarify that cases falling into the categories must still be assessed individually for equities, including the factors listed in ICE's 2011 prosecutorial discretion memo,<sup>3</sup> before they are pursued for removal by DHS agents, officers, or attorneys.
- Reform detainer policy to include, among other changes: strictly limiting the issuance of detainers, clarifying that "reason to believe" an individual is removable means "probable cause," and providing for review of detainer decisions at DHS headquarters to reduce the number of erroneous detainers issued, enhance oversight, and increase national uniformity. As part of the process of revising its detainer policy and practices, DHS should provide an opportunity for affected communities and groups to comment on detainer problems currently experienced across the country.
- End the use of deportations without hearings for individuals who are prima facie eligible for relief from removal or for prosecutorial discretion, and for all unrepresented individuals who agree to a stipulated removal; limit the use of expedited removal to individuals apprehended at a port of entry or while attempting to enter, consistent with DHS policy prior to 2004; and provide an administrative appeal process for immigrants to challenge an expedited or stipulated removal order, visa waiver removal order, voluntary departure, or other administrative order.
- Implement reforms to ensure that ICE's 2011 prosecutorial discretion memo is significantly strengthened and applied uniformly nationwide and extended to CBP, including by issuing a DHS-wide policy requiring all Notices to Appear to be consistent with the civil enforcement priorities and ICE's 2011 prosecutorial discretion memo, developing an objective assessment tool to score prosecutorial discretion factors, and establishing review processes at DHS Headquarters.

## II. End Programs and Practices Violating Civil Liberties, Civil Rights, and Human Rights

### *287(g) and Secure Communities*

ICE's partnerships with state and local law enforcement agencies for the enforcement of immigration law, via 287(g) agreements and Secure Communities, incentivize profiling based on race or ethnicity by local law enforcement, undermine community policing, and threaten public safety. The Administration has taken a positive step in eliminating the use of 287(g) "task force" models, but the 287(g) jail model still presents significant concerns. It is particularly problematic that ICE has not terminated agreements with jurisdictions where the ACLU and other organizations have documented enforcement practices that thwart ICE's civil enforcement priorities or where

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<sup>1</sup> See "Recommendations to DHS to Address Record-Level Deportations," American Civil Liberties Union (Jan. 22, 2014), available at [https://www.aclu.org/sites/default/files/assets/14\\_1\\_22\\_aclu\\_recommendations\\_to\\_dhs\\_to\\_address\\_record-level\\_deportations\\_final2.pdf](https://www.aclu.org/sites/default/files/assets/14_1_22_aclu_recommendations_to_dhs_to_address_record-level_deportations_final2.pdf).

<sup>2</sup> Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, to All ICE Employees (Mar. 2, 2011), available at <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf>.

<sup>3</sup> Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, to All Field Office Directors, All Special Agents in Charge, All Chief Counsel (June 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

there is evidence of biased and discriminatory policing.<sup>4</sup> Of the 37 active 287(g) agreements, over one-third are operating in states that passed “show me your papers” laws in recent years (Arizona, Alabama, Georgia, South Carolina, Utah). Other 287(g) agreements are operating in locations with demonstrated records of hostility to immigrants, including Prince William County (VA), Wake County (North Carolina), Frederick County (Maryland), and others.

DHS should:

- Terminate all 287(g) agreements, including jail models, and not enter into any new 287(g) agreements;
- Short of terminating all agreements, terminate agreements with all jurisdictions where there is reason to believe (based on community complaints or otherwise) that enforcement practices are inconsistent with ICE’s civil enforcement priorities and/or where there is biased and discriminatory policing. Such termination should not require a formal DOJ investigation; indeed, recurring budget language requires that “no funds . . . may be used to continue a delegation of law enforcement authority authorized under section 287(g) of the Immigration and Nationality Act (8 U.S.C. 1357(g)) if the Department of Homeland Security Inspector General determines that the terms of the agreement governing the delegation of authority have been violated”<sup>5</sup>;
- Reform the use of ICE detainers as described above and further detailed in the ACLU’s “Administrative Recommendations on ICE Immigration Detainers”<sup>6</sup>;
- Decline to issue ICE detainers on individuals in jurisdictions where racial profiling or other discriminatory local enforcement practices occur, including but not limited to jurisdictions under consent decree with DOJ (indeed, such non-issuance should not require a formal DOJ investigation); and
- Publicly release, in a timely manner, the long-promised quarterly statistical analyses of Secure Communities, along with information reflecting outcomes of DHS/ICE investigation of jurisdictions that are statistical outliers or “anomalies.” The quarterly analyses should include data on detainers issued for victims, witnesses, plaintiffs, and individuals engaged in a protected right.<sup>7</sup>

### ***Operation Streamline***

Operation Streamline is a partnership between DHS and DOJ to prosecute migrants in the federal criminal justice system for illegal entry (under 8 U.S.C. §1325) and illegal re-entry (under 8 U.S.C. §1326). DHS’s role includes the apprehension and referral of migrants who could otherwise be channeled into the civil immigration enforcement system to DOJ for criminal prosecution. CBP also details its agents at the southwest border as Special Assistant U.S. Attorneys to assist DOJ and U.S.

