



October 26, 2016

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Privatized Immigration Detention Facilities Subcommittee  
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U.S. Department of Homeland Security  
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**RE: ACLU calls on HSAC to urge immediate moratorium on expansion of immigration detention**

Dear Chairwoman Tandy and members of the HSAC Privatized Immigration Detention Facilities Subcommittee:

Thank you for giving us the opportunity to meet with you in early October. In the intervening weeks since our meeting, alarming developments have arisen that have direct bearing on the charge given to this HSAC Subcommittee – whether DHS should end the use of private prisons. In October, DHS Immigration and Customs Enforcement (“ICE”) has aggressively expanded the use of private prison contractors and has locked DHS into long-term contracts, at the very same time that this Subcommittee is investigating the problem and preparing its report for the Secretary. Based on media reports and private prison job announcements, it appears that ICE has executed, or is close to finalizing, detention contracts for at least 3,600 privately-run beds in October alone.

It is extremely troubling that ICE is moving full steam ahead in increasing privatized immigration detention beds precisely at the time that this Subcommittee is studying whether DHS should end the use of private prisons. We urge the Subcommittee to press DHS to issue a moratorium on any expansion of immigration detention. Specifically ICE should not enter into any new detention contract or any contract renewal involving a private prison company or county jail. ICE should also be restrained from increasing the number of detention beds at any existing facility run by a private prison company or county jail.

- 1) DHS recently executed a contract with private prison company CCA to detain up to 1,200 immigrants at a notorious New Mexico prison that had its contract with the Bureau of Prisons severed in 2016.**

The ACLU recently learned that ICE has entered into a brand new contract with Corrections Corporation of America (“CCA”), one of the nation’s

largest private prison companies, to detain up to 1,200 immigrants at Cibola County Correctional Center in Milan, New Mexico. These new CCA detention beds are expected to come online within the next 30 days, and CCA is currently hiring a new “correctional officer” at the Cibola prison.<sup>1</sup> Significantly, as recently as September 2016, CCA had operated a private prison at Cibola County Correctional Center. In July 2016 the Bureau of Prisons (“BOP”) terminated the CCA contract, and the last prisoners were removed from Cibola in September.

The Cibola facility has long been known to be one of the most problem-prone prisons in the nation. *The Nation* and the Investigative Fund have documented at least three questionable deaths at the Cibola prison. One prisoner died after a long delay in medical care following a heart attack. Another prisoner hanged himself after being left alone and untreated in a cell even though officials had previously flagged him as suicidal.<sup>2</sup>

Beyond the prisoner deaths, the Cibola prison accumulated more demerits than any other private facility for repeated and systemic violations in the medical unit. For months on end, the Cibola prison operated without a single medical doctor. On five separate reviews, BOP monitors found that CCA had not appropriately treated inmates with TB. On three separate reviews, BOP monitors found that Cibola’s HIV care was not up to federal standards.<sup>3</sup>

When BOP severed the Cibola contract in July 2016, this marked only the fourth time in the last decade that BOP had terminated a contract prior to the end of the contract period.<sup>4</sup> However, just as the final BOP prisoners were transferred out of Cibola in September, CCA seized the opportunity to convert its contract, virtually overnight, into a new ICE contract to detain up to 1,200 immigrants in the very prison that was deemed unfit for prisoners.

The Cibola prison case illustrates how CCA is literally operating a revolving door – shuttling out prisoners one month, shuttling in immigration detainees the next month. Under this new CCA/Cibola contract, ICE has taken the place of BOP, and immigration detainees have taken the place of federal prisoners. But CCA and the Cibola prison remain exactly the same.

*The CCA/Cibola conversion from a BOP contract to an ICE contract, virtually overnight, makes it undeniably clear that DHS plans to continue doing business with private prison companies without regard to a prison’s record of abuses, deaths, or poor conditions.*

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<sup>1</sup> “Correctional Officer” (Milan, NM) job notice, posted Oct. 19, 2016 at

<http://jobs.cca.com/milan/correctional-officer/jobid10524584-correctional-officer-jobs>.

<sup>2</sup> For an extensive discussion of the poor medical care and mental health care record at the Cibola facility, please see Seth Freed Wessler, *The Feds Will Shut Down the Troubled Private Prison in a ‘Nation’ Investigation*, THE NATION, Aug. 15, 2016,

<https://www.thenation.com/article/feds-will-shut-down-troubled-private-prison-in-nation-investigation/> [attached as Exhibit A].

<sup>3</sup> *Id.*

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

**2) DHS recently renewed a five-year contract for CCA to run a mass family detention facility comprised of 2,400 beds.**

In recent weeks, ICE renewed and extended the mass family detention contract at Dilley, Texas to run through September 2021. For the next five years CCA will continue to operate the 2,400-bed facility to detain Central American children and mothers seeking refugee protection. The Dilley contract is a no-bid, fixed-price, middleman-dependent contract with CCA.<sup>5</sup> Like its 2014 predecessor contract, the new Dilley contract uses Eloy, Arizona as a middleman for this Texas-based facility—an arrangement that one legal academic described as “twisting and distorting the procurement process past recognition.”<sup>6</sup> On a conference call with investors, the CEO of CCA gloated about the Dilley contract renewal, calling the timing of the renewal “notable with this ongoing [HSAC Subcommittee] review” and expressing confidence that HSAC and DHS would “come to the same conclusion that, we’ve been a really, really good tool for ICE.”<sup>7</sup>

Astonishingly, this CCA contract extension came only weeks after the DHS Advisory Committee on Family Residential Centers recommended that DHS end family detention and overhaul immigration policies to safeguard child welfare<sup>8</sup> and at the same time that this HSAC Subcommittee is actively evaluating whether DHS should end the use of private prisons.

*The Dilley contract extension makes it patently clear that DHS plans to continue doing big business with private prison companies at the expense of the most vulnerable in our midst -- Central American children and mothers who remain detained for months, sometimes longer than a year, as they pursue their asylum claims in court.*

**3) Since summer 2016, ICE has increased the number of detention beds at existing facilities run by private prison corporations.**

The ACLU has recently learned that ICE has increased the number of detention beds at four facilities run by for-profit prison corporations. Specifically, ICE has expanded detention capacity at GEO Coastal Bend Detention Facility, Texas; LaSalle County Regional Detention Center,

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<sup>5</sup> Jamie McGee, *CCA announces ICE contract extension*, THE TENNESSEAN, October 18, 2016, <http://www.tennessean.com/story/money/2016/10/18/cca-announces-ice-contract-extension/92355068/>.

<sup>6</sup> Chico Harlan, *Inside the administration’s \$1 billion deal to detain Central American asylum seekers*, WASHINGTON POST, Aug. 14, 2016, [https://www.washingtonpost.com/business/economy/inside-the-administrations-1-billion-deal-to-detain-central-american-asylum-seekers/2016/08/14/e47f1960-5819-11e6-9aee-8075993d73a2\\_story.html](https://www.washingtonpost.com/business/economy/inside-the-administrations-1-billion-deal-to-detain-central-american-asylum-seekers/2016/08/14/e47f1960-5819-11e6-9aee-8075993d73a2_story.html).

<sup>7</sup> Jamie McGee, *CCA announces ICE contract extension*, THE TENNESSEAN, October 18, 2016, <http://www.tennessean.com/story/money/2016/10/18/cca-announces-ice-contract-extension/92355068/>.

<sup>8</sup> U.S. IMMIGRATION CUSTOMS ENFORCEMENT, *Report of the DHS Advisory Committee on Family Residential Centers*, Sept. 30, 2016, <https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf>; U.S. IMMIGRATION CUSTOMS ENFORCEMENT, *Report of the DHS Advisory Committee on Family Residential Centers – Recommendations Only*, Sept. 30, 2016, <https://www.ice.gov/doclib/sevis/pdf/acfrcDraftSubcommRecmdOnly.pdf>.

Louisiana; Willacy County Regional Detention Facility, Texas; and Torrance County Detention Facility, New Mexico/Texas. All of these facilities have existing ICE contracts, and the new detention beds have been added since June 2016.

**4) DHS officials are scrambling to find 5,000 more prison beds and are willing to waive national immigration detention standards and rape prevention requirements.**

Beyond increasing direct contracts with private prisons, DHS officials have been trying to buy more county jail space for immigration detention purposes. In at least a few cases, ICE is seeking to contract with a county which in turn will subcontract with a for-profit prison company. There is even discussion of waiving ICE national detention standards and 2003 Prison Rape Elimination Act requirements for these beds.<sup>9</sup> As one official put it, “They’re scraping the bottom looking for beds.”<sup>10</sup>

ICE is presently working to buy jail space in Youngstown, Ohio; Aurora, Colorado; Robstown, Texas<sup>11</sup>; and Glen Burnie/Anne Arundel, Maryland.<sup>12</sup> CCA has already posted nine job notices for the Youngstown facility, including detention officer and unit manager jobs.<sup>13</sup> Beyond these contracts in-the-works, ICE in October started detaining 75 immigrants at Kankakee County jail outside Chicago<sup>14</sup> even though no ICE contract had been executed.

The accelerated growth of detention and the rapid expansion of detention facilities is cause for tremendous concern. The use of detention facilities that are exempt from even the most basic detention standards –and/or utilized without a formal agreement – raises obvious concerns, including questions about what detention and medical standards (if any) are being applied to the facility, what mechanisms (if any) ICE is using to monitor conditions in the facility, and how the facility can be held accountable for deaths, inhumane conditions of confinement, and other lapses.

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<sup>9</sup> Devlin Barrett, *Record Immigrant Numbers Force Homeland Security to Search for New Jail Space*, WALL STREET JOURNAL, October 21, 2016, <http://www.wsj.com/articles/record-immigrant-numbers-force-homeland-security-to-search-for-new-jail-space-1477042202>.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Amanda Yeager, *Council passes residential rehabilitation bill, delays vote on immigrant detention resolution for the second time*, CAPITAL GAZETTE, Oct. 17, 2016, <http://www.capitalgazette.com/news/government/ph-ac-cn-county-council-1018-20161017-story.html>.

<sup>13</sup> OHIO JOBS AT CCA, <http://jobs.cca.com/ohio-jobs> (last visited Oct. 25, 2016).

<sup>14</sup> Dimitrios Kalantzis, *Kankakee County jail housing immigrant detainees*, DAILY JOURNAL, October 12, 2016, [http://www.daily-journal.com/news/local/kankakee-county-jail-housing-immigrant-detainees/article\\_40320b12-79d5-5779-96be-94d4fe63f4ba.html](http://www.daily-journal.com/news/local/kankakee-county-jail-housing-immigrant-detainees/article_40320b12-79d5-5779-96be-94d4fe63f4ba.html).

## **ACLU Recommendations**

In the face of these alarming developments, this HSAC Subcommittee has an urgent and critical role to play in putting the brakes on DHS's expansion of its immigration detention capacity. Recent events have made it patently clear that ICE is moving at lightning speed to dramatically scale up its detention capacity and is willing to do business with any operator including for-profit prison companies.

First and foremost, **DHS/ICE should halt all negotiations and execution of any detention contracts, with immediate attention to contracts involving facilities at Cibola/Milan (NM); Youngstown (OH); Kankakee (IL); Aurora (CO); Robstown (TX); and Glen Burnie/Anne Arundel (MD).**

Second, DHS should take immediate proactive steps to end the following contracts involving for-profit prison corporations; two of these contracts are due to expire in the very near future:

- *South Texas Detention Complex*, Pearsall, Texas: This contract with the Geo Group ("GEO") is set to expire on November 30, 2016. There is a long and extensive record of detainee abuse at the Pearsall detention facility. Human Rights Watch, in their report *Detained and at Risk*, documented rampant sexual abuse and harassment at the Pearsall facility. Numerous detainees reported being subjected to frequent sexual abuse in 2008.<sup>15</sup> More recently in 2014, a GEO employee who had worked at the Pearsall detention facility for four years was found guilty of sexually abusing a detainee while working together in the kitchen.<sup>16</sup> That same year a transgender woman told reporters that while detained at the Pearsall facility, she was sexually assaulted and verbally harassed time and again by detention guards and detainees.<sup>17</sup>
- *Otay Mesa Detention Center*, San Diego, California: This contract with CCA is set to expire on June 30, 2017. In 2015, fifteen detainees, many of whom were asylum seekers fleeing persecution, participated in a hunger strike to protest their indefinite detention. Protesters had been locked up for months, some for years, while pursuing their asylum claims in court—with no idea if or when they

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<sup>15</sup> HUMAN RIGHTS WATCH, *Detained and at Risk*, Aug. 25, 2010, <https://www.hrw.org/report/2010/08/25/detained-and-risk/sexual-abuse-and-harassment-united-states-immigration-detention>.

<sup>16</sup> Guillermo Contreras, *Ex-Jail Worker Guilty in Inmate Sex Abuse Trial*, SAN ANTONIO EXPRESS NEWS, Sept. 17, 2014, <http://www.mysanantonio.com/news/local/article/Ex-jail-worker-guilty-in-inmate-sex-abuse-trial-5762538.php>.

<sup>17</sup> Cindy Carcamo, *Transgender Asylum-Seekers Often Mistreated in Detention, Study Finds*, LOS ANGELES TIMES, Mar. 23, 2016, <http://www.latimes.com/local/lanow/la-me-ln-transgender-immigrants-20160323-story.html>.

would ever be released.<sup>18</sup> In 2014 a community group that runs a visitation program for detainees reported that ICE had attempted to silence them after the group warned of alleged sexual assault, neglect, and harassment taking place at the Otay Mesa detention facility. After being informed of the potential abuse, ICE tried to end the visitation program completely unless the group was willing to sign a confidentially agreement that would require them to “defend” and “indemnify” ICE and CCA from any liability “arising” out of their volunteer work.<sup>19</sup>

- *Eloy Detention Facility in Arizona.*<sup>20</sup> This CCA-run facility, one of the largest detention facilities in the nation, has the dubious distinction of being the deadliest facility, with 14 detainees dying inside the Eloy facility since 2003. In 2012, a routine annual inspection evaluated Eloy’s suicide prevention policies. The inspectors found that Eloy’s suicide watch room—the place where people at the most acute risk of suicide are supposed to be housed and whose chief purpose is to deny them the means to kill themselves—contained “structures or smaller objects that could be used in a suicide attempt.”

The following year, Elsa Guadalupe-Gonzalez hanged herself in one of Eloy’s general population units. Two days later, Jorge Garcia-Mejia hanged himself in a different general population unit. ICE conducted death reviews afterward, which found that “confusion as to who has the authority to call for local emergency medical assistance” led to delays in CCA staff calling 911 after each suicide. The reviews also found that CCA and ICE staff failed to conduct an appropriate debriefing of medical and security staff after the two suicides, and that Eloy lacked a formal suicide prevention plan. Over two years later, in May 2015, José de Jesús Deniz Sahagun committed suicide in his cell just hours after a doctor had removed him from suicide watch.<sup>21</sup> ICE’s death review found that Eloy still had not adopted a suicide prevention plan at the time of Mr. Deniz Sahagun’s death.<sup>22</sup>

Beyond the highest immigration detainee death rate, Eloy detainees have suffered sexual assault and abuse. In 2011 the ACLU of Arizona sued on behalf of a transgender woman who was intimidated, harassed, and sexually assaulted by a CCA guard while

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<sup>18</sup> Kate Linthicum, *Dozens of Asylum-Seeking Immigrants Stop Eating to Protest Detention*, LOS ANGELES TIMES, Dec. 2, 2015, <http://www.latimes.com/local/lanow/la-me-ln-immigrant-hunger-strike-20151202-story.html>.

<sup>19</sup> Erika Eichelberger, *Watchdog: Feds Are Muzzling Us for Reporting Alleged Immigrant Detainee Sex Abuse*, MOTHER JONES, Mar. 19, 2014, <http://www.motherjones.com/politics/2014/03/ice-sexual-abuse-immigrant-detention-oversight>.

<sup>20</sup> Please see Exhibit B for a detailed summary of numerous cases of deaths, suicides, and denial of medical care inside the Eloy Detention Facility.

<sup>21</sup> For a detailed summary of Mr. Deniz Sahagun’s death, please see Exhibit B.

<sup>22</sup> Carl Takei, Michael Tan, & Joanne Lin, AMERICAN CIVIL LIBERTIES UNION, *Shutting Down the Profiteers*, Sept. 2016, <https://www.aclu.org/report/shutting-down-profiteers-why-and-how-department-homeland-security-should-stop-using-private>.

detained at the Eloy facility.<sup>23</sup> Ms. Guzman-Martinez was sexually assaulted twice – once in 2009 involving a guard who forced her to ingest his ejaculated semen and threatened to deport her if she did not comply with his demands. Ms. Guzman-Martinez immediately reported the assault to detention staff and the Eloy Police Department, and the CCA guard was eventually convicted in Pinal County Superior Court of attempted unlawful sexual contact.<sup>24</sup>

Despite this sexual assault, CCA and ICE did nothing to protect her from further abuse. In a separate incident that took place in April 2010, Ms. Guzman-Martinez was sexually assaulted by a male detainee in the same all-male housing unit where she was subjected to the first assault. After she reported the second assault to the police, Ms. Guzman-Martinez was released from ICE custody.

Third, we urge this Subcommittee to issue extremely clear recommendations that set forth constitutionally-sound detention policies that will survive the test of time, and not be contingent on the specific circumstances of any given time. HSAC should adopt the policy recommendations set forth in the white paper *Shutting Down the Profiteers: Why and How DHS Should Stop Using Private Prisons*.<sup>25</sup> This paper (attached as Exhibit C) proposes a clear, comprehensive plan for how ICE can reduce its reliance on detention enough to free itself from its private prison contracts.<sup>26</sup> This would include the following policy changes. We have included estimates of the likely detention population reductions associated with each policy change, as follows:

- **End family detention and detention of asylum seekers** (11,000 to 15,000 people);
- **End prolonged detention without bond hearings** (at least 4,500 people);
- **Interpret the mandatory custody statute to permit a range of custodial options, and apply it only to immigrants recently convicted of serious crimes who do not have meritorious immigration cases** (5,000 to 10,000 people); and
- **Stop imposing exorbitant, unaffordable bonds** (at least 1,300 people).

These common-sense reforms would avoid wasteful detention spending at the cost to American taxpayers, while establishing constitutionally sound detention policies. Moreover, all of these policy reforms could be

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<sup>23</sup> *ACLU of Arizona Files Lawsuit on Behalf of Transgender Woman Sexually Assaulted by CCA Guard*, Dec. 5, 2011, <https://www.aclu.org/news/aclu-arizona-files-lawsuit-behalf-transgender-woman-sexually-assaulted-cca-guard>.

