



The American Civil Liberties Union

Written Statement
For a Hearing on

Homeland Security Oversight

Submitted to the Senate Judiciary Committee

Wednesday, April 2, 2008

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Introduction

The American Civil Liberties Union (“ACLU”) commends the Senate Judiciary Committee for conducting an oversight hearing of the Department of Homeland Security (“DHS”). We urge the Committee to initiate a rigorous oversight process to ensure that DHS is held accountable to Congress and the public for its enforcement practices. The following written statement, submitted on behalf of the ACLU, will address a range of problematic practices at the Immigration Customs Enforcement (“ICE”), a sub-department of DHS, during the interrogation, detention, and removal stages, as well as DHS’s collection of personal data on millions of Americans, its use and misuse of that data, and its attempts to build an ever-expanding surveillance infrastructure.

The ACLU is a nonpartisan public interest organization dedicated to protecting the constitutional rights of individuals. The ACLU consists of more than half a million members, countless additional activists and supporters, several national projects, and 53 affiliates nationwide. The ACLU was born during the “Red Scare” in 1920, a time when then U.S. Attorney General A. Mitchell Palmer ordered immigrants summarily detained and deported because of their political views. Since its founding, the ACLU has consistently defended and protected immigrants’ rights. The ACLU has the largest litigation program in the country dedicated to defending the civil and constitutional rights of immigrants. Through a comprehensive advocacy program including litigation, public education, and legislative and administrative advocacy, the ACLU is at the forefront of major struggles securing immigrants’ rights including legal challenges to ICE’s unconstitutional laws and practices.

Part 1 – Problems with ICE Interrogation, Detention, and Removal Practices

People charged with being removable are entitled to due process including a hearing before an immigration judge and review by a federal court. Among the specific rights that apply in removal proceedings are the right to be represented by counsel (at no expense to the government); to receive reasonable notice of the charges and of the time and place of the hearing; to have a reasonable opportunity to examine adverse evidence and witnesses; to present favorable evidence; to receive competent language interpretation; and to have the government prove its case by clear, convincing, and unequivocal evidence.

ICE has systematically chipped away at these core constitutional protections by pursuing an unprecedented campaign of interrogations, detention, and removal of immigrants. Since 2006, with the initiation of Operation Return to Sender, ICE has aggressively ramped up punitive deportation-only initiatives including:

- large-scale, mass raids in worksites and homes;
- dramatic increase in detention beds;
- expansion of federal immigration enforcement to include state and local police;
- denial of access to counsel for people facing removal from the U.S.;
- mass transfers of detainees to facilities hundreds of miles from their homes;
- incarceration of detainees in unsanitary inhumane conditions;

- denial of medical and dental care to detainees, including those with serious, life-threatening conditions.

I. Unprecedented large-scale round-up raids

Since the launch of Operation Return to Sender in 2006, ICE has engaged in an unprecedented round of raids, both at worksites and in homes, hitting many regions of the country. Below is a snapshot of just a few of the regions that have been hard hit by large-scale immigration raids:

Swift raids: On December 12, 2006, six Swift & Company facilities located in Greeley, Colorado; Cactus, Texas; Grand Island, Nebraska; Hyrum, Utah; Marshalltown, Iowa and Worthington, Minnesota were raided by ICE. ICE estimates that approximately 1,282 Swift employees were detained on immigration violations, and 65 were charged with criminal violations related to identity theft.

New Bedford, Massachusetts raid: On March 6, 2007, the New Bedford community was devastated by one of the nation's largest immigration raids, resulting in the arrest of 361 workers of the Michael Bianco factory. All but a few were detained, and 206 were transferred to detention facilities in Texas, hundreds of miles from their families, homes, and counsel. An estimated 100 to 200 children were separated from their parents. In response, the ACLU and a coalition of groups filed a lawsuit, challenging ICE's misconduct during the raid.

Van Nuys, California raid: On February 7, 2008, more than 100 ICE agents raided a printer supply manufacturer in the San Fernando Valley, taking into custody over 130 employees on immigration-related charges and arresting eight on federal criminal charges. Following the raid, ICE officials denied the workers access to counsel during ICE's interrogation of the workers, even after the attorneys had filed Form G-28s Notice of Entry of Appearance. The ACLU, the National Immigration Law Center, and the National Lawyers Guild recently filed a lawsuit on behalf of the workers, challenging ICE's denial of access to counsel.¹

Long Island suburbs raids: In September 2007 teams of 6 to 10 armed ICE agents raided the homes of Latinos without court-issued search warrants. The raids were conducted during late night or pre-dawn hours. ICE agents pounded on and/or broke down doors and windows while screaming loudly at the inhabitants inside the house. ICE agents represented themselves as "police" and bullied or forced their way into people's homes without obtaining their consent to enter. The ACLU filed a lawsuit challenging that ICE violated the immigrants' Fourth amendment rights by entering and searching their homes without valid warrants or voluntary consent and in the absence of probable cause and exigent circumstances. Furthermore, following the raid, Nassau County Police Commissioner Lawrence Mulvey stated that his officers would no longer cooperate with ICE, because they do not support ICE's "cowboy tactics."²

¹ See Appendix A: Perdomo, Daniela. "Workers in Raid Get Right to Legal Counsel." Los Angeles Times. March 14, 2008.

² See Appendix B: "New York Officials Denounce Tactics Used in Immigration Raids." Fox News. October 3, 2007.

Georgia raids: In September 2006 armed federal agents searched and entered private homes without warrants and detained and interrogated people solely on the basis that they looked “Mexican.” These raids swept so broadly that they covered homes where all the residents are U.S. citizens. In addition, the agents used excessive and wholly unnecessary force and destroyed private property without cause. The ACLU filed a class action suit on behalf of U.S. citizens who “appear Mexican,” challenging that the federal agents violated the citizens’ Fourth amendment rights by entering and searching homes without valid warrants or voluntary consent and in the absence of probable cause or exigent circumstances. The ACLU suit further challenges that the federal agents violated the citizens’ Fifth amendment rights by targeting them on the basis of race/ethnicity and/or national origin in violation of the Equal Protection Clause.

DHS Secretary Chertoff has claimed that the ICE enforcement operations launched in 2006 are aimed at capturing “fugitive aliens,” with the highest priority on apprehending individuals who pose a threat to national security or the community and whose criminal records include violent crimes. However, 94 percent of those arrested by the San Francisco Fugitive Operations Team between January 1 and March 31, 2007, did not fit within the category of “criminal fugitives.” A majority were not even subject to outstanding removal orders according to a letter from the acting ICE director to Congresswoman Anna Eshoo. These numbers indicate that ICE’s raids, though purportedly targeted at “fugitive aliens,” in reality have swept so broadly that the vast majority of people arrested under Operation Return to Sender were innocent bystanders.