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<sup>4</sup> See ACLU FOUNDATION OF GEORGIA, TERROR AND ISOLATION IN COBB: HOW UNCHECKED POLICE POWER UNDER 287(G) HAS TORN FAMILIES APART AND THREATENED PUBLIC SAFETY (Oct. 2009), available at [http://www.acluga.org/download\\_file/view\\_inline/1505/392/](http://www.acluga.org/download_file/view_inline/1505/392/) (reporting on Cobb County); ACLU FOUNDATION OF GEORGIA, THE PERSISTENCE OF RACIAL PROFILING IN GWINNETT TIME FOR ACCOUNTABILITY, TRANSPARENCY, AND AN END TO 287(G) (Mar. 2010), available at [http://www.acluga.org/download\\_file/view\\_inline/1504/392/](http://www.acluga.org/download_file/view_inline/1504/392/) (reporting on Gwinnet County). ACLU of North Carolina submitted 57 complaints to CRCL on behalf of immigrants held in Wake County Jail in 2010. See Stacy Davis, *Letter Reveals Complaints About Treatment at Wake Jail*, WRAL.COM (July 7, 2011), available at <http://www.wral.com/news/state/story/9829279/>. See Sirene Shebaya, *Frederick County Officials Shouldn't Be Enforcing Immigration Law*, BALTIMORE SUN (Dec. 10, 2012) available at [http://articles.baltimoresun.com/2012-12-10/news/bs-ed-immigration-enforcement-20121210\\_1\\_immigration-status-immigration-law-law-enforcement](http://articles.baltimoresun.com/2012-12-10/news/bs-ed-immigration-enforcement-20121210_1_immigration-status-immigration-law-law-enforcement).

<sup>5</sup> Consolidated Appropriations Act, 2014, H.R. 3547, 113th Cong. (2014) (enacted).

<sup>6</sup> See “Administrative Recommendations on ICE Immigration Detainers,” American Civil Liberties Union (Jan. 22, 2014) available at

[https://www.aclu.org/sites/default/files/assets/14\\_1\\_22\\_aclu\\_administrative\\_recommendations\\_on\\_ice\\_detainers\\_final.pdf](https://www.aclu.org/sites/default/files/assets/14_1_22_aclu_administrative_recommendations_on_ice_detainers_final.pdf)

<sup>7</sup> Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, to All Field Office Directors, All Special Agents in Charge, All Chief Counsel (June 17, 2011), available at

<http://www.ice.gov/doclib/foia/prosecutorial-discretion/certain-victims-witnesses-plaintiffs.pdf>.

Marshals.<sup>8</sup> DHS's policy goal is to deter illegal migration, but it is virtually impossible to measure the multiple factors that inform a migrant's decision to cross, and the desire to reunite with family or find a job often outweighs any fear of prosecution.<sup>9</sup> It is also unclear that DHS can even collect the data necessary to assess deterrent effect with any accuracy. Meanwhile, the Attorney General has directed U.S. Attorneys to prioritize cases that deal with national security, violent crime, and financial fraud and cases that protect our most vulnerable communities.<sup>10</sup>

Prosecutions for illegal entry and illegal re-entry serve neither DHS nor DOJ goals. Yet illegal entry and illegal re-entry are now the most prosecuted federal crimes in the United States.<sup>11</sup> According to the Pew Research Center, the increase in §1326 convictions over the past two decades accounts for 48 percent of the growth in total convictions in federal courts over the period.<sup>12</sup> Incarceration costs alone for people with illegal entry and re-entry convictions have been estimated at \$1 billion annually.<sup>13</sup> Streamline-related trials also present significant due process concerns.<sup>14</sup>

Operation Streamline, as a zero-tolerance program, should be eliminated as wasteful and counter to fundamental notions of prosecutorial discretion and fitting the punishment to the crime. But short of elimination, CBP should at a minimum significantly downscale its role in channeling unlawful migrants into the federal criminal justice system by:

- Deprioritizing §1325 and §1326 referrals for vulnerable individuals (for example, domestic violence survivors and the elderly), for individuals with significant U.S. ties (specifically, individuals with U.S. citizen minor children or spouses, veterans and members of the U.S. armed forces, and long-time former lawful permanent residents), and for individuals who have not, within the previous five years, completed sentences for serious, violent felonies; and
- Ending the practice of appointing Border Patrol attorneys or other DHS employees to act as Special Assistant U.S. Attorneys, or in any prosecutorial capacity, in §1325 and §1326 cases, to avoid inherent conflicts of interest.

### ***CBP Use of Force***

CBP's reform plans regarding use of force, outlined in September 2013, do not address mechanisms of reporting and oversight relating to all uses of force, individual accountability for unreasonable use of force, and transparency and communication regarding deaths that occur as a result of a CBP encounter, among other gaps.<sup>15</sup> Reform in these areas is essential to ending the culture of impunity that external stakeholders perceive at CBP. Since January 2010, at least 27 people have died following encounters with CBP officials in which force was used. That number includes seven

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<sup>8</sup> LISA SEGHEITI, BORDER SECURITY: IMMIGRATION ENFORCEMENT BETWEEN PORTS OF ENTRY 8 (Cong. Research Serv., CRS Report for Congress R42138, Jan. 16, 2014).