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

<sup>25</sup> Carl Takei, Michael Tan, & Joanne Lin, AMERICAN CIVIL LIBERTIES UNION, *Shutting Down the Profiteers*, Sept. 2016, <https://www.aclu.org/report/shutting-down-profiteers-why-and-how-department-homeland-security-should-stop-using-private>.

<sup>26</sup> Carl Takei & Joanne Lin, AMERICAN CIVIL LIBERTIES UNION, *Homeland Security Must Stop Using Private Prisons for Immigration Detention. Here's How to Do It*, October 3, 2016, <https://www.aclu.org/blog/speak-freely/homeland-security-must-stop-using-private-prisons-immigration-detention-heres-how>.

implemented by DHS under its existing authorities, without any new legislation.

Finally, many national lawmakers including leading Members of Congress have called on DHS to end the use of private prisons. Congressional lawmakers have introduced legislation, held press conferences, penned op-eds, and sent letters to DHS – pushing for an end to profit-driven immigration detention. For a compendium of congressional actions, please see Exhibit D.

The stakes could not be higher for this HSAC report. At a time when BOP is severing ties with the private prison industry, DHS is becoming more entangled with the private prison industry. We thank you for giving us the opportunity to offer our expertise, and urge HSAC to press DHS to issue a moratorium on the expansion of immigration detention.

Sincerely,



Joanne Lin  
Legislative Counsel  
Washington Legislative Office



Carl Takei  
Staff Attorney  
National Prison Project

**Attachments:**

Exhibit A – *Nation* Investigation: Cibola County Correctional Center

Exhibit B – Instances of Abuse at the Eloy Detention Center

Exhibit C – *Shutting Down the Profiteers* ACLU Report

Exhibit D – Compendium of Congressional Actions Regarding the Use of Privatized Detention

**Exhibit A:**  
***Nation* Investigation: Cibola County Correctional Center**

## **The Feds Will Shut Down the Troubled Private Prison in a ‘Nation’ Investigation**

*The facility is among several in which our reporting has uncovered dozens of deaths that involved substandard medical care.*

*By Seth Freed Wessler*

A storm forms over Interstate 40 in New Mexico near Cibola County Correctional Facility, a private prison that will close at the end of September. (*Reuters / Lucas Jackson*)

The BOP notified one of the country’s leading private prison companies, Corrections Corporation of America, on July 29 that a long-troubled federal prison the company had operated for 16 years will be closed down. The notice is exceptional in the BOP’s history of overseeing its privatized prisons—in the last decade, it has ended only three other private prison contracts before they were set to expire—and it follows reporting by *The Nation* and the Investigative Fund that documented poor medical care at the prison, including at least three questionable deaths.

The minimum-security Cibola County Correctional Center, in Milan, New Mexico, holds 1,200 prisoners, all noncitizens convicted of federal crimes, who will be moved to other prisons before the facility is shuttered at the end of September.

Cibola is one of several facilities that have been the focus of a *Nation* and Investigative Fund series that has uncovered dozens of questionable deaths in 11 privatized federal prisons. Drawing from 30,000 pages of previously unreleased federal records obtained through an open-records lawsuit, we documented dozens of premature deaths following shoddy medical care in these federal prisons, which are used to hold noncitizens. The documents, as well as interviews with former BOP officials and contractors’ medical staff, reveal the BOP’s own oversight monitors issuing increasingly stern warnings about medical neglect, understaffing of medical units, and underperforming internal quality-control systems. Yet federal administrators repeatedly extended contracts at the same prisons that the agency’s monitors declared to be in trouble.

The standard contract offers private companies a 10-year agreement to operate the prisons. Cibola marks only the fourth time in the last decade that the BOP has walked away from a contract prior to the end of that 10-year period. Each time it has done so, including with CCA’s Cibola contract, it has ended the contracts as no-fault terminations. Not once has the BOP terminated a contract for default, which could negatively affect a company’s ability to acquire a new federal contract.

The last privatized federal prison to lose a contract before the end of the normal 10-year agreement was the Willacy County Correctional Center in southern Texas. As I reported in *The*

**Exhibit A:**  
***Nation* Investigation: Cibola County Correctional Center**

*Nation* last year, Willacy erupted in a major riot in February 2015, after guards responded to a protest over medical care with tear gas and rubber bullets. The prisoners so ransacked that facility that the BOP declared it uninhabitable and was forced to end the contract it had signed with Management & Training Corporation.

As *The Nation* detailed in June, Cibola has been among the BOP's most problem-prone private prisons, accumulating more demerits from BOP monitors than any other private facility for repeated and systemic violations in the medical unit. Prison medical staff repeatedly failed to evaluate and treat patients in accordance with policy, and for months on end the prison operated without a single medical doctor.

CCA's spokesperson Jonathan Burns told *The Nation* in an e-mail that the company is "disappointed with the decision" to end the Cibola contract, which was not set to expire until 2020. He did not reply to a question about any attempts by the company to address medical deficiencies.

The Bureau of Prisons did not respond substantively to questions about whether the decision to close Cibola was related to documented health-services problems. A BOP spokesperson wrote, "The Bureau decided it was not in our best interests" to extend the contract. A BOP spokesperson wrote, "The Bureau decided it was not in our best interests" to extend the contract.

In April 2014, BOP monitors found Cibola's medical unit was operating far out of compliance with federal standards, and the agency warned CCA to correct course. When monitors returned, however, they discovered that CCA had failed to comply. For the fifth time in a row, monitors found that the prison hadn't appropriately treated inmates with TB. For the third consecutive time, HIV care was also not up to standard. For the fourth time, inmates were not properly assessed for medical issues. And the oversight monitors discovered a prisoner had died after a long delay in care following a heart attack.

"The contractor failed to implement corrective action for the past 5 years," a BOP official wrote CCA in a 2015 letter I obtained last week, through my open-records lawsuit.

The BOP continued to warn CCA about the facility, and it even appeared to show some improvement, according to BOP records. But in March of 2015 another prisoner died: a 39-year-old Mexican man named Jelacio Martinez-Lopez, whom federal officials had previously flagged as suicidal, hanged himself after he was left alone and untreated in a cell.

Renee Wilkins, a psychologist, served as Cibola's mental-health director for a decade until her retirement shortly after Martinez-Lopez's suicide. She said last week that the prison's health and mental-health departments were consistently understaffed, and that she lacked necessary resources to treat seriously mentally ill patients.

**Exhibit A:**  
***Nation Investigation: Cibola County Correctional Center***

Despite what Wilkins called “constant problems with staffing of our medical department,” an issue the BOP has noted across the federal prison system, BOP administrators have renewed or extended the agreement with CCA nine times since the Cibola contract was first inked in 2000. “The Bureau of Prisons’ decision to cancel the Cibola private prison contract is welcome but long overdue,” said Carl Takei of the ACLU, “given the Corrections Corporation of America’s well-documented, sometimes deadly history of failing to meet contractually mandated medical standards. But it’s important to remember that the bureau still contracts with 10 other private prisons that hold noncitizen prisoners with little transparency, limited oversight, and similarly grisly records.”

The Department of Justice’s inspector general last week released an investigation of the bureau’s system of contract prisons and the federal oversight of them. The report found that on a set of safety measures the private prisons, which at the time of the study held 22,000 men, performed more poorly than BOP-run facilities. In the area of medical care, the BOP’s efforts to monitor the prisons were hobbled by poor communication between various parts of the oversight infrastructure, and weak evaluation tools. When prisoners died in the contract facilities, the investigators discovered, the bureau had not set up adequate procedures “to require corrective action from the contractor.” Echoing our own investigation, the report said that problems went “uncorrected for extended periods,” because the BOP had no systems in place to “proactively take action before a problem becomes acute or systemic.”

In the next nine months, 10 more contracts will be up for renewal or extension. “The bureau should be moving more quickly to shut down this entire network of shadow prisons,” Takei added.

## **Exhibit B: Instances of Abuse at the Eloy Detention Center**

### **Deficiencies in Medical and Mental Healthcare:**

Since 2003, fourteen detainees have died at Eloy—which makes it the deadliest immigration detention facility in the nation. In 2012, a routine annual inspection evaluated Eloy’s suicide prevention policies. The inspectors found that Eloy’s suicide watch room—the place where people at the most acute risk of suicide are supposed to be housed and whose chief purpose is to deny them the means to kill themselves—contained “structures or smaller objects that could be used in a suicide attempt.” The following year, Elsa Guadalupe-Gonzalez hanged herself in one of Eloy’s general population units. Two days later, Jorge Garcia-Mejia hanged himself in a different general population unit. U.S. Immigration and Customs Enforcement (ICE) conducted death reviews afterward, which found that “confusion as to who has the authority to call for local emergency medical assistance” led to delays in Corrections Corporation of America (CCA) staff calling 911 after each suicide. The reviews also found that CCA and ICE staff failed to conduct an appropriate debriefing of medical and security staff after the two suicides, and that Eloy lacked a formal suicide prevention plan. Just over two years later, on May 20, 2015, José de Jesús Deniz Sahagun committed suicide in his cell just hours after a doctor had removed him from suicide watch. ICE’s death review found that Eloy still had not adopted a suicide prevention plan at the time of Mr. Deniz Sahagun’s death.<sup>1</sup>

### The Details of José de Jesús Deniz Sahagun’s Death<sup>2</sup>:

Jose de Jesus Deniz-Sahagun, 31 at death, committed suicide on May 20, 2015 in CCA-operated Eloy Detention Center, less than 12 hours after a doctor moved him from suicide watch to mental health observation status with 15-minute checks and no restrictions on his property. According to the review, Deniz-Sahagun ultimately used an item from his property – a sock – to end his life. Before arriving at Eloy, while in Border Patrol custody, ODO documented that Deniz-Sahagun exhibited self-harming behavior. He jumped twice from a bench and landed on his head. Border Patrol agents transported him to the hospital on May 17, 2015, where he “told the emergency room physician he was attempting to break his own neck because he feared his life was in danger by both Mexican coyotes and USBP [US Border Patrol].”

On May 18, 2015, when Deniz-Sahagun was transferred to Eloy, ODO noted that Border Patrol agents informed a nurse in Eloy’s booking area that Deniz-Sahagun had been taken to the hospital the day before for his suicide attempt and that he had since been “observed banging his head against a wall at the Border Patrol Station and behave[ing] erratically during transport.”

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<sup>1</sup> Carl Takei, Michael Tan, & Joanne Lin, AMERICAN CIVIL LIBERTIES UNION, *Shutting Down the Profiteers*, Sept. 2016, <https://www.aclu.org/report/shutting-down-profiteers-why-and-how-department-homeland-security-should-stop-using-private>.

<sup>2</sup> HUMAN RIGHTS WATCH, *US: Deaths in Immigration Detention Newly Released Records Suggest Dangerous Lapses in Medical Care* (2016), <https://www.hrw.org/news/2016/07/07/us-deaths-immigration-detention>.

## **Exhibit B: Instances of Abuse at the Eloy Detention Center**

ODO noted however that “the Medical Alert section of his [Border Patrol] Alien Booking Record was blank, and no medical or mental health documentation accompanied him to [Eloy].” The pre-screening and intake nurses at Eloy determined that Deniz-Sahagun was not suicidal and referred him for a routine, rather than urgent, mental health follow-up. Deniz-Sahagun was cleared for placement in general population in the early afternoon. Around 10 p.m. that evening, Deniz-Sahagun requested to be placed in protective custody “because he believed his cellmate [redacted] was going to kill him.”

On the morning May 19, 2015, ODO discussed four separate use of force incidents “used to control Deniz-Sahagun” over the course of approximately three hours. The ODO reviewed video of each of these events, including “a video recording [that] shows Deniz-Sahagun struggling on the floor as four officers hold him in place. He screams in English and Spanish, ‘Help me,’ ‘Call my lawyer,’ ‘This is brutality,’ and ‘They want to kill me.’” A facility doctor determined that Deniz-Sahagun suffered from delusional disorder and placed him on suicide watch from May 19 to 26, 2015. The order required nursing checks every eight hours, mental health checks every 24 hours and one-on-one observation by an officer. The doctor also ordered anti-psychotic and anti-anxiety medications assuming that “involuntary administration would be necessary.” These medications were not administered by medical staff, but no documentation of this was made in Deniz-Sahagun’s medical record and the doctor was not informed.

On the morning of May 20, 2015, a doctor removed Deniz-Sahagun from suicide watch “because he believed the detainee was no longer a danger to himself.” The doctor told ODO that it was “not clear to him what prompted Deniz-Sahagun’s change, but he assumed the detainee had been administered a sedative.” Around 5:30 p.m. that day, Deniz-Sahagun was discovered unresponsive in his cell. His airway was blocked by an orange sock which caused him to asphyxiate.

**Expert comments:** Dr. Keller<sup>3</sup> emphasized that medical staff failed to adequately elevate the level of Deniz-Sahagun’s treatment to his symptoms. “This patient was severely unstable. He had been taken to the hospital after a suicide attempt days before and was placed on suicide watch at Eloy,” said Dr. Keller. “Based on one report of him claiming he was not suicidal he was downgraded to 15-minute checks.” Instead he should have been thoroughly evaluated by a psychiatrist and strongly considered for hospitalization.

Dr. Keller further noted that detention itself could have exacerbated Deniz-Sahagun’s mental health condition.

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<sup>3</sup> Dr. Allen Keller is an associate professor at New York University (NYU) School of Medicine, associate professor at the NYU Gallatin School of Individualized Study, director of the Bellevue/NYU Program for Survivors of Torture, and director of the NYU School of Medicine Center for Health and Human Rights and a general internist with an expertise in evaluation and treatment of immigrants and in access to health care for prisoners.

## **Exhibit B: Instances of Abuse at the Eloy Detention Center**

Dr. Stern<sup>4</sup> also raised serious concerns about the appropriateness of Deniz-Sahagun's mental health care, in particular the doctor's decision to downgrade Deniz-Sahagun from suicide watch. He faulted the ODO's death review for not adequately analyzing that decision and not including an appropriate subject matter expert in psychiatric health.

### Pablo Gracida-Conte<sup>5</sup>:

[Pablo Gracida-Conte] died of heart disease after repeated failures to provide him with timely and efficient care. After four months of worsening, untreated medical problems, Mr. Gracida died on October 30, 2011, at the University of Arizona's University Medical Center in Tucson, Arizona. He became the 10th person since October 2003 to die while incarcerated at Eloy. The autopsy report states the cause of death for the 54-year-old as cardiomyopathy, a treatable disease of the heart muscle.

During Mr. Gracida's 142 days in detention, he complained of ongoing health issues such as vomiting after every meal and extreme upper abdominal pain. Eloy staff had difficulty communicating with Mr. Gracida, who spoke Mixteco. Although the facility has access to telephonic interpreters and had ample time to find an interpreter, it never obtained one. Mr. Gracida's long list of sick call requests reads as a desperate, repeated cry for help that was ignored until it was too late.

After Mr. Gracida's death, the ODO conducted a death review in December 2011 and concluded that:

- Eloy failed to provide medical care in accordance with PBNDS 2008.
- Eloy's medical provider had failed to provide him with timely and efficient care. A doctor who participated in the ODO's death review concluded that "[Mr.] Gracida's death might have been prevented if the providers, including the physician at [Eloy], had provided the appropriate medical treatment in a timely manner."
- Eloy failed to send Mr. Gracida to the emergency room. In the ODO's investigation, a doctor stated that Mr. Gracida's condition on October 24 "should have been considered urgent, and he should have been referred to a cardiologist."
- Communication with Mr. Gracida happened only at a "very basic level." Although Spanish-speaking staff documented that Mr. Gracida spoke "very little Spanish," they never obtained a Mixteco interpreter.

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<sup>4</sup> Dr. Marc Stern is a correctional health expert who is an assistant affiliate professor of public health at the University of Washington and a former subject matter expert for investigations conducted by the US Department of Homeland Security, as well as the former health services director for Washington State's Department of Corrections.

<sup>5</sup> Carl Takei et al., AMERICAN CIVIL LIBERTIES UNION, *Fatal Neglect* (2016), [https://www.aclu.org/sites/default/files/field\\_document/fatal\\_neglect\\_acludwnnmc.pdf](https://www.aclu.org/sites/default/files/field_document/fatal_neglect_acludwnnmc.pdf).

## **Exhibit B: Instances of Abuse at the Eloy Detention Center**

- Language and cultural barriers were contributing factors in the failure to address Mr. Gracida's medical needs.

Despite these concerns, the ODO death investigator chose not to cite Eloy as non-compliant with ICE PBNDS standards related to interpretation assistance. In addition, the ODO investigation uncovered evidence that Eloy staff were well aware of Mr. Gracida's deteriorating condition, revealing that a guard reported that Mr. Gracida had been vomiting after every meal. The ODO death investigator expressed concern that at the time of review, Eloy did not have a clinical director, noting that an Eloy doctor stated that the clinic is understaff[ed] and she "badly needs help." In its investigation, the ODO states that Eloy had been without a clinical director for four of the five years it had been open; however, in its 2012 facility inspection, the ODO states that Eloy opened in 1994. It is unclear how long the facility has been without a clinical director based on these documents.

Eloy passed its 2011 ERO and ODO inspections before Mr. Gracida's death. Both the January 2012 ERO inspection and July 2012 ODO inspection mention his death, but do not identify any problems at Eloy. ODO inspectors claim that people at Eloy are seen for sick call in a timely manner and sick call slips are effectively and expediently triaged. They conclude that medical staffing is adequate; however, they also encourage Eloy to fill the clinical director position, which they claim had been vacant since May 2009, as soon as possible. This assertion contradicts the ODO's statement that Eloy had been without a clinical director for the past four years. Remarkably, the ODO inspection claims that Mr. Gracida's death was the first death "to ever occur" at Eloy when, in fact, it was the 10th death at the facility. Today, Eloy is known as the deadliest immigration detention center in the nation. Four years after Mr. Gracida's death, the facility still did not have a doctor on staff. Recent deaths at the facility led Rep. Raúl Grijalva (D-AZ) to write a letter to DHS Secretary Jeh Johnson expressing alarm and calling for greater transparency of facility operations. If ODO and ERO inspectors held Eloy to ICE detention standards for medical care, Mr. Gracida's death and possibly four other deaths since 2011 could have been prevented.

### Angela<sup>6</sup>:

Angela is a 40-year-old Jamaican woman who has been a lawful resident for 33 years. She is blind in one eye and suffers from a painful and recurring skin disease. Upon her detention at Eloy, she provided her medical history. Over the course of her four-month detention, she began to experience significant pain and swelling of her face. Despite multiple requests for pain medication and attention from a doctor, she was not provided care until she fainted in her

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<sup>6</sup> ACLU OF ARIZONA, *In Their Own Words: Enduring Abuse in Arizona Immigration Detention Centers* (2011), <http://www.acluaz.org/sites/default/files/documents/detention%20report%202011.pdf>.