Among the thousands of people who have been rounded up by ICE under the auspices of Operation Return to Sender is Kebin Reyes, six years old at the time of his arrest in March 2007. A native-born U.S. citizen, Kebin was sleeping when ICE officers stormed into his home. Kebin’s father Noe told the ICE agents that Kebin is a U.S. citizen, and asked permission to call a relative to care for Kebin while Noe was detained. The ICE agents refused. Instead they made Noe wake up Kebin, who watched as officers handcuffed his father, and then took father and son to the ICE booking station in San Francisco. Kebin spent 10 hours locked in a room with his father. ICE agents never allowed Noe to call someone to pick up Kebin. It was only when a relative heard from neighbors what happened and came to the ICE facility that Kebin was able to leave.³

Like Kebin, children all over the country have been traumatized by seeing their parents swept up and taken away or by being left behind without care after school when parents have been arrested without notice. After the raids in which Kebin was arrested, the San Rafael City Schools Board of Education wrote to Congresswoman Lynn Woolsey, reporting, “The ICE raids sent our schools into a state of emergency. Many students were and remain distracted from school work as they worry about their loved ones. Most of these children are, by and large, American-born, full-fledged citizens with a right to a quality education and to live in this country for the rest of their lives.” To vindicate Kebin’s rights under the Fourth Amendment and to prevent future abuses, the ACLU, the Lawyers’ Committee for Civil Rights, and the law firm of Coblenz Patch Duffy & Bass filed a lawsuit against ICE in April 2007.

³ See Appendix C: McKinley, Jesse. “San Francisco Bay Area Reacts Angrily to Series of Immigration Raids.” New York Times. April 28, 2007.

Just as troubling as the sweeping breadth of recent raids are accompanying reports of rampant constitutional violations. Both DHS Secretary Chertoff and ICE Assistant Secretary Myers have publicly stated that administrative warrants cannot be used by ICE agents to enter people's homes. However, in practice, ICE agents have been entering people's homes, even without consent. ICE's response that people are voluntarily consenting to questioning is insupportable when considering that ICE agents, fully armed and identifying themselves as "police," are banging on people's doors and windows in the pre-dawn hours as the inhabitants are sleeping. Sweeping and overbroad raids are terrorizing immigrant communities across the U.S. while doing little, if anything, to improve the safety and security of the U.S.⁴

Recommendations: The ACLU urges that ICE:

- Halt large-scale, pre-dawn raids, both at worksites and in homes;
- Refrain from investigating and/or detaining family members, roommates, housemates, neighbors, and other bystanders, without individualized suspicion.
- Clarify standards for determining "consent"
- Not identify themselves as "police."
- Not question any persons represented by counsel without counsel present during the interview.

II. Expansion of federal immigration enforcement to include state and local police

In recent years ICE has entered into an increasing number of 287(g) agreements with states and localities. Under 287(g) agreements, state and local law enforcement can identify, process, and detain immigrants whom they encounter during their daily law-enforcement activity, including traffic stops. The ACLU has challenged such 287(g) agreements on the basis that state and local law enforcement lack the inherent authority to arrest individuals for civil immigration violations. Enforcement of federal immigration laws is an exclusive federal function based on Congress's plenary powers to regulate immigration.

For example, the ACLU has sued Danbury, Connecticut for arresting 11 immigrants in September 2006 in a public park in an undercover immigration sting operation at a public park. A Danbury police officer disguised himself as a contractor/employer looking to hire day laborers. The ACLU lawsuit challenges the arrests on civil immigration violations on the basis of failure to have valid warrants, lack of probable cause, or lack of reason to believe that the detained were engaging in unlawful activity. Additionally, the suit challenges Danbury's immigration enforcement activities on the grounds that federal law preempts state or local police from civil immigration enforcement activity, thereby leaving Danbury without appropriate authority cognizable under 8 U.S.C. § 1357. The case also challenges the detentions on the basis on race, ethnicity, perceived national origin, asserting that the 11 immigrants were subjected to selective law enforcement arising out of a malicious and bad faith intent to drive them out of Danbury.

⁴ See Appendix D: Bernstein, Nina. "Citizens Caught Up in Immigration Raid." New York Times. October 4, 2007.

Supporters of 287(g) agreements often have little or no understanding of immigration law and its complexities. Some proponents envision a fictional database system where a local police officer can enter a person's name in the computer and immediately get an answer from ICE that the person is "legal" or "illegal." In reality, determining an individual's immigration status requires extensive training and expertise in immigration law and procedures, and thus is simply not suitable for state and local law enforcement.

Section 287(g) supporters fail to understand that immigration status is complex, fluid, and very case-specific. For example, many people are in the U.S. pursuant to a non-immigrant visa for employment, study, investment, travel, and other reasons. Most of them are typically admitted to the U.S. for a certain period of time, but many can then request to extend their stay or to change to a different status with the DHS Citizenship Immigration Services ("CIS"). During the pendency of their application, they may have no documentation that proves they are in current lawful status even though CIS is aware of their presence in the U.S. and permits them to remain here until a decision is made on their application. Many people in the U.S. are in the midst of applying for permanent resident status, sponsored by a family member or employer. Others are seeking refugee protection. Others have been granted special status based on being a victim of family abuse, trafficking in persons, or a violent crime. Still others are in immigration removal proceedings but are applying for relief with an immigration judge. Still others have been denied relief by an immigration judge but are appealing their removal orders to the Board of Immigration Appeals. Finally, it is not uncommon for a single individual to be pursuing simultaneously multiple forms of immigration relief. These are just a few of the many permutations that could apply to a single individual who is arrested by a local police officer.

The practice of deputizing state and local police to enforce federal immigration laws has proven to be highly ineffective and dangerous. No case illustrates this better than that of Pedro Guzman, a U.S. citizen born in California who was deported to Mexico because an employee of the Los Angeles County Sheriff's Office determined that Mr. Guzman was a Mexican national. Mr. Guzman, cognitively impaired and living with his mother prior to being deported, ended up in Mexico – a country where he had never lived – forced to eat out of trash cans and bathe in rivers. His mother, also a U.S. citizen, took leave from her Jack in the Box job to travel to Mexico in search of her son. She combed the jails and morgues of northern Mexico in search of her son. After he was located and allowed to reenter the U.S., Mr. Guzman was so traumatized that he could not speak for some time. To vindicate Mr. Guzman's rights and to prevent future DHS errors and abuses, the ACLU and the law firm of Morrison & Foerster filed a lawsuit against ICE last year.⁵

In addition, deputizing state and local law enforcement to become deportation agents pushes immigrant communities farther and farther away from police protection. Fearful that a call to the police will result in deportation, immigrant victims of crime, including battered women, are choosing not to summon the police, thereby subjecting themselves and their children to further violence. Ultimately this dynamic jeopardizes all segments of society, not just immigrant communities. Police rely heavily on tips from witnesses or people familiar with suspects. If the

⁵ See Appendix E: Esquivel, Paloma. "Suit Filed Over Disabled U.S. Citizen's Deportation Ordeal." Los Angeles Times. February 28, 2008.

police are cut off from these sources of information, they will encounter greater difficulties in apprehending suspects and solving criminal cases.

Finally, charging state and local law enforcement with the responsibility of enforcing immigration laws opens the door for law enforcement to engage in racial profiling. Latinos, Asians, and other immigrants will be at risk of being stopped, arrested, interrogated, and detained by state and local law enforcement for no reason other than looking or sounding “foreign.”

Recommendations: The ACLU urges that ICE:

- Halt entering into future 287(g) agreements with states and localities;
- Cease recognition and compliance with 287(g) agreements currently in operation.
- Halt implementation of the Secure Communities plan which seeks to expand state and local law enforcement powers to enforce federal immigration laws.