<sup>9</sup> HUMAN RIGHTS WATCH, TURNING MIGRANTS INTO CRIMINALS: THE HARMFUL IMPACT OF U.S. BORDER PROSECUTIONS 24 n.40 (May 2013), available at [http://www.hrw.org/sites/default/files/reports/us0513\\_ForUpload\\_2.pdf](http://www.hrw.org/sites/default/files/reports/us0513_ForUpload_2.pdf).

<sup>10</sup> U.S. DEPT. OF JUSTICE, SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY (Aug. 2013), available at <http://www.justice.gov/ag/smart-on-crime.pdf>. According to BJS statistics, in 2010 only 20 percent of defendants charged with illegal reentry had prior felony convictions for violent offenses. See HUMAN RIGHTS WATCH, *supra* note 9.

<sup>11</sup> In FY 2013, for example, U.S. Attorneys' offices filed criminal charges against almost 100,000 immigrants for illegal entry or illegal re-entry. See TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, AT NEARLY 100,000, IMMIGRATION PROSECUTIONS REACH ALL-TIME HIGH IN FY 2013 (Nov. 25, 2013) <http://trac.syr.edu/immigration/reports/336/>.

<sup>12</sup> Michael T. Light, et. al., Pew Research Hispanic Trends Project, *The Rise of Federal Immigration Crimes* (Mar. 18, 2014), available at <http://www.pewhispanic.org/2014/03/18/the-rise-of-federal-immigration-crimes/>.

<sup>13</sup> ALISTAIR GRAHAM ROBERTSON, ET. AL., GRASSROOTS LEADERSHIP, OPERATION STREAMLINE: COSTS AND CONSEQUENCES (Sept. 2012), available at [http://grassrootsleadership.org/sites/default/files/uploads/GRL\\_Sept2012\\_Report-final.pdf](http://grassrootsleadership.org/sites/default/files/uploads/GRL_Sept2012_Report-final.pdf).

<sup>14</sup> See, e.g., HUMAN RIGHTS WATCH, *supra* note 9, at 76-80; JOANNA LYDGATE, ASSEMBLY-LINE JUSTICE: A REVIEW OF OPERATION STREAMLINE 12-15 (Jan. 2010), available at [http://www.law.berkeley.edu/files/Operation\\_Streamline\\_Policy\\_Brief.pdf](http://www.law.berkeley.edu/files/Operation_Streamline_Policy_Brief.pdf).

<sup>15</sup> See "U.S. Customs and Border Protection Use of Force Recommendations, Reviews and Next Steps," U.S. Customs and Border Protection (Sept. 25, 2013) available at [http://www.cbp.gov/xp/cgov/border\\_security/bs/force\\_reviews.xml](http://www.cbp.gov/xp/cgov/border_security/bs/force_reviews.xml).

minors under 21, nine U.S. citizens, eight individuals alleged to be throwing rocks, and six individuals killed while on the Mexican side of the border.<sup>16</sup> To date, it is unknown whether CBP has conducted a thorough investigation of each of these incidents to determine whether the force used was justified and whether it could have been avoided through different tactics or training, better supervision, different tools, adherence to policy, or changes in policy. Moreover, the ACLU has documented a pattern of abusive use of force at ports of entry.<sup>17</sup>

DHS has taken a long-overdue first step by releasing CBP's 2010 Use of Force Policy Handbook, albeit redacted. But the agency continues to refuse to release the Police Executive Research Forum (PERF) review of CBP use of force. The DHS Office of Inspector General's September 2013 report on CBP use of force was limited in scope and heavily redacted.

To bring CBP into line with leading law enforcement standards relating to use of force, and to improve transparency and accountability to the public, DHS should:

- Request an independent review of all use-of-force fatalities in the last five years;
- Publicly release the PERF review, unredacted and in full;
- Implement all PERF recommendations; and
- Implement additional changes to CBP use of force policy and practice, including body-worn and dashboard cameras with strong privacy protections, as detailed by the ACLU<sup>18</sup> and other organizations.

### ***Racial Profiling***

The inappropriate use of race or ethnicity by CBP agents and officers has been well documented, most recently in a series of complaints filed by the ACLU of Arizona.<sup>19</sup> The Maricopa County Sheriff's Office, in fact, has said it was instructed by ICE to use race as a factor in immigration enforcement – contrary to controlling Ninth Circuit case law.<sup>20</sup> To help ensure that its enforcement activities do not inadvertently facilitate racial profiling or otherwise discriminatory policing, DHS should:

- Conduct a comprehensive review of DHS policies and practices relating to roving patrol stops and checkpoints to determine whether the agency is complying with the U.S. Constitution, applicable non-discrimination laws, and agency guidelines. This review should include

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<sup>16</sup> For a detailed list, see "ACLU Recommendations Regarding Use of Force by U.S. Customs and Border Protection Officers," note 1, available at

[https://www.aclu.org/sites/default/files/assets/14\\_02\\_24\\_aclu\\_use\\_of\\_force\\_recommendations\\_final.pdf](https://www.aclu.org/sites/default/files/assets/14_02_24_aclu_use_of_force_recommendations_final.pdf).