## **Exhibit B: Instances of Abuse at the Eloy Detention Center**

housing unit and was rushed to a local hospital. She remained in the hospital for several days and was given intravenous antibiotics. Angela filed a grievance with the detention center about their untimely response to her medical needs. Soon after she filed her grievance, she was released from custody.

### Helen<sup>7</sup>:

Helen was detained at Eloy Detention Center for one month. For almost the entire time she was detained, she experienced severe vaginal bleeding. She filed medical requests and told staff that this was not normal for her monthly period, but they still did not consider her situation a medical emergency. The bleeding became so severe that Helen experienced blurred vision, fainting, and could not walk. Helen continued to file requests to see a doctor. Ultimately, detention officers called a medical emergency and Helen was taken to a local hospital, where doctors performed a complete hysterectomy.

### Anonymous<sup>8</sup>:

Among the most commonly reported problems by detainees in Arizona is that their requests for medical care were not taken seriously by detention staff, nor conveyed to appropriate medical staff. Detainees have also reported experiencing delays before being seen by or receiving treatment from a provider, and are not given care consistent with prior treatment. In some cases, detainees told the ACLU that they provided detention center medical staff with previous medical records and prescriptions, yet still did not receive consistent or timely care. In one case, a man suffering from bipolar disorder and depression reported that it took medical staff approximately three weeks to provide him with his antipsychotic medication. Upon intake at Eloy, he told a nurse about his condition and the names of the medications he had been prescribed. While he waited for his medication, he became increasingly frustrated and was eventually placed in isolation for “acting out” in general population.

### Manuel Cota-Domingo<sup>9</sup>:

[34-year-old Manuel Cota-Domingo] died of heart disease, untreated diabetes, and pneumonia in December 2012 at St. Joseph's Hospital and Medical Center shortly after being transferred there from Eloy Detention Center.

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> HUMAN RIGHTS WATCH, *US: Deaths in Immigration Detention Newly Released Records Suggest Dangerous Lapses in Medical Care* (2016), <https://www.hrw.org/news/2016/07/07/us-deaths-immigration-detention>.

## **Exhibit B: Instances of Abuse at the Eloy Detention Center**

The death review contains persuasive evidence that correctional officers did not respond to calls for help for approximately three hours while Cota-Domingo was having trouble breathing. When officers finally notified medical providers of his condition, they delayed evaluating him and finally sent him to the hospital in a van instead of an ambulance. Both medical experts concluded that the combination of these delays likely contributed to a potentially treatable condition becoming fatal.

ODO's death review for Manuel Cota-Domingo notes that he entered CCA's Eloy Detention Center with a plastic bag containing medicine for diabetes but that it was stored with his property and not given to nurses. Later, a licensed practical nurse doing his intake recorded that he denied having insulin with him or being diabetic. In an interview with ICE, Cota-Domingo's cousin, who was also detained at Eloy at the same time, said he encouraged Cota-Domingo to talk to medical personnel about his medical condition but that Cota-Domingo refused because he believed he would "have to pay for medical care he could not afford." CCA told Human Rights Watch there are no fees for medical care delivered at Eloy.

The review includes interviews with three detainees who were present when Cota-Domingo began to have problems breathing, at about 10 p.m. on the night of December 19, 2012. His cellmate began to bang his cell door and call for help at about 11 p.m.; he stated correctional officers did not respond until 2 a.m. The review documents further delays, including a decision by a registered nurse to wait two hours to attend to Cota-Domingo's complaint of chest pain, failure to call 911 because of an Eloy Detention Center policy that only certain medical staff could call 911, and a decision by facility staff to send Cota-Domingo to the emergency room in a van rather than an ambulance.

Taken together these delays meant that Cota-Domingo did not arrive at the emergency room until at least eight hours after he first began to have trouble breathing. He was pronounced dead at the hospital days later of hypertrophic and atherosclerotic cardiovascular disease with diabetic ketoacidosis, or untreated diabetes, and pneumonia.

The ODO found in its review of Cota-Domingo's death that Eloy Detention Center medical staff believed they could not call 911 without first receiving a "provider's order" per Eloy Detention Center's Local Operating Procedure on Emergency Medical Services. The ODO did not cite this policy as a violation in this case. Four months later, as mentioned above, Jorge Garcia-Mejia and Elsa Guadalupe-Gonzalez hanged themselves within days of each other. In reviews of these deaths, ODO found that "confusion as to who has the authority to call for local emergency medical assistance" led to three-minute and five-minute delays in calling 911, respectively in each case. The ODO reviews of their deaths indicate that Eloy Detention Center policy did then allow security personnel to call 911 under CCA Policy 8-1A on medical emergencies, but not

## **Exhibit B: Instances of Abuse at the Eloy Detention Center**

before alerting others within the facility, and that security staff believed they had no authority to call 911 without an assessment from medical staff. In these latter cases, the ODO found the facility violated the 2011 PBNDS requirement of “access to specified 24-hour emergency medical, dental, and mental health services” due to the confusion over who could call 911. CCA told Human Rights Watch that “there has never been a CCA policy that specifically indicates who can or cannot contact 911 for emergency services.”

“While it is unclear whether their lives could have been saved in the absence of this delay, waiting five minutes to call 911 can be a matter of life or death,” said Dr. Keller. “Any staff member should be able to call 911 in an emergency,” said Dr. Stern, further adding, “A timely review of Mr. Cota-Domingo’s death should have remedied the 911 confusion before Ms. Guadalupe-Gonzales and Mr. Garcia-Mejia’s deaths.”

### **Sexual Assault and Harassment<sup>10</sup>:**

[In 2011, t]he American Civil Liberties Union of Arizona filed a lawsuit in federal court on behalf of a 28-year-old transgender woman who was intimidated, harassed, and sexually assaulted by a CCA guard while she was in immigration custody at the Eloy Detention Center.

The lawsuit, filed against CCA, ICE officials, and the City of Eloy, charges that local and federal officials failed to protect Tanya Guzman-Martinez from abusive male staff members at the facility in Eloy, even after being notified about the sexual attack and ongoing harassment by staff and other male detainees.

During her 8-month detention at Eloy, one of the largest ICE facilities in the country, Guzman-Martinez was sexually assaulted twice. One incident occurred on December 7, 2009 and involved a detention officer who after repeated harassment, maliciously forced Guzman-Martinez to ingest his ejaculated semen and threatened to deport her back to Mexico if she did not comply with his demands. Guzman-Martinez immediately reported the assault to detention staff and the Eloy Police Department and the detention officer was later convicted in Pinal County Superior Court of attempted unlawful sexual contact.

Despite this attack, immigration officials did nothing to protect her from further abuse. In a separate incident that took place on April 23, 2010, Guzman-Martinez was sexually assaulted by a male detainee in the same all-male housing unit where she was subjected to the first assault. She didn’t report the assault to local police until about a week later because she feared retaliation

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<sup>10</sup> *ACLU of Arizona Files Lawsuit on Behalf of Transgender Woman Sexually Assaulted by CCA Guard, Dec. 5, 2011, <https://www.aclu.org/news/aclu-arizona-files-lawsuit-behalf-transgender-woman-sexually-assaulted-cca-guard>.*

**Exhibit B:**  
**Instances of Abuse at the Eloy Detention Center**

by detention staff and other detainees. Soon after she reported the second assault to the police, Guzman-Martinez was released from ICE custody.

Although Guzman-Martinez was released from detention more than a year-and-a-half ago, she still suffers from the emotional pain she endured while at Eloy.

[The] lawsuit alleges that CCA, Eloy, and ICE personnel failed to take basic steps to protect Guzman-Martinez's physical safety and emotional well-being, to properly train and monitor the staff at the center or to implement best practices to house transgender detainees and prevent the sexual assault of vulnerable populations.

**Exhibit C:**  
***Shutting Down the Profiteers* ACLU Report**

# SHUTTING DOWN THE PROFITEERS:

Why and How the Department of Homeland Security  
Should Stop Using Private Prisons

September 2016





# **Shutting Down The Profiteers:** Why and How the Department of Homeland Security Should Stop Using Private Prisons

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# EXECUTIVE SUMMARY

On August 18, 2016, the Deputy Attorney General directed the Bureau of Prisons (BOP) to take steps to reduce, and ultimately end, the use of privately-operated prisons. In undertaking these reforms, the Justice Department (DOJ) embarked on a course to ensure that all federal prisoners are eventually incarcerated at BOP facilities, not contracted facilities.

Shortly after the DOJ announcement, the Homeland Security (DHS) Secretary tasked a subcommittee of the Homeland Security Advisory Council (HSAC) with evaluating whether Immigration and Customs Enforcement (ICE) should follow DOJ's lead and eliminate use of private immigration detention. This task cannot be competently undertaken without a comprehensive assessment of the immigration detention system as well as of the laws, policies, and practices that shape the current detention population. To be meaningful, the HSAC review must put all options on the table.

For the past three decades, the immigration detention population has increased dramatically, reaching historic highs under the Obama administration. To manage the growing detainee population, ICE has increasingly turned to for-profit prison corporations and to county jails. By summer 2016, both the ICE detainee daily population and the proportion of detainees in privately run facilities reached record high levels, with the average daily detainee population exceeding 37,000. Of this population, approximately 73 percent are detained in privately run facilities, about 15 percent in county jails, and only 12 percent are in federally-owned facilities. Thus, on any given day some 24,500 detainees are locked up in private prisons, with most of the remainder detained in county jails.

Irrespective of the type of detention facility, ICE has never been able to ensure safe humane conditions that comport with a civil detention model. Detainee deaths, suicides, sexual abuse, and denial of medical care have been documented at all types of facilities. Private prison companies, which are incentivized to cut medical staffing and deny care to maximize shareholder return, have a particularly grisly track record. In February 2016, the ACLU, Detention Watch Network, and the National Immigrant Justice Center examined each of the deaths in custody over a two-year period in which ICE's own death review concluded that non-compliance with ICE medical standards contributed to the person's death. Six of these eight deaths took place in private prisons. For example, when Evalin-Ali Mandza had a heart attack at GEO Group, Inc.'s Denver Contract Detention Facility in Aurora, Colorado, the company's medical staff did not even call 911 until nearly an hour after a code-blue emergency was called, in part because a nurse prioritized filling out transfer paperwork over calling an ambulance. This delay, along with staff not being familiar with the relevant medical protocols and failing to administer appropriate cardiac medication, were identified as potential contributing factors in Mr. Mandza's death.

The immigration detention system is devoid of rigorous oversight and transparency. The Corrections Corporation of America's Eloy Detention Center in Arizona exemplifies the impunity these companies enjoy. Since 2003, fourteen detainees have died at Eloy—which makes it the deadliest immigration detention facility in the nation. At least five of these deaths were suicides, yet Eloy *still* had not adopted a suicide prevention plan when José de Jesús Deniz Sahagun killed himself in his cell in May 2015. Eloy still holds nearly 1,500 immigrants today. The most horrific example of sexual abuse in ICE custody also comes from a CCA facility. Between 2009 and

2010, a CCA guard responsible for transporting detainees from CCA's Hutto detention facility to the airport for their deportation flights sexually assaulted multiple women while en route, typically at night. His modus operandi was to stop his van on the way to the airport, order each woman outside of the van, and sexually assault them on the side of the road. He was able to do this with impunity because, in violation of CCA's contract with ICE, the company permitted him to drive the women without a fellow guard in the van. The only reason why his sexual abuse came to light was that one of the women reported the abuse to an airport employee before boarding her deportation flight.

Unlike federally-run facilities, contract facilities are not obligated to provide to DHS or Congress critical information about detention operations and conditions. Therefore, these contract facilities—including those run by for-profit prison corporations—operate outside the purview of public oversight and accountability.

At the same time, for-profit prison companies have played a central role in the expansion of the immigration detention system and the implementation of harsh detention policies and practices. Prior to June 2014, ICE detained fewer than 100 children and mothers at one facility in Pennsylvania. However, starting in mid-to-late 2014, ICE swiftly began detaining unprecedented numbers of families in Karnes, Texas and Dilley, Texas—together operating over 3,500 beds. These facilities were not erected by ICE, but by the nation's two largest private prison corporations. Those companies were able to swiftly create this horrific new form of mass detention because they stood at the ready—primed to create massive new jails as quickly as ICE requested them.

Similarly, under the Obama administration ICE has greatly increased the detention of asylum seekers, from some 10,000 asylum seekers detained in Fiscal Year (FY) 2009 to over 44,000 asylum seekers detained in FY 2014. These asylum seekers have fled brutal violence and persecution, and the vast majority do not have a criminal record. Most asylum seekers are locked up in privately run facilities or county jails, and many are detained for over a year while they pursue their claims in immigration court. These two disturbing detention trends—mass family detention and unprecedented rates of detention of asylum seekers—have all developed under the Obama administration. As the government has implemented punitive policies against the most vulnerable immigrants, ICE has increasingly turned to for-profit, prison corporations to expand its detention capacity.

As the HSAC Subcommittee undertakes its review, we urge the Subcommittee to consider:

First and foremost, profiteering should have no place in *any* detention system. This applies to profits reaped by private prison companies and to profits made by county jails that contract with ICE. Profiteering should never be part of the equation when deprivation of physical liberty is at stake, especially the liberty and well-being of children, mothers, and asylum seekers.

Second, the private prison companies running many of ICE's largest detention facilities are the same prison companies that the BOP is in the process of severing ties with. In both the BOP and ICE contexts, these prison companies operate with essentially the same business model. The DOJ's Inspector General found that the companies' methods of operation put prisoners' rights and needs at risk. And in the ICE context, this fundamentally penal model is wholly inconsistent with what is

supposed to be a civil detention model. As described by ICE, “ICE detention is solely for the purpose of either awaiting the resolution of an individual’s immigration case or to carry out a removal order. ICE does not detain for punitive reasons.”

Third, some ICE officials have suggested that the only way to end ICE’s reliance on private prisons would be to massively expand its reliance on county jails. That is the wrong path. Any long-term strategy to assure safe, humane, and truly civil conditions cannot rely on ICE’s past pattern of outsourcing. Instead, ICE must ensure the federal government maintains direct operational control over nearly all ICE detention beds. Moreover, ICE must adopt true civil immigration detention standards along the lines of those proposed by the American Bar Association, and must require all federal facilities to implement such standards.

Finally, DHS should look to the DOJ experience and specifically to the underlying policies that have fueled record-level detention rates. The August 2016 DOJ announcement to phase out BOP’s use of private prisons was made possible by a series of decisions to shorten certain types of nonviolent drug sentences, which together reduced the BOP population by approximately 25,000 prisoners from its 2013 peak. While DOJ has implemented common-sense criminal justice reform policies, exemplified by its 2013 “Smart on Crime” initiative to ensure more proportional sentences for low-level and nonviolent drug offenses, DHS has undertaken no comparable course of detention reform. Rather, DHS and ICE have pursued extremely aggressive policies which have produced unprecedented detention levels by all metrics: total numbers of people detained, vulnerable immigrants detained, duration of detention, and revenue for for-profit prison corporations.

In order to curtail and eventually end the use of private prisons, DHS will need to implement policies aimed at reducing unnecessary detention.

This white paper explains how to carry out that reduction.

Specifically, ICE should generally stop using detention as a means to ensure appearance for court proceedings. Instead, as the Vera Institute of Justice recommended to ICE’s predecessor agency more than 15 years ago, detention should be reserved chiefly for effectuating removal orders.

Fully committing to this shift could completely eliminate ICE’s need for reliance on private prisons. In place of its current mass detention apparatus, the government should rely on release on recognizance, bond, and a range of community-based Alternatives to Detention (ATDs) with case management services. ATDs have long been proven effective at ensuring appearance, at a far lower cost to taxpayers than detention, and relying on them would be consistent with best practices from the criminal justice system.

If the next president implements these recommendations, DHS will finally be able to end profiteering by private prisons in the immigration detention system. This will make the detention system more accountable, transparent, and better able to assure safe, humane, and truly civil detention conditions.

The key elements of the transition from a detention-based model to a community-based model of compliance include the following policy changes. We have included estimates of the likely detention population reductions associated with each policy change, as follows:

<b>Policy change</b>	<b>Estimated impact<sup>1</sup> on the average daily detention population</b>
<p>End family detention and detention of asylum seekers: Close all three family detention centers, utilize immigration court (Immigration and Nationality Act § 240) removal proceedings rather than expedited removal for family units, and release asylum-seeking families to sponsors in the community.</p> <p>Clarify to all ICE field offices that the 2009 Directive—Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture—remains in full force and has not been rescinded by the DHS 2014 Enforcement priorities memorandum.</p>	<p>11,000 to 15,000 people</p>
<p>End prolonged detention without bond hearings: DHS and DOJ should construe the general immigration detention statutes to require a bond hearing before an immigration judge for all individuals detained more than six months, where the government must justify continued detention.</p>	<p>At least 4,500 people</p>
<p>Interpret the mandatory custody statute to permit a range of custodial options, and apply it only to immigrants recently convicted of serious crimes who do not have meritorious immigration cases: Recognize that electronic monitoring, house arrest, and other coercive liberty restrictions satisfy INA § 236(c)'s "custody" requirement.</p> <p>Narrow application of mandatory custody to exclude those with substantial challenges to removal.</p> <p>Properly construe INA § 236(c) to apply only to individuals who are taken into ICE custody at the time of their release from criminal custody.</p>	<p>5,000 to 10,000 people</p>
<p>Stop imposing exorbitant, unaffordable bonds: DHS and DOJ should require that immigration officials use the least restrictive conditions necessary to ensure the individual's appearance for court proceedings, including alternatives to detention, when determining such conditions under INA § 236(a) or 212(d)(5). Moreover, where ICE or an Immigration Judge sets a cash bond, they must consider the individual's ability to pay and impose no bond amount greater than necessary to ensure appearance. Finally, DHS should make a more flexible range of secured and unsecured bonds available, rather than require individuals to post the full cash amount to be released.</p>	<p>At least 1,300 people</p>

<sup>1</sup> Note that because a single individual may fall into multiple categories, the total impact on the detention population may be smaller than the sum of all individual categories.

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# I. INTRODUCTION: WHY ICE MUST END ITS RELIANCE ON PRIVATE PRISONS

This policy white paper is a roadmap for how ICE can phase out its reliance on private prison contractors. For decades, it has been clear that handing immigrants in federal custody over to private prison companies is a recipe for abuse, neglect, and misconduct. But thanks to decades of increasing use of detention being implemented through increased outsourcing, immigration enforcement officials have become heavily dependent on this predatory industry.