III. Growth and expansion of inhumane immigration detention

Immigration detention has more than quadrupled over the past 15 years. Each year Congress allocates more money to ICE for detention bed space and more personnel. The vast majority of detainees have no counsel to represent them in bond matters or immigration removal proceedings. Free or low-cost immigration legal services are completely absent in many regions. Frustrated by the unending incarceration and the lack of assistance in navigating the immigration system, many detainees – even those with legitimate immigration applications – simply give up and are deported. Their stories are the product of a failed immigration system – a system that purports to be premised on due process, but in actuality pushes people out of the U.S. by subjecting them to long periods of incarceration in unsanitary inhumane conditions, without access to appointed counsel.

These due process violations have been exacerbated by ICE’s growing practice of transferring detainees to facilities far from their location of arrest, often hundreds of miles away from their homes and workplaces. For example, in October 2007 ICE closed down the San Pedro detention facility in Southern California and subsequently transferred over 420 detainees to facilities in Texas, Arizona, Washington State, and other parts of California. Prior to transferring the detainees to remote facilities, ICE did not notify the detainees’ counsel. In many cases an immigration judge had already commenced merits hearings on the detainees’ cases. The mass transfer of detainees out of state has resulted in unnecessary prolonged detention, with many detainees forced to start their cases all over again before a new immigration judge in a different jurisdiction.

In addition to challenging the constitutionality of mandatory detention and prolonged detention, the ACLU has been at the forefront of challenging ICE’s inhumane unsanitary conditions of confinement including ICE’s policy of family detention which resulted in the prolonged detention of families with children. In 2007 the ACLU and the University of Texas Law School sued on behalf of children incarcerated at the Hutto, Texas prison as their parents were pursuing bona fide asylum claims. At the time the lawsuits were filed, the children were receiving only one hour of education per day, were required to wear prison uniforms, were held in jail cells for much of the day, and were often disciplined by guards with threats of separation from their

parents. In August 2007 the parties reached a settlement which mandated major improvements in conditions at Hutto. Although those families represented by the ACLU and University of Texas were eventually released from Hutto, other families with children are being detained in Hutto and other facilities.

In 2007 the ACLU filed a class action lawsuit against a Corrections Corporation of America facility in San Diego where detainees were incarcerated in grossly overcrowded quarters. A separate ACLU lawsuit against the San Diego facility challenged the inadequate medical and mental health care afforded to detainees. One of the detainees whose serious medical needs was grossly neglected was Francisco Castaneda, who testified before the Subcommittee on Crime, Terrorism and Homeland Security of the House Judiciary Committee on October 4, 2007, at a hearing on “Detention and Removal: Immigration Detainee Medical Care.” Detained for eight months in the San Diego facility, Mr. Castaneda suffered extremely painful bleeding and discharge from his penis. Numerous health care professionals—both on-site and off-site—stated that Mr. Castaneda required a biopsy to determine whether he was suffering from penile cancer. But the biopsy was never authorized. Instead of diagnosing and treating his serious condition, medical professionals provided Mr. Castaneda with pain medication and an order for clean boxer shorts on a daily basis, to replace the boxer shorts that he regularly soiled with blood and discharge. Only after relentless advocacy by the ACLU was Mr. Castaneda released from ICE custody. Mr. Castaneda promptly received a biopsy at the emergency room and learned that he had developed metastatic penile cancer that had already spread to other parts of his body. In February 2008, just four months after testifying before this Subcommittee, Mr. Castaneda passed away, succumbing to the cancer.⁶

Recommendations for Congress:

- Congress should strengthen the long-established statutory right to counsel for all people facing removal from the U.S. by assuring access to government-appointed counsel.
- Congress should mandate that no detainee be housed in a facility that fails to comply with the detention standards. ICE shall codify, through the promulgation of regulations, national detention standards that are consistent with internationally recognized human rights principles.
- Congress should require that all immigration deaths in detention—including deaths at SPCs, CDFs, and IGSAs—be publicly reported by ICE to Congress on a regular basis.

Recommendations for ICE oversight:

- ICE shall develop non-penal alternatives to detention to decrease the number of people detained and/or subject to ICE supervision, especially with respect to asylum seekers, torture survivors, victims of human trafficking, juveniles, families with children, sole caregivers, survivors of domestic abuse and other violent crimes, and long-term permanent residents.
- ICE shall ensure that all detainees be given a constitutionally adequate custody review before an immigration judge or impartial adjudicator. In cases where ICE seeks to detain an individual beyond six months, ICE shall bear the burden of proving by clear and

⁶ See Appendix F: Weinstein, Henry. “Judge Calls Immigration Officials’ Decision ‘Beyond Cruel.’” Los Angeles Times. March 13, 2008.

convincing evidence that prolonged detention is justified. Where ICE cannot make its burden, ICE shall release such detainees on bond with reasonable conditions.

- ICE shall not transfer detainees to remote facilities where a Form G-28 Notice of Entry of Appearance has been filed on behalf of a detainee, where the detainee has requested a bond hearing, where the detainee has filed an application with the immigration court, and/or when an immigration judge has conducted a merits hearing in the detainee's case.
- ICE shall ensure the transfer of complete medical records along with detainees so that receiving facilities have all of the information needed to ensure prompt, necessary treatment.

IV. Privatization of Immigration Detention

DHS has entered into more and more contracts with private companies, including the Corrections Corporation of America, to incarcerate immigrants. Some of the facilities with the poorest conditions are run by CCA, including the facilities in Hutto and San Diego. Private prisons are less accountable than public prisons about their daily operations, in part because they claim they are not required to provide information to the public or the government (at the federal level) under the Freedom of Information Act.⁷ As a result of the opening created by decreased oversight, private companies will often disregard guidelines on a range of issues such as types of detainees to be housed, staffing levels, and medical care to be provided. This results in greater profitability for the private companies, without reducing the cost to taxpayers. Ronald T. Jones, a former CCA manager recently told Time Magazine that CCA uses a reporting system in which accounts of major, sometimes violent prison disturbances and other significant events were often masked or minimized in reports provided to government agencies with oversight over prison contracts. Jones claimed that the company even began keeping two sets of books — one for internal use that described prison deficiencies in telling detail, and a second set that Jones describes as “doctored” for public consumption, to limit bad publicity, litigation, or fines that could compromise CCA’s multimillion-dollar contracts with federal, state, or local agencies.⁸

CCA, as previously mentioned, runs Hutto, the detention facility that settled with the ACLU after it was disclosed that it kept children in a prison facility; it provided no child care; and children were forced to sit by their parents as they conferred with attorneys, often having to hear brutal tales of rape and torture.⁹

Recommendations for ICE oversight:

- ICE should develop protocols to regularly inspect privately-owned detention facilities and ensure that they are held accountable for their daily operations.
- Congress should mandate that privately-owned detention facilities be held to federal reporting standards and the Freedom of Information Act.

⁷ Holden, Honorable Tim [PA-17] (2007). Testimony before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Committee on the Judiciary. November 8, 2007.

⁸ See Appendix G: Zagorin, Adam. “Scrutiny for a Bush Judicial Nominee.” Time Magazine. March 13, 2008. <http://www.time.com/time/printout/0,8816,1722065,00.html#>

⁹ Echegaray, Chris. “Inmate Sues CCA After Ear Torn Off.” Tennessean. March 27, 2008. <http://www.tennessean.com/apps/pbcs.dll/article?AID=/20080327/NEWS03/803270395/1017/NEWS01>.

- In light of the reported corruption and abuse by for-profit detention facilities, DHS should stop using them for immigration detention.