<sup>17</sup> See Press Release, American Civil Liberties Union, ACLU Demands Federal Investigation Into Charges of Abuse by Border Agents (May 10, 2012), available at <https://www.aclu.org/immigrants-rights/aclu-demands-federal-investigation-charges-abuse-border-agents>; Complaint and request for investigation of abuse of power, excessive force, coercion, and unlawful confiscation of property by Customs and Border

Protection at ports of entry along the U.S.-Mexico border, American Civil Liberties Union and ACLU Southern Border Affiliates (May 9, 2012), available at <http://www.aclu.org/immigrants-rights/customs-and-border-protection-complaint>

<sup>18</sup> See Press Release, American Civil Liberties Union, ACLU Calls New CBP Commitments Limited, Issues Detailed Recommendations on Use of Force (Sept. 25, 2013), available at <https://www.aclu.org/immigrants-rights/aclu-calls-new-cbp-commitments-limited-issues-detailed-recommendations-use-force>.

<sup>19</sup> Complaint and request for investigation of unlawful roving patrol stops by U.S. Border Patrol in southern Arizona including unlawful search and seizure, racial profiling, trespassing, excessive force, and destruction of personal property, ACLU of Arizona and ACLU Border Litigation Project (Oct. 9, 2013), available at

<http://www.acluaz.org/sites/default/files/documents/ACLU%20AZ%20Complaint%20re%20CBP%20Roving%20Patrols%20Oct%209%202013.pdf>; Complaint and request for investigation of abuses at U.S. Border Patrol interior checkpoints in southern Arizona, including unlawful search and seizure, excessive force, and racial profiling, ACLU of Arizona and ACLU Border Litigation Project (Jan. 15, 2014), available at <http://www.acluaz.org/sites/default/files/documents/ACLU%20AZ%20Complaint%20re%20CBP%20Checkpoints%20202014%2001%2015.pdf>.

<sup>20</sup> Letter from Joseph Arpaio, Sheriff of Maricopa County, to Eric Holder, Attorney General and ICE Office of General Counsel (Jan. 6, 2014), available at

<http://www.mcso.org/MultiMedia/PressRelease/Arpaio%20Letter%20to%20Holder.pdf>.

- recommendations to reduce CBP’s “100-mile zone” for investigative detentions and warrantless searches of vehicles to 25 miles, and for permissible incursions on private property to 10 miles;
- Expand the settlement in the case of *Jose Sanchez et al. v. U.S. Border Patrol et al.* nationwide, in particular the terms relating to 4<sup>th</sup> Amendment training and data collection<sup>21</sup>;
  - Issue clear guidance to all DHS officers (including local officers deputized under 287(g)) that race, ethnicity, and national origin may not be considered to any extent in determining removability or conducting any enforcement activity, except that officers may rely on race, ethnicity, and national origin in a specific individual description; and
  - Urge DOJ to issue revised guidance on the use of racial profiling by federal law enforcement that closes the border integrity and national security loopholes and prohibits profiling based on actual or perceived religion, national origin, sexual orientation, or gender (including gender identity and expression).

An end to all 287(g) agreements and an end to or reform of the Department’s reliance on Secure Communities, which incentivize the use of race and ethnicity by state and local law enforcement – as recommended above – will also help ensure that DHS enforcement activities do not inadvertently facilitate racial profiling or otherwise discriminatory policing.

### ***Sensitive Locations Enforcement***

DHS has recognized that immigration and border enforcement actions should not take place at, near, or focused on certain “sensitive locations,” including schools, hospitals, institutions of worships, and sites of religious ceremonies. In recognition of the importance of strong guidance on the issue, Section 3721 of S. 744 forbade enforcement of immigration law in sensitive locations by ICE and CBP officers and agents except in exigent circumstances and with prior supervisory approval. Notwithstanding the ICE and CBP memoranda regarding sensitive locations enforcement,<sup>22</sup> the ACLU and other organizations have documented cases of immigration enforcement taking place at county courthouses, resulting in the apprehension of individuals who are in court to pay traffic tickets, to appear for hearings or mediation, and even to get married.<sup>23</sup> DHS enforcement at county courthouses deters people from accessing the courts for critical protections including domestic violence restraining orders, child custody, child support, child guardianship, and wage and hour and other labor protections.

DHS should issue new sensitive locations enforcement guidance that:

- Applies to all DHS components to ensure consistency, particularly on the issues of sensitive locations sites, exigent circumstances, exemption from restrictions, and prior approval requirements;
- Specifies that all courts (other than immigration courts) and their premises are “sensitive locations”;
- Instructs all DHS personnel to cease using courts and other sensitive locations as a records source for immigration enforcement actions, unless the individual has been convicted of a crime (other than a state or local conviction that relates to a non-citizen’s immigration status) for

<sup>21</sup> Settlement agreement, *Sanchez v. U.S. Border Patrol*, CV12-5378-RJB (U.S.D.C. W.D. Wash. Sept. 20, 2013), available at <https://aclu-wa.org/sites/default/files/attachments/2013-09-23--Fully%20Executed%20Settlement%20Agreement.pdf>.