Some ICE officials have suggested that the only way to end ICE's reliance on private prisons would be to massively expand its reliance on county jails, which are the other major form of outsourced detention.<sup>2</sup> That is the wrong path. For ICE, any long-term strategy to assure safe, humane, and truly civil conditions cannot rely on the same failed pattern of outsourcing this core federal responsibility. Instead, ICE must ensure the federal government maintains direct operational control over nearly all ICE detention beds. That in turn will require a significant reduction in ICE's detention population.

This white paper therefore describes how to achieve that population reduction. Specifically, to facilitate its transition away from private prisons and avoid unnecessary detention, ICE should generally stop using detention as a means to ensure appearance for court proceedings. Instead, detention should be reserved chiefly for effectuating removal orders.

Fully committing to this shift could completely eliminate ICE's reliance on private prisons. As of June 2016, more than 25,000 of the 37,000 people in ICE detention did not have a final order of removal. Depending on the outcome of their immigration or expedited removal proceedings, these individuals may end up either being deported or granted permission to remain in the United States. This is an extraordinarily high use of detention for these civil proceedings, and is out of step with best practices for pretrial detention and supervision in the criminal justice system. In place of its current mass detention apparatus, the government should utilize release on recognizance, bond, and a range of community-based ATDs with case management services. ATDs have long proven effective at ensuring appearance, at a far lower cost to U.S. taxpayers than detention, and relying on them would be consistent with best practices from the criminal justice system.

Just as a 25,000-person decline in the federal prison population enabled the Justice Department to phase out its private prison contracts without needing to build new federal prisons, the population reductions described in this white paper will provide DHS the ability to safely and humanely phase out most or all of its private prison contracts without a major investment in building new federal detention facilities or

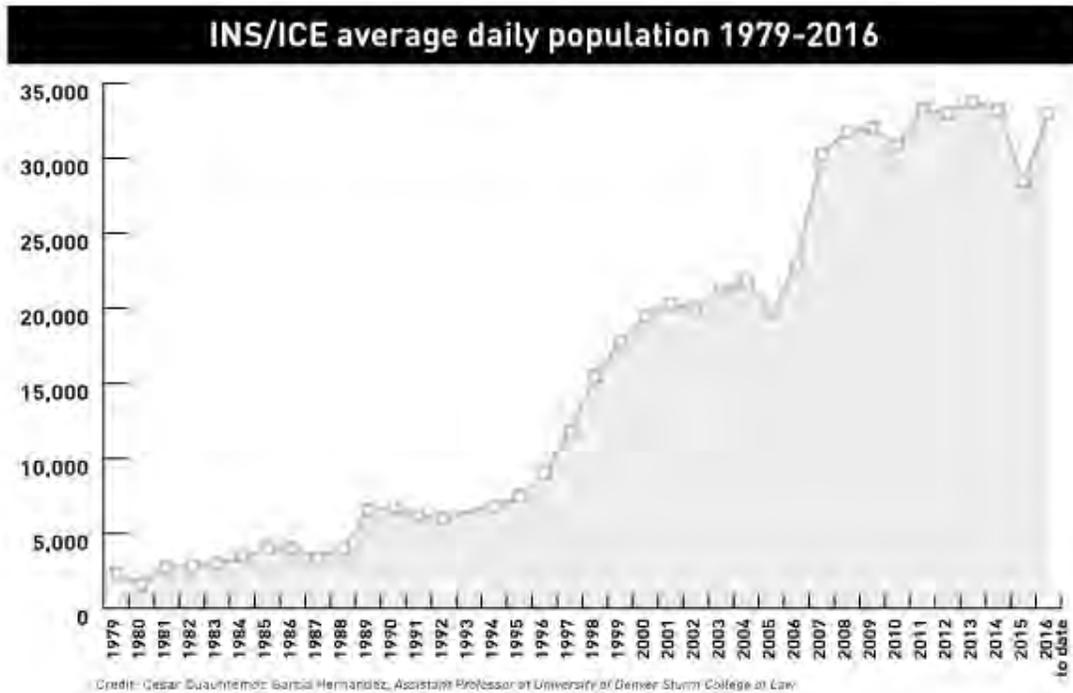
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<sup>2</sup> See Brian Bennett, *White House Considers Ending For-Profit Immigrant Detainee Centers, But Critics Say It Could Add Billions To The Cost*, L.A. TIMES (Sept. 6, 2016, 3:00 AM), <http://www.latimes.com/nation/la-na-immigration-detention-20160906-snap-story.html>.

increased reliance on other forms of detention outsourcing, such as county jail contracts.

## 1. THE DETENTION SYSTEM

The practice of detaining massive numbers of immigrants in hundreds of jails and jail-like facilities across the country is relatively new. In 1980, fewer than 2,000 people were held in immigration detention nationwide. Between 1980 and 1990, the system more than tripled in size, to nearly 7,000 beds. And in the last two decades, it has exploded. Between FY 1995 and FY 2016, the average daily immigration detention population grew from 7,475 to 32,985.<sup>3</sup>



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<sup>3</sup> Doris Meissner, et al., *Immigration Enforcement in the United States: The Rise of a Formidable Machinery* 126 (Jan. 2013), <http://www.migrationpolicy.org/pubs/enforcementpillars.pdf>; See also Transactional Records Access Clearinghouse, *New Data on 637 Detention Facilities Used by ICE in FY 2015*, Syracuse University (Apr. 12, 2016), <http://trac.syr.edu/immigration/reports/422/> (stating that a total of 39,083 individuals were still in ICE custody at the end of FY 2015).

<sup>4</sup> Chart provided courtesy of César Cuauhtémoc García Hernández, Assistant Professor, University of Denver Sturm College of Law, and updated with FY 2015 and FY 2016 data by the ACLU. Prof. García Hernández generated the chart using data from the following sources: DHS, Office of Insp. Gen., *ICE's Release of Immigration Detainees* (Aug. 2014) [http://www.oig.dhs.gov/assets/Mgmt/2014/OIG\\_14-116\\_Aug14.pdf](http://www.oig.dhs.gov/assets/Mgmt/2014/OIG_14-116_Aug14.pdf) (FY 2013 data); ICE, *ICE Detainee Population Statistics By Fiscal Year*, <http://www.ice.gov/doclib/foia/reports/ero-facts-and-statistics.pdf> (FY 2001-12 data); Alison Siskin, Congressional Res. Serv., *Immigration-Related Detention: Current Legislative Issues* (Jan. 12, 2012); Alison Siskin, Congressional Res. Serv., *Immigration-Related Detention: Current Legislative Issues* (April 28, 2004) (FY 1994-2000 data); Timothy J. Dunn, *The Militarization of the U.S.-Mexico Border 1978-1992* (1996); ICE, *Fiscal Year 2014 ICE Enforcement and Removal Operations Report Draft 9* (n.d.), <https://assets.documentcloud.org/documents/1375456/ice-draft-report.pdf>. The chart was updated with FY 2015 and FY 2016-to-date data using statistics from ICE, *Weekly Departures and Detention Report*, at 9 (June 20, 2016) ("ICE WRD Report"), <https://oversight.house.gov/wp-content/uploads/2016/07/ICE-Weekly-Departures-and-Detention-Report1.pdf>.

In recent months, the average daily detention population has grown to record levels, hitting nearly 37,000 people in June 2016. This is fueled by a sharp increase in the number of immigrants and asylum-seekers who are being detained despite not having any history of criminal convictions. As of June 2016, the majority of all immigration detainees—more than 20,000 people—have no criminal record.<sup>5</sup>

Immigration detention is intended to be civil and non-punitive.<sup>6</sup> As ICE recently stated to reporters, “ICE detention is solely for the purpose of either awaiting the resolution of an individual’s immigration case or to carry out a removal order. ICE does not detain for punitive reasons.”<sup>7</sup> Nevertheless, ICE detention facilities—both those run by public officials and by private companies—overwhelmingly consist of jails and jail-like facilities.<sup>8</sup> This state of affairs has persisted for decades, notwithstanding the Obama administration’s oft-cited 2009 pledge to transform ICE detention into a “truly civil detention system.”<sup>9</sup> In 2009, correctional expert Dr. Dora Schriro, who served as Department of Homeland Security (DHS) Secretary Janet Napolitano’s Special Advisor on ICE Detention and Removal, noted:

With only a few exceptions, the facilities that ICE uses to detain aliens were built, and operate, as jails and prisons to confine pre-trial and sentenced felons. ICE relies primarily on correctional incarceration standards designed for pre-trial felons and on correctional principles of care, custody, and control. These standards impose more restrictions and carry more costs than are necessary to effectively manage the majority of the detained population.<sup>10</sup>

Dr. Schriro’s observation holds true today. Although ICE promulgated new detention standards in 2011,<sup>11</sup> these standards are still derived from prison and jail standards and are less protective of the rights of individuals in detention than the American Bar

<sup>5</sup> ICE WRD Report, *supra* note 4, at 6.

<sup>6</sup> Dora Schriro, *Immigration Detention Overview and Recommendations 2-3* (Oct. 6, 2009) (“Schriro Report”), available at <http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf>. See also *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (“The proceedings at issue here are civil, not criminal, and we assume that they are non-punitive in purpose and effect.”); *Wong Wing v. United States*, 163 U.S. 228, 237 (1896) (permitting immigration commissioner to detain immigrants but not impose a sentence of hard labor).

<sup>7</sup> Carrie Johnson, *Justice Department Will Phase Out Its Use Of Private Prisons*, NAT’L PUBLIC RADIO (Aug. 18, 2016, 1:15 pm ET), <http://www.npr.org/sections/thetwo-way/2016/08/18/490498158/justice-department-will-phase-out-its-use-of-private-prisons>.

<sup>8</sup> Human Rights First, *Jails and Jumpsuits: Transforming the U.S. Immigration Detention System—A Two-Year Review 7-12* (Oct. 6, 2011), <http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Jails-and-Jumpsuits-report.pdf>.

<sup>9</sup> See, e.g., Nina Bernstein, *U.S. to Reform Policy on Detention for Immigrants*, N.Y. TIMES, (Aug. 5, 2009), <http://www.nytimes.com/2009/08/06/us/politics/06detain.html?pagewanted=all>; See also Human Rights First, *Jails and Jumpsuits*, *supra* note 8 at 4-6.

<sup>10</sup> Schriro Report, *supra* note 6, at 2-3.

<sup>11</sup> See ICE, *Performance-Based National Detention Standards 2011*, <https://www.ice.gov/doclib/detention-standards/2011/pbnds2011.pdf>. However, the 2011 standards represent a major improvement over ICE’s previous standards, which were deficient even in comparison to prison and jail standards. See also *Written Statement of The American Civil Liberties Union: Hearing on Holiday on ICE: The U.S. Department of Homeland Security’s New Immigration Detention Standards, Before the H. Judiciary Subcommittee on Immigration Policy and Enforcement* (Mar. 28, 2012), [https://www.aclu.org/files/assets/aclu\\_detention\\_standards\\_hearing\\_statement\\_final\\_2.pdf](https://www.aclu.org/files/assets/aclu_detention_standards_hearing_statement_final_2.pdf).

Association’s model standards for civil immigration detention.<sup>12</sup> In 2013, the U.S. Commission on International Religious Freedom (USCIRF) concluded that “all detainees, including asylum seekers, continue to be detained under inappropriately penal conditions.”<sup>13</sup> USCIRF found that even the facilities that ICE described as “civil detention” facilities imposed restrictions on detainee movement, often do not permit detainees to wear their own regular clothes, retain penal practices such as frequent headcounts (sometimes as often as eight times daily), and maintain penal architectural elements such as “perimeter fences, razor wire, barbed wire, or concertina coils, and locked entry doors as well as an extensive use of video and sound monitoring throughout the facilities.”<sup>14</sup> In September 2015, the U.S. Commission on Civil Rights reached the same conclusion, finding that “DHS and its component agencies and contractees detain undocumented immigrants in a manner inconsistent with civil detention and instead detain many undocumented immigrants like their criminal counterparts in violation of a detained immigrant’s Fifth Amendment Rights.”<sup>15</sup>

## 2. OVER-DETENTION, PRIVATIZATION, AND THE NEED FOR LESS DETENTION

The growth of immigration detention is closely tied to the growth of the private prison industry. The reason is that as Immigration and Naturalization Service (INS), and later Immigration and Customs Enforcement (ICE), rapidly expanded the detention of immigrants in the 1990s and 2000s, the agency repeatedly chose to further outsource detention rather than developing in-house detention capacity. (Indeed, the Corrections Corporation of America’s inaugural contract was with INS in 1983, to detain immigrants in Texas.<sup>16</sup>)

As a result, the overwhelming majority of people detained in ICE custody are now held in non-federal facilities. While ICE does utilize a handful of federally-owned detention facilities—known as Service Processing Centers—around the country, these facilities hold fewer than 4,000 detainees, or about 12 percent of ICE’s detention population.<sup>17</sup> All other ICE detainees are held in a mixture of private prisons and local jails—with a substantial majority in private prisons. According to ICE, 73 percent of people detained by the agency are now held in facilities operated by private prison

<sup>12</sup> See A.B.A., *ABA Civil Immigration Detention Standards* (2012), <http://www.americanbar.org/content/dam/aba/administrative/immigration/abaimmdetstds.authcheckdam.pdf>.

<sup>13</sup> See U.S. Commission on International Religious Freedom, *Assessing the U.S. Government’s Detention of Asylum Seekers: Further Action Needed to Fully Implement Reforms* 4 (Apr. 2013), <http://www.uscirf.gov/sites/default/files/resources/ERS-detention%20reforms%20report%20April%202013.pdf>

<sup>14</sup> *Id.* at 4-5.

<sup>15</sup> U.S. Commission on Civil Rights, *Statutory Enforcement Report: The State of Civil Rights at Immigration Detention Facilities* 97-106 (Sept. 2015), [http://www.usccr.gov/pubs/Statutory\\_Enforcement\\_Report2015.pdf](http://www.usccr.gov/pubs/Statutory_Enforcement_Report2015.pdf).

<sup>16</sup> Grassroots Leadership, *The Dirty Thirty: Nothing to Celebrate About 30 Years of Corrections Corporation of America* 1 (June 2013), [http://grassrootsleadership.org/sites/default/files/uploads/GRL\\_Dirty\\_Thirty\\_formatted\\_for\\_web.pdf](http://grassrootsleadership.org/sites/default/files/uploads/GRL_Dirty_Thirty_formatted_for_web.pdf); See also Lee Fang, *How Private Prisons Game the Immigration System*, THE NATION (Feb. 27, 2013), <https://www.thenation.com/article/how-private-prisons-game-immigration-system/>

<sup>17</sup> National Immigrant Justice Center, *The Immigration Detention Transparency & Human Rights Project: August 2015 Report* 5 (Aug. 2015), <http://immigrantjustice.org/sites/immigrantjustice.org/files/images/NIJC%20Transparency%20and%20Human%20Rights%20Project%20August%202015%20Report%20FINAL3.pdf>.

companies.<sup>18</sup> This represents a significant increase over 2009, when 49 percent of ICE detention beds were run by private prison companies.<sup>19</sup>



These trends have enriched private prison investors. In 2008, the two biggest private prison companies—Corrections Corporation of America (CCA) and GEO Group (GEO)—received a combined \$307 million in revenue from ICE detention contracts. By 2015, that number had more than doubled, to more than \$765 million.

Most recently, the Obama administration’s 2014 abrupt policy shift toward mass family detention—detaining thousands of young children and their mothers to “send a message” against others who might seek to enter the United States<sup>20</sup>—has created an enormous windfall for the private prison industry. Last year, just one family detention facility in Dilley, Texas accounted for 14 percent of CCA’s revenue.<sup>21</sup> Indeed, as CCA noted in its annual report, the company’s increased federal revenues in 2015 “primarily resulted from” the Dilley family detention contract.<sup>22</sup>

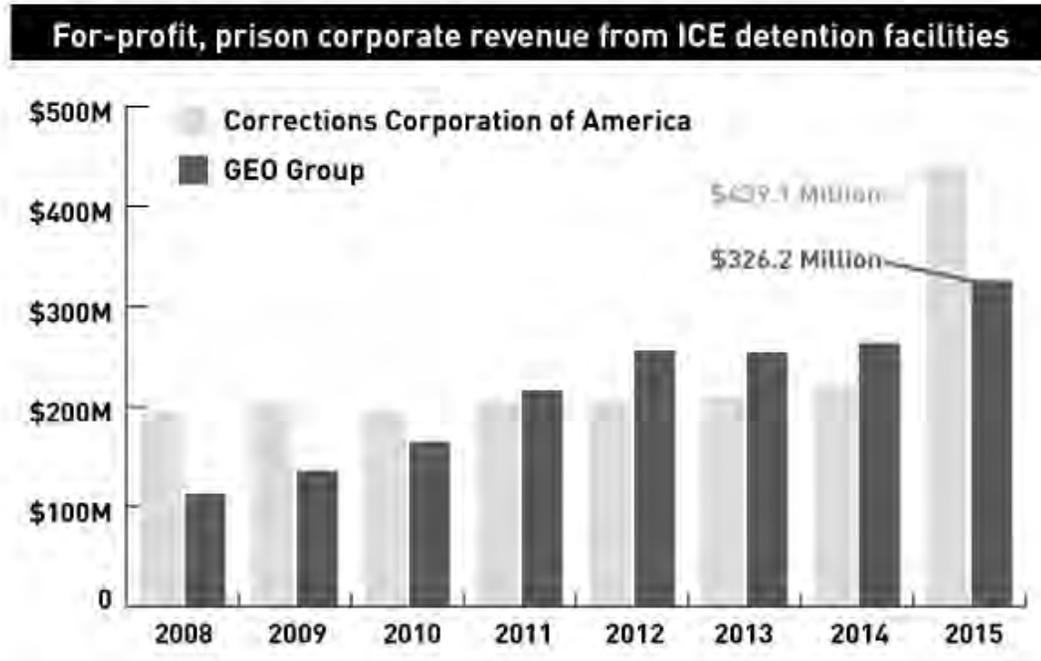
<sup>18</sup> Steven Nelson, *Private Prison Companies, Punched in the Gut, Will Keep Most Federal Business*, U.S. NEWS & WORLD REPORT (Aug. 18, 2016), <http://www.usnews.com/news/articles/2016-08-18/private-prison-companies-punched-in-the-gut-will-keep-most-federal-business>.

<sup>19</sup> Grassroots Leadership, *Payoff: How Congress Ensures Private Prison Profit with an Immigration Detention Quota 6* (Apr. 2015), [http://grassrootsleadership.org/sites/default/files/reports/quota\\_report\\_final\\_digital.pdf](http://grassrootsleadership.org/sites/default/files/reports/quota_report_final_digital.pdf)

<sup>20</sup> Julia Preston, *Detention Center Presented as Deterrent to Border Crossings*, N.Y. TIMES (Dec. 15, 2014), <http://www.nytimes.com/2014/12/16/us/homeland-security-chief-opens-largest-immigration-detention-center-in-us.html>.

<sup>21</sup> Chico Harlan, *Inside the Administration’s \$1 billion Deal to Detain Central American Asylum Seekers*, WASH. POST (Aug. 14, 2016), [https://www.washingtonpost.com/business/economy/inside-the-administrations-1-billion-deal-to-detain-central-american-asylum-seekers/2016/08/14/e47f1960-5819-11e6-9aee-8075993d73a2\\_story.html](https://www.washingtonpost.com/business/economy/inside-the-administrations-1-billion-deal-to-detain-central-american-asylum-seekers/2016/08/14/e47f1960-5819-11e6-9aee-8075993d73a2_story.html).

<sup>22</sup> Corrections Corp. of America, Annual Report (Form 10-K) for the fiscal year ended December 31, 2015, at 62 (Feb. 25, 2016).



Private prison companies have also engaged in extensive lobbying and other influence-peddling that appears to be aimed at maintaining ICE’s heavy reliance on their industry. A recent report by the nonprofit Grassroots Leadership examined CCA and GEO’s lobbying disclosure documents, and found that both companies repeatedly disclosed that they engaged in direct lobbying on “Issues related to comprehensive immigration reform,” “Issues relating to housing of ICE prison inmates,” and DHS appropriations for ICE detention facilities. The vast majority of both companies’ lobbying expenditures occurred in quarters when they were lobbying the DHS Appropriations Subcommittee.<sup>23</sup> The revolving door between ICE and the private prison industry also raises serious concerns about agency capture. David Venturella left a position as an assistant director at ICE (where he pushed to apprehend more immigrants to boost deportation numbers) to become Executive Vice President for Corporate Development at GEO.<sup>24</sup> Julie Myers Wood, formerly the DHS Assistant Secretary in charge of ICE, now serves on GEO’s board of directors.<sup>25</sup>

However, the harms of over-detention are not limited to private prisons. The other form of outsourced detention—ICE contracts with state and local facilities—also expanded significantly in the 1990s and 2000s. As INS and then ICE expanded these county jail contracts, the agency failed to keep many of these contracts updated to the agency’s latest detention standards. In particular, both a 2014 Government Accountability Office (GAO) report and a 2015 National Immigrant Justice Center (NIJC) report found that ICE continues to permit many county jails to operate under

<sup>23</sup> Grassroots Leadership, *Payoff: How Congress Ensures Private Prison Profit with an Immigration Detention Quota*, at 11-13 (Apr. 2015), [http://grassrootsleadership.org/sites/default/files/reports/quota\\_report\\_final\\_digital.pdf](http://grassrootsleadership.org/sites/default/files/reports/quota_report_final_digital.pdf)

<sup>24</sup> Andrea Jones, *The For-Profit Immigration Imprisonment Racket*, ROLLING STONE (Feb. 22, 2013), <http://www.rollingstone.com/politics/news/the-for-profit-immigration-imprisonment-racket-20130222>; See also Center for Responsive Politics, *David Venturella Employment Timeline* (last visited Sept. 12, 2016), [https://www.opensecrets.org/revolving/rev\\_summary.php?id=78082](https://www.opensecrets.org/revolving/rev_summary.php?id=78082).

<sup>25</sup> GEO Group, *Board of Directors, Julie M. Wood* (last visited Sept. 12, 2016), [http://www.geogroup.com/Julie\\_M\\_Wood](http://www.geogroup.com/Julie_M_Wood)

the oldest version of its detention standards, which are more than fifteen years old and predate not only ICE's 2009 detention reform initiative, but the creation of ICE as a separate agency.<sup>26</sup> NIJC, Detention Watch Network, and the ACLU have also identified serious, life-threatening deficiencies in ICE's oversight of both private prison contracts and county jail contracts.<sup>27</sup> Moreover, because the purpose of jails is to hold people in criminal custody, they operate in a manner inconsistent with civil detention principles. Indeed, some jails actually intermingle ICE detainees in housing units together with prisoners held on criminal charges.<sup>28</sup>

The longstanding failure of ICE to ensure safe, humane conditions of civil detention in its outsourced detention system—both county jails and private prisons—underscores the difficult, important oversight task that a federal agency faces whenever it hands people in federal custody over to non-federal entities. And it suggests that ICE should heed the Justice Department's recent conclusion that private prisons "compare poorly" to federally-run prisons.<sup>29</sup> That poor performance carries over to county jails as well. Thus, a long-term strategy to assure safe, humane, and truly civil conditions cannot rely on ICE's default strategy of outsourcing to private prisons or county jails. Instead, ICE must ensure the federal government maintains direct operational control over all but a handful of ICE detention beds.

### 3. HUMAN CONSEQUENCES OF OVER-DETENTION AND PRIVATIZATION

ICE's ever-expanding reliance on private prisons has taken a terrible human toll. Although all three major private prison companies have agreed to abide by ICE's most recent detention standards, there is no guarantee that the companies will actually follow through on that promise. And their record of abuse, neglect, and misconduct gives little reason to believe that they will.

Take, for example, CCA's Eloy Detention Center in Arizona. Since 2003, fourteen detainees have died at Eloy—which makes it the deadliest immigration detention facility in the nation.<sup>30</sup> In 2012, a routine annual inspection evaluated Eloy's suicide

<sup>26</sup> U.S. Government Accountability Office, *Immigration Detention: Additional Actions Needed to Strengthen Management and Oversight of Facility Costs and Standards*, GAO-15-153, 28-35 (Oct. 2014), <http://www.gao.gov/assets/670/666467.pdf>; See also National Immigrant Justice Center, *The Immigration Detention Transparency & Human Rights Project: August 2015 Report* 5-7 (Aug. 2015), <http://immigrantjustice.org/sites/immigrantjustice.org/files/images/NIJC%20Transparency%20and%20Human%20Rights%20Project%20August%202015%20Report%20FINAL3.pdf>.

<sup>27</sup> Detention Watch Network & National Immigrant Justice Center, *Lives in Peril: How Ineffective Inspections Make ICE Complicit in Immigration Detention Abuse* (Oct. 2015), <http://immigrantjustice.org/sites/immigrantjustice.org/files/THR-Inspections-FOIA-Report-October-2015-FINAL.pdf>; See also American Civil Liberties Union, *Detention Watch Network & National Immigrant Justice Center, Fatal Neglect: How Ice Ignores Deaths in Detention* (Feb. 2016), [https://www.aclu.org/sites/default/files/field\\_document/fatal\\_neglect\\_acludwnnjjc.pdf](https://www.aclu.org/sites/default/files/field_document/fatal_neglect_acludwnnjjc.pdf).

<sup>28</sup> U.S. Government Accountability Office, *Immigration Detention: Additional Actions Needed to Strengthen Management and Oversight of Facility Costs and Standards*, GAO-15-153, 9 (Oct. 2014), <http://www.gao.gov/assets/670/666467.pdf>; Schriro Report, *supra* note 6 at 21.

<sup>29</sup> Memorandum from Sally Yates, Deputy Attorney General, U.S. Department of Justice, regarding Reducing Our Use of Private Prisons (Aug. 18, 2016), <https://www.justice.gov/opa/file/886311/download>

<sup>30</sup> Megan Jula & Daniel Gonzalez, *Eloy Detention Center: Why so many suicides?*, ARIZONA REPUBLIC (July 29, 2015), <http://www.azcentral.com/story/news/arizona/investigations/2015/07/28/eloy-detention-center-immigrant-suicides/30760545/>; ICE, *List of Deaths in ICE Custody, 10/1/2003 to*

prevention policies. The inspectors found that Eloy's suicide watch room—the place where people at the most acute risk of suicide are supposed to be housed and whose chief purpose is to deny them the means to kill themselves—contained “structures or smaller objects that could be used in a suicide attempt.”<sup>31</sup> The following year, Elsa Guadalupe-Gonzalez hanged herself in one of Eloy's general population units. Two days later, Jorge Garcia-Mejia hanged himself in a different general population unit. ICE conducted death reviews afterward, which found that “confusion as to who has the authority to call for local emergency medical assistance” led to delays in CCA staff calling 911 after each suicide. The reviews also found that CCA and ICE staff failed to conduct an appropriate debriefing of medical and security staff after the two suicides, and that Eloy lacked a formal suicide prevention plan.<sup>32</sup> Just over two years later, on May 20, 2015, José de Jesús Deniz Sahagun committed suicide in his cell just hours after a doctor had removed him from suicide watch. ICE's death review found that Eloy *still* had not adopted a suicide prevention plan at the time of Mr. Deniz Sahagun's death.<sup>33</sup>

The most horrific example of sexual abuse in ICE custody also comes from a CCA facility. Between 2009 and 2010, a CCA guard responsible for transporting detainees from CCA's Hutto detention facility to the airport for their deportation flights sexually assaulted multiple women while en route, typically at night. His modus operandi was to stop his van on the way to the airport, order each woman outside of the van, and sexually assault them on the side of the road. He was able to do this with impunity because, in violation of CCA's contract with ICE, the company permitted him to drive the women without a fellow guard in the van. The only reason why his sexual abuse came to light was that one of the women reported the abuse to an airport employee before boarding her deportation flight.<sup>34</sup>

A number of detainees have tried to protest their mistreatment and unnecessary detention by engaging in hunger strikes, especially as the number of asylum seekers in detention has risen in recent years.<sup>35</sup> However, private prison companies are willing to

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7/28/2016 (Sept. 8, 2016),

[https://www.ice.gov/sites/default/files/documents/FOIA/2016/detaineeDeaths\\_07\\_28\\_2016.pdf](https://www.ice.gov/sites/default/files/documents/FOIA/2016/detaineeDeaths_07_28_2016.pdf)

<sup>31</sup> NIJC, *In Focus: ICE Inspections at Eloy Federal Contract Facility, Arizona*, <http://immigrantjustice.org/focus-ice-inspections-elyo-federal-contract-facility-arizona> (last visited Sept. 8, 2016). Inexplicably, ICE's inspectors nevertheless gave Eloy a passing rating on suicide prevention. *Id.*

<sup>32</sup> Human Rights Watch, *US: Deaths in Immigration Detention* (July 7, 2016)

<https://www.hrw.org/news/2016/07/07/us-deaths-immigration-detention>; <https://perma.cc/H7CD-CESP>; <https://perma.cc/KB73-R7E5j>.

<sup>33</sup> *Id.*

<sup>34</sup> ACLU, *ACLU of Texas Today Files Federal Lawsuit on Behalf of Women Assaulted at T. Don Hutto Detention Center* (Oct. 19, 2011), <https://www.aclu.org/news/documents-obtained-aclu-show-sexual-abuse-immigration-detainees-widespread-national-problem>; ACLU of Texas, *Their Stories In Their Own Words* (Oct. 19, 2011), <https://www.aclutx.org/en/press-releases/hutto-sexual-abuse-case-background>; Renee Feltz, *Guard's arrest highlights sexual assault of immigrant detainees*, PBS (Aug. 27, 2010), <http://www.pbs.org/wnet/need-to-know/security/lax-regulations-lead-to-sexual-assault-of-immigrant-detainees/3149/>.

<sup>35</sup> See, e.g., Julián Aguilar, *For Detained Immigrants on Hunger Strikes, Results Aren't Guaranteed*, TEX. TRIB. (Nov. 28, 2015), <https://www.texastribune.org/2015/11/28/detained-immigrants-hunger-strikes-could-be-gamble/>; Associated Press, *Judge Approves Force-Feeding of Detainee on Hunger Strike* (Dec. 8, 2015), <https://www.yahoo.com/news/judge-approves-force-feeding-detainee-hunger-strike-234845109.html?ref=qs>; Jennifer Chowdhury, *South Asian Detainees Seeking Asylum*, NBC NEWS (Oct. 21, 2015, 3:29 PM), <http://www.nbcnews.com/news/asian-america/south-asian-detainees-seeking-asylum-hold-hunger-strike-n448681>; Elise Foley, *Detained Immigrant Women Claim Retaliation for Hunger Strike*, HUFFINGTON POST POL. (Nov. 3, 2015, 5:41 PM), <http://www.huffingtonpost.com/entry/immigrant-detention-hunger->

go to great lengths to squelch such protests. When detainees went on hunger strike at GEO's Northwest Detention Center in Tacoma, Washington to protest conditions of confinement and lack of access to bond hearings, GEO staff invited them to meet with an assistant warden to discuss their grievances—and then escorted them directly into solitary confinement cells without the promised meeting. They were released from solitary only after the ACLU of Washington and Columbia Legal Services filed a lawsuit alleging that these actions violated the First Amendment.<sup>36</sup> At CCA's Hutto detention facility in Texas, women who had been detained after seeking asylum began refusing to eat last November in protest of their continued detention; in news reports, ICE denied the existence of a hunger strike even as the women described CCA retaliation.<sup>37</sup> It was later revealed that CCA had adopted a written policy explicitly instructing its staff how to retaliate against detainees who are refusing to eat, which the policy described as "protesting in a passive aggressive manner." The policy authorizes CCA staff to put the facility on lock-down in response to a food strike, rescind commissary-purchasing privileges for the entire facility, and rescind TV, radio, visitation, and telephone access for those participating in the protest.<sup>38</sup>

Once detained, people are entirely dependent on ICE and its contractors for medical care, because of barriers to getting care from an outside doctor while detained. But private prison companies, which are incentivized to cut medical staffing and deny care to maximize shareholder return, have a grisly track record in this area. In February 2016, the ACLU, Detention Watch Network, and the National Immigrant Justice Center examined each of the deaths in custody over a two-year period in which ICE's own death review concluded that non-compliance with ICE medical standards contributed to the person's death. Six of these eight deaths took place in private prisons.<sup>39</sup> For example, when Evalin-Ali Mandza had a heart attack at GEO's Denver Contract Detention Facility in Aurora, Colorado, medical staff did not even call 911 until nearly an hour after a code-blue emergency was called. At one point during this hour-long delay, a nurse attempted to perform an electrocardiogram (EKG) on Mandza but was unable to get a reading, then performed the wrong test, and then was unable to interpret the results because she had not received the necessary training. Another nurse prioritized filling out transfer paperwork over calling 911, even after a

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strike\_563918c3e4b0307f2caaf975; Kate Linthicum, *Why 26 Asylum-Seekers in a California Detention Center Have Stopped Eating*, L.A. TIMES (Nov. 11, 2015, 5:00 AM),

<http://www.latimes.com/local/lanow/la-me-ln-in-adelanto-hunger-strike-20151110-story.html>; Aviva Stahl, *More than 100 US Immigrant Detainees Are on Hunger Strike this Thanksgiving*, VICE NEWS (Nov. 26, 2015, 5:10 PM), <https://news.vice.com/article/more-than-100-us-immigrant-detainees-are-on-hunger-strike-this-thanksgiving>; *Why Immigrant Detainees In California Just Launched A Hunger Strike*, THINK PROGRESS (Nov. 2, 2015),

<http://thinkprogress.org/immigration/2015/11/02/3718005/adelanto-hunger-strike/>; Roque Planas, *Immigration Detainees Begin Hunger Strike at Georgia Detention Center*, HUFFINGTON POST (Apr. 21, 2016, 7:18 pm ET) [http://www.huffingtonpost.com/entry/immigration-detainees-hunger-strike\\_us\\_57194fd3e4b0d0042da8bfb1](http://www.huffingtonpost.com/entry/immigration-detainees-hunger-strike_us_57194fd3e4b0d0042da8bfb1).

<sup>36</sup> Steven Hsieh, *After Lawsuit, ICE Releases Hunger Strikers From Solitary Confinement*, THE NATION (Apr. 4, 2014), <https://www.thenation.com/article/after-lawsuit-ice-releases-hunger-strikers-solitary-confinement/>.

<sup>37</sup> Alexis Garcia-Ditta, *Hutto Hunger Strike Reportedly Growing Despite ICE Denials*, TEXAS OBSERVER (Nov. 5, 2015), <https://www.texasobserver.org/hutto-hunger-strike-reportedly-growing-despite-ice-denials/>.

<sup>38</sup> *A Shocking Glimpse Inside America's Privatized Detention Facilities for Immigrants*, THINKPROGRESS (Mar. 10, 2016) <http://thinkprogress.org/justice/2016/03/10/3757575/secretive-world-of-privatized-immigrant-detention/>.

<sup>39</sup> American Civil Liberties Union, *Detention Watch Network & National Immigrant Justice Center, Fatal Neglect: How Ice Ignores Deaths in Detention 6* (Feb. 2016), [https://www.aclu.org/sites/default/files/field\\_document/fatal\\_neglect\\_acludwnniic.pdf](https://www.aclu.org/sites/default/files/field_document/fatal_neglect_acludwnniic.pdf).

doctor had ordered the call to be made.<sup>40</sup> In July 2016, Human Rights Watch analyzed ICE death reviews from eighteen subsequent deaths and found similar failures. For example, before his death at CCA's Houston Contract Detention Facility, Peter George Carlisle Rockwell complained of blurred vision to medical staff. Although a physician's assistant determined he should be seen by a higher-level provider within a day, that appointment was never scheduled. Ten days later, Mr. Rockwell collapsed of a hemorrhagic stroke, but staff failed to recognize the emergency, delayed calling 911, delayed starting CPR, and did not apply an automated external defibrillator (AED) until 13 minutes after his collapse. By the time he was transported to the hospital, Mr. Rockwell was already nonresponsive and had to be placed on a ventilator; he died seven days later.<sup>41</sup>

## II. HOW TO REDUCE THE IMMIGRATION DETENTION POPULATION

According to ICE, the agency keeps approximately 24,500 people in private prisons on any given day.<sup>42</sup> Accordingly, to reduce the immigration detention population enough to cancel all of these contracts without major investments in new federal detention facilities and without replacing private prisons with county jail beds, the government must shift approximately that number of people from detention to release on recognizance, release on bond, or release on various forms of supervision.

To carry out that shift, DHS should generally stop relying on detention as a means of ensuring court appearance, and chiefly reserve detention for effectuating removal orders. In place of its current mass detention apparatus, the government should rely on community-based compliance mechanisms: release on recognizance, bond, and community-based ATDs with case management services.

As of June 2016, more than 25,000 of the 37,000 people in ICE detention did not have a final order of removal;<sup>43</sup> depending on the outcome of their immigration or expedited removal proceedings, these individuals may end up either being deported or granted permission to remain in the United States. Replacing detention with community-based compliance mechanisms for those with pending immigration proceedings is a proven technique, is consistent with the best practices for pretrial detention and supervision in the criminal justice system, and would dramatically reduce the number of people held in detention.

This policy shift would not create significant public safety risks. Approximately 15,000 of the 25,000 detainees without final orders have no criminal record whatsoever. For the 10,000 with criminal records, many could be safely supervised in the community—including those subject to INA § 236(c)'s mandatory custody

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<sup>40</sup> *Id.* at 7-8.

<sup>41</sup> Human Rights Watch, *US: Deaths in Immigration Detention* (July 7, 2016), <https://www.hrw.org/news/2016/07/07/us-deaths-immigration-detention>.

<sup>42</sup> Steven Nelson, *Private Prison Companies, Punched in the Gut, Will Keep Most Federal Business*, U.S. NEWS & WORLD REPORT (Aug. 18, 2016), <http://www.usnews.com/news/articles/2016-08-18/private-prison-companies-punched-in-the-gut-will-keep-most-federal-business>.

<sup>43</sup> ICE WRD Report, *supra* note 4, at 6.

requirements. A recent study found that half of those detained under INA § 236(c)'s mandatory custody requirement would be candidates for release even using ICE's current, release-averse risk assessment.<sup>44</sup> Moreover, ICE's current risk assessment system does not distinguish between people who recently committed serious offenses and those who have been rehabilitated or "aged out" of crime.<sup>45</sup> These distinctions are important, because there are a range of tools available to secure the compliance of people on supervision, depending on the severity and recency of their criminal history and other risk factors. Indeed, there are many models that ICE can draw upon from best practices in the criminal justice system.

Although shifting to a community-based model of compliance would represent a major change in strategy for ICE, the idea is hardly unprecedented. The Vera Institute of Justice recommended exactly this path for ICE's predecessor agency in 2000:

How can the INS most effectively assure compliance with the law and, at the same time, treat noncitizens in a just and humane manner? The research suggests the answer is for INS to release to alternatives (such as community supervision) as many people as it can, as quickly as it can, while they complete their immigration court hearings. The alternatives would include not only community supervision, at varying levels of intensity, but also the existing . . . alternatives of bond, parole, and recognizance. Once individuals have completed their hearings, the INS would reassign those required to leave the country to the more rigorous alternatives—either detention or intensive supervision. In this way, detention would be reserved for those who cannot be released and, along with the most intense supervision, for people who are at the stage of the removal process when they are most likely to abscond.<sup>46</sup>

Indeed, in the 16 years since the Vera Institute made its recommendations to INS, the state of the art in criminal justice supervision has been further advanced by more research and application in the field.

To carry out this reduction in the detention population, the government must commit itself to two key tasks:

*First*, the government should embrace best practices from the criminal justice system and replace most detention with a range of calibrated, community-based alternatives. See Point III, *infra*.

*Second*, both DHS and DOJ should fully exercise their authority to release individuals on parole and bond so that ICE no longer detains individuals who pose no significant flight risk or danger to the community. See Point IV, *infra*.

Only both of these changes—a commitment to using appropriate and calibrated community-based compliance tools, and the expansive use of release authority—will allow the government to reduce the detained population enough so that DHS can end its reliance on private prisons. Notably, the executive branch can carry out this shift

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<sup>44</sup> See Robert Koulisch, *Using Risk to Assess the Legal Violence of Mandatory Detention*, 5:30 LAWS, at 20 (July 5, 2016), <http://www.mdpi.com/2075-471X/5/3/30>.

<sup>45</sup> *Id.* at 11.

<sup>46</sup> Vera Institute of Justice, *Testing Community Supervision for the INA: An Evaluation of the Appearance Assistance Program*, Vol. 1, at 70 (Aug. 2000), available at [http://archive.vera.org/sites/default/files/resources/downloads/INS\\_finalreport.pdf](http://archive.vera.org/sites/default/files/resources/downloads/INS_finalreport.pdf).

from detention to community-based compliance mechanisms without any legislative changes.

Separate and apart from the administrative policy reforms that DHS/ICE should undertake, both Congress and the executive must scrap the 34,000-bed ICE detention quota. This quota (an annual requirement that ICE “maintain” at least 34,000 detention beds regardless of operational needs) is arbitrary, irrational, wasteful, and an extreme outlier. No corrections system in America operates under a similar quota.<sup>47</sup> At a time when DOJ and states across the country are instituting common-sense criminal justice reforms to reduce incarceration levels, it is unacceptable for Congress to legislatively guarantee unnecessary profits for the private prison companies and county jails that contract with ICE. Congress should repeal the bed quota, and ICE should not permit the quota to drive any detention policies or practices. Instead of filling an arbitrary number of beds each night, DHS should concentrate its detention resources and operations on those immigrants with final removal orders who are likely to be deported in the near future. Even with the quota in place, ICE can begin a shift to community-based compliance mechanisms, since ICE has enough flexibility to cancel a substantial number of contracts without dropping below the arbitrary minimum number of beds.<sup>48</sup>

### **III. ICE MUST REPLACE DETENTION WITH A RANGE OF CALIBRATED ALTERNATIVES**

This section describes how ICE can ensure immigration respondents comply with immigration proceedings through various community-based mechanisms, in place of detention.

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<sup>47</sup> *Written Statement of the American Civil Liberties Union: Hearing on the Release of Criminal Detainees by U.S. Immigration and Customs Enforcement: Policy or Politics?, Before the H. Comm. on the Judiciary 5-6 (Mar. 19, 2013), available at [https://www.aclu.org/files/assets/aclu\\_statement\\_for\\_3\\_19\\_house\\_judiciary\\_committee\\_hearing\\_on\\_immigration\\_enforcement\\_final\\_3\\_18\\_13.pdf](https://www.aclu.org/files/assets/aclu_statement_for_3_19_house_judiciary_committee_hearing_on_immigration_enforcement_final_3_18_13.pdf); National Immigrant Justice Center, Eliminate the Detention Bed Quota, <http://www.immigrantjustice.org/eliminate-detention-bed-quota> (last visited Sept. 22, 2016).*

<sup>48</sup> ICE currently has contracts for a total detention capacity of approximately 44,453 beds, more than 10,000 beds above the congressional quota. See ICE ERO Custody Management Division, Authorized DMCP Facilities (Dec. 8, 2015) (adult detention contracts have a defined capacity of 39,609 beds, plus at least 1,190 “as-needed” beds potentially available); GEO Group, 2015 Annual Report at 10 (2016) (Karnes has 1,158-bed family detention capacity); CCA, Annual Report (Form 10-K) for the fiscal year ended December 31, 2015, at 16 (Feb. 25, 2016) (Dilley has 2,400-bed family detention capacity); A.B.A. Commission on Immigration, Family Immigration Detention: Why the Past Cannot Be Prologue, at 19 (July 31, 2015), [https://www.americanbar.org/content/dam/aba/publications/commission\\_on\\_immigration/FINAL%20ABA%20Family%20Detention%20Report%208-19-15.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/FINAL%20ABA%20Family%20Detention%20Report%208-19-15.authcheckdam.pdf) (Berks has 96-bed family detention capacity).

## 1. ADOPT BEST PRACTICES FROM THE CRIMINAL JUSTICE SYSTEM BY RESERVING COERCIVE MEASURES AND INTENSIVE SUPERVISION FOR THOSE WHO POSE THE GREATEST RISK OF NON-COMPLIANCE

Alternatives to incarceration have widespread support in the pretrial criminal justice context. They 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, and the Council on Foreign Relations' Independent Task Force on U.S. Immigration Policy.

This does not mean, however, that detention should simply be replaced with across-the-board intensive supervision. Criminologists widely agree that when designing community correctional programs, it is important to calibrate the intrusiveness and intensity of supervision to the individual, with frequent check-ins and monitoring reserved for those who pose the highest risks of non-compliance.<sup>49</sup> Directing too many supervision resources and interventions at supervisees who are already low-risk can actually have the counterintuitive effect of making them more likely to fail by imposing multiple unnecessary burdens on them.<sup>50</sup>

In line with this principle, many detainees pose little risk of flight or danger to the community and could be released on bond or their own recognizance, costing the government nothing for supervision and monitoring.

Criminal justice research shows that inexpensive and nonintrusive interventions can significantly enhance compliance for people released on recognizance or bond. Reminding defendants of their court appearances—known as court date notification—is a pretrial release intervention designed to reduce failures to appear (FTAs) and associated costs. Numerous studies have demonstrated the effectiveness of court date notification. With funding from the U.S. Department of Justice's Bureau of Justice Assistance, the Pretrial Justice Institute (PJI) conducted an extensive literature review and identified court notification programs in six states that have been rigorously evaluated. The target populations ranged from defendants issued a citation/summons for minor offenses to those charged with felonies. All of the studies concluded that court date notifications are effective at reducing FTA in court.<sup>51</sup> For example, a Colorado pilot project designed to measure the impact of telephone calls to defendants concluded that live-telephone callers either reminding defendants to come

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<sup>49</sup> See, e.g., Christopher T. Lowenkamp & Edward J. Latessa, *Understanding the Risk Principle: How and Why Correctional Interventions Can Harm Low-Risk Offenders*, TOPICS IN COMMUNITY CORRECTIONS (2004); Pew Center on the States, *Risk/Needs Assessment 101: Science Reveals New Tools to Manage Offenders* (Sept. 2011), [http://www.pewtrusts.org/~media/legacy/uploadedfiles/pca\\_assets/2011/pewriskassessmentbriefpdf.pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/pca_assets/2011/pewriskassessmentbriefpdf.pdf)

<sup>50</sup> See Lowenkamp & Latessa, *supra* note 49.

<sup>51</sup> Pretrial Justice Institute, *State of the Science of Pretrial Release Recommendations and Supervision* 15-20 (June 2011), [https://www.pretrial.org/download/research/PJI%20State%20of%20the%20Science%20Pretrial%20Recommendations%20and%20Supervision%20\(2011\).pdf](https://www.pretrial.org/download/research/PJI%20State%20of%20the%20Science%20Pretrial%20Recommendations%20and%20Supervision%20(2011).pdf)

to court or notifying them of their warrant status after the FTA could reduce FTAs by more than half.<sup>52</sup>

## 2. UTILIZE MORE INTENSIVE SUPERVISION AS NEEDED

More intense forms of supervision and monitoring, such as enrollment in an ATD program, carry higher costs than release on recognizance or bond, but those costs still pale in comparison to the cost of detention. They are thus well-suited for mitigating the risks associated with individuals who cannot be released on recognizance or a simple bond. Current ATDs range in cost from pennies,<sup>53</sup> to \$8.49 per person per day<sup>54</sup> depending on the type of monitoring.

The most restrictive alternatives, like ankle-attached GPS monitors, are very effective for higher-risk individuals but also the most costly. Ankle monitors require confinement in a specific space for many hours per day to charge the device. Not only is this a substantial restriction on liberty, but it is more expensive for ICE and is rarely necessary for an asylum-seeker who has every incentive to attend her hearing. DHS should only use GPS devices when no other conditions could reasonably ensure public safety and compliance with the immigration process. When ICE has used intensive supervision, however, it has achieved impressive compliance. A recent GAO report found that over 95 percent of those on “full-service” ATDs (which include both case management and technology-based tracking) appeared for their final hearings.<sup>55</sup>

For the vast majority of immigrants who require supervision, community-support ATD models are far more appropriate than electronic monitoring. These models are particularly well-suited for asylum seekers, torture survivors, the elderly, individuals with medical and mental health needs, and other vulnerable groups. To be most effective, ATD programs must be operated by community-based nonprofit organizations, as these organizations are trained and equipped to identify the needs of immigrants and to build trust with immigrant communities.

Holistic programs that offer case management services and facilitate access to legal counsel as well as safe and affordable housing have been shown to substantially increase program compliance without the extensive use of electronic monitoring. Previous pilots have shown excellent results:

- *95.6 percent appearance rate:* In 2013 Lutheran Immigration and Refugee Services (LIRS) entered into a memorandum of understanding with

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<sup>52</sup> Timothy Schnacke et. al., *Increasing Court Appearance Rates and Other Benefits of Live-Caller Telephone Court Date Reminders: The Jefferson County, Colorado, FTA Pilot Project and Court Date Notification Program* 15 (May 2011), <https://www.pretrial.org/download/research/Jefferson%20County%20CO%20Increasing%20Court%20Appearance%20Rates%202011.pdf>.

<sup>53</sup> S. Comm. on Appropriations, *Summary of Emergency Supplemental Funding Bill*, <http://www.appropriations.senate.gov/news/chairwoman-mikulski-releases-summary-emergency-supplemental-funding-bill> (Jul. 2014).

<sup>54</sup> ICE FY 2016 Congressional Budget Justification, [http://www.dhs.gov/sites/default/files/publications/DHS\\_FY2016\\_Congressional\\_Budget\\_Justification.pdf](http://www.dhs.gov/sites/default/files/publications/DHS_FY2016_Congressional_Budget_Justification.pdf).

<sup>55</sup> Government Accountability Office, *Alternatives to Detention: Improved Data Collection and Analyses Needed to Better Assess Program Effectiveness* (Nov. 2014), <http://www.gao.gov/assets/670/666911.pdf>.

ICE to screen vulnerable immigrants for release and enrollment in LIRS' Community Support Initiative. Between June 2013 and Nov. 2014, 44 out of 46 formal referrals were in full compliance.<sup>56</sup>

- *96 percent appearance rate at 3 percent the cost of detention:* In 1999 the Immigration and Naturalization Service (INS) partnered with Lutheran Immigration and Refugee Service to assist 25 Chinese asylum seekers released from detention. INS released the asylum seekers into open shelters around the country, where they received housing, food, medical care, and continuous case management. Participants had a 96 percent appearance rate and the annual program costs were just 3 percent of what it would have cost to detain them.<sup>57</sup>
- *97 percent appearance rate:* Between 1999 and 2002 INS collaborated with Catholic Charities of New Orleans to work with 39 asylum seekers released from detention and 64 "indefinite detainees" who could not be removed from the United States. The court appearance rate for participants was 97 percent and the program cost \$1,430 per year per client, a fraction of the cost of detaining them.<sup>58</sup>

### 3. SECURE COMPLIANCE OF FAMILIES THROUGH ATTORNEYS

It is well-documented that being represented by an attorney is a strong indicator that a family will appear for their immigration court hearings. According to an analysis of 2015 data from the Executive Office of Immigration Review (EOIR) by Human Rights First, 98 percent of families with legal counsel are in compliance with their obligations to appear for court hearings.<sup>59</sup>

Accordingly, if DHS and DOJ simply ensure that all family units in immigration proceedings receive representation by attorneys, there will be no reason to keep these families detained except on the rare occasions when a particular parent or child poses an unacceptable risk to public safety.

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<sup>56</sup> Women's Refugee Commission et. al., *The Real Alternatives to Family Detention*, <https://www.womensrefugeecommission.org/images/zdocs/Real-Alternatives-to-Family-Detention.pdf>

<sup>57</sup> Lutheran Immigration and Refugee Service, *Unlocking Liberty: A Way Forward for U.S. Immigration Detention Policy* (Oct. 27, 2011), [www.lirs.org/dignity](http://www.lirs.org/dignity).

<sup>58</sup> Sue Weishar, *A More Human System: Community-Based Alternatives to Immigration Detention (Part 2)*, Just South Quarterly (2010).

<sup>59</sup> Human Rights First, *Myth vs. Fact: Immigrant Families' Appearance Rates in Immigration Court* (July 2015), <http://www.humanrightsfirst.org/sites/default/files/MythvFact-Immigrant-Families.pdf>.

## IV. AVOID DETAINING PEOPLE WHO POSE LITTLE DANGER OR FLIGHT RISK, AND USE SUPERVISION TO MITIGATE RISKS FOR OTHERS

Currently, ICE severely underutilizes its existing statutory authority to release individuals on parole and bond. Through the measures described below, ICE could significantly reduce the number of people who remain unnecessarily detained. We have estimated the likely impact of each measure based on publicly available data.

### 1. END FAMILY DETENTION AND THE MASS DETENTION OF ASYLUM SEEKERS

Recommendations: Close all three family detention centers, utilize immigration court (Immigration and Nationality Act § 240) removal proceedings rather than expedited removal for family units, and release asylum-seeking families to sponsors in the community.

Clarify to all ICE field offices that the 2009 Directive—Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture—remains in full force and has not been rescinded by the DHS 2014 Enforcement Priorities Memorandum.

**Estimated Reduction in Detained Population: 11,000 to 15,000 people<sup>60</sup>**

Asylum seekers are people who are entering the United States in order to seek protection from harm in their home countries—a status that is protected under international law. Under the 1951 Convention relating to the Status of Refugee and its 1961 Protocol, asylum seekers are not to be penalized for arriving at a country of refuge without immigration documentation, and the detention of asylum seekers is subject to narrow limits.<sup>61</sup>

Asylum seekers are generally good candidates to be released while their immigration cases are pending. Empirical research has found that asylum seekers fleeing

<sup>60</sup> See Dep't of Homeland Security, *Detained Asylum Seekers, Fiscal Year 2014 Report to Congress*, at 8 T.1, 23 T. 7 (Sept. 9, 2015) (FY 14 asylum detention data obtained by Human Rights First via FOIA); discussion *supra* note 48 (family detention capacity). The average daily population (ADP) of detained asylum-seekers was approximately 8,170 in FY 2014 (the most recent statistics available). This ADP was calculated using FY 14 statistics on the number and average lengths of stay for detained affirmative asylum applicants, credible fear asylum applicants, and defensive asylum applicants, using the following formula:  $ADP = \text{Admissions} \times \text{ALOS} / 365$ . Due to the dramatic increase in use of family detention and the 86% increase in findings of credible fear between FY 2014 and FY 2016, however, the FY 2014 asylum statistics likely represent a significant undercount. To account for this, the ACLU added a range of between 3,000 and 7,000 additional people to the estimate to account for increased detention of adult asylum-seekers and changes in family detention (in particular, the activation and full ramp-up of the Dilley and Karnes family detention facilities) during this time period.

<sup>61</sup> Human Rights First, *Lifeline on Lockdown: Increased U.S. Detention of Asylum Seekers 8-9* (July 2016), [http://www.humanrightsfirst.org/sites/default/files/Lifeline-on-Lockdown\\_0.pdf](http://www.humanrightsfirst.org/sites/default/files/Lifeline-on-Lockdown_0.pdf).

persecution are predisposed to comply with legal processes, even if they might lose their cases, and can be effectively supervised in the community. Releasing asylum seekers (on alternatives as needed) and affording legal assistance can protect the rights of asylum seekers and facilitate compliance with proceedings and legitimate removals, at far less human and financial cost than detention.<sup>62</sup> But in recent years, the U.S. has significantly increased its detention of asylum seekers. The shift follows—and appear to be influenced by—two major policy changes announced by the Obama administration in 2014: a policy of deterring Central American families from seeking asylum by detaining them en masse, and a November 2014 immigration enforcement priorities memorandum that deems people “apprehended at the border or at ports of entry attempting to unlawfully enter the United States” as top enforcement priorities.<sup>63</sup>

Government data show a sharp decrease in parole grants in the wake of these policy changes, even though they did not actually rescind the existing 2009 Asylum Parole Directive.<sup>64</sup> In 2012, before these changes, ICE granted parole to 80 percent of arriving asylum seekers who established a credible fear.<sup>65</sup> By contrast, in the first nine months of 2015, ICE granted parole to only 47 percent of arriving asylum seekers who established a credible fear. In one ICE district, the grant rate was as low as 12 percent.<sup>66</sup> A recent report by Human Rights First documented numerous denials of parole even when asylum seekers meet the Parole Directive’s criteria.<sup>67</sup>

Decreased parole grants translate into increased detention of asylum seekers. In FY 2014, ICE held 44,270 asylum seekers in immigration detention facilities—a three-fold increase from 2010, when the agency detained 15,769 asylum seekers.<sup>68</sup>

Additionally, under the administration’s family detention policy, approximately 3,600 mothers and children seeking asylum are held in family detention centers at any given time. This is the federal government’s largest project of detaining families since the mass incarceration of Japanese Americans during World War II. The policy overwhelmingly affects families with legitimate asylum cases; in Q2 2016 (the most

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<sup>62</sup> See generally Mark Noferi, *A Humane Approach Can Work: The Effectiveness of Alternatives to Detention for Asylum Seekers* (July 2015) available at <http://cmsny.org/publications/noferi-detention-asylum/>.

<sup>63</sup> See Memorandum from Jeh Johnson, Secretary of Homeland Security, regarding Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants (Nov. 20, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf); DHS, Statement by Secretary Johnson Regarding Today’s Trip to Texas (Dec. 15, 2014), <https://www.dhs.gov/news/2014/12/15/statement-secretary-johnson-regarding-today%E2%80%99s-trip-texas>.

<sup>64</sup> The 2009 Asylum Parole Directive provides that an arriving asylum seeker determined to have a “credible fear” of persecution should generally be paroled from detention if his or her “identity is sufficiently established, the alien poses neither a flight risk nor a danger to the community, and no additional factors weigh against release.” ICE Directive 11002.1, Parole of Arriving Aliens Found to Have A Credible Fear of Persecution or Torture (2009), available at [https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole\\_of\\_arriving\\_aliases\\_found\\_credible\\_fear.pdf](https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_aliases_found_credible_fear.pdf)).

<sup>65</sup> USCIRF, *Assessing the U.S. Government’s Detention of Asylum Seekers*, *supra* note 13, at 9-10.

<sup>66</sup> ICE data obtained through a Freedom of Information Act Request by the ACLU and the Center for Gender and Refugee Studies at the UC Hastings School of Law.

<sup>67</sup> HRF, *Lifeline on Lockdown*, *supra* note 61, at 17-22. These include denials based on the November 2014 enforcement priorities; denials based on unexplained assertions of flight risk; denials based on the purported failure to establish identity even where asylum seekers have submitted extensive documentation; and denials without the interview required by the Parole Directive or any explanation of the reasons for the denial.

<sup>68</sup> See *id.* at 11.

recent quarter that is publicly available), 89.5% of detained families established credible fear.<sup>69</sup> And this detention is being carried out primarily by private prison companies, which manage the vast majority of the family detention beds now in operation.<sup>70</sup> The detention of adult asylum seekers is similarly reliant on private prisons. Five detention facilities—all of which are privately operated—held nearly a third of all detained asylum seekers nationwide in 2014.<sup>71</sup>

The government’s mass detention of asylum seekers raises serious human rights and civil rights concerns, imposes harms that are wildly out of proportion to the government’s interest in assuring people’s presence at court hearings, and is simply the wrong policy for a country that should act as a place of welcome and beacon of hope in an unstable world.

## 2. END PROLONGED DETENTION WITHOUT BOND HEARINGS

Recommendation: DHS and DOJ should construe the general immigration detention statutes to require a bond hearing before an immigration judge for all individuals detained more than six months, where the government must justify continued detention.

Estimated Reduction in Detained Population: At least 4,500 people<sup>72</sup>

As a result of court backlogs, people who challenge their deportation in immigration court are subjected to the longest average detention times.<sup>73</sup> Many immigrants—including asylum seekers and longtime lawful permanent residents—are incarcerated for months or even years while the immigration courts and federal courts resolve their immigration cases. Moreover, many detainees never receive the basic due process of a bond hearing to determine whether they can be released while their case is pending. As a result, many detainees are subjected to prolonged detention even though they have substantial challenges to removal and pose no flight risk or significant danger to public safety. Indeed, perversely, individuals who are likely to be legally entitled to remain in the United States are especially vulnerable to prolonged detention, as they have the strongest incentives to fight their cases despite being detained.<sup>74</sup>

<sup>69</sup> See USCIS Asylum Division, Family Facilities Credible Fear (May 16, 2016), [https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED\\_CF\\_RF\\_FamilyFacilitiesFY14\\_16Q2.pdf](https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_CF_RF_FamilyFacilitiesFY14_16Q2.pdf).

<sup>70</sup> See CCA, South Texas Family Residential Center, <http://www.cca.com/facilities/south-texas-family-residential-center>; GEO Group, Karnes County Residential Center, <http://www.geogroup.com/maps/locationdetails/23>.

<sup>71</sup> HRF, *Lifeline on Lockdown*, *supra* note 61, at 12-13. The five facilities are CCA’s T. Don Hutto Residential Center in Taylor, Texas; CCA’s South Texas Detention Complex in Pearsall, Texas; GEO’s Coastal Bend Detention Facility in Robstown, Texas; CCA’s Eloy Detention Center in Eloy, Arizona; and GEO’s LaSalle Detention Facility in Jena, Louisiana.

<sup>72</sup> This estimate is derived from an analysis of EOIR data obtained through the Freedom of Information Act of detained respondents whose removal cases were pending before EOIR for at least six months.

<sup>73</sup> Transactional Records Access Clearinghouse, *Legal Noncitizens Receive Longest ICE Detention*, Syracuse University (June 3, 2013), <http://trac.syr.edu/immigration/reports/321/>.

<sup>74</sup> ACLU, Prolonged Detention Fact Sheet, [https://www.aclu.org/sites/default/files/assets/prolonged\\_detention\\_fact\\_sheet.pdf](https://www.aclu.org/sites/default/files/assets/prolonged_detention_fact_sheet.pdf); TRAC Immigration, *Legal Noncitizens Receive Longest ICE Detention*, <http://trac.syr.edu/immigration/reports/321/> (“In a perverse way, individuals who were legally entitled to remain in the United States typically experienced the longest detention times”).

Such unnecessary detention causes harm to individuals and their families and imposes a significant financial burden on U.S. taxpayers, at an average cost of \$186.68 per detainee per day.<sup>75</sup>

This prolonged lack of access to bond hearings is also wildly out of step with practices in the criminal justice system, where judicial decisions regarding bond and release conditions are typically made within hours or days of arrest. In federal criminal cases, for example, these decisions are made at the defendant's initial appearance, which must be held "without unnecessary delay" before the nearest available magistrate or judicial officer.<sup>76</sup>

Six Courts of Appeals have held that prolonged immigration detention without constitutionally adequate review raises serious due process concerns, and the Second Circuit and Ninth Circuit have specifically identified six months as the presumptive point in time after which a bond hearing is required.<sup>77</sup> By adopting a presumptive six-month limit on detention without a bond hearing, after which time the government must justify further detention at a bond hearing before an immigration judge, DHS and DOJ would reconcile agency practice with these six appellate court rulings and significantly reduce unnecessary detention.<sup>78</sup>

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<sup>75</sup> This was calculated by dividing ICE's FY 2016 custody operations cost (\$2,316,744,000) by 365 days to obtain a daily custody operations cost (\$6,347,243.84) and dividing that by the number of FY 2016 authorized detention beds (34,000). See Dep't of Homeland Security FY 2017 Congressional Budget Justification, Vol. 2, at 3, 5, 6, [https://www.dhs.gov/sites/default/files/publications/FY%202017%20Congressional%20Budget%20Justification%20-%20Volume%202\\_1.pdf](https://www.dhs.gov/sites/default/files/publications/FY%202017%20Congressional%20Budget%20Justification%20-%20Volume%202_1.pdf). This is the same methodology that the National Immigration Forum used to calculate the average per-detainee, per-day cost of detention using FY 2013 statistics. See National Immigration Forum, *The Math of Immigration Detention*, at 2 (Aug. 2013), <https://immigrationforum.org/wp-content/uploads/2014/10/Math-of-Immigration-Detention-August-2013-FINAL.pdf>. The substantial cost increase from FY 2013 appears to be driven by the rise of family detention beginning in FY 2014.

<sup>76</sup> See 18 U.S.C. § 3142(f) (directing that decisions regarding conditions of release or detention be made at the initial appearance unless a continuation is granted, and limiting the duration of such continuances); Fed. R. Crim. P. 5(a) (requiring person arrested to be taken for initial appearance "without unnecessary delay"); *Mallory v. United States*, 354 U.S. 449, 455 (1957) (where defendant "was arrested in the early afternoon and was detained at headquarters within the vicinity of numerous committing magistrates," police decision to delay arraignment by six hours to interrogate him violated Fed. R. Crim. P. 5(a).); *Corley v. United States*, 556 U.S. 303, 320 (2009) (Rule 5 presentment requirement "stretches back to the common law").

<sup>77</sup> See *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015); *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015), cert. granted *Jennings v. Rodriguez*, 15-1204 (June 20, 2016). Other circuits have adopted a case-by-case analysis for when mandatory detention is unreasonably prolonged. See *Reid v. Donelan*, 819 F.3d 486 (1st Cir. 2016); *Diop v. ICE/Homeland Security*, 656 F.3d 221 (3d Cir. 2011); *Sopo v. Attorney General*, 825 F.3d 1199 (11th Cir. 2016); *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003) (requiring release when mandatory detention exceeds a reasonable period of time).

<sup>78</sup> This rule would apply to the general immigration detention statutes, 8 U.S.C. §§ 1225, 1226, and 1231, and not the detention statutes that apply specifically to individuals detained for terrorism or other national security reasons, 8 U.S.C. §§ 1226a, 1531–1537. A six-month period would also be consistent with the Supreme Court's ruling in *Demore v. Kim*, which upheld the constitutionality of mandatory detention under 8 U.S.C. § 1226(c) for the "brief period of time necessary" for removal proceedings—a period that it understood to average between a month and a half and five months—as well as the Court's holding in *Zadvydas v. Davis* that the detention of individuals with final orders of removal beyond six months is presumptively unreasonable. 538 U.S. 510, 513 (2003); 533 U.S. 678, 701 (2001).

### 3. INTERPRET THE MANDATORY CUSTODY STATUTE TO PERMIT A RANGE OF CUSTODIAL OPTIONS, AND APPLY IT ONLY TO IMMIGRANTS RECENTLY CONVICTED OF SERIOUS CRIMES WHO DO NOT HAVE MERITORIOUS IMMIGRATION CASES

Recommendations: Recognize that electronic monitoring, house arrest, and other coercive liberty restrictions satisfy INA § 236(c)'s "custody" requirement. Narrow application of mandatory custody to exclude those with substantial challenges to removal. Properly construe INA § 236(c) to apply only to individuals who are taken into ICE custody at or near the time of their release from criminal custody.

Estimated Reduction in Detained Population: 5,000 to 10,000 people<sup>79</sup>

INA § 236(c), codified at 8 U.S.C. § 1226(c), requires that noncitizens—including many longtime lawful permanent residents—with certain criminal convictions be mandatorily kept in ICE custody for the "brief period" necessary for removal proceedings.<sup>80</sup> In many cases, the convictions at issue are very minor, such as drug possession or shoplifting. INA § 236(c) is routinely applied to require detention even when the person poses no flight risk or danger and is highly likely to be eligible for immigration relief that would allow them to remain in the country.

Former government officials and legal scholars have long criticized the mandatory detention statute as imposing an overly restrictive constraint on the agency's discretion to make optimal use of its limited detention resources.<sup>81</sup> The government has made a bad situation even worse by adopting an expansive interpretation of INA § 236(c) that is not required by the statute and, in many cases, applies mandatory detention in ways that raise serious constitutional concerns. By limiting INA § 236(c) to its proper scope, DHS will gain flexibility to ensure that detention is used only where an individual poses a danger or flight risk that requires confinement, and not imposed where an individual may be safely supervised in the community. The government should do this in several ways.

<sup>79</sup> The lower bound of 5,000 people was calculated by analyzing the number of detained respondents with at least one INA § 236(c) predicate charge whose case was pending before EOIR in June 2016. The upper bound of 10,000 people is based on the number of detainees with criminal records as of June 2016. See ICE WRD Report, *supra* note 4, at 6. Although not all detainees with criminal records are subject to INA § 236(c), the mandatory custody requirement encompasses many low-level offenses, making it difficult to identify which detainees would be subject to this requirement without knowing their actual offense histories.

<sup>80</sup> See *Demore*, 538 U.S. at 513.

<sup>81</sup> See, e.g., Margaret Taylor, *Demore v. Kim: Judicial Deference to Congressional Folly, Immigration Stories* (2005), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=739231](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=739231).

## A. RECOGNIZE THAT ELECTRONIC MONITORING, HOUSE ARREST, AND OTHER COERCIVE LIBERTY RESTRICTIONS SATISFY 236(C)'S "CUSTODY" REQUIREMENT

For those individuals who are properly subject to INA § 236(c), ICE should frequently use electronic monitoring, house arrest, or other restrictive forms of custody short of costly detention. This approach would address ICE's legitimate interest in ensuring court appearance and community safety, but at far lesser humanitarian and fiscal costs.

INA § 236(c) provides that the Attorney General "shall take into custody any alien who" is "deportable" or "inadmissible" for a qualifying crime, and prohibits that person's "release . . . from custody" except for purposes of the federal Witness Protection Program. INA § 1226(c) (emphasis added). However, INA § 236(c) does not place any textual limitation on the term "custody", and the term is not defined anywhere in the INA or immigration regulations.<sup>82</sup>

DHS should interpret the term "custody" in INA § 236(c) as including not only physical detention but alternative forms of custody such as electronic monitoring, curfews, and home detention. This definition of "custody" is consistent with federal law, which defines custody broadly. Federal habeas law, for example, defines custody as restraints on a person's liberty that are "not shared by the public generally."<sup>83</sup> Courts have interpreted custody as including probation, release on recognizance with conditions of supervision, mandatory attendance in a rehabilitative program, and even the intensive supervision requirements under ICE's ISAP program.<sup>84</sup> In the criminal context, the Supreme Court has clarified in *Reno v. Koray* that the distinction between custody and release turns on whether a defendant is "subject to the control" of the Bureau of Prisons, not whether he or she is physically incarcerated.<sup>85</sup> Federal court precedent thus suggests that the term "custody" has a broad meaning that includes alternatives such as home arrest and electronic monitoring. It is well within DHS's discretion—as well as sound policy—to adopt a broader interpretation of "custody" that includes restrictive forms of supervision short of costly detention.

<sup>82</sup> By contrast, 8 U.S.C. § 1226(a), which provides general detention authority to the government in immigration cases, is worded in terms of "detention" and nowhere mentions custody.

<sup>83</sup> *Jones v. Cunningham*, 371 U.S. 236, 240 (1963).

<sup>84</sup> In the federal habeas context, custody has been found to include probation, *Olson v. Hart*, 965 F.2d 940 (10th Cir. 1993), parole, *Jones v. Cunningham*, 371 U.S. 236 (1963); *DePompei v. Ohio Adult Parole Authority*, 999 F.2d 138 (6th Cir. 1993), conditions placed on a defendant released on recognizance while his case was on appeal, *Hensley v. Municipal Court*, 411 U.S. 345, 351 (1973), and mandatory attendance at rehabilitative program, *Dow v. Circuit Court of the First Circuit*, 995 F.2d 922, 923 (9th Cir. 1993). By rendering its decision in *Nguyen v. B.I., Inc.*, 435 F. Supp. 2d 1109 (D. O.R. 2006), the district court de facto recognized that supervision under ISAP, including wearing an ankle bracelet and 12-hour curfews, constituted custody. In a separate context, under the federal escape statute, 18 U.S.C. § 751(a), escape or attempted escape from custody may occur from a pre-release guidance center, work release program, or halfway house. See *United States v. Rudinsky*, 439 F.2d 1074 (6th Cir. 1971); *Perez-Calo v. United States*, 757 F. Supp. 1 (D. Puerto Rico 1991).

<sup>85</sup> 515 U.S. 50, 62-63 (1995) (holding, in sentencing context, that whether an individual is "released" depends on if he remains "subject to [the custodian's] control," and not whether he is still subject to "jail-like conditions").

Instead, however, DHS narrowly interprets “custody” to require the physical *detention* of individuals. This interpretation is inconsistent with the use of the term “custody” in federal law generally, and results in the unnecessary detention of everyone subject to INA § 236(c). Just as the Bureau of Prisons exercises broad discretion to determine which form of custody to use in individual cases, ICE should be making discretionary decisions about which forms of custody to use for people subject to INA § 236(c).

## B. NARROWLY APPLY MANDATORY CUSTODY TO EXCLUDE THOSE WITH SUBSTANTIAL CHALLENGES TO REMOVAL

INA § 236(c) requires ICE to maintain in its custody noncitizens who are “deportable” or “inadmissible” on designated criminal grounds. In *Matter of Joseph*,<sup>86</sup> the BIA broadly construed INA § 236(c) to apply to any noncitizen who is charged with deportability or inadmissibility under one of the designated grounds, unless the individual can show that the government is “substantially unlikely” to establish the charges. This highly expansive standard, however, is not required by the statute or regulations, and—in combination with DHS’s narrow construction of the term “custody”—results in the across-the-board detention of many individuals who have substantial challenges to removal, including claims to relief that would permanently entitle a noncitizen to remain in the United States, such as cancellation of removal.<sup>87</sup> For example, in nearly 20% of cases that were decided in FY 2015, the Immigration Court ruled in favor of immigrants held in mandatory custody.<sup>88</sup>

DHS and DOJ should reject the overbroad interpretation of the statute set forth in *Joseph*.<sup>89</sup> Rather, where an individual has a substantial challenge to removal, including a claim to permanent immigration relief, the government should not subject them to mandatory detention, but provide a bond hearing to determine if s/he poses a danger or flight risk that can only be mitigated with actual detention.

<sup>86</sup> 22 I & N Dec. 799 (BIA 1999).

<sup>87</sup> Indeed, under the *Joseph* standard, even an individual whose proceedings are terminated by an immigration judge on the grounds that he or she is not removable is subject to mandatory detention if ICE chooses to appeal that decision to the BIA, unless the individual can demonstrate that the government is “substantially unlikely to prevail” on its appeal. See *Joseph*, 22 I&N Dec. at 665.

<sup>88</sup> EOIR, *Certain Criminal Charge Completion Statistics 2* (Aug. 2016), <https://www.justice.gov/sites/default/files/pages/attachments/2016/08/25/criminal-charge-completion-statistics-201608.pdf>.

<sup>89</sup> Notably, the Supreme Court in *Demore* upheld only the mandatory detention, for a brief period of time, of an individual who had *conceded* deportability, because such detention was reasonably related to the purpose of INA § 236(c). 538 U.S. at 527-28. In contrast, the mandatory detention of individuals with substantial challenges to removal raises serious due process concerns because such individuals do not pose the categorical flight risk or danger to public safety that warrants their mandatory imprisonment. See, e.g., *Gonzalez v. O’Connell*, 355 F.3d 1010 (7th Cir. 2004) (noting that Supreme Court specifically left open this question in *Demore*); *Demore*, 538 U.S. at 577 (Breyer, J., dissenting) (concluding that the constitutional claim to bail where an individual raises a substantial challenge to removal is “strong”); *Tijani*, 430 F.3d at 1246-47 (Tashima, J. concurring) (concluding that *Joseph* standard is “egregiously” unconstitutional in case of LPR challenging deportability); *Casas v. Devane*, No. 15-cv-8112, 2015 WL 7293598 (N.D. III. Nov. 19, 2015) (holding mandatory detention of person with good faith challenge to removal unconstitutional; petitioner sought post-conviction relief from guilty plea due to ineffective assistance of counsel); *Papazoglou v. Napolitano*, 2012 WL 1570778, at \*5 (N.D. III. May 3, 2012) (mandatory detention of individual whom the immigration judge had granted new adjustment of status to lawful permanent residence “present[ed] a question of constitutionality”).

### C. PROPERLY CONSTRUE THE MANDATORY CUSTODY STATUTE TO APPLY ONLY TO INDIVIDUALS WHO ARE TAKEN INTO ICE CUSTODY AT THE TIME OF THEIR RELEASE FROM CRIMINAL CUSTODY

Finally, the government should stop misapplying mandatory custody to individuals who are taken into ICE custody months or years after serving their related criminal sentence. Congress envisioned mandatory custody to require ICE to take custody of noncitizens “when the alien is released” from serving their criminal sentences for certain designated crimes,<sup>90</sup> meaning at the time of such release. Nonetheless, under the BIA’s decision in *Matter of Rojas*,<sup>91</sup> the government applies INA § 236(c) to individuals it takes into custody any time after their release from criminal custody, even if the release occurred nearly 20 years ago, when the statute went into effect. As a result, instead of using the mandatory custody statute to ensure a continuous chain of custody between the criminal justice and immigration enforcement systems, ICE is applying mandatory custody to individuals who have been at liberty for months or years and leading productive lives in their communities.

The Ninth Circuit has rejected *Matter of Rojas*, holding that “[u]nder the plain language of 8 U.S.C. § 1226(c), the government may detain without a bond hearing *only those criminal aliens it takes into immigration custody promptly upon their release*” from criminal custody for an offense referenced in the mandatory detention statute.<sup>92</sup> *Rojas* also has been rejected by most district courts to consider the question and by three of six judges sitting en banc in the First Circuit.<sup>93</sup> By contrast, four other circuits have agreed with the government’s position, albeit on different grounds.<sup>94</sup>

Nothing precludes the government from adopting a narrower construction of the statute that conforms to congressional intent and makes more efficient use of the government’s limited resources. DHS and DOJ should abandon the overbroad interpretation set forth in *Matter of Rojas* and apply mandatory custody only to individuals ICE apprehends at the time of their release from criminal custody.

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<sup>90</sup> 8 U.S.C. § 1226(c).

<sup>91</sup> 23 I. & N. Dec. 117 (BIA 2001).

<sup>92</sup> *Preap v. Johnson*, --- F.3d ---, 2016 WL 4136983, at \*11 (9th Cir. 2016). The Ninth Circuit specifically affirmed district court orders requiring bond hearings for detainees in California and Washington State who were not *immediately* detained upon their release from relevant criminal custody); See also *Khoury v. Asher*, No. 14- 35482, 2016 WL 4137642, at \*1 (9th Cir. Aug. 4, 2016) (unpublished).

<sup>93</sup> See *Castañeda v. Souza*, 810 F.3d 15, 18–43 (1st Cir. 2015) (en banc) (Barron, J.).

<sup>94</sup> See *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015); *Sylvain v. Attorney General*, 714 F.3d 150 (3d Cir. 2013); *Hosh v. Lucero*, 680 F.3d 375 (4th Cir. 2012); *Olmos v. Holder*, 780 F.3d 1313 (10th Cir. 2015).

#### 4. STOP IMPOSING EXORBITANT, UNAFFORDABLE BONDS

Recommendation: DHS and DOJ should require that immigration officials use the least restrictive conditions necessary to ensure the individual's appearance for court proceedings, including alternatives to detention, when determining such conditions under INA § 236(a) or 212(d)(5). Moreover, where ICE or an Immigration Judge sets a cash bond, they must consider the individual's ability to pay and impose no bond amount greater than necessary to ensure appearance. Finally, DHS should make a more flexible range of secured and unsecured bonds available, rather than require individuals to post the full cash amount to be released.

**Estimated Reduction in Detained Population: At least 1,300 people<sup>95</sup>**

Both the federal government and a growing consensus of federal courts have recognized that incarcerating criminal defendants solely because they cannot afford to pay bond is unconstitutional.<sup>96</sup> As the U.S. Department of Justice recently explained in a Georgia bail case, “a bail scheme that imposes financial conditions, without individualized consideration of ability to pay and whether such conditions are necessary to assure appearance at trial, violates the [due process and equal protection guarantees of the] Fourteenth Amendment.”<sup>97</sup> “[A] jurisdiction may not use a bail system that incarcerates indigent individuals without meaningful consideration of their indigence and alternative methods of assuring their appearance at trial.”<sup>98</sup>

The same concerns apply to immigrants kept in detention solely because they cannot afford to pay an ICE or immigration court bond. Nonetheless, neither ICE officials nor Immigration Judges routinely consider a person's ability to pay when setting bond or alternative conditions of supervision. Consequently, immigration detainees are routinely locked up solely due to their lack of money, without any finding that they pose a danger or flight risk that cannot be mitigated through other means.

<sup>95</sup> This is a very conservative estimate based on a national extrapolation of the average daily population of people detained for nontrivial periods of time on bonds they cannot afford to pay in the Central District of California. The Central District of California data are derived from *Hernandez v. Lynch*, No. 5:16-cv-00620 (C.D. Cal.).

<sup>96</sup> See, e.g., *Jones v. City of Clanton*, No. 2:15-cv-00034, 2015 WL 5387219, at \*2-3 (M.D. Ala. Sept. 14, 2015); *Walker v. City of Calhoun, GA*, No. 4:15-CV-0170-HLM, 2016 WL 361612, at \*10-11, 14 (N.D. Ga. Jan. 28, 2016) (granting class-wide preliminary injunction); *Pierce v. City of Velda City, MO*, No. 4:15-cv-00570-HEA, 2015 WL 10013006, at \*1 (E.D. Mo. June 3, 2015) (Dkt. 16) (issuing declaratory judgment); *Thompson v. Moss Point, MS*, No. 1:15-cv-00182-LG-RHW, 2015 WL 10322003, at \*1 (S.D. Miss. Nov. 16, 2015) (Dkt. 18) (same); *Cooper v. City of Dothan*, 1:15-cv-00425-WKW-TFM, 2015 WL 10013003, at \*3-4 (M.D. Ala. June 18, 2015) (Dkt. 7) (granting temporary restraining order); see also *Rodriguez v. Providence Cmty. Corr., Inc.*, No. 3:15-cv-01048, 2015 WL 9239821, at \*1, 6-7 (M.D. Tenn. Dec. 17, 2015) (holding that detaining misdemeanor probationers on money bail without an inquiry into their ability to pay was unconstitutional and granting class-wide preliminary injunction).

<sup>97</sup> Br. for the U.S. as Amicus Curiae, p.13, *Walker v. City of Calhoun*, 2016 WL 4417419 (2016), available at <https://www.justice.gov/crt/file/887436/download>; accord Statement of Interest of the United States, p. 1, *Jones v. City of Clanton* (hereinafter “DOJ Statement”), 2015 WL 5387219 (2015); U.S. Dep’t of Justice, Dear Colleague Letter, Mar. 14, 2016, at 7, available at <https://www.justice.gov/crt/file/832461/download> (“courts must not employ bail or bond practices that cause indigent defendants to remain incarcerated solely because they cannot afford to pay for their release.”).

<sup>98</sup> *Id.* DOJ Statement at 21.

As in the criminal justice context, the government should adopt bond-setting procedures to ensure that people in civil immigration proceedings are not incarcerated due to their poverty.

*First*, when setting conditions of release, the government should apply a standard at least as protective as the one that the federal Bail Reform Act applies to criminal defendants in federal court: use only the least restrictive means required to ensure appearance to guarantee that noncitizens are not unnecessarily deprived of their liberty. Under this standard, ICE and the IJ should first consider whether an individual can be released on his own recognizance and, if not, apply only those conditions of release (including bond and conditions of supervision) that are reasonably necessary to ensure his appearance.<sup>99</sup>

*Second*, the government should end its policy and practice of requiring immigration detainees to post the full cash value of the immigration bond to obtain release. The government's reliance on full cash bonds—without consideration of an individual's financial ability to pay the bond—is out of step with well-established procedures in federal and state courts, results in the detention of individuals based solely on their poverty, and is not required by the governing statute.<sup>100</sup> Bond systems for criminal detainees routinely accept the posting of deposit or property bonds, rather than insisting on payment of a full cash bond, and often rely on fully unsecured bonds.<sup>101</sup> Indeed, recent research indicates that for criminal defendants, unsecured bonds are just as effective at achieving public safety and court appearance as secured bonds.<sup>102</sup> DHS should bring its bond practices in line with the criminal justice system and permit individuals a more flexible range of secured and unsecured bonds, as appropriate to ensure their appearance.

## V. CONCLUSION

For decades, ICE and its predecessor agency have relied on outsourced detention—both county jails and private prisons—to fuel the expansion of the immigration detention system. As a result, ICE has never been able to ensure safe, humane conditions of civil detention, and the private prison industry has developed an alarmingly cozy relationship with the agency.

As described in this white paper, ICE needs to end its relationship with the private prison industry by significantly reducing its reliance on detention. Specifically, ICE should generally stop using detention as a means to ensure appearance for court proceedings. Instead, as the Vera Institute of Justice recommended to ICE's predecessor agency more than fifteen years ago, detention should be reserved chiefly for effectuating removal orders. This white paper identifies specific recommendations

<sup>99</sup> See 18 U.S.C. § 3142(a)-(c).

<sup>100</sup> 8 U.S.C. § 1226(a), the general immigration detention statute, refers broadly to “security approved by . . . the Attorney General” and does not require full cash bonds.

<sup>101</sup> Deposit bonds permit a defendant to post a percentage, such as 10%, of the bond as security, and the total bond amount becomes due only if he fails to appear. Property bonds allow the defendant to post property as security, which would be forfeited if the person fails to appear.

<sup>102</sup> See Pretrial Justice Institute, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option 3* (Oct. 2013), <http://www.pretrial.org/download/research/Unsecured%20Bonds.%20The%20As%20Effective%20and%20Most%20Efficient%20Pretrial%20Release%20Option%20-%20Jones%202013.pdf>.

for how to carry out that shift. The ACLU urges the HSAC Subcommittee and DHS to adopt these recommendations.

## **Exhibit D: Compendium of Congressional Actions Regarding the Use of Privatized Detention**

Numerous members of Congress have also called for the end of private contracts through a variety of means such as legislation, letters, press releases, and prepared statements. Below is a summary of some of the major calls to action from Members from across the country:

- **Legislation:**
  - (09/17/2015) Senator Sanders (I-VT) and Representative Grijalva (D-AZ) introduced the Justice is Not For Sale Act of 2015, which bans the use of private prisons and detention facilities, in both the House and the Senate (S. 2054 & H.R. 3543).<sup>1</sup> Co-Sponsors to H.R. 3543 include the following Representatives:
    - Grayson (D-FL), Ellison (D-MN), Smith (D-WA), Lowenthal (D-CA), Chu (D-CA), Schakowsky (D-IL), Napolitano (D-CA), Rush (D-IL), Lee (D-CA), Watson Coleman (D-NJ), Rangel (D-NY), Takano (D-CA), Waters (D-CA), Nadler (D-NY), Slaughter (D-NY), Gutierrez (D-IL), Meeks (D-NY), Honda (D-CA), McGovern (D-MA), Bass (D-CA), Norton (D-DC), Clark (D-MA), Serrano (D-NY), Lieu (D-CA), Kaptur (D-OH), Moore (D-WI), Johnson (D-GA), Jackson Lee (D-TX), Polis (D-CO), and Blumenauer (D-OR).
  
- **Letters:**
  - (08/22/2016) Senator Sanders and Representative Grijalva asked DHS to end private prison use in a letter to DHS Secretary Jeh Johnson.<sup>2</sup>
  - (09/26/2016) U.S. Senators, led by Senator Patrick Leahy (D-VT), submitted a letter expressing concern with the use of for-profit prison companies in immigration detention. In addition to Leahy, the letter is signed by the following Senators:
    - Durbin (D-IL), Murray (D-WA), Franken (D-MN), Menendez (D-NJ), Gillibrand (D-NY), Wyden (D-OR), Booker (D-NJ), Warren (D-MA), Merkley (D-OR), Sanders (I-VT), and Hirono (D-HI).<sup>3</sup>
  - (09/29/2016) Representatives Grijalva (D-AZ) and Schakowsky (D-IL) urged Secretary Johnson to end DHS's relationship with private prisons in a letter.<sup>4</sup>

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<sup>1</sup> JUSTICE IS NOT FOR SALE ACT OF 2015, S. 2054, 114<sup>th</sup> Cong. (2015): <https://www.congress.gov/114/bills/s2054/BILLS-114s2054is.pdf>; JUSTICE IS NOT FOR SALE ACT OF 2015, H.R. 3543, 114<sup>th</sup> Cong. (2015): <https://www.congress.gov/114/bills/hr3543/BILLS-114hr3543ih.pdf>.

<sup>2</sup> Sanders, Grijalva Ask DHS to End Private Prison Use, Aug. 22, 2016, [http://www.sanders.senate.gov/newsroom/press-releases/sanders-grijalva-ask-dhs-to-end-private-prison-use?utm\\_content=buffer78713&utm\\_medium=social&utm\\_source=twitter.com&utm\\_campaign=buffer](http://www.sanders.senate.gov/newsroom/press-releases/sanders-grijalva-ask-dhs-to-end-private-prison-use?utm_content=buffer78713&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer).

<sup>3</sup> Leahy Leads Senators in Demanding Answers from DHS on Use of Private Prisons, Sept. 26, 2016, <https://www.leahy.senate.gov/press/leahy-leads-senators-in-demanding-answers-from-dhs-on-use-of-private-prisons>.

<sup>4</sup> Grijalva, Schakowsky Call for Moratorium on For-Profit Detention Contracts & Transparency in DHS Review, Sept. 29, 2016, <https://grijalva.house.gov/news-and-press-releases/grijalva-schakowsky-call-for-moratorium-on-forprofit-detention-contracts-transparency-in-dhs-review/>.

- **Press Releases:**
  - (08/30/2016): Representative Smith (D-WA) released a press release praising DHS for reviewing privatized immigration detention.<sup>5</sup>
  - (08/30/2016) Representatives Torres (D-CA), Lofgren (D-CA), Roybal-Allard (D-CA), Gutiérrez (D-IL), Conyers, Jr. (D-MI), Polis (D-CO), Chu (D-CA), Sánchez (D-CA), and Becerra (D-CA) applauded the review of private detention centers and urged for their closure in a press release.<sup>6</sup>
  
- **Blog Posts:**
  - (09/21/2016) Representative Polis (D-CO) condemned the use of private contracts in a blog post for the Huffington Post.<sup>7</sup>
  
- **Statements:**
  - (09/22/2016) Representative Conyers, Jr. (D-MI) expressed his concern over the use of private prisons and detention centers during the Hearing on Oversight of the U.S. Immigration and Customs Enforcement before the Committee on the Judiciary.<sup>8</sup>

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<sup>5</sup> *Smith Statement on Department of Homeland Security's Decision to Establish Review of Privatized Immigration Detention*, Aug. 30, 2016, <https://adamsmith.house.gov/media-center/press-releases/smith-statement-on-department-of-homeland-security-s-decision-to>.

<sup>6</sup> *Members of Congress Applaud Announcement of DHS Review of Private Detention Centers*, Aug. 30, 2016, <https://torres.house.gov/media-center/press-releases/members-congress-applaud-announcement-dhs-review-private-detention>.

<sup>7</sup> Rep. Jared Polis, *Profiteering and Perpetuating Human Misery at Taxpayer Expense: The Worst Form of Corporations Co-Opting Government*, HUFFINGTON POST, Sept. 21, 2016, [http://www.huffingtonpost.com/jared-polis/profiteering-from-human-m\\_b\\_12082282.html](http://www.huffingtonpost.com/jared-polis/profiteering-from-human-m_b_12082282.html).

<sup>8</sup> *Statement of the Honorable John Conyers, Jr., Ranking Member for the Hearing on Oversight of the U.S. Immigration and Customs Enforcement Before the Committee on the Judiciary*, Sept. 22, 2016, <https://democrats-judiciary.house.gov/news/press-releases/statement-honorable-john-conyers-jr-ranking-member-hearing-oversight-us>.