Part 2 – The Homeland Security Infrastructure: The Emperor Has No Clothes

The ACLU has documented in numerous statements for the Congressional Record our concerns about the many DHS programs that endanger Americans' privacy and civil liberties. The Department's collection of personal data on millions of Americans, its use and misuse of that data, and its attempts to build a larger and more intrusive surveillance infrastructure should raise alarms for this committee and for the public at large. But perhaps just as alarming is the fact that the shocking majority of these programs simply do not work; they provide the illusion of security but no actual security benefit to our nation. Like the fabled emperor in the Hans Christian Anderson story, the Bush Administration security empire, with DHS at its center, has no clothes.

I. Passenger Screening

Since its creation, DHS has been attempting to build a domestic, identity-based airline passenger screening scheme. Proposals have included searching and storing the travel histories of every American, attempting to use data mining and predictive software to evaluate potential terrorist threats among the general population and comparing Americans against terrorist watch lists. A look back at these attempts reveals a story of one misstep after another – broken promises, deadlines missed (and missed again), illegal testing of personal information, rules broken, and sloppy handling of information.

We have gone from CAPPS I – computer assisted passenger profiling – to CAPPS II computer assisted passenger prescreening, to CAPPS 2.1, 2.2, 2.3, and now Secure Flight versions 1, 2 and 3. None of the new schemes have worked and none are operational. In August 2007, DHS issued a new Federal Register notice describing a scaled back version of Secure Flight that will focus on watch list checks.¹⁰ The problems with this version of Secure Flight are illustrative of the larger problem with air passenger prescreening. The program relies on government watch lists, which are a bloated, useless mess. In June 2007, *60 Minutes* obtained a copy of the list, and found that it contained numerous common American names such as John Williams and Robert Johnson, the names of dead people, and even the president of Bolivia. The Department of Justice Office of the Inspector General found in a September 2007 report that the government's watch lists are not only riddled with errors and inconsistencies, but are also extremely bloated, and still growing fast.¹¹ According to the size and rate of growth reported in September by the IG, the watch list today stands at approximately 941,100 records.¹²

Perhaps more importantly for the Committee, the legal and constitutional implications for individuals who have wrongly come under suspicion by their government remain unclear. The "blacklists" created by DHS and applied by an ever-increasing number of DHS officials as they

¹⁰ 72 C.F.R. 48365.

¹¹ *Follow-up Audit of the Terrorist Screening Center*, U.S. Department of Justice Office of the Inspector General Audit Division, Audit Report 07-41, September 2007.

¹² See www.aclu.org/watchlist

interact with the public are increasingly likely to prevent law-abiding U.S. persons from exercising their full legal and constitutional rights and privileges.

II. US VISIT

US VISIT is another program that, despite years of work, remains functionally inoperative. Last week, DHS touted the fact that it was now collecting 10 fingerprints from all international visitors at New York JFK International Airport.¹³ However, as has been widely reported, DHS may have built the entry portion but it is nowhere near completion of the exit portion. In other words, we generally have no idea of whether our visitors – whether they are tourists or terrorists – are still in the U.S., which was supposed to have been the entire purpose of this white elephant (defined in the dictionary as “a possession entailing great expense out of proportion to its usefulness or value”). The Government Accountability Office (GAO) put it in June 2007 as follows: “After investing about \$1.3 billion over 4 years, DHS has delivered essentially one-half of US-VISIT.”¹⁴ We have forced our friends to submit to fingerprints and a digital photograph before they enter the U.S. (at unknown cost to the U.S. tourist industry). We keep all that personal data in a huge database where it has very little legal protection, but also provides little benefit to our security. As the GAO concluded, DHS’s US-VISIT programs “are not well-defined, planned, or justified on the basis of costs, benefits, and risks.”¹⁵

III. Real ID

The Department’s lackluster attempt to implement the Real ID Act has been nothing short of a joke. After taking two and a half years to promulgate regulations for implementation of the Act, DHS’s final regulations fail to address many of the most basic concerns over Real ID – including identity theft, privacy, danger to victims of domestic violence and religious liberty. Worse from a security perspective, DHS pushed the implementation deadline for Real ID to the year 2014 for those under 50, and 2017 for those over 50. It is difficult to understand how a program that has been touted as so urgent for our security can be left unimplemented for more than a decade.

IV. Western Hemisphere Travel Initiative

Over the last three years DHS has endlessly repeated the need for consistent and uniform standards for drivers’ licenses – describing Real ID as the cure for everything from terrorism to illegal immigration to identity theft. Yet DHS abandoned principle in a related program on travel and license security: the Western Hemisphere Travel Initiative (WHTI). WHTI regulations authorize the state of Washington to create an enhanced drivers’ license (EDL) for the purpose of crossing the border. In those regulations, DHS make clear that “Each EDL program is specific to each entity based on specific factors such as the entity’s level of interest,

¹³ [“DHS Begins Collecting 10 Fingerprints from International Visitors at New York’s John F. Kennedy International Airport,”](#) DHS Press Release, March, 25, 2008.

¹⁴ <http://www.gao.gov/new.items/d071044t.pdf>

¹⁵ <http://www.gao.gov/highlights/d071065high.pdf>

funding, technology, and other developmental and implementation factors.”¹⁶ DHS cannot have it both ways – either consistent licensing standards are a key to security or they are just window dressing designed to provide the appearance of security.

V. Border Fencing

SBINet, shorthand for "Secure Border Initiative Network," will be, if it is ever built, a 'virtual' border fence that relies on sensors and long-range cameras mounted on high observation towers. In addition to the serious privacy concerns raised by long-range surveillance cameras capable of observing the activities of everyday Americans living along the border, to date, and as recently highlighted by a hearing before the House Homeland Security Committee, SBINet has repeatedly failed to achieve its operational objectives. Volatile weather and the untamed environment have resulted in fuzzy, unfocused images produced by cameras, and the technology is incapable of achieving the tasks for which it was created.¹⁷ In addition, the communication between the surveillance towers and the command center in Tucson is delayed because of the physical distance, creating even more problems with SBINet.¹⁸ The Committee on Homeland Security described the programs as providing “marginal' functionality at best.”¹⁹

VI. Data Mining

Another exhibit in the DHS catalogue of incompetence is the Automated Targeting System (ATS). This program utilizes computer software to analyze the travel patterns of Americans so that “authorized CBP employees can access risk-scored passenger information.”²⁰ These risk scores are essentially determinations of American travelers’ potential to be terrorists. This type of score is the worst sort of computerized, identity-based, ineffective dragnet security. In fact, as security experts note, it cannot be effective in apprehending terrorists. US airlines transported 769.4 million travelers in 2007, and no one thinks there were likely to be more than a handful of terrorists at most.²¹ Even if the program were 99% effective (a very questionable assumption) it would identify 7.7 million false positives – innocent travelers. These false positives would swamp the system, wiping out any possible investigative advantage.

Recognizing the uselessness and potential harmfulness of this kind of data mining, Congress enacted a prohibition on the use of “algorithms assigning risk to passengers whose names are not on government watch lists.”²² Yet DHS has disregarded this prohibition. It continues to employ data mining as part of the ATS program, arguing against logic that the restriction only applies to the aforementioned domestic passenger prescreening program Secure Flight.