<sup>22</sup> See U.S. Immigration and Customs Enforcement, “Enforcement Actions at or Focused on Sensitive Locations” (Oct. 24, 2011), available at <http://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf>; U.S. Customs and Border Protection, “U.S. Customs and Border Protection Enforcement Actions at or Near Certain Community Locations,” (Jan. 18, 2013) available at <http://foiarr.cbp.gov/streamingWord.asp?i=1251>.

<sup>23</sup> See, e.g., Press Release, American Civil Liberties Union of Southern California, ACLU condemns ICE for ‘bait and switch’ courthouse policy (Feb. 10, 2014) <http://www.aclusocal.org/press-release-aclu-condemns-ice-bait-switch-courthouse-policy/>; Michael Kauffman, “Arrested for following the law,” American Civil Liberties Union of Southern California (Oct. 17, 2013) <http://www.aclusocal.org/arrested-following-law/>.

which he or she served more than one year's imprisonment completed within the past five years, and which has not been expunged, set aside, or the equivalent;

- Instructs DHS personnel not to undertake enforcement actions based on requests from employees or others at sensitive locations sites and courts, absent exigent circumstances;
- Collects and publicizes data on enforcement actions at or near sensitive locations;
- Restricts enforcement at sites where court-ordered activities take place (such as mediation or supervised visitation); and
- Includes special protections for juveniles.

### III. Strengthen Due Process and Human Rights Protections in Detention

#### *Prolonged Detention Without Bond Hearings*

ICE spends \$2 billion annually on immigration detention to hold approximately 400,000 immigrants in a sprawling network of county jails, contract prisons, and ICE-run facilities across the country – simply to ensure they appear at hearings and comply with an immigration judge's final order when relevant. Many ICE detainees are incarcerated for months or even years while their cases are pending with the immigration courts and federal courts. A significant proportion of these individuals never receive the most basic element of due process: an immigration bond hearing to determine if their detention is even necessary. They are subjected to prolonged detention even though they ultimately may become permanent residents or qualify for other immigration relief.<sup>24</sup> Many detained immigrants pose no danger to public safety or flight risk that cannot be mitigated by alternatives. Federal courts have increasingly concluded that prolonged detention without constitutionally adequate review raises serious due process concerns, and that six months is the presumptive point in time after which a bond hearing is required.<sup>25</sup>

Unnecessary – and indefinite – detention causes severe psychological harm, particularly for individuals who have fled persecution or domestic violence, and traumatizes families both emotionally and economically. It also imposes a significant financial burden on U.S. taxpayers, even though effective and far less costly alternatives to detention are available, and routinely and successfully used in the criminal justice system.<sup>26</sup>

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<sup>24</sup> DHS subjects three main categories of individuals to prolonged detention without bond hearings: 1) individuals, often lawful permanent residents (LPRs), whom the government claims are subject to “mandatory detention” under 8 U.S.C. § 1226(c) because they are allegedly removable on certain criminal grounds; 2) individuals who are detained upon arrival in the United States, including asylum seekers who have established a “credible fear” of persecution, and LPRs with longstanding ties to the United States who are returning from brief trips abroad (See 8 C.F.R. § 1003.19(h)(2)(i)(B) (providing that immigration judges lack jurisdiction to conduct bond hearings for “arriving aliens”)); and 3) individuals detained pending judicial review of their removal orders – their detention can span months and years while they wait for courts of appeals to decide their cases.

<sup>25</sup> *Rodriguez, et. al. v. Robbins, et. al.*, No. 12-56734 (9<sup>th</sup> Cir. 2013); *Reid v. Donelan*, NO. 13-cv-30125-MAP (D. Mass 2014).

<sup>26</sup> NATIONAL IMMIGRATION FORUM, THE MATH OF IMMIGRATION DETENTION (Aug. 2013), available at <http://www.immigrationforum.org/images/uploads/mathofimmigrationdetention.pdf>. Julie Myers Wood and Steve J. Martin, “Smart alternatives to immigrant detention,” *Washington Times* (Mar. 28, 2013), available at <http://www.washingtontimes.com/news/2013/mar/28/smart-alternatives-to-immigrant-detention/>. Alternatives to detention are recommended as cost-savers by the American Jail Association, American Probation and Parole Association, American Bar Association, Association of Prosecuting Attorneys, Heritage Foundation, International Association of Chiefs of Police, National Conference of Chief Justices, National Sheriffs' Association, Pretrial Justice Institute, Texas Public Policy Foundation (home to Right on Crime), and the Council on Foreign Relations' Independent Task Force on U.S. Immigration Policy. See American Jail Association, Resolution on Pretrial Justice (Oct. 24, 2010), available at <http://www.pretrial.org/download/policy-statements/AJA%20Resolution%20on%20Pretrial%20Justice%202011.pdf>; American Probation and Parole Association, APPA Supports Pretrial Supervision Services (June 15, 2010), available at [http://www.appa-net.org/eweb/Dynamicpage.aspx?webcode=IE\\_NewsRelease&wps\\_key=4ce5b0cc-e5d6-4407-bcab-096640386f02](http://www.appa-net.org/eweb/Dynamicpage.aspx?webcode=IE_NewsRelease&wps_key=4ce5b0cc-e5d6-4407-bcab-096640386f02); American Bar Association, ABA Criminal Justice Standards on Pretrial Release – Third Edition (Oct. 28, 2002), available at <http://www.pretrial.org/wpfb-file/aba-standards-on-pretrial-release-2002-pdf/>; Association of Prosecuting Attorneys, Policy Statement on Pretrial Justice, available at <http://www.pretrial.org/wp->

