

The Honorable Jeh Johnson
Secretary of Homeland Security
U.S. Department of Homeland Security
3801 Nebraska Avenue NW
Washington, DC 20528

October 31, 2016

Dear Secretary Johnson:

As former Immigration Judges and Board of Immigration Appeals Members, we write to express our concern and disappointment at your decision to use the waning months of the administration to dramatically expand the numbers of men, women and children detained by U.S. Immigration and Customs Enforcement