¹⁶ Designation of an Enhanced Driver’s License and Identity Document Issued by the State of Washington as a Travel Document under the Western Hemisphere Travel Initiative, US Customs and Border Protection, Pg 3 (not yet published in the Federal Register).

¹⁷ GAO Report, Observations on Selected Aspects of SBInet Program Implementation, October 24, 2007, Report GAO-08-131T, pg. 7.

¹⁸ *Id.*

¹⁹ Press Release, House Committee on Homeland Security, February 22, 2008.

²⁰ October 2, 2007 response to ACLU FOIA

²¹ Press Release, US Department of Transportation, Bureau of Transportation Statistics, March 13, 2008.

²² Public Law 109-295, Title V, Sec. 514 (e).

The problem of the use of data mining extends well beyond DHS to other parts of the federal government. The *Wall Street Journal* recently reported that the National Security Agency has constructed a massive ongoing domestic surveillance system that involves the collection and mining of large amounts of data about Americans' routine transactions.²³ This program, according to the report, is tantamount to a revival of the Total Information Awareness program, which Congress supposedly banned in 2003, and includes passenger data provided by DHS.

A competent security agency would not waste resources trying to construct vast systems that treat every person as a suspect, and try to filter out the one-in-a-billion traveler who might be a terrorist using unreliable personal information and computer algorithms. Instead, it would concentrate on the basic, old-fashioned legwork that is the only way genuine terror plots have ever been foiled.

Complex new programs can be difficult and time-consuming to implement, and delays and dead ends might be understandable in any one of these programs. But when the pattern is repeated across so many different programs, the obvious conclusion to draw is that there is a larger systemic problem. Clearly, DHS, as currently constituted, is not competent to implement these programs. In addition, even aside from implementation issues, many of these programs were ill-conceived at the outset – failing to account for the fact that they run counter to privacy, due process, and other deep-rooted American principles established to assure fairness to the innocent. The result has been that these programs have become caught up in a morass of troubling implications and dilemmas. It is time for Congress to take a hard look at these programs and recognize the Bush Administration's security apparatus for what it is: naked.

The ACLU appreciates the opportunity to submit this written statement and urges the Committee to exercise meaningful oversight over DHS and ICE by implementing the proposed recommendations.

²³ Siobhan Gorman, *NSA's Domestic Spying Grows As Agency Sweeps Up Data*, The Wall Street Journal, March 10, 2008.

Appendix A:

Los Angeles Times

http://www.latimes.com/news/local/los_angeles_metro/la-me-immigration14mar14,1,6100997.story

From the Los Angeles Times

Workers in raid get right to legal counsel

A settlement between civil rights groups and federal officials allows immigrants seized in Van Nuys to be accompanied by a lawyer at all meetings and interrogations.

By Daniela Perdomo

Los Angeles Times Staff Writer

March 14, 2008

Civil rights groups said Thursday that they had reached a settlement with federal officials guaranteeing that workers nabbed in an immigration raid last month in Van Nuys can be accompanied by an attorney to all meetings and interrogations.

The settlement, finalized Wednesday, was reached after groups, including the American Civil Liberties Union of Southern California, the National Lawyers Guild and the National Immigration Law Center, sought a restraining order in federal court last month against federal immigration officials who they alleged had repeatedly blocked attorneys from accompanying workers to interviews. The settlement applies to about 130 workers at Micro Solutions Enterprises detained Feb. 7 on immigration violations.

Immigration and Customs Enforcement officials said the terms of the settlement were confidential but the agency was "very pleased with the result."

"It should be emphasized that ICE conducts work site enforcement operations lawfully, professionally and with extreme consideration to humanitarian concerns," said spokeswoman Lori Haley. Haley said the agency advises detainees of "their right to legal counsel and communication with consular officers by telephone or in person, after initial processing is completed."

According to Angelica Salas, executive director of the Coalition for Humane Immigrant Rights of Los Angeles, ICE officials said the meetings to which lawyers were denied attendance were "administrative" and did not require the presence of legal counsel.

The organizations seeking the restraining order contended that the workers had a right to have an attorney present in those initial interviews, as well as any others.

"The government won't pay for the attorneys, but if the worker has access to one, they are allowed to meet with them," said Ahilan Arulanantham, a staff attorney with the ACLU of Southern California and one of the attorneys representing the workers pro bono.

Arulanantham said the groups hoped that the case would set a legal precedent.

"The government would have a hard time explaining why the rights of these people are different from those of others" detained in similar raids, he said.

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Appendix B:



New York Officials Denounce Tactics Used in Immigration Raids

Wednesday, October 03, 2007

Associated Press

GARDEN CITY, N.Y. —

Federal agents displayed a "cowboy" mentality while running roughshod over local police officers — at times pointing their weapons at cops — and ensnared more suspected illegal aliens than targeted gangsters in raids on Long Island last week, officials said Tuesday.

"There were clear dangers of friendly fire," Nassau County Police Commissioner Lawrence Mulvey said. "We did have members that were actually drawn upon."

Mulvey and County Executive Tom Suozzi want Homeland Security Secretary Michael Chertoff to investigate the tactics used by Immigration and Customs Enforcement agents; ICE is under the jurisdiction of the Homeland Security department.

The furor erupted after agents rounded up 186 people last week in what was billed as a crackdown on gang activity on Long Island. Federal authorities said many of the people arrested were gang members, but local officials believe that claim was exaggerated and that the raids were largely an attempt to round up illegal immigrants.

Nassau County officials contend only eight of the 92 arrested in their county had any ties to gangs.

Mulvey has said his officers would no longer cooperate with the raids unless tactics and policies are changed.

Mulvey contended that better cooperation between ICE agents and Nassau cops could have led to more arrests of targeted gang members. In one case, Mulvey said, "ICE sought a 28-year-old defendant using a photograph taken when he was a 7-year-old boy."

He also said the ICE agents appeared to have come from various locations across the country and didn't even wear the same uniforms; some wore cowboy hats. During some raids, ICE agents momentarily pointed their weapons at Nassau County officers in apparent confusion.

ICE special agent Peter J. Smith did not immediately return a telephone call for comment, but on Monday dismissed the police complaints as a misunderstanding.

Appendix C:

The New York Times
nytimes.com

April 28, 2007

San Francisco Bay Area Reacts Angrily to Series of Immigration Raids

By [JESSE McKINLEY](#)

SAN FRANCISCO, April 27 — It was not the typical Bay Area morning. Before dawn on March 6, dozens of federal [immigration](#) agents conducted surprise raids in San Rafael and nearby Novato, two comfortable Marin County suburbs where the idea of early morning excitement usually involves a trip to Starbucks.

The raids are part of the government's Operation Return to Sender, in which more than 23,000 people have been arrested nationwide, including more than 1,800 in Northern and Central California, immigration officials said.

And while the raids have upset many pro-immigrant groups nationwide, that displeasure has been particularly acute in the Bay Area, a region that generally bends left politically and where many cities consider themselves so-called "sanctuaries" for illegal immigrants.

"These people have been here many, many years and they have an investment in the community," said Mayor Al Boro of San Rafael, a city of about 56,000 residents, a quarter of whom are Latino. "And we need to respect that."

Several city councils have passed resolutions expressing their anger about the raids, and local religious leaders have issued stern proclamations. The Roman Catholic Archdiocese of San Francisco, for example, said in late March that they were inhumane and called for their immediate end. The raids have also led to protests in several cities, with another round planned for Tuesday in the area's three largest cities: San Francisco, San Jose and Oakland.

