Written Statement of the
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For a Hearing on

"Providing for the Detention of Dangerous Aliens"

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My name is Ahilan T. Arulanantham. I am the Deputy Legal Director of the ACLU of Southern California. I have spent much of the last seven years representing immigrants who spent months, and often years, in immigration detention. During that time I have served as counsel on several of the major court decisions in the field of immigration detention. My testimony today expresses the ACLU's strong opposition to the proposed legislation for which this hearing was convened.

Although immigration detention centers look and feel like prisons, especially to the immigrants locked inside, from a legal standpoint they differ from the criminal justice system's prisons in several crucial respects. Immigration detention is a form of *civil* detention, not a form of *criminal* punishment. Immigrants are sent to detention centers when the Department of Homeland Security (DHS) wants to deport them from the country. Sometimes that occurs because they have been convicted of a crime. In such cases the immigrants *first* serve their sentences and then, afterward, instead of being released as a U.S. citizen would be, they are sent to immigration detention while awaiting a decision on whether the conviction will result in their deportation. In many other situations, however, the trigger for immigration detention is not criminal activity at all, but instead some other kind of immigration matter, such as overstaying a visa or attempting to gain asylum. *More than half* of the people in immigration detention have never been convicted of any crime.[1] As one might expect then, the purpose of immigration detention is *not* to punish people for crimes, but rather to ensure that they appear for their deportation hearings and, if they lose, to facilitate their removal. Because detention while a deportation case is pending is not punishment for criminal activity, immigrants have no right to

[1] Donald Kerwin and Serena Yi-Ying Lin, Immigrant Detention: Can ICE Meet Its Legal Imperatives and Case Management Responsibilities? 20 (Migration Policy Institute Sept. 2009), *available at* http://www.migrationpolicy.org/pubs/detentionreportSept1009.pdf (reporting that 58% of the detainees held on January 25, 2009 did not have criminal convictions).

an appointed attorney when they seek to challenge their immigration detention. In fact, an estimated 84% of immigration detainees do not have lawyers.[2]

Most importantly for present purposes, immigration detainees have no absolute right to a prompt bond hearing before a judge, as all criminal defendants do. The existing immigration laws make bond hearings available for some immigrants in detention, but not for others. In fact, as DHS interprets the immigration laws, even if you win your case, DHS can continue to detain you without bond while it appeals the decision in your favor. As a result, our immigration detention system already detains thousands of individuals who present no danger to the community or risk of flight.

Creating a vast new federal preventive detention authority, as the legislation under consideration is *guaranteed* to do, would result in the unnecessary detention of thousands more individuals who would otherwise contribute to the economy, serve their communities, and support their families, which often include U.S. citizen children and spouses. It would also come at great expense to taxpayers, who would foot the bill at a rate of $122 per detainee per day. Most important, the proposed legislation would also come at great cost to the liberty of thousands of immigrants for whom incarceration without due process is unjustifiable. In our society liberty is the norm, while detention without trial is the narrow exception. The Constitution's Due Process Clause protects each person's freedom by ensuring that no one is detained absent strong procedural protections to prevent the unnecessary deprivation of liberty. We cannot support a law that would allow the indefinite detention of the asylum-seeker who thirsts for freedom or the prolonged detention without due process of the immigrant mother who wants to pursue her legal right to stay and care for her U.S. citizen children. Such laws are fit for

[2] ABA Commission on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases.* (2010), 5-8, *available at* http://new.abanet.org/immigration/pages/default.aspx.

repressive regimes, not for the United States of America. The ACLU therefore strongly opposes this bill.

I. Raymond, Warren, and Many

"Dangerous aliens" is the title of today's hearing, but most of the immigrants covered by the proposed legislation are anything but dangerous. I want to begin by sharing a few of their stories. Although many advocates focus on individuals who are in immigration custody because they have committed crimes, I also want to discuss those who form the majority of immigration detainees – people who have no criminal history.

The Reverend Raymond Soeoth is a Christian Minister who fled Indonesia with his wife in 1999, where they faced persecution for practicing their faith. Reverend Soeoth was initially allowed to work in the U.S. while applying for asylum and eventually became the assistant minister for a church. He also opened a small corner store with his wife. Yet when his asylum application was denied in 2004, the government arrested him at his home and took him into detention.

Even though Reverend Soeoth posed no danger or flight risk, had never been arrested or convicted of any crime, and had the right to continue litigating his case in both immigration and federal court, he spent over two-and-a-half years in an immigration detention center while the courts decided whether or not to reconsider his asylum claim. During that time, he never received a hearing before an Immigration Judge to determine whether his detention was justified. Instead, the decision on whether or not to release him was left to DHS officials who did not even interview him, let alone conduct a hearing. Unsurprisingly, they concluded after each review that he should remain detained, leaving Reverend Soeoth separated from his wife, his community and his congregation. Because his wife could not maintain the store that the couple had jointly

run, she was forced to shut it down – all because our government would not give him a 15-minute bond hearing in front of an Immigration Judge.

In February 2007, after we filed a habeas corpus petition in federal court to obtain a bond hearing for Reverend Soeoth, the court ruled in our favor. After two and a half years in detention, he finally received a bond hearing and was ordered released by an Immigration Judge. He has lived in his community – back with his wife and his congregation – ever since, without doing any harm to anyone. He ultimately returned to his position as a congregational leader, won the right to reopen his case, and will likely be granted asylum. Under the proposed legislation, he would never have gotten the bond hearing that led to his release.

Mr. Soeoth is not alone. Warren Joseph is a lawful permanent resident of the United States and a decorated veteran of the first Gulf War. He moved to the United States from Trinidad nearly 22 years ago and has five U.S. citizen children, a U.S. citizen mother and a U.S. citizen sister. A few months after coming to the U.S., when he was 21 years old, Warren enlisted in the U.S. Army. He served in combat positions in the Persian Gulf, was injured in the course of duty, and received numerous awards and commendations recognizing his valiant service in that war. At one point during the conflict, he returned to battle after being injured and successfully rescued his fellow soldiers.

Like many Gulf War veterans, Warren returned from the war with symptoms that were only later diagnosed as Post Traumatic Stress Disorder (PTSD). His sister recalls that she "was shocked to see how much Warren had changed." He was anxious, had recurring nightmares about killing people, and would wake up in a cold sweat. He became withdrawn and thought about suicide constantly.

In 2001, Warren unlawfully purchased a handgun to sell to individuals to whom he owed money. He fully cooperated with an investigation by the Bureau of Alcohol, Tobacco, and Firearms, and his actions were not deemed sufficiently serious to warrant incarceration. Two years later, however, suffering from partial paralysis and debilitating depression, Warren violated his probation by moving to his mother's house and failing to inform his probation officer. He served six months for the probation violation. Upon his release, in 2004, he was placed in removal proceedings and subjected to mandatory immigration detention.

Warren remained in immigration detention for more than three years while he fought his deportation. During his entire period of incarceration, he was never granted a bond hearing to determine whether his detention was justified. Indeed, even after the Third Circuit Court of Appeals concluded that he was entitled to apply for relief from removal, and remanded his case back to the immigration court, the government continued to subject Warren to mandatory detention. My colleagues at the ACLU filed a habeas petition on Warren's behalf, which was pending when the Immigration Judge granted him relief from removal, and DHS finally released him. Fortunately, DHS chose not to appeal the Immigration Judge's grant of relief. Otherwise, he could have spent additional months in mandatory detention pending the government's appeal.

Warren has lived a productive life since his release, but has struggled to understand how our country could have locked him in immigration detention for three years *for no reason* after he served honorably during the Gulf war.

Many Uch is another immigrant who would never have won his freedom under the proposed legislation. His story was featured in the PBS documentary "Sentenced Home." He left Cambodia as a child refugee with his parents, fleeing persecution by the Khmer Rouge. The family settled lawfully in Seattle, Washington. As a teenager, Many ran with a bad crowd and

was convicted of armed robbery: he drove the getaway car. Many served 40 months - the sentence prescribed by the state judge – and then was transferred to immigration detention because he was not a U.S. citizen.

Although his conviction rendered him deportable, the United States lacked a repatriation agreement with Cambodia, so after Many finished serving his sentence he was neither released nor deported. Instead, he was lost in legal limbo, remaining in immigration detention for 28 months waiting to be deported because DHS believed it had authority to detain him until our foreign policy differences with Cambodia were resolved, no matter how long that could take. This predicament, known as "indefinite" detention, was widespread prior to the Supreme Court's decision in *Zadvydas v. Davis*,[3] because the federal government recognized no temporal limit on how long such detention could last. However, after the Supreme Court read the immigration laws to generally authorize such detention for only six months, it became possible for people like Many to avoid a life of permanent imprisonment. He eventually filed a habeas corpus petition and was released under supervision. For the past 12 years he has regularly reported to Immigration and Customs Enforcement (ICE). Since Many's release, he has consistently been employed, married a U.S. citizen, and has a four-year-old American citizen daughter. He is an active contributing member of his community, working with young Cambodian immigrants as a mentor and community mediator, and also helps lead a Buddhist society. Last year, the Governor of Washington pardoned Many for his conviction.

Reverend Soeoth, Warren, and Many wasted years of their lives in immigration detention for no reason, separated from their jobs, their families (including U.S. citizen children), and their communities. The federal taxpayer spent approximately $122 each day– $45,000 per person per year – for each of them to be needlessly detained. They are three among thousands of

[3] 533 U.S. 678 (2001).

individuals who exemplify why detention must be a last resort, used only where necessary, and always accompanied by robust procedural protections such as bond hearings before an Immigration Judge.

II. Legal Principles

The proposed legislation dramatically expands DHS's detention authority in three areas. It greatly increases DHS's power to detain people *indefinitely* – that is, when no country will take them back, expands DHS's authority to detain people without bond hearings for *prolonged* periods of time, and increases DHS's authority to detain people without bond hearings based on *old convictions*. I will discuss each of these, and then discuss the ACLU's concerns with the proposed legislation's attempt to alter the federal courts' jurisdiction to consider challenges to DHS detention decisions.

a. Indefinite Detention

The proposed legislation would work a radical expansion in DHS' authority to detain a vast number of individuals *indefinitely*. Under this law, thousands of people would be subject to permanent incarceration without trial, at the discretion of low-level DHS officials. The creation of a vast new preventive detention system would constitute a grave breach of our constitutional obligations, and would also represent a tremendous waste of taxpayer resources, while doing little to make us safer.

The law governing the detention of people who cannot be repatriated to another country, such as Many Uch, derives from the Supreme Court's rulings in *Zadvydas v. Davis* and *Clark v. Martinez*.[4] *Zadvydas* rests on a principle fundamental to our Nation's jurisprudence: "In our society liberty is the norm," and detention without trial "is the carefully limited exception."[5] As

[4] *Zadvydas v. Davis*, 533 U.S. 678 (2001); *Clark v. Martinez*, 543 U.S. 371, 378 (2005).
[5] *United States v. Salerno*, 481 U.S. 739, 755 (1978).

a result, *Zadvydas* recognized that "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem."[6] To avoid resolving that problem, *Zadvydas* interpreted the immigration detention statutes to authorize detention for a "presumptively reasonable" six month period of time, during which DHS may detain immigrants while attempting to deport them.[7]

DHS has implemented the Supreme Court's directive through a scheme that already permits lengthy detentions while DHS works to remove non-citizens who have lost their immigration cases. Under current law, noncitizens ordered removed due to their criminal history or for national security reasons cannot be released from detention during the 90-day "removal period" that follows their removal order.[8] Beyond that period, however, detention is permitted only under more limited circumstances. Because *Zadvydas* and *Clark* held that DHS may not indefinitely detain immigrants who have been ordered removed solely because no country will accept their return, DHS is obligated to release most detainees if there is no "significant likelihood of removal in the reasonably foreseeable future."[9] That limitation has not prevented DHS from detaining thousands of people for six months or longer after they receive a final order of removal, but it has prohibited the indefinite and potentially permanent detention of people like Many.

The Supreme Court's analysis in *Zadvydas* focused heavily on the purpose of immigration detention, which is to facilitate an individual's removal from the United States, *not* to permit general preventive detention on public safety grounds. Our system of justice already has two different legal regimes in place to deal with the general protection of public safety. The

[6] *Zadvydas*, 533 U.S. at 690.
[7] *Zadvydas*, 533 U.S. at 701.
[8] *See* 8 U.S.C. § 1231(a)(2).
[9] *Zadvydas*, 533 U.S. at 701.

criminal system incarcerates roughly 1.6 million people on any given day,[10] including thousands of non-citizens. In addition, a parallel civil system allows the detention of people who are mentally ill and dangerous, including sex offenders, even after their criminal sentences are over. Because it is fundamental to our system of justice that "preventive detention based on dangerousness [must be] limited to specially dangerous individuals and subject to strong procedural protections," the Supreme Court has made clear that the immigration detention system, with its broad mandate and limited procedural protections, is not a general preventive detention regime.[11]

Of course, as the Court in *Zadvydas* recognized, individuals who cannot be removed do not have to be left to "live at large" in the United States. Rather, they are released with "supervision under conditions that may not be violated."[12] These conditions can include electronic monitoring and other forms of intensive supervision. The use of such conditions of release has a substantial fiscal benefit when compared to detention. The immigration detention system already maintains an average daily population of more than 33,000 individuals at great monetary cost to the government -- $122 per person per day, for a total of $1.9 billion a year in this fiscal year, according to DHS estimates, with $100 million more than that requested in the fiscal year 2012 budget. In contrast, supervised alternatives to detention cost approximately $8.88 per person per day.[13]

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[10] *See* Bureau of Justice Statistics, "Total Correctional Population." (year end 2009), *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=11

[11] *Zadvydas*, 533 U.S. at 691.

[12] *Id.* at 696.

[13] Statement of John Morton, "The Fiscal Year 2011 Budget for U.S. Immigration and Customs Enforcement" U.S. House of Representatives Committee on Appropriations, Subcommittee on Homeland Security (Mar. 18, 2010); ICE, "Protecting the Homeland: ATD Nationwide Program Implementation Report" at 9 (Feb. 1, 2010); Department of Homeland Security, FY12 Congressional Budget Justification, 938, *available at* http://www.dhs.gov/xlibrary/assets/dhs-congressional-budget-justification-fy2012.pdf.

We do not need to distort the purpose of our immigration detention system and transform it into a new general preventive detention regime in order to make our country safe. As Justice Scalia recognized when he ruled that Congress had not authorized indefinite detention in *Clark v. Martinez*,[14] the government already has substantial authority available to deal with cases of truly "dangerous aliens" who cannot be removed.

First, all immigrants are subject to the same criminal laws that apply to all persons in the United States. Indeed, any immigrant convicted of a crime has already been sentenced by a judge with access to all available information concerning the offense and the perpetrator. That judge determined the appropriate sentence, taking into account considerations of public safety and the arguments of a prosecutor. Immigrants who violate the terms of probation or parole arising from a criminal sentence can have their release revoked, resulting in their return to prison. Similarly, immigrants who violate their conditions of supervised release from immigration custody can be prosecuted in the criminal system for such violations and sent to prison on that basis.

Second, immigrants who suffer from a mental illness that renders them a danger to themselves or others, including sex offenders, can be civilly committed under existing state and federal law after serving their criminal sentence. There is a dedicated set of provisions of the U.S. Code applicable to the Bureau of Prisons for "Hospitalization of a person due for release but suffering from mental disease or defect,"[15] and a similar provision for the commitment of sex

[14] 543 U.S. 371, 386 n.8 (2005).
[15] 18 U.S.C. § 4246.

offenders.[16] Public health measures such as quarantine laws also apply to non-citizens, as they do to citizens.[17]

Finally, the immigration laws themselves provide for the prolonged detention of immigrants who cannot be removed, but whose release would pose a threat to national security. The USA PATRIOT Act of 2001 addressed "mandatory detention of suspected terrorists," and through that provision authorizes the detention of non-citizens who cannot be removed, provided that they actually present a danger to our national security – a decision that has to be made by a high-level Department of Justice official.[18]

This extensive legal framework for addressing "dangerous aliens" renders the proposed legislation largely duplicative in some areas, such as those involving preventive detention for people who are mentally ill and dangerous or who pose a threat to national security. In other areas, where the new legislation proposes the preventive detention of those convicted of ordinary crimes, it represents an affront to our most basic Constitutional protections as already defined by the Supreme Court. In implementing *Zadvydas* and *Clark*, the courts have struck a careful balance between the government's interests and immigrants' rights grounded in the Constitution, developing a decade of legal doctrine based on the fundamental principle that the government should not have unchecked power to detain people indefinitely through the immigration laws.

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[16] 18 U.S.C. § 4248 (Civil commitment of a sexually dangerous person). The Supreme Court recently upheld this scheme against a constitutional challenge. *See United States v. Comstock*, 130 S. Ct. 1949 (2010).

[17] *See* Kathleen S. Swendiman and Jennifer K. Elsea, "Federal and State Quarantine and Isolation Authority." Congressional Research Service (Jan. 23, 2007), *available at* http://www.fas.org/sgp/crs/misc/RL33201.pdf .

[18] 8 U.S.C. § 1226a. In addition, existing federal regulations permit DHS to indefinitely detain certain non-citizens who cannot be removed in certain circumstances – where releasing the individual would pose a danger to the public on account of the person's highly contagious disease, would have adverse foreign policy consequences, would pose significant national security or terrorism risks, and would pose a special danger to the public because the person has been convicted of a crime of violence, possesses a mental condition or personality disorder and is likely to engage in future violence because of behavior associated with that condition or disorder, and no conditions of release can reasonably be expected to ensure public safety. 8 C.F.R. § 241.14. The federal courts are divided on the validity of these regulations in light of *Zadvydas* and *Clark*. *Compare Hernandez-Carrera v. Carlson*, 547 F.3d 1237 (10th Cir. 2008), *with Tran v. Mukasey*, 515 F.3d 478 (5th Cir. 2008), *and Thai v. Ashcroft*, 366 F.3d 790 (9th Cir. 2004).

Any legislation that gives DHS the power to indefinitely detain vast numbers of non-citizens would be both unwise and unconstitutional.

b. Prolonged Detention

The proposed legislation would also greatly expand DHS's power to detain non-citizens for prolonged periods of time while their cases remain pending in the courts. Individuals like Reverend Raymond Soeoth and Warren Joseph, who faced years of imprisonment in the immigration detention system while their cases were pending, would be ineligible for bond hearings under the proposed legislation. Through that change, the proposal would reverse the decisions of a number of federal courts that have ruled that individuals subject to prolonged detention while their cases are pending have a right to a bond hearing.

The rules governing release from detention while immigration cases are pending are critically important because of the time it can take to resolve an immigration case. While some cases are decided quickly, many others can take years to finish due to systemic failures for which DHS and DOJ are largely responsible. The current backlog of immigration cases in the immigration court system is "more than a third higher (44 percent) than levels at the end of FY 2008,"[19] compounding the immigration system's notorious difficulties in achieving just outcomes through fair hearings.[20] The director of the Executive Office for Immigration Review (EOIR) testified to the Senate Judiciary Committee last week that "[t]here are no signs today of the case receipts slowing. In fact, due to the receipt of more than 200,000 matters during the first half of FY 2011, EOIR projects that the case receipts for this fiscal year will top 400,000. Of the case receipts so far this fiscal year, 41 percent are detained cases. Of the cases EOIR has

[19] TRAC Immigration, "Immigration Case Backlog Still Growing in FY 2011" (Feb. 7, 2011) *available at* http://trac.syr.edu/immigration/reports/246/.

[20] *See, e.g.,* Immigration Court Observation Project of the National Lawyers Guild, *Fundamental Fairness: A Report on the Due Process Crisis in New York City Immigration Courts* (May 2011) *available at* http://nycicop.files.wordpress.com/2011/05/icop-report-5-10-2011.pdf.

completed in FY 2011, 43 percent were detained cases."[21] And while the Constitution requires that there be some judicial review of deportation cases, the time required for judicial review adds almost a year-and-a-half to the slow administrative proceedings, which took on average 280 days in the last fiscal year.[22]

Because cases routinely take years to resolve, the rules governing release while a case is pending are extremely important. People can lose years of their lives waiting for their cases to finish. Even if they win before the Immigration Judge, they can remain detained for years while the DHS litigates an appeal. The proposed legislation appears to take the power to consider such individuals for release from detention out of the hands of Immigration Judges who conduct bond hearings. In place of such bond hearings, the proposal would either mandate the prolonged detention of many individuals who pose no danger or flight risk, or otherwise place their liberty in the hands of DHS officials who make discretionary decisions without the benefit of hearings, and therefore consistently detain people who present no risk of danger or flight. In doing so, this portion of the proposed legislation also runs afoul of basic constitutional requirements.

The Supreme Court addressed immigration detention pending completion of removal proceedings several years ago, ruling in *Demore v. Kim* that the detention without bond hearings of immigrants convicted of certain crimes was constitutional where such detention was "*brief*."[23]

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[21] Testimony of Juan Osuna (May 18, 2011), *available at* http://judiciary.senate.gov/pdf/5-18-11%20Osuna%20Testimony.pdf.

[22] *See INS v. St. Cyr*, 533 U.S. 289, 300 (2001) (holding that some judicial intervention is "unquestionably" required in deportation cases); Judicial Business of the U.S. Courts, Annual Report of the Director 9, Table B-4C (2010), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/judicialbusinespdfversion.pdf (reporting median time of 16.7 months from filing to final disposition of administrative agency appeals); TRAC Immigration, "Immigration Courts Taking Longer to Reach Decisions." (Nov. 11, 2010), *available at* http://trac.syr.edu/immigration/reports/244/

[23] *See* 538 U.S. 510, 513 (2003); 8 U.S.C. § 1226(c).

In reaching that conclusion, the Court relied on data establishing that the vast majority of immigration detentions (85%) lasted an average of 47 days or less.[24]

A snapshot look at detention on January 25, 2009, five years later, revealed that the average amount of time spent in pre-removal detention has greatly increased. The average detention length as of January 2009 was 81 days, while 26% of individuals spent more than ninety days behind bars, including 10% who spent up to a year and 3% who spent more than a year.[25] At least 4,170 individuals had been detained for six months or longer, and 1,334 for one year or more. Some had been detained as long as five, nine, and, in one case, 15 years.[26]

While the Supreme Court has yet to address such prolonged detentions, the lower courts have, and they have largely found that due process likely requires bond hearings for immigrants who face the threat of prolonged detention.[27] These courts have recognized that individuals in DHS custody have a profound liberty interest in avoiding years of incarceration while their immigration cases remain pending. Because of the weighty liberty interest involved, due process requires that civil immigration detention be reasonably related to its purpose of ensuring appearance for removal, and also that such detention be accompanied by adequate procedural

[24] *Demore*, 538 U.S. at 529.
[25] Kerwin and Lin, *Immigrant Detention*, *supra*, at 1.
[26] See Roberts, Michelle, *AP Impact: Immigrants face detention, few rights*, Wash. Post. (Mar. 13, 2009).
[27] *See e.g.*, *Casas-Castrillon v. DHS*, 535 F.3d 942, 950 (9th Cir. 2008); *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005) (both construing § 1226(c) as only authorizing detention for "expeditious" removal proceedings in order to avoid the serious constitutional problem of prolonged mandatory detention); *Ly v. Hansen*, 351 F.3d 263, 271-72 (6th Cir. 2003) (construing § 1226(c) as only authorizing mandatory detention for the period of time reasonably needed to conclude proceedings promptly); *Welch v. Ashcroft*, 293 F.3d 213, 224 (4th Cir. 2002) (holding, prior to *Demore*, that "[f]ourteen months of incarceration . . . of a longtime resident alien with extensive community ties, with no chance of release and no speedy adjudication rights" to be impermissible); *Flores-Powell v. Chadbourne*, 677 F. Supp. 2d 455, 468-71 (D. Mass. 2010) (construing § 1226(c) to implicitly require that removal proceedings be completed within a reasonable period of time; if not, detention can only continue after an individualized determination of flight risk and dangerousness); *Alli v. Decker*, 644 F. Supp. 2d 535, 539 (M.D. Pa. 2009) (noting "the growing consensus . . . throughout the federal courts" that prolonged mandatory detention raises serious constitutional problems).

safeguards to ensure that this purpose is served in each detainee's case.[28] As a result, any system that robs Immigration Judges of the authority to hold bond hearings in cases where DHS has incarcerated a non-citizen for a prolonged period of time, and thereby eliminates even this minimal procedural protection from the prolonged detention system, would violate the Due Process Clause.

Even the existing immigration detention system struggles to satisfy these constitutional requirements. Immigration court proceedings are often delayed because immigrants have no right to appointed counsel, and are often detained in remote locations where they cannot obtain representation. In fact, about 84% of immigration detainees have no lawyer to represent them.[29] Many of these individuals pose no flight risk or danger to public safety, yet frequently, like Reverend Soeoth and Warren Joseph, they never receive a bond hearing to determine whether their detention is even necessary. They may well have substantial challenges to removal from the United States – indeed, Reverend Soeoth and Warren both won their cases – yet they are forced to endure years of incarceration as the price for pursuing their legal right to live in the this country. Such prolonged detention is arbitrary and unfair, and imposes tremendous hardship on immigrants and their relatives, many of whom are U.S. citizens or immigrants residing lawfully in the United States.

The problems arising from such extended detention are not limited to those non-citizens who have criminal convictions that subject them to mandatory detention. On the contrary, DHS interprets the existing laws to foreclose bond hearings for many people with no criminal history,

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[28] *Zadvydas*, 533 U.S. at 690-91; *Singh v. Holder*, - F.3d -, 2011 WL 1226379 (9th Cir. 2011); *Diouf v. Napolitano*, 634 F.3d 1081, 1092 (9th Cir. 2011).

[29] ABA, *Reforming the Immigration System*, *supra*, 5-8. To give but one example of the repercussions this entails, asylum seekers who have legal representation are three times as likely to be granted asylum. Human Rights First, *U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison* at 8 (2009) *available at* http://www.humanrightsfirst.org/pdf/090429-RP-hrf-asylum-detention-sum-doc.pdf.

and passage of the proposed legislation would ensure that bond hearings remain the exception rather than the rule for large sectors of the detainee population.

For example, I represented a Sri Lankan Tamil torture victim whose first name I share – Ahilan Nadarajah – who managed to escape Sri Lanka and sought asylum in our country. He was stopped at the border and detained for nearly five years despite being granted asylum twice, because the government repeatedly appealed his victories and kept him locked in detention. The prolonged detention of asylum-seekers is particularly tragic, as it leads to the re-traumatization of individuals who have already suffered torture and persecution.[30] Ahilan was released only after the U.S. Court of Appeals, speaking through a unanimous and ideologically diverse panel, ruled that his detention was unlawful because of its length, and because there was almost no chance the government would remove him in light of the Immigration Judge's rulings in his case.[31] The court confirmed "that the general immigration detention statutes do not authorize the Attorney General to incarcerate detainees for an indefinite period."[32]

Ahilan would not have won his release if the proposed legislation had been law. We know that asylum-seekers typically have no criminal history, and often have relatives lawfully present in the United States. Yet under the new legislation, even asylum-seekers who win asylum, withholding of removal, or relief under the Convention Against Torture from an Immigration Judge may be detained for prolonged periods while the government appeals their

[30] *See generally*, Physicians for Human Rights and the NYU/Bellevue Center for Survivors of Torture, *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers* (June 2003); *see also* Human Rights First, *In Liberty's Shadow*: *U.S. Detention of Asylum Seekers in the Era of Homeland Security*, 33-34 (2004).
[31] The panel consisted of Circuit Judges Sidney R. Thomas and Richard C. Tallman, and District Judge James M. Fitzgerald.
[32] *Nadarajah v. Gonzales*, 443 F.3d 1069, 1078 (9th Cir. 2006). Although *Nadarajah* had no occasion to address the question, because it ruled on statutory grounds, non-admitted aliens subject to detention under § 1225(b) are also entitled to due process with respect to their detention. *See Kwai Fun Wong v. United States*, 373 F.3d 952, 971 (9th Cir. 2004) (holding that although non-admitted noncitizens lack procedural rights with respect to admission, they are otherwise entitled to due process protections); *Rosales-Garcia v. Holland*, 322 F.3d 386, 410-13 (6th Cir. 2003) (en banc) (holding that indefinite detention of inadmissible aliens under post-final order statute, 8 U.S.C. § 1231(a)(6), raises serious constitutional concerns).

cases. The proposed legislation would bar Immigration Judges from granting bond to such individuals, even if they have been detained for years. Similarly, lawful permanent residents (LPRs) often have strong legal claims and longstanding ties to the United States, including U.S. citizen spouses and family members. Nonetheless, the proposed legislation would prevent Immigration Judges from granting bond to returning LPRs, thus ensuring that many of them will remain detained for months, or even years, while their cases remain on-going, even if they present a minimal flight risk or danger to the community.

Nor is the problem of prolonged detention limited to asylum seekers and returning lawful permanent residents. Another client of mine, a Senegalese computer engineer named Amadou Diouf, spent nearly two years in detention while his case dragged on, even though he was married to a United States citizen, and had been convicted of only one crime – possession of less than 30 grams of marijuana. DHS had charged him with overstaying his visa, but their review process nonetheless found him unsuitable for release based on his marijuana conviction and lack of family ties. Again, he was released only after a federal judge ordered that he be given a bond hearing. He would never have gotten that hearing under the proposed legislation, and the taxpayers would have spent thousands of dollars detaining him, even though he has lived without incident under supervision for four years, while his removal case has remained pending.

The U.S. Court of Appeals opinion in Diouf's case, issued by another unanimous and ideologically diverse panel of judges, explained clearly why bond hearings before Immigration Judges present an important procedural protection that we must not abandon: "Diouf's own case illustrates why a hearing before an Immigration Judge is a basic safeguard for aliens facing prolonged detention . . . . The government detained Diouf in March 2005. DHS conducted custody reviews . . . in July 2005 and July 2006. In both instances, DHS determined that Diouf

should remain in custody pending removal because his 'criminal history and lack of family support' suggested he might flee if released. In February 2007, however, an Immigration Judge determined that Diouf was not a flight risk and released him on bond. If the district court had not ordered the bond hearing on due process grounds, Diouf might have remained in detention until this day."[33] This is but one example of the federal courts' wider recognition that there is "no evidence that Congress intended to authorize the long-term detention of aliens without providing them access to a bond hearing before an immigration judge."[34]

Against this backdrop, the proposed legislation would unlawfully and systematically subject thousands of non-citizens who are challenging the government's efforts to remove them to prolonged detention without constitutionally-adequate review. The regime it proposes relegates noncitizens to months, and often years, of detention regardless of whether that imprisonment has extended beyond the period reasonably necessary to conclude their removal proceedings, is sufficiently justified by flight risk or danger, or is accompanied by adequate procedural protections.

Finally, the proposed legislation provides that the length of detention during removal proceedings "shall not affect" any detention under the post-order detention statute, 8 U.S.C. § 1231. To the extent that this provision attempts to formalistically shield the entire length of an individual's detention from consideration by a court, it also raises serious due process concerns. As courts have recognized, "simple fairness, if not basic humanity, dictates that a court should take into consideration the entire period in which a person has lost his liberty—during what is

[33] *Diouf v. Napolitano*, 634 F.3d 1081, 1092 (9th Cir. 2011). The Ninth Circuit panel was composed of Judges Cynthia Holcomb Hall, Raymond C. Fisher, and Jay S. Bybee.
[34] *Casas-Castrillon v. DHS*, 535 F.3d 942, 950 (9th Cir. 2008).

essentially an integrated process—without parsing what statutory provision he may have been held under."[35]

In sum, the changes to the law governing prolonged detention being proposed today suffer from the same legal, policy, and moral defects as do the changes proposed regarding indefinite detention. There is no rationale for eliminating the role that Immigration Judges play, through bond hearings, to ensure that people being imprisoned for years actually present a risk of danger or flight. By eliminating that protection, the proposed legislation would create a massive strain on federal resources and run afoul of our most basic Constitutional principles.

c. Mandatory Detention Based on Old Convictions

The proposed legislation would also amend 8 U.S.C. § 1226(c), the mandatory detention statute, which requires the Attorney General to take custody of noncitizens who are deportable or inadmissible based on certain designated offenses "when the alien is released" from serving criminal sentences for those offenses. The overwhelming majority of federal courts to consider the issue have construed § 1226(c) not to apply where ICE takes custody of individuals long after their release from criminal confinement for an offense covered by the statute.[36] Along the same lines, a recent BIA decision establishes that § 1226(c) applies only to those individuals who are

[35] *Bourguignon v. MacDonald*, 667 F. Supp. 2d 175, 183 (D. Mass. 2009) (citing cases).
[36] *See, e.g.*, *Louisaire v. Muller*, -- F. Supp. 2d --, 2010 U.S. Dist. LEXIS 129193, *16 (S.D.N.Y. Dec. 1, 2010); *Bracamontes v. Desanti*, No. 2:09cv480, 2010 U.S. Dist. LEXIS 75958, *18 (E.D. Va. June 16, 2010); *Dang v. Lowe*, No. 1:CV-10-0446, 2010 U.S. Dist. LEXIS 49780, *17, 35-36 (M.D. Pa. May 7, 2010); *Monestime v. Reilly*, 704 F. Supp. 2d 453, 458 (S.D.N.Y. 2010); *Khodr v. Adduci*, 697 F. Supp. 2d 774, 778 (E.D. Mich. 2010); *Scarlett v. U.S. Dep't of Homeland Sec*., 632 F. Supp. 2d 214, 219 (W.D.N.Y. 2009); *Waffi v. Loiselle*, 527 F. Supp. 2d 480, 488 (E.D. Va. 2007); *Bromfield v. Clark*, No. C06-0757-JCC2006, U.S. Dist. LEXIS 98435 (W.D. Wash. Oct. 16, 2006); *Zabadi v. Chertoff*, No. 05-03335, 2005 U.S. Dist. LEXIS 31914, 2005 WL 3157377, *5 (N.D. Cal. Nov. 22, 2005); *Quezada-Bucio v. Ridge*, 317 F. Supp. 2d 1221, 1228 (W.D. Wash. 2004); *but see Sulayao v. Shanahan*, No. 09-7347, 2009 U.S. Dist. LEXIS 86497 (S.D.N.Y. Sept. 15, 2009); *Serrano v. Estrada*, No. 3:01CV1916M, 2002 U.S. Dist. LEXIS 3667, 2002 WL 485699 (N.D. Tex. Mar. 6, 2002).

taken into ICE custody upon their release from criminal custody for an offense that triggers mandatory detention.[37]

The proposed legislation would vastly expand the mandatory detention of individuals who have been at liberty for years, leading productive lives. Under the new provision, so long as the noncitizen could be charged with removability based on one of the grounds set forth in § 1226(c), it would make no difference when the triggering offense was committed – it might have taken place decades before the statute was enacted – or that the individual never even served any time in jail for that offense. Rather, if an individual were the subject of any form of criminal custody after the statute's effective date, he or she would be mandatorily detained.

The fundamental problem with this proposal is that it would lead to the detention of many individuals who present no flight risk or danger to the community. Take the example of Carlos Calcano. Carlos was a longtime lawful permanent resident who had a steady job managing the dining hall at Phillips Academy in Andover, Massachusetts, and lived with his U.S. citizen wife and two teenage U.S. citizen children. Carlos was arrested by ICE at his naturalization interview based on a firearms offense he committed nearly twenty years before and for which he was sentenced to and served two years probation. By itself, this offense, which occurred years before the mandatory detention provision went into effect, would not have subjected Carlos to mandatory detention. Nonetheless, ICE argued that Carlos was subject to mandatory detention because of a 2002 arrest for which he spent less than 24 hours in custody, after which the charges were promptly dropped. Carlos spent approximately six months in mandatory immigration

[37] *Matter of Garcia Arreola*, 25 I. & N. Dec. 267, 271 (BIA 2010). *Garcia Arreola* overturned the Board's prior decision in *Matter of Saysana*, 24 I. & N. Dec. 602 (BIA 2008), which held that any release from criminal custody after the effective date of the statute was sufficient to trigger mandatory detention if at some point the individual had been convicted of a designated offense, regardless of whether that offense occurred years prior to the statute's enactment. Prior to *Garcia-Arreola*, nearly all federal courts to have addressed the issue rejected *Saysana*'s interpretation of the statute. *See, e.g.*, *Saysana v. Gillen*, 590 F.3d 7 (1st Cir. 2009).

detention, during which time he lost his job and his family suffered extreme hardship. Despite being forced to fight his case from detention, Carlos was ultimately granted cancellation of removal—a permanent form of immigration relief—and has since become a U.S. citizen.

As courts have recognized, mandatory detention is unwarranted when applied to people like Carlos because noncitizens who committed an offense and were released from custody for that offense a considerable time ago generally do not present a great risk of danger or flight.[38] Moreover, the new provision needlessly compromises the ability of immigrants like Carlos, who have some of the strongest claims against removal, to meaningfully defend their right to remain in the United States. There is no good reason why such individuals should not be able to present their case for release to an Immigration Judge.

d. Jurisdiction-Stripping and Exhaustion

Finally, the proposed legislation is deeply flawed because it would undermine the basic protection that our Constitution affords to all those who have been detained: the right to seek the writ of habeas corpus from a federal court. This right has been a bulwark of liberty ever since the Constitution enshrined the principle established in England 800 years ago, that "the king is at all times entitled to have an account, why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted."[39] The proposed legislation would create havoc in the process governing habeas review of immigration detention by making judicial review of a noncitizen's detention "available exclusively in habeas corpus proceedings instituted in the United States District Court for the District of Columbia, and only if the alien has exhausted all administrative remedies (statutory and regulatory) available to the alien as of right." In addition

[38] *See Saysana v. Gillen*, 590 F.3d 7, 18 (1st Cir. 2009) (reasoning that "the more remote in time a conviction becomes and the more time after a conviction an individual spends in a community, the lower his bail risk is likely to be") (citing cases).
[39] 3 Blackstone *Commentaries on the Laws of England* (1765-1769) (ed. 1907), 131.

to being inconsistent with the government's frequently-expressed litigation position that habeas corpus actions must be filed in the district where an individual is actually detained, this restriction would impose significant burdens on the D.C. District Court, which will be flooded by habeas petitions filed by noncitizens from around the country. Both pro se and represented non-citizens will be disadvantaged by being forced to file and litigate their cases in a district far from where they are detained.

The D.C. federal district court is already overwhelmed with cases, particularly from Guantanamo detainees: in 2010, 372 criminal cases and 2,474 civil cases were filed in the D.C. District Court, which has a dozen active and four senior judges. The chief judge of the court stated in March that "[w]e plan to try very few civil cases this spring and summer . . . . This is as bad as I've seen it."[40] To put the numbers in perspective, in the year preceding March 2010, at least 767 immigrant detainee habeas petitions – but likely many more -- were filed across the country.[41] Thus, the provision would, at a bare minimum, increase the D.C. District Court's caseload by approximately 30%. Barring the allocation of significant additional resources, this change would almost certainly undermine the prompt and effective review of unlawful detention – the core function of the writ of habeas corpus.[42]

Moreover, the D.C. District Court would be faced with the dilemma of which substantive law to apply – the law of the circuit in which the individual is actually detained, or the law of the circuit where the petition is being litigated. As with other proposals for channeling judicial

[40] Bill Mears, "Judicial nominee logjam creates 'crisis' in some federal courts." CNN (Mar. 4, 2011), available at http://articles.cnn.com/2011-03-03/politics/arizona.judicial.logjam

[41] This number reflects the number of cases classified as "alien detainee" habeas petitions on the federal courts' docketing system known as PACER. However, the number is underinclusive, because district courts do not consistently identify habeas petitions challenging unlawful immigration detention with this label.

[42] *See INS v. St. Cyr*, 533 U.S. 289, 301 (2001) ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive detention, and it is in that context that its protections have been strongest.").

review of immigration decisions to Washington, D.C., there is no basis for making such a significant change without extensive study and consultation with stakeholders.

The proposed legislation is unconstitutional, costly, and unnecessary. It would create expensive categorical detention mandates for large groups of people who present no danger or risk of flight, and deny fair process to some of the most vulnerable members of the detained population, such as asylum-seekers. Its attempt to expand DHS's power to preventively detain individuals is unconstitutional, and would likely be struck down in the courts, although only after years of costly litigation. This legislation asks Congress to cast aside the robust procedural protections that our tradition requires whenever liberty is at stake, and substitute in its place a fiscally imprudent, unconstitutional, and inhumane alternative. Detaining for years thousands of immigrants like Reverend Raymond Soeoth, Warren Joseph, Many Uch, Ahilan Nadarajah, Amadou Diouf, and Carlos Calcano, all of whom are contributing members of our society today after being imprisoned without hearings, benefits no one. Precedent and principle unite in opposition to these measures, which offend the glorious but fragile rule that "[i]n our society liberty is the norm." We urge you to oppose the proposed legislation.[43]

[43] The appendix to this testimony contains another 15 examples of wrongful detention from cases in which I or other ACLU attorneys have been involved.

APPENDIX

CASE STORIES

The following case stories illustrate the serious civil liberties concerns raised by a preventive detention regime. As these stories show, prolonged, mandatory, and indefinite immigration detention result in the arbitrary and unnecessary imprisonment of countless individuals who pose no flight risk or danger, or whose removal is not significantly likely in the reasonably foreseeable future. Moreover, the government's failure to provide adequate custody review means that there is often no meaningful procedure by which to ensure that detention is used appropriately. These stories also make all too clear that prolonged and indefinite detention causes tremendous hardship to both the detainees themselves and their families and communities. Unfortunately, these stories are typical of the thousands of noncitizens who are wrongfully deprived of their liberty every year by the government's unlawful detention practices.

* * *

MB is a 39-year-old citizen of Haiti who has resided continuously in the United States as a lawful permanent resident since 1986. Mr. B was subject to mandatory detention for nine years while defending his right against removal to Haiti, where he faces torture at the hands of the authorities.

Mr. B suffers from paranoid schizophrenia and takes anti-psychotic medication to manage his condition. He was placed in removal proceedings in April 2000 based on a 1997 conviction for attempted robbery. The incident underlying the conviction stemmed from Mr. B's attempt to get five dollars back from a street vendor who had sold him two beers, which Mr. B wanted to return because they were warm. The immigration judge granted Mr. B. relief under the Convention Against Torture (CAT) on the grounds that that, as a deportee with a criminal record, he would be imprisoned upon return to Haiti, deprived of his medication, and face severe physical abuse by guards. The government, however, appealed the judge's decision, and the Board of Immigration Appeals (BIA) reversed it, beginning a ten-year legal struggle to defend Mr. B's rights against removal and torture in Haiti. Initially, the government stipulated to remand Mr. B's case to the BIA in light of BIA case law granting CAT relief to other mentally ill Haitians in Mr. B's situation. Nonetheless, the BIA reaffirmed its decision ordering Mr. B's removal. Mr. B then moved to reopen his case based on new evidence that Haiti had begun confining mentally ill deportees with criminal records in crawl-spaces, not even big enough to stand up in. The BIA denied reopening. On appeal, the U.S. Court of Appeals for the Second Circuit reversed on the grounds that the BIA had failed to provide an adequate justification for its denial of reopening. Shortly after the earthquake in Haiti in January 2010, Mr. B's attorneys submitted additional evidence to the BIA regarding the impact of the earthquake on care for the mentally ill and conditions for prisoners in Haiti and requested that the BIA remand the case for

further proceedings. The BIA granted this motion. Mr. B's case is currently pending before the immigration judge, with a hearing date scheduled in January 2012.

Mr. B was in immigration detention in a New Jersey jail for nine of the ten years that his removal case has been pending – three times longer than his sentence for the conviction that gave rise to the removal case. U.S. Immigration and Customs Enforcement (ICE) released Mr. B in January 2009. At that time, due to inadequate management of his mental illness while in immigration detention, Mr. B was deemed by doctors at the Kings County Hospital Center to be psychotic. After extensive treatment, Mr. B has regained his ability to think rationally and function normally. Though he continues to reside in a psychiatric facility, he is now able to be employed and leave the facility on weekends to visit his family – all U.S. citizens and permanent residents – without supervision.

Baskaran Balasundaram is a Tamil farmer who suffered severe persecution from both sides in Sri Lanka's bloody civil war. In May 2007, the Liberation Tigers of Tamil Eelam (LTTE)—also known as the "Tamil Tigers," and designated by the U.S. government as a terrorist organization in 1997—captured Mr. Balasundaram at gunpoint and held him at one of their training camps. He managed to escape, only to be repeatedly captured and tortured by Sri Lankan government forces.

Fearing for his own safety and that of his family, Mr. Balasundaram fled to the United States, arriving at Boston's Logan Airport in July 2008. However, the Department of Homeland Security (DHS) took him into custody, where he remained for over two years because DHS maintained that being forced to work in a kitchen making food for other captives was enough to trigger the "material support" statute, which barred him from obtaining asylum. Even once an immigration judge granted Mr. Balasundaram asylum, DHS continued to hold him while they appealed the decision.

The ACLU filed suit in federal district court asking for the immediate release of Mr. Balasundaram, or at least for a fair bond hearing to determine whether his continued detention was appropriate. In June 2010, Judge Young issued an order stating that the government did not have the right to hold Mr. Balasundaram indefinitely—but giving the government three more months to conclude the asylum proceedings. In July 2010, two years after Mr. Balasundaram arrived in the United States, the government agreed to release him pending the conclusion of the proceedings.

Balasundaram commented from his detention facility: "I won asylum from the judge. Why am I still here? I am no criminal. I told the truth. Why punish me for two years in jail? . . . I'm very sad and scared to be in this place. I haven't spoken to my family in two years. This place is really bad."

RC, a native and citizen of Ireland, entered the United States as a lawful permanent resident in 1955 at the age of five, where he has lived continuously ever since. His entire immediate family is in the United States. In recent years, Mr. C has struggled with a drug problem and, in August 2006, was convicted of a misdemeanor drug possession offense, for which he was sentenced to time served and a six month suspension of his driver's license. On the basis of this offense alone, Mr. C was placed in removal proceedings and subject to mandatory detention for approximately ten months while fighting his case. Ultimately, in March 2011, Mr. C was granted cancellation of removal—a permanent form of immigration relief—and released. He now lives in Queens, New York with his brother. Mr. C celebrated his 60th birthday in detention.

Carlos Calcano was detained by U.S. Immigration and Customs Enforcement (ICE) at his naturalization interview and subjected to mandatory detention for a firearms offense he had committed nearly twenty years before. Mr. Calcano was sentenced to two years probation for his offense, which he served without incident. Mr. Calcano had a steady job managing the dining hall at Phillips Academy in Andover, Massacusetts, a U.S. citizen wife, and two teenage U.S. citizen children. Because his firearms offense predated the mandatory detention statute by several years, it could not by itself subject him to mandatory detention. Nonetheless, ICE argued that he was still subject to mandatory detention because of a 2002 arrest in which Mr. Calcano spent less than 24 hours in custody, and for which the charges were promptly dropped. Mr. Calcano spent approximately six months in mandatory detention, during which time he lost his job and his family suffered extreme hardship. He ultimately won cancellation relief and has since become a U.S. citizen. Mr. Calcano has been reunited with his family and has returned to his job at Phillips Academy, where he has been promoted to kitchen supervisor.

Aurora Carlos-Blaza, a citizen of the Philippines, lawfully entered the United States years ago as a teenager. Ms. Blaza has been deeply committed to her family, working in California fruit orchards during school vacations to help her parents finance a house and attending a local community college so as to be able to serve as a caregiver for members of her extended family. However, after her husband conceived a child in an extramarital affair, divorced her, and left her deeply in debt and ashamed of asking her family for assistance, Ms. Blaza was convicted on charges arising out of loans she took out for herself in the name of her aunt and cousin. For two and a half years, U.S. Immigration and Customs Enforcement (ICE) kept Ms. Blaza in detention while she pursued her claim that the statute under which she was convicted did not make her deportable. ICE maintained custody despite an outpouring of support from Ms. Blaza's family and her U.S. citizen partner and her strong equities as a

committed worker and caregiver. Moreover, ICE detained Ms. Blaza in a facility in Hawaii, far from her home and family in Fresno, California.

In December 2008, Ms. Blaza was given a bond hearing under the Ninth Circuit's decision in *Casas-Castrillon v. Department of Homeland Security*, 535 F.3d 942 (9th Cir. 2008). An immigration judge granted Ms. Blaza release on $5,000 bond, holding that the government failed to show that she presented a sufficient danger or flight risk to justify her continued detention. Upon her release, Ms. Blaza returned to Fresno, worked as an office assistant, and gave birth to a son. After ultimately losing her immigration case, Ms. Blaza returned to the Philippines with her child without incident.

Amadou Diouf has lived in this country for approximately fifteen years. He entered the United States on a student visa, obtaining a degree in information systems from a university in Southern California. The government initiated removal proceedings against him for overstaying his student visa after he was arrested and charged with possession of a small quantity of marijuana—an offense that did not render him deportable. Nevertheless, Mr. Diouf was detained for over 20 months during the pendency of his removal proceedings, even though he was *prima facie* eligible for adjustment of status to lawful permanent residence through his marriage and had not been convicted of a removable offense. Notably, the only process Mr. Diouf received during his prolonged imprisonment were two perfunctory reviews of his administrative file in which U.S. Immigration and Customs Enforcement (ICE) summarily continued his detention. Ultimately, a federal district court ordered that Mr. Diouf receive a bond hearing before an immigration judge where the government was required to show that his detention was still justified. Upon conducting a hearing, the immigration judge found that Mr. Diouf did not present a flight risk or danger sufficient to justify detention and ordered his release on bond. Despite this decision and the fact that Mr. Diouf was living on conditions of supervised release without incident since being released, the government continued to argue that he should be detained without a bond hearing. Mr. Diouf has continued to report to ICE without incident for more than four years since his release. He works as a car salesman.

Jose Farias-Cornejo, a lawful permanent resident and citizen of Mexico, came to the United States with his parents prior to his first birthday. All of his immediate family lives in the United States, including his mother, who is a lawful permanent resident, and his four siblings, all of whom are U.S. citizens. His fiancée, Melissa Lopez, is also a U.S. citizen. In 2003, Mr. Cornejo, who has a learning disability, successfully graduated from high school and proceeded to work a variety of jobs near his hometown, including in construction and landscaping. In September 2009, following a conviction for being under the influence of a controlled substance, U.S. Immigration and Customs Enforcement (ICE) initiated removal proceedings against Mr.

Cornejo. Despite his strong family and community ties, ICE incarcerated Mr. Cornejo for over 16 months while he awaited a final decision in his immigration case, which he ultimately won in January 2011. Throughout that time, Mr. Cornejo was never once afforded a bond hearing to determine whether his ongoing detention was justified. Since being released from detention, Mr. Cornejo has moved to Pomona, California, where he remains close to his family and is eagerly awaiting the birth of his first child.

Ms. G-Z, a nineteen-year-old woman from Colombia, was abducted twice by members of the Revolutionary Armed Forces of Colombia (FARC)—a leftist guerilla insurgent group—as a result of her association with military officers and policemen. After a third kidnapping in 2006, the young woman fled to the United States in search of refuge. She arrived at Newark Liberty International airport, where she was arrested and detained in New Jersey. Although the immigration judge found her testimony credible, the judge concluded that she did not meet the definition of a refugee. U.S. Immigration and Customs Enforcement ignored her request for release on parole while her appeal was pending, despite a diagnosis for anxiety and depression that was exacerbated by her detention. In January 2008—after 17 and a half months in detention—Ms. G-Z decided to accept deportation, "averr[ing] that despite the fact that her 'fear of persecution is as strong as ever[,]' the detention was . . . 'affecting me physically and destroying me mentally' and . . . served as a daily and unwelcome reminder of the indignity of detention at the hands of the FARC."[44] After her deportation, the U.S. Court of Appeals for the Third Circuit found that she had a well-founded fear of future persecution.

Sam Kambo, an accomplished government employee and engineer, was detained at his green card interview in 2006, twelve years after he had legally entered the United States, because U.S. Immigration and Customs Enforcement (ICE) suspected that he had taken part in politically-motivated executions in his native Sierra Leone. This caused outrage and an outpouring of support from his community in Austin, Texas.

In June 2007, the immigration judge found that there was no credible evidence to tie Mr. Kambo to the crimes in Sierra Leone and ordered him released, but ICE immediately appealed this determination. In fact, on two separate occasions, ICE appealed the immigration judge's determination that Mr. Kambo should be released on bond. Mr. Kambo's friends and co-workers rallied around him, organizing a plate lunch every month to raise money for groceries for his wife and U.S. citizen children. The federal district court judge presiding over Mr. Kambo's habeas petition pointedly rebuked ICE, saying, "I am confused by what the government is doing

[44] *Gomez-Zuluaga v. AG of the United States*, 527 F.3d 330, 339 (3rd Cir. 2008).

here. You have an order in June ’07 that is adverse to you . . . You have an individual who has been in this country . . . at least since 1994 . . . What is the problem with allowing him to go on bond?” Finally, in October 2007, Mr. Kambo was granted release. Because Mr. Kambo could not work legally while awaiting resolution of his case, he and his family left the United States during the summer of 2008.

Warren Joseph is a lawful permanent resident of the United States and a decorated veteran of the first Gulf War. He moved to the United States from Trinidad nearly 22 years ago and has five U.S. citizen children, a U.S. citizen mother and a U.S. citizen sister.

A few months after coming to the U.S., when he was 21 years old, Warren enlisted in the U.S. Army. He served in combat positions in the Persian Gulf, was injured in the course of duty and received numerous awards and commendations recognizing his valiant service in that war, including returning to battle after being injured and successfully rescuing his fellow soldiers.

Like many Gulf War veterans, Warren returned from the war with symptoms that were only later diagnosed as Post Traumatic Stress Disorder. His sister recalls that she “was shocked to see how much Warren had changed.” He was anxious, had recurring nightmares about killing people, and would wake up in a cold sweat. He became withdrawn and thought about suicide constantly. In 2003, he drank rust remover and had to be hospitalized.

In 2001, Warren unlawfully purchased a handgun to sell to individuals to whom he owed money. He fully cooperated with an investigation by the Bureau of Alcohol, Tobacco, and Firearms, and his actions were not deemed sufficiently serious to warrant incarceration. Two years later, however, suffering from partial paralysis and debilitating depression, Warren violated his probation by moving to his mother's house and failing to inform his probation officer. He served six months for the probation violation. Upon his release, in 2004, he was placed in removal proceedings and subjected to mandatory immigration detention.

Warren remained in immigration detention for more than three years while he fought his deportation. During his entire period of incarceration, Warren was never granted a hearing to determine whether his detention was justified. Indeed, even after the U.S. Court of Appeals for the Third Circuit found that he was entitled to apply for relief from removal, and remanded his case back to the immigration court, the government continued to subject him to mandatory detention. He was not released until he finally prevailed on his application for relief before the Immigration Judge, which conclusively resolved his deportation case in his favor.

Commenting on his ordeal, Mr. Joseph said: “I joined the Army because I love the United States; I am very disappointed that I have been treated this way, but I still love this country.”

Aiman Musleh is a Palestinian born in Bethlehem, within the Israeli Occupied West Bank, who came to the United States on a visitor's visa in 1998. He has no criminal record. Mr. Musleh overstayed his visa and was ordered removed in 2003. In 2008, days before Mr. Musleh's wedding, immigration authorities arrested him at his home and placed him in custody. Mr. Musleh remained in detention for eight months even though, as with many individuals from the West Bank, his removal was not reasonably foreseeable. Ultimately, Mr. Musleh was released on an order of supervision because U.S. Immigration and Customs Enforcement was unable to obtain travel documents to effectuate his removal. Since his release from detention in September 2008, Mr. Musleh has complied with all conditions of his supervision. He has been steadily employed and was recently promoted to a supervisory role.

Ahilan Nadarajah, an ethnic Tamil farmer who was tortured in his native Sri Lanka, was detained for nearly five years while seeking asylum in the United States. From the age of 17, Mr. Nadarajah was brutally and repeatedly tortured by soldiers in the Sri Lankan Army who arrested him and accused him of belonging to the insurgent group, the Liberation Tigers of Tamil Eelam (LTTE). Over the course of several arrests, soldiers beat him, hung him upside down, pricked his toenails, burned him with cigarettes, held his head inside a bag full of gasoline until he lost consciousness, and beat him with plastic bags full of sand. Eventually, Mr. Nadarajah fled to the United States in October 2001, where he was immediately arrested at the border. U.S. Immigration and Customs Enforcement (ICE) then held Mr. Nadarajah in detention for nearly five years while he fought his case, despite an immigration judge twice holding that he was entitled to asylum and rejecting the government's claims, based on false and secret evidence, that he was in fact a member of the LTTE. The BIA affirmed the grant of asylum, and the Attorney General declined further review, giving Mr. Nadarajah refugee status.

Although Mr. Nadarajah was initially granted parole with bond, ICE subsequently rejected his attempt to tender money for the bond years later on the grounds that the bond order was "stale." ICE also denied Mr. Nadarajah's further parole requests after he won relief from the immigration judge and BIA. At no point during his lengthy detention did Mr. Nadarajah receive an opportunity to contest his detention before an immigration judge. Ultimately, in March 2006, Mr. Nadarajah was ordered released from detention by the U.S. Court of Appeals for the Ninth Circuit, which held that the immigration laws did not authorize his detention where his removal was not reasonably foreseeable, and that the government lacked any facially legitimate or bona fide ground for denying his parole request.

Hiu Lui Ng, a Chinese national with a U.S. citizen wife and two young U.S. citizen children, was detained by U.S. Immigration and Customs Enforcement when he appeared for his green card interview. Mr. Ng clearly posed no danger or risk of flight: he was a computer

programmer with a good job and no prior criminal history, and he was eligible for a green card based on a petition filed by his wife. Yet he was detained for more than a year while he sought to reopen a past in absentia removal order, the validity of which he contested. His case became front page news in August when he died in detention after failing to receive proper medical care and suffering horrendous abuse from prison guards, including an injury that caused him to break his spine. In an editorial issued shortly thereafter, the *New York Times* criticized not only the way Mr. Ng was treated, but the fact that he was detained in the first place.[45]

Lobsang Norbu, a Buddhist monk from Tibet, fled China after he had been arrested, incarcerated, and tortured twice on the basis of his religious beliefs and political expressions in support of Tibetan independence. He arrived in New York and was immediately placed into immigration detention pending the adjudication of his asylum claim. Mr. Norbu's attorney filed a parole application that included an affidavit from a member of the American Tibetan community who pledged to provide Mr. Norbu lodging and ensure his appearance at any hearings. During Mr. Norbu's ten-month detention, the government provided no response to this parole request, and Mr. Norbu was never given the opportunity to argue for his release before an immigration judge. In August 2007, the Board of Immigration Appeals reversed the immigration judge's denial of Mr. Norbu's asylum claim, stating that the judge clearly erred in finding that Mr. Norbu was not credible. Mr. Norbu is currently living in a Tibetan group home on Long Island, New York and working at a restaurant. He has applied for adjustment of status.

Julio Peguero, a native and citizen of the Dominican Republic, entered the United States over 15 years ago as a lawful permanent resident. He has spent over 19 months in immigration detention while challenging the government's efforts to remove him, without ever receiving an opportunity to contest his imprisonment before an immigration judge. The government is seeking Mr. Peguero's removal based on a single, ten-year old conviction for felony sale and possession of a controlled substance for which he was sentenced to one day of jail time and probation. He has no other criminal history. Moreover, Mr. Peguero maintains that he is innocent of the charges and was coerced into pleading to the offense by his defense attorney, and that his attorney never advised him of the immigration consequences of his plea. As a result, Mr. Peguero's conviction is likely to be vacated due to ineffective assistance of counsel under the Supreme Court's recent decision in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010).

Mr. Peguero was arrested by U.S. Immigration and Customs Enforcement in November 2009 after he was denied naturalization based on his conviction. At the time of his arrest, he had been living in Nassau County, New York for approximately fifteen years. He owned a home, ran

[45] *See* Nina Bernstein, *Ill and in Pain, Detainee Dies in U.S. Hands*, N.Y. TIMES, Aug. 12, 2008, at A1; Editorial, *Mr. Ng's Death*, N.Y. TIMES, Aug. 17, 2008, at WK9.

two barbershops, and also helped support his lawful permanent resident mother. As a result of his prolonged detention, Mr. Peguero has already lost one of his businesses. In April 2011, a federal district court granted his petition for a writ of habeas corpus and ordered a bond hearing where the government must show that his continued detention is justified.

Alejandro Rodriguez, a Mexican national who has been in the United States since he was a baby, was detained for more than three years without a meaningful hearing on the propriety of his prolonged detention in light of the non-violent nature of his convictions and his strong community ties. Prior to his detention, Mr. Rodriguez lived near his extended family in Los Angeles, working as a dental assistant to support his two U.S. citizen children. His claim against removal hinged on whether he could be deported for two non-violent convictions—joyriding when he was 19, and a misdemeanor drug possession when he was 24. Mr. Rodriguez was denied release by U.S. Immigration and Customs Enforcement (ICE) on the basis of administrative file custody reviews in which ICE rejected his requests for release based entirely on a written questionnaire, without even interviewing him. After Mr. Rodriguez filed a habeas petition in district court—but before the petition was adjudicated—ICE released him on his own recognizance, revealing that the agency had never considered him a flight risk or danger to the community. He has remained released on conditions of supervision without incident since his release over three years ago.

Leticia Salguero-Morales is a single mother of two U.S. citizen children and has lived in Phoenix, Arizona for 20 years. Originally from Guatemala, Ms. Salguero was detained for 21 months until her release in September 2010. She has never been arrested or convicted of any crime. Ms. Salguero was first placed in proceedings for having entered the United States without inspection. She applied for relief from removal in the form of suspension of deportation and asylum. An immigration judge initially found her eligible for suspension on the grounds that her deportation would cause extreme hardship, but later deemed her ineligible under a retroactive bar to relief enacted in the 1996 immigration laws. Ultimately, this resulted in a final removal order in 2004. However, because her attorney failed to inform her of this order, Ms. Salguero was not aware she had been ordered removed until January 2009, when she was arrested by ICE and placed in detention.

Despite her clean record and family ties and requests by counsel for her release, U.S. Immigration and Customs Enforcement (ICE) continued to detain her in deplorable and inhumane conditions. For more than one year, while detained at the Pinal County Jail, Ms. Salguero was not allowed to have contact visits with her children, did not have access to outdoor recreation, and endured extreme depression and anxiety. Moreover, at no point in her lengthy imprisonment did Leticia receive a bond hearing before an immigration judge over whether her

continued detention was justified. Instead, Ms. Salguero received a series of administrative file custody reviews by ICE officials that merely rubber-stamped her detention.

Ultimately, in September 2010, a federal district court granted a habeas corpus petition ordering the Board of Immigration Appeals (BIA) to decide whether Ms. Salguero's case should have been administratively closed and "re-papered" so that she could proceed with her application for suspension/cancellation of removal. The BIA administratively closed her case. The district court also ordered ICE to determine whether Ms. Salguero could be released under its guidelines regarding detention priorities. Ms. Salguero was subsequently released on conditions of supervision and has reunited with her children.

When asked about her situation, Ms. Salguero said "the law of ICE is so unfair to people. I am a single mother, working, honest, fighting here in this jail for months, separated from my children, fighting for my case. This law, which separates many families, closes the door to fixing our immigration status, and destroys the lives and futures of our children who are citizens paying the consequences of this great cruelty."

Raymond Soeoth is a Christian minister from Indonesia. In 1999, when Reverend Soeoth and his wife fled Indonesia to escape persecution for practicing their faith, they could not have anticipated the treatment they would receive in the United States. Initially, Reverend Soeoth was allowed to work in the United States while applying for asylum and eventually became the assistant minister for a church. He and his wife also opened a small corner store. Yet when his asylum application was denied in 2004, the government arrested him at his home and took him into detention. Even though Reverend Soeoth posed no danger or flight risk, had never been arrested or convicted of any crime, and had the right to seek reopening of his case before both the immigration courts and federal courts, ICE insisted on keeping him in detention. He spent over two and a half years in an immigration detention center while the court decided whether or not to reconsider his asylum claim. During that time, he never received a hearing to determine whether his detention was justified.

While in detention, Reverend Soeoth was isolated from his family and community as well as his congregation. His wife was unable to maintain the store that the couple had jointly run and she was forced to shut it down. In February 2007, Reverend Soeoth finally received a bond hearing as a result of a successful habeas corpus petition filed by the ACLU. Following that hearing Reverend Soeoth was released on a $7,500 bond. Although his asylum case was subsequently denied, the government granted him "deferred action" status, a temporary form of relief that can be renewed annually on a discretionary basis, as part of a settlement reached because the government had subjected him to illegal forcible drugging during his detention. He and his wife subsequently won their motion to reopen their asylum case.

Commenting on his ordeal, Reverend Soeoth stated that "I can't understand why in America I must choose between two evils: going back to Indonesia to face persecution or being detained while I fight for asylum."

Saluja Thangaraja, who was released from immigration detention on her 26th birthday, fled Sri Lanka in October 2001 after being tortured, beaten and held captive there. She was detained on the United States-Mexico border later that month, on her way to reunite with relatives in Canada, and was imprisoned in a federal detention center near San Diego for over four and a half years, until March 2006.

During years of civil unrest and turmoil, Saluja and her family were displaced from their home and forced to live in a police camp after conflict broke out in their small town between the Sri Lankan Army and the separatist group, the Liberation Tigers of Tamil Eelam. After finally returning to her home, Saluja was twice abducted, beaten and tortured by the Sri Lankan army. Saluja went into hiding after her second abduction, and soon after the family decided she needed to leave the country to protect her life.

Despite finding that she had a credible fear of persecution, the government refused to release her from detention while she sought asylum before the immigration court, the Board of Immigration Appeals (BIA), and ultimately the U.S. Court of Appeals for the Ninth Circuit. In August 2004, after almost three years in detention, the Ninth Circuit found that Saluja faced a well-founded fear of persecution if she were returned to Sri Lanka and granted her withholding of removal—a form of relief that prohibits the government from returning her to that country. In addition, the Court found Saluja eligible for asylum, concluding that the immigration judge and the BIA's previous rejection of her claims lacked a reasonable basis in law and fact.

Despite this stinging rebuke, the government continued to doggedly pursue Saluja's removal and to insist on her detention. Indeed, even after the immigration judge granted Saluja asylum in June 2005, the government appealed that decision to the BIA and refused to release Saluja during this process.

Saluja finally gained her freedom in March 2006, but only after the ACLU petitioned the district court for her release. Upon her release, she was finally able to reunite with her family in Canada, where she has now married and had a child.

Buu Van Truong is a native and citizen of Vietnam who became a lawful permanent resident in 1999. He has a young U.S. citizen son. In 2007, Mr. Truong pled guilty to two counts of encouraging his nieces to come to the United States unlawfully, for which he was sentenced to six months in jail and three years probation. He has no other criminal history. As a

result of his offense, Mr. Truong was ordered removed in May 2009. Mr. Truong waived appeal in the hopes that he would be promptly removed so that he could return to Vietnam and earn money to support his son. He fully cooperated with the government's efforts to remove him. Nonetheless, Mr. Truong languished in detention for over 16 months because the government was unable to secure a travel document from the Vietnamese embassy. Ultimately, Mr. Truong was released on conditions of supervision after he filed a habeas petition in federal district court. Since his release, he has been reunited with his son and is currently working as a store clerk. He is regularly reporting to U.S. Immigration and Customs Enforcement.

Many Uch is a Cambodian national who was subjected to indefinite detention by ICE for over two years. His story was featured in the PBS documentary, "Sentenced Home." Mr. Uch left Cambodia as a child with his parents, who were refugees fleeing persecution at the hands of the Khmer Rouge. He and his family lived and wandered in the forests for over 10 months until the United Nations found them. The family settled as refugees in Seattle, Washington. As a teenager, Mr. Uch got involved in a gang, and was convicted in 1994 of robbery in the first degree with a weapon, as the driver of the getaway car. After serving his criminal sentence, he was taken into immigration custody.

While Mr. Uch was in immigration custody, the United States did not have a repatriation agreement with Cambodia, so there was no way for the United States to deport him. Mr. Uch languished in immigration custody for over two years (28 months) waiting to be deported. He eventually filed a habeas petition and obtained release in October 1999 (several years before the United States would even resume deportations to Cambodia). He regularly reported to ICE since that time.

Since his release, Mr. Uch has been consistently employed (he currently holds two jobs), has married a U.S. citizen, and has a four-year-old daughter. He has also been an active member of his community. He organizes and does advocacy on issues concerning deportees; he has been part of a youth organizing group for young Cambodians, serving as a mentor and community mediator; and he serves on the board of directors for a Buddhism society in Seattle.

In 2010, Mr. Uch obtained a pardon for his crime from the Governor of Washington, Chris Gregoire.