DHS should work with DOJ to ameliorate the impact of current detention practices by:

- Requiring a bond hearing before an immigration judge for all individuals detained more than six months, where the government must justify continued detention;
- Interpreting “custody” in the mandatory detention statute (8 U.S.C. § 1226(c)) to permit the use of forms of custody short of detention, such as electronic monitoring or house arrest;
- Construing 8 U.S.C. § 1226(c) to apply only to individuals who are taken into ICE custody at or near the time of their release from criminal custody, as the statute provides on its face; and
- Not applying 8 U.S.C. § 1226(c) to individuals with substantial challenge to removal, including claims for relief from removal.

### *Access to Counsel*

Immigrants in removal proceedings must navigate an extraordinarily complex body of law, regulations, and procedures in order to mount effective defenses against deportation. The American Bar Association has observed: “Fundamental principles of fairness and due process demand that vulnerable individuals who aren’t able to secure paid or pro bono counsel should have counsel appointed by the government.”<sup>27</sup> DOJ’s Executive Office for Immigration Review has noted the challenges created by non-represented cases for court efficiency, and the National Association of Immigration Judges wrote to members of Congress that “when noncitizens are represented by attorneys, Immigration Judges are able to conduct proceedings more expeditiously and resolve cases more quickly.”<sup>28</sup> Recent studies have documented the considerable impact of legal representation on the outcomes of removal cases.<sup>29</sup> In recognition of the dire need, Section 3502 of S. 744 contains a provision requiring appointed counsel for unaccompanied children, people with severe mental disabilities, and other particularly vulnerable immigrants in removal proceedings.

The ACLU has urged DHS, DOJ, and HHS to take immediate steps to ensure that two classes of indigent unrepresented individuals in removal proceedings be afforded legal representation, either pro bono or at government expense: 1) all children and 2) all individuals with serious mental disabilities that render them unable to represent themselves (whether or not such individuals are in

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[content/uploads/2013/02/APA-Pretrial-Policy-Statement.pdf](http://www.heritage.org/research/reports/2012/01/administrative-reforms-in-immigration-and-border-security-policies); Matt Mayer, The Heritage Foundation, Heritage Web Memo 3455: Administrative Reforms Insufficient to Address Flawed White House Immigration and Border Security Policies (Jan. 10, 2012), available at <http://www.heritage.org/research/reports/2012/01/administrative-reforms-in-immigration-and-border-security-policies>; International Association of Chiefs of Police, “Law Enforcement’s Leadership Role in the Pretrial Release and Detention Process (Feb. 2011), available at <http://www.pretrial.org/wp-content/uploads/2013/02/IACP-LE-Leadership-Role-in-Pretrial-20111.pdf>; National Conference of Chief Justices, Resolution 3, Endorsing the Conference of State Court Administrators Policy Paper on Evidence-Based Pretrial Release (Jan. 13, 2013), available at <http://www.pretrial.org/wp-content/uploads/2013/02/CCJ-Resolution-on-Pretrial-1.pdf>; National Sheriffs’ Association, National Sheriffs’ Association Supports and Recognizes the Contribution of Pretrial Services Agencies to Enhance Public Safety (June 18, 2012), available at <http://www.pretrial.org/wp-content/uploads/filebase/policy-statements/NSA%20Pretrial%20Resolution.pdf>; Pretrial Justice Institute, *The Solution*, available at <http://www.pretrial.org/solutions/>; Marc Levin, Texas Public Policy Foundation, “Public Safety and Cost Control Solutions for Texas County Jails (Mar. 6, 2012), available at <http://www.texaspolicy.com/center/effective-justice/reports/public-safety-and-cost-control-solutions-texas-county-jails>; and Council on Foreign Relations’ Independent Task Force, Task Force Report: U.S. Immigration Policy (July 2009), available at <http://www.cfr.org/immigration/us-immigration-policy/p20030>.

<sup>27</sup> James Silkenat, President-Elect, American Bar Association, Remarks at Human Rights First Dialogue on Detention, Washington, DC (April 2013), available at <http://www.humanrightsfirst.org/wp-content/uploads/ABA-Silkenat-HRF-Dialogues-Detention.pdf>.

<sup>28</sup> Charles H. Kuck, *Legal Assistance for Asylum Seekers in Expedited Removal: A Survey of Alternative Practices*, p. 8, in U.S. COMM’N. ON INTERNATIONAL RELIGIOUS FREEDOM, *ASYLUM SEEKERS IN EXPEDITED REMOVAL* (2005), available at [http://www.uscirf.gov/images/stories/pdf/asylum\\_seekers/legalAssist.pdf](http://www.uscirf.gov/images/stories/pdf/asylum_seekers/legalAssist.pdf); Letter from Dana Marks, Nat’l. Association of Immigration Judges, to Members of Congress, March 22, 2013 (on file with the ACLU).

<sup>29</sup> See Steering Committee of the New York Immigration Representation Study Report, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 CARDOZO LAW REVIEW 357, 357-416 (2011), available at <http://cardozolawreview.com/Joomla1.5/content/33-2/NYIRS%20Report.33-2.pdf>; Jaya Ramji-Nogales, Andrew I. Schoenholtz, Phillip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007).

ICE detention at the time of their immigration proceedings). Federal statutory and constitutional laws require that these two groups of individuals receive legal representation, whether paid or pro bono, and no statute prohibits the government from providing such representation where individuals facing deportation are indigent. On April 22, 2013, ICE and EOIR made public commitments to ensure that unrepresented detained individuals with serious mental disorders can access legal counsel.<sup>30</sup> To fulfill these commitments and its additional legal obligations, ICE should:

- Continue to work closely with DOJ to implement April 22, 2013, commitments relating to detained individuals with serious mental disabilities;
- Cooperate with DOJ and HHS to develop and implement plans in a timely manner to expand access to counsel to all indigent unrepresented children in immigration proceedings; and
- Cooperate with DOJ to develop and implement plans in a timely manner for all individuals with serious mental disabilities who are unable to represent themselves and are not detained at the time of their immigration proceedings.

### ***CBP Short-Term Detention Conditions***

CBP's short-term detention system – including holding cells at Border Patrol stations, checkpoints, and ports of entry, and secondary inspection areas – is a black box. The scale of the system is unknown, the standards governing conditions not public, and oversight authority within the agency unclear. Complaints of CBP misconduct include verbal and physical abuse, denial of medical care, inadequate food and water, due process violations, exposure to extreme temperatures, extended use of bright lights and inadequate provision of space or bedding making sleep impossible, extreme overcrowding, and permanent confiscation of personal items (including legal documents, medication and personal identification). A major University of Arizona study for which 1,113 recent deportees were interviewed in 2010, 2011, and 2012 found that 45 percent of respondents reported not receiving sufficient food while in U.S. custody, 37 percent reported denial of medical attention, and 39 percent reported confiscation of personal property, including money and identity documents.<sup>31</sup> In the past three years, many media and NGO reports have documented cases that are consistent with these findings.<sup>32</sup>

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<sup>30</sup> See Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, to Thomas D. Homan, Acting Executive Associate Director, Enforcement and Removal Operations, Peter S. Vincent, Principal Legal Advisor, and Kevin Landy, Assistant Director, Office of Detention Policy and Planning, "Civil Immigration Detention: Guidance for New Identification and Information-Sharing Procedures Related to Unrepresented Detainees with Serious Mental Disorders or Conditions" (Apr. 22, 2013), available at [http://www.ice.gov/doclib/detention-reform/pdf/11063.1\\_current\\_id\\_and\\_infosharing\\_detainees\\_mental\\_disorders.pdf](http://www.ice.gov/doclib/detention-reform/pdf/11063.1_current_id_and_infosharing_detainees_mental_disorders.pdf); Memorandum from Brian M. O'Leary, Chief Immigration Judge, Executive Office for Immigration Review, to All Immigration Judges, "Nationwide Policy to Provide Enhanced Procedural Protections to Unrepresented Detained Aliens with Serious Mental Disorders or Conditions" (Apr. 22, 2013), available at <http://nwirp.org/Documents/ImpactLitigation/EOIRDirective04-22-2013.pdf>.

<sup>31</sup> See JEREMY SLACK ET. AL., UNIV. OF ARIZONA, IN THE SHADOW OF THE WALL: FAMILY SEPARATION, IMMIGRATION ENFORCEMENT AND SECURITY 24, 26 (Mar. 15, 2013), available at [http://las.arizona.edu/sites/las.arizona.edu/files/UA\\_Immigration\\_Report2013web.pdf](http://las.arizona.edu/sites/las.arizona.edu/files/UA_Immigration_Report2013web.pdf).

<sup>32</sup> See Cindy Carcamo and Richard Simon, *Immigrant groups complain of 'icebox' detention cells*, LOS ANGELES 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*, NEW YORK 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](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 CUSTODY ON THE ARIZONA SONORA BORDER (Sept. 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](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

DHS should take steps to reform CBP's detention practices, including by:

- Creating an office responsible for CBP detention operations, planning, and oversight;
- Publicly releasing comprehensive information on the location and capacity of CBP short-term detention facilities, including average daily populations in each location;
- Requiring 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";
- Creating an online detainee locator for individuals in CBP custody, analogous to the system in place for individuals in ICE detention;
- Creating enforceable standards applicable to all CBP short-term custody facilities and hold rooms that address the provision of adequate nutrition, appropriate climate, and medical care; dissemination of legal information in commonly-spoken languages; access to lawyers, consular officials, family members, and non-governmental organizations; and policies for identifying asylum seekers and victims of violence and referring their cases to USCIS.

### ***Solitary Confinement***

The ACLU welcomed ICE's September 2013 directive on the use of solitary confinement in ICE detention, in particular its strong reporting and review requirements.<sup>3</sup> Compliance system-wide, however, is a significant challenge, as the policy relies on staff and officials in county jails and contract facilities across the country, as well as ICE officials, to submit to a new set of limitations and requirements relating to their facility operations. To ensure that the directive's intent is fully realized, ICE should:

- Rigorously oversee compliance with the new directive and hold accountable any facilities – including jails and contract facilities – that do not comply with the directive's requirements; and
- Regularly release data to Congress and the public related to the use of solitary confinement in ICE facilities.

### ***PREA Implementation***

The ACLU welcomed the March 2014 release of the DHS Prison Rape Elimination Act regulations to set standards to prevent, detect, and respond to sexual abuse and assault in DHS confinement facilities. These long-overdue standards must be implemented system-wide – not only in DHS-run facilities. DHS should:

- Move swiftly to implement the PREA rule in all ICE-run facilities and in all CBP facilities and hold rooms; 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 180 days of the effective date of the DHS rule.

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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](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), *available at* [http://www.seguridadcondemocracia.org/administrador\\_de\\_carpetas/biblioteca\\_virtual/pdf/beyondborderbuildup\\_wola.pdf](http://www.seguridadcondemocracia.org/administrador_de_carpetas/biblioteca_virtual/pdf/beyondborderbuildup_wola.pdf).

## **IV. Improve Efficiency and Accountability Department-wide**

### ***Uniform Complaint Process***

Consistent documented deficiencies within DHS complaint systems have inhibited the Department's ability to identify civil rights, civil liberties, and other concerns, to resolve complaints appropriately, and to reform policies or training when systemic problems are identified. Despite significant advances in technology, the DHS complaint systems are outdated. For example, the DHS OIG has found that CBP's case management system to track use of force incidents and complaints is entirely inadequate, and that the agency has failed to appropriately integrate complaint data analysis into decision-making.<sup>33</sup> In addition, the current complaint practices lack transparency and are inconsistent with the Administration's Open Government Initiatives, sending individuals who file complaints – U.S. citizens and noncitizens who interact with officers at one of DHS's many component agencies – into a black hole. Complainants routinely wait years, only to receive form letters in response to serious complaints alleging misconduct and mismanagement. The numerous overlapping complaint filing avenues within DHS create confusion as to where complaints should even be filed. Given its complex structure and its officers' daily interactions with thousands of people, 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.

### ***Proactive Disclosure of A-Files***

Under 8 U.S.C.A. § 1229, aliens in removal proceedings are entitled to “have access to the alien's visa or other entry document, if any, and any other records and documents, not considered by the Attorney General to be confidential, pertaining to the alien's admission or presence in the United States.”<sup>34</sup> Currently, DHS relies entirely on the Freedom of Information Act (FOIA) to satisfy this statutory obligation. This policy not only wastes significant Departmental resources on processing A-file FOIA requests (which account for over 90 percent of USCIS FOIAs); it also means that the vast majority of individuals in removal proceedings are unable to access the documents necessary to ensure a fair hearing. The Ninth Circuit has held that the current FOIA process is inadequate to effectuate the government's statutory obligations under 8 U.S.C.A. §1229.<sup>35</sup> In order to fulfill its statutory obligations, reduce the resources needed to process FOIA requests, and increase fairness in immigration proceedings, DHS should:

- Adopt a policy of proactively providing a copy of their A-file to all individuals in immigration proceedings.

## **V. Conclusion**

DHS should move quickly in implementing these administrative enforcement reforms to strengthen due process, civil liberties, and civil rights, and to protect families and communities. We urge you,

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<sup>33</sup> DHS OFFICE OF INSPECTOR GENERAL, CBP USE OF FORCE TRAINING AND ACTIONS TO ADDRESS USE OF FORCE INCIDENTS (Sept. 2013), available at [http://www.oig.dhs.gov/assets/Mgmt/2013/OIG\\_13-114\\_Sep13.pdf](http://www.oig.dhs.gov/assets/Mgmt/2013/OIG_13-114_Sep13.pdf).

<sup>34</sup> 8 U.S.C.A. § 1229(a)

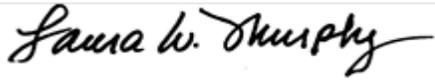
<sup>35</sup> *Dent v. Holder*, 627 F.3d 365, 374-75 (9th Cir. 2011).

as the newest leaders of the U.S. Department of Homeland Security, to prioritize these recommendations so that citizens and non-citizens alike enjoy the full protections of the U.S. Constitution.

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Sincerely,

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