The raids have even upset people in more conservative regions to the east. In Mendota, an agricultural town in the Central Valley that calls itself the “Cantaloupe Center of the World,” the City Council passed a resolution last month condemning them. The raids, according to the resolution, had driven much-needed migrant workers underground and caused “emotional turmoil and financial hardship.”

In Richmond, another economically challenged city just east across the bay from San Francisco, Mayor Gayle McLaughlin, a member of the [Green Party](#), wrote a bill restating an ordinance that prohibits city employees from cooperating with federal immigration authorities. It passed the City Council unanimously in February.

That sanctuary sentiment was also echoed on Sunday in a speech by Mayor Gavin Newsom of San Francisco, a Democrat, who repeated his city’s noncooperative status, a move that drew a rebuke from [a Republican](#) lawmaker in Washington, Representative [Tom Tancredo](#) of Colorado, who called the mayor’s actions “a clear and direct violation of the law.”

The anti-raid sentiments have also energized some opponents of immigration. A recent protest in San Rafael was also attended by nearly 100 members of anti-immigrant groups, including members of the Northern California chapter of the Minuteman Civil Defense Corps, a group that advocates stronger borders.

Much of the debate has been focused in San Rafael, a genial bayside commuter city about 20 miles north of San Francisco. Shortly after the raids, Mr. Boro sent a letter to Senator [Dianne Feinstein](#), Democrat of California, saying they had “left our city in turmoil,” with residents now distrustful of the police and children fearful of losing their parents.

“Waking people up in the dark of night, at 5 a.m., in their homes seems more like a scare tactic than a law enforcement necessity,” Mr. Boro wrote.

Calls to the local police have decreased in recent weeks, Mr. Boro said, and he attributed the dropoff to the immigration raids’ “chilling effect because people think our police were involved.”

Educators in San Rafael said the raids sent schools into “a state of emergency” as American-born children were suddenly without one or both parents who had been caught up in the sweeps. Shortly afterward, absenteeism at school spiked, and school officials asked teachers and others to ride buses with students to make sure a caregiver picked them up.

A school board member, Jenny Callaway, said she feared that test scores of anxiety-ridden students would suffer. “Our charge is to provide a quality education regardless of citizenship,” Ms. Callaway said. “How do we do this when children are afraid to come to the bus stop?”

One student caught up in the raids was 7-year-old Kebin Reyes, who was with his father, Noe, when he was arrested early in the morning of March 6. Mr. Reyes, 37, a Guatemalan, said that after his arrest, he was not allowed to call relatives to come to pick up his son, and that they both

were held all day in a locked room at the offices of Immigration and Customs Enforcement in San Francisco, an experience he says left his son traumatized.

“Before the arrest, my son was very friendly and would speak to most anyone, very active,” Mr. Reyes said, through a translator. “Since the day of the arrest, Kebin has turned to be very reserved and quiet and not as open to speak to anyone.”

On Thursday, the [American Civil Liberties Union](#) filed suit on behalf of Kebin, who was born in the United States and is an American citizen, charging that federal authorities had violated his constitutional rights. Immigration officials would not comment on the specifics of the case, but said agents had acted appropriately.

“When we encounter minors in the course of an enforcement action, we will not leave them unattended,” said Virginia Kice, a spokeswoman for the immigration agency. “This young man was not arrested; he was transported along with this father to the I.C.E. office, where he was supervised until a family member came to get him.”

Immigration agency officials say Mr. Reyes was ordered deported in 2000, the same year his son was born. He is fighting that order, and a hearing is scheduled in June. But there is no question, Mr. Reyes said, about his son’s status.

“My son has the same rights as any American citizen,” he said. “He is born here in California.”

Appendix D:

The New York Times
nytimes.com

October 4, 2007

Citizens Caught Up in Immigration Raid

By [NINA BERNSTEIN](#)

Peggy Delarosa-Delgado, a United States citizen, Long Island homeowner and mother of three, was fast asleep when someone banged at the door before 6 a.m. last Thursday.

Her son Christopher, 17, a high school senior, opened the door, and more than a dozen federal [immigration](#) agents and one Suffolk County police officer pushed past him, he said later.

Only after the agents had herded her other children into the living room, frightened her aunt and uncle, and drawn a gun on a family friend staying in the basement, Ms. Delarosa-Delgado said, did she awake to discover that her house in Huntington Station had been the mistaken target of a raid by Immigration and Customs Enforcement.

It was not the first time. In the summer of 2006, she said, agents waving the same photo of a deportable immigrant named Miguel had stormed into her house before dawn. No Miguel has ever lived there, she said — at least not since she bought the place in 2003.

This time, the raid on her house was part of a series of antigang sweeps on Long Island. The raids, which resulted in 186 immigrant arrests, were denounced by officials in Nassau County as riddled with mistakes and marked by misconduct. But on Ms. Delarosa-Delgado's side of the county line, the Suffolk County police commissioner, Richard Dormer, hailed the sweeps as a successful operation that made the community safer.

Ms. Delarosa-Delgado, 42, a school aide who was born in the Dominican Republic, moved to the United States 24 years ago and became a citizen in 1990, does not feel safer.

"It's not right," she said. "My kids were scared. They had to sit in the living room like little criminals."

"Sure, look for criminals. But they've got to make 100 percent sure that the house they're going into, the person's there. They can't come in just because my address pops up in the computer."

Suffolk County police officials said they stood by their statements praising the raids. But Ms. Delarosa-Delgado's complaint is one of many that have been emerging in Suffolk County as employers, church workers and lawyers learn who was arrested.

"They took guys who I see in church every single week, whose homes I've gone into and everything," said Sister Margaret Smyth, a nun who attends church in Greenport, where she said 12 immigrant men were arrested last Thursday. "Some of them work on farms, some of them work construction," she said. "They're family men."

One man who was arrested, Walter Tzun, has been in the country for a decade, she said. She described him as married, a father, a taxpayer and a construction worker whose employer has been trying to sponsor him for a green card. He has been moved from a New Jersey jail to two detention centers in Pennsylvania, she said, and has been told that he is headed to Texas. She said the man's boss drove to Pennsylvania "to try to bond him out" and help him stay.

Eberhard Müller, formerly the executive chef of the restaurant Lutèce and now the owner of a 180-acre farm on the East End of Long Island, said he had spent a week trying to locate the brother, cousin and roommate of one of his workers, a legal immigrant from El Salvador. The three were arrested in a raid at their home in Greenport early last Thursday, he said, leaving babies and two distraught wives behind.

Mr. Müller said he finally learned with the help of a lawyer that two of the three, Omar Mena Lopez and Marvin Lopez, were at the federal Metropolitan Detention Center in Brooklyn, and that one, Valentin Rudy Escobar Montenegro, was in a detention center in York, Pa.

"They accuse them of being gang associates, which makes no sense," Mr. Müller said, describing all three as holding down two or three jobs as roofers, restaurant workers and farmhands.

“Marvin Lopez is a librarian in his country, the sweetest person in the world. He works 14 hours a day, seven days a week. How is he able to be a gang member?”

Accounts of the Suffolk County raids are similar to those criticized in Nassau County.

“These were like dragnets being cast over entire houses,” said Nadia Marin-Molina, director of the Workplace Project, an immigrant advocacy organization in Hempstead that has gathered many of the complaints.

