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“The Release of Criminal Detainees by U.S. Immigration and Customs Enforcement: Policy or Politics?”

The American Immigration Lawyers Association (AILA) submits the following testimony to the Committee on the Judiciary. AILA is the national association of immigration lawyers established to promote justice and advocate for fair and reasonable immigration law and policy. AILA has over 12,000 attorney and law professor members.

The number of immigration detainees has more than doubled over the last 10 years and more than tripled over the last 15 years – from 108,454 in 1996 and 204,459 in 2001 to 429,247 in 2011. Spending on detention has increased exponentially as well, from \$864 million seven years ago to \$2.02 billion today.

The restraint of an individual’s liberty is one of the most consequential government powers. No one should be deprived of their liberty except as a last resort. But every day, thousands of people – including asylum seekers and those with no criminal convictions – are detained by Immigration and Customs Enforcement (ICE) though they pose no flight risk or threat to public safety. According to recent ICE data, as of May 2, 2011, 41% of immigrants in detention were classified at the lowest possible risk level.

ICE *should* be releasing from institutional detention those individuals who should never have been detained in the first place. Spending billions of taxpayer dollars to needlessly detain immigrants who could successfully and safely be released is a poor use of limited resources. Immigration detention costs U.S. taxpayers between \$122 and \$164 per day. Furthermore, the conditions of immigration detention fall well below appropriate standards for civil confinement.

Instead of detention, ICE has a range of other tools at its disposal to ensure court appearances, including setting a bond, releasing individuals on their own recognizance, and using alternatives to detention (ATD). Each of these options costs far less than institutional detention and imposes fewer restraints on liberty. The ATD programs ICE currently operates cost as little as \$14 per day and are grossly underutilized.

ICE, like every law enforcement agency, should make an individualized determination of risk before confining someone to a detention facility. In fact, it is ICE policy to screen each individual to assess the risk of flight and threat to public safety. ICE’s recently-launched Risk Assessment Tool is a step in the right direction. If implemented properly, it will assess the risk level of each individual apprehended, while taking into account the individual’s special vulnerabilities.

ICE could do more to expand its use of proven alternatives to detention, and Congress should appropriate more funding for ATD programs. ATD programs are critical to the lives of noncitizens in removal proceedings, many of whose cases drag on for years and who would otherwise be separated from loved ones and isolated from community support, while being deprived of legal representation (over 80% of detained individuals are unrepresented).

Community-based ATD programs should be established by law and funded by Congress. Non-governmental organizations (NGOs) are mission-driven and generate more community resources because of their ability to attract volunteers and donations of goods and services, and have a track record of creating effective community-centered release programs.

Our laws should also ensure that intrusive or intensive forms of supervision are utilized only when necessary. Frequently, ICE improperly uses ATDs on individuals who should be released without any supervision. ATD programs that retain custody over the person, such as electronic monitoring, should be reserved for individuals who do not meet the requirements of other less restrictive release options but who can otherwise be released from jail.

Finally, AILA members are deeply concerned that our immigration laws do not always ensure that a neutral adjudicator can review ICE's initial detention decision in order to determine in each case whether detention is necessary and lawful. As currently applied by ICE, mandatory custody or detention laws automatically deny bond hearings to entire groups of people. These laws deny noncitizens basic due process and must be reformed. Categorical laws that mandate deprivation of liberty – no matter the specific circumstances of a person's case – run afoul of basic principles of fairness and due process.

Immigration officers and judges must have the authority in all cases to consider alternatives to detention for individuals who are vulnerable or pose little risk to communities and to consider in each case whether continued detention is necessary and lawful. Further, ICE should be required to place each individual in the least restrictive setting available, and use alternatives to detention, such as release on recognizance, bond, supervision, or ankle GPS monitors.