The complaints echo a federal lawsuit filed last month in Manhattan contending that immigration agents unlawfully force their way into the homes of Latino families in violation of the Fourth Amendment’s protection from unreasonable searches.

“We have been inundated with calls,” said Cesar Perales, director of the Puerto Rican Legal Defense and Education Fund, which filed the lawsuit. “People are terrified by these indiscriminate raids.”

Mr. Perales said yesterday that by week’s end he would seek an emergency restraining order to stop such raids.

Appendix E:

Los Angeles Times

<http://www.latimes.com/news/local/la-me-guzman28feb28,0,4185060.story>

From the Los Angeles Times

Suit filed over disabled U.S. citizen's deportation ordeal

The man was left in Tijuana with \$3 and wandered in Mexico for months while worried family members searched for him.

By Paloma Esquivel

Los Angeles Times Staff Writer

February 28, 2008

A U.S. citizen who was wrongly deported to Tijuana last year while in the custody of the Los Angeles County Sheriff's Department on Wednesday filed a lawsuit against the county and the federal government, alleging that his constitutional rights were violated.

Pedro Guzman, 30, who is developmentally disabled, was missing for nearly three months before he was found in Mexico and released to his family, his attorneys said. Guzman had been dropped off in Tijuana with \$3 in his pocket and spent much of his time wandering Baja California on foot, eating from dumpsters and bathing in rivers, they said.

The lawsuit was filed on behalf of Guzman and his mother, Maria Carbajal, in U.S. District Court and named the Sheriff's Department and U.S. Immigration and Customs Enforcement among the defendants. The family is seeking unspecified damages.

Guzman's ordeal began when he was arrested last March after he entered a private airport in Lancaster and tried to board a plane, the lawsuit states. He pleaded guilty to trespassing and was sentenced to 120 days in county jail, but that was later cut to 40 days.

On May 11, before his sentence was up, Guzman called his family from Tijuana and told them he had been deported, according to the lawsuit. Sheriff's officials had turned Guzman over to federal immigration agents.

But Guzman and immigration officials differ over what happened.

ICE officials said Guzman was deported after he told agents he was born in Nayarit, Mexico, and was in the U.S. without authorization.

"Mr. Guzman repeatedly told ICE officers and Customs and Border Patrol officials and others that he was born in Mexico and signed a document agreeing to voluntarily return," said Lori Haley, ICE spokeswoman.

Guzman's lawyers dismissed ICE's claims as "unmitigated lies" during a news conference Wednesday attended by Carbajal and other family members.

"He never said that he was born in Mexico," said Mark Rosenbaum, legal director of the ACLU, which with a private law firm is representing the plaintiffs.

Rosenbaum also pointed out that several sheriff's documents, including the incident report filed after the arrest, showed that Guzman was a U.S. citizen. Sheriff's officials also knew that Guzman complained of hearing voices while in custody and was prescribed anti-psychotic medication, according to his lawsuit.

Rosenbaum also criticized Sandra Figueras, the sheriff's custody agent who interviewed him about his citizenship status, as "inadequately trained."

"Our government treated the color of Mr. Guzman's skin as conclusive, irrefutable evidence that Peter was not and could not be a U.S. citizen," Rosenbaum said.

Sheriff's officials declined to comment Wednesday.

Guzman's mother and two brothers, Michael Guzman and Juan Carlos Chabes, said they wanted the government to acknowledge its wrongdoing.

"I want them to see that what they did was not right," said Carbajal, who tearily described spending several days wandering through Tijuana looking for her son, leaving fliers with his

photo at the morgue, hospitals, churches and shelters.

When her money ran out after three days, she slept in the closet-sized backroom of a banana warehouse, where she was allowed to stay in exchange for cooking for the warehouse workers, according to the suit.

Since returning from Mexico, Guzman, who did not attend the news conference, has been terrified of strangers and has been unable to return to work, Carbajal said.

"He had some of these problems before, but now he's worse," Carbajal said. "I have to accompany him when we go out. He doesn't talk. His mind wanders."

ICE officials called Guzman's deportation an isolated incident. "This is a one-of-a-kind case," ICE's Haley said.

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Appendix F:

Los Angeles Times

<http://www.latimes.com/news/local/la-me-cruel13mar13,0,2053450.story?track=ntothtml>

From the Los Angeles Times

Judge calls immigration officials' decision 'beyond cruel'

The ruling says a detainee who later died of penile cancer was denied a biopsy of a lesion though several doctors said the procedure was urgently needed. His family will be allowed to seek damages.

By Henry Weinstein

Los Angeles Times Staff Writer

March 13, 2008

In a stinging ruling, a Los Angeles federal judge said immigration officials' alleged decision to withhold a critical medical test and other treatment from a detainee who later died of cancer was "beyond cruel and unusual" punishment.

The decision from U.S. District Judge Dean Pregerson allows the family of Francisco Castaneda to seek financial damages from the government.

Castaneda, who suffered from penile cancer, died Feb. 16. Before his release from custody last year, the government had refused for 11 months to authorize a biopsy for a growing lesion, even though voluminous government records showed that several doctors said the test was urgently needed, given Castaneda's condition and a family history of cancer, Pregerson said.

But rather than test and treat Castaneda, government officials told him to be patient and prescribed antihistamines, ibuprofen and extra boxer shorts, the judge wrote in a decision released late Tuesday. In summary, the judge wrote, the care provided to Castaneda "can be characterized by one word: nothing."

Pregerson blasted public health officials' "attempt to sidestep responsibility for what appears to be . . . one of the most, if not the most, egregious" violations of the constitutional prohibition against cruel and unusual punishment that "the court has ever encountered."

At this stage of the proceedings, "the only question is whether" the plaintiffs' allegations, if true, show that government officials "were deliberately indifferent to his condition. The court finds that they do," Pregerson said.

"Everyone knows that cancer is often deadly. Everyone knows that early diagnosis and treatment often saves lives," the judge wrote. The government's own records, he emphasized, "bespeak of conduct that transcends negligence by miles. It bespeaks of conduct that, if true, should be taught to every law student as conduct for which the moniker 'cruel' is inadequate," Pregerson concluded in permitting the case to move forward.

Conal Doyle, an Oakland attorney who is co-counsel for Castaneda's family members, said the Salvadoran immigrant spent eight months in custody on a charge of possession of methamphetamine with intent to sell, then was transferred to immigration custody because he did not have legal residency.

He first informed the Immigration and Customs Enforcement medical staff at the San Diego Correctional Facility on March 27, 2006, that "a lesion on his penis was becoming painful and growing," the judge wrote. The next day, a physician assistant at the facility examined Castaneda and issued a treatment plan calling for a consultation with a urologist "ASAP" and a request for a biopsy, according to government records cited by the judge.

Over the next 11 months, several doctors, with increasing urgency, made the same recommendations. For example, after conducting an examination June 7, 2006, Dr. John Wilkinson, an oncologist, wrote a report saying he strongly agreed that Castaneda had an urgent need for a biopsy and an assessment by a urologist because he might have "penile cancer. . . . In this extremely delicate area . . . there can be considerable morbidity from even benign lesions which are not promptly treated."

That same day, Pregerson said, Dr. Esther Hui of the Division of Immigration Health Services acknowledged Castaneda's condition but said the government would not admit him to a hospital because her agency considered a biopsy "an elective outpatient procedure."

Pregerson, who became a federal judge in 1996, said evidence presented by the plaintiffs suggested that Hui, one of the defendants, characterized the surgery as elective so the federal government would not have to provide or pay for it.

In February 2007, after the American Civil Liberties Union intervened, a biopsy was finally scheduled. A few days before the procedure, however, Castaneda was abruptly released, the judge wrote. He went to the emergency room of Harbor-UCLA Medical Center and was diagnosed with metastatic squamous cell carcinoma. His penis was eventually amputated, and chemotherapy ultimately proved unsuccessful.

Four months before he died, Castaneda testified at a hearing held by the House Judiciary Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law, as his teenage daughter listened.

"Mr. Castaneda's case was just outrageous," Rep. Zoe Lofgren (D-San Jose), chairwoman of the subcommittee, said in an interview Tuesday.

Lofgren said one of the things she found most troubling was that "bureaucrats" at Immigration and Customs Enforcement in Washington have the power to overrule recommendations of doctors who have actually seen the medical problems of detainees. "That is a recipe for disaster," she said.

Lori Haley, an ICE spokeswoman from Laguna Niguel, said in an e-mail that she could not comment on the Castaneda case but that the agency spent nearly \$100 million on medical, dental and psychiatric care for detainees in fiscal 2007.

The government had argued that its employees were immune from this lawsuit. A spokesman for the U.S. attorney's office said the Justice Department might appeal Pregerson's ruling.

Last year, the U.S. Government Accountability Office issued a report on medical care at immigration detention facilities that said officials at some of the sites "cited difficulties in obtaining approval for outside medical and mental health care as . . . presenting problems in caring for detainees."

Doyle said Castaneda's death "would have been prevented by the exercise of basic human decency."

Loyola Law School professor Laurie Levenson said the decision was legally significant and factually compelling. "This was not a detainee with a hangnail," she said. "You should not have to have your penis fall off to get medical treatment from the government."

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Appendix G:



Thursday, Mar. 13, 2008

Scrutiny for a Bush Judicial Nominee

By Adam Zagorin/Washington

As the top lawyer for America's biggest private prison company, Corrections Corporation of America (CCA), Gus Puryear IV is known to sport well-pressed preppy pink shirts, and his brownish mop of hair stands out among most of President Bush's graying nominees to the federal bench. A favorite of G.O.P. hard-liners, Puryear, 39, prepped Dick Cheney for the vice presidential debates — both in 2000 and 2004 — and served as a senior aide to two former Senators and onetime presidential hopefuls, Bill Frist and Fred Thompson.

Political connections, though, may not be enough to get Puryear a lifetime post as a federal district judge in Tennessee. Puryear recently confronted tough questions about his conduct, experience and potential conflicts of interest from Democrats on the Senate Judiciary Committee, which must approve him before a full Senate vote. Now, a former CCA manager tells TIME that Puryear oversaw a reporting system in which accounts of major, sometimes violent prison disturbances and other significant events were often masked or minimized in accounts provided to government agencies with oversight over prison contracts. Ronald T. Jones, the former CCA manager, alleges that the company even began keeping two sets of books — one for internal use that described prison deficiencies in telling detail, and a second set that Jones describes as "doctored" for public consumption, to limit bad publicity, litigation or fines that could derail CCA's multimillion-dollar contracts with federal, state or local agencies.

CCA owns or operates 65 prisons, housing some 70,000 inmates across the U.S. According to the company's website, it has a greater than 50% share of the booming private prison market. CCA is also a major contributor to Republican candidates and causes, and spends millions of dollars each year lobbying for government contracts. (Puryear enjoys a friendship with Cheney's son-in-law, Philip Perry, who lobbied for CCA in Washington before serving as general counsel for the Department of Homeland Security, which has millions of dollars in contracts with CCA, from 2005 to 2007.) The company has likewise given financial support to tax-exempt policy groups that support tough sentencing laws that help put more people behind bars. Like other prison companies, CCA has faced numerous lawsuits that stem from allegedly inadequate staff levels that can be a cause of high levels of violence in the prisons. Though hundreds of such lawsuits are often pending at any given time, many brought by inmates in its own facilities, CCA under Puryear has mounted an especially vigorous defense against them, refusing to settle all but the most damaging.

Jones knows CCA intimately. Until last summer, the longtime Republican was in charge of "quality assurance" records for CCA prisons across the U.S. He says that in 2005, after CCA found itself embarrassed on several occasions by the public release of internal records to government agencies, Puryear mandated that detailed, raw reports on prison shortcomings carry a blanket assertion of "attorney-client privilege," thus forbidding their release without his written consent. From then on, Jones says, the audits delivered to agencies were filled with increasingly vague performance measures. "If the wrong party found out that a facility's operations scored low in an audit, then CCA could be subject to litigation, fines or worse," explains Jones. "When Mr. Puryear felt there was highly sensitive or potentially damaging information to CCA, I would then be directed to remove that information from an audit report." Puryear would not comment on the allegations. Jones resigned from CCA last summer to pursue a legal career.

According to Jones, Puryear was most concerned about what CCA described as "zero tolerance" events, or ZT's — including unnatural deaths, major disturbances, escapes and sexual assaults. According to Jones, bonuses and job security at the company were tied to reporting low ZT numbers. Low numbers also pleased CCA's government clients, as well as the company's board, which received a regular tally, and Wall Street analysts concerned about potentially costly lawsuits that CCA might face.

In 2006, for example, Jones says CCA had to lock down a prison in Texas to control rioting by as many as 60 inmates. Despite clear internal guidelines defining the incident as a ZT, Jones says he was ordered not to label it that way. Instead it was logged as, "Altered facility schedule due to inmate action". And this was not unusual, says Jones: "Information was misrepresented in a very disturbing way concerning the company's most important performance indicators, which included escapes, suicides, violent outbreaks and sexual assaults."

Companies often try to show their best face to customers, and safeguard internal records with "attorney-client privilege." But according to Stephen Gillers, a leading expert on legal ethics at New York University, CCA's use of that privilege seems like "a wholesale, possibly overreaching claim," similar to the blanket assertions of major tobacco companies that tried to keep damaging internal documents from public view. Those assertions of privilege have been rejected by federal judges as an attempt to improperly conceal their internal data on the dangers of smoking from customers, the courts and legal adversaries. CCA could also be in legal trouble if it minimized the tally of serious prison incidents and, by implication, its possible financial liability. As chief legal counsel, Puryear would have also had an obligation to ensure his board had all the information it needed, good or bad, to make decisions. If Puryear's reporting system had the effect of withholding information relevant to official prison oversight, that could bear on his suitability as a federal judge by suggesting his "disdain for the proper operation of an important function of government," notes Gillers.

Contacted by TIME, CCA says that Puryear, "has served the company well and honorably as general counsel and will be an outstanding judge." The company denies allegations that it keeps two sets of books, saying: "A final audit report is made available to our customers. Appropriate information gathered in the audits is separately provided to our legal department." The company adds that "CCA has produced all relevant, non-privileged documents in litigation," that its board

is regularly apprised of the most serious prison incidents, and that "all appropriate" information is given to the financial community.

President Bush recently called Puryear and his 27 other judicial nominees facing Senate confirmation "highly qualified." Whether or not the Senate agrees on Puryear, Bush is likely to leave the White House with fewer judges approved than Bill Clinton or Ronald Reagan, both two-term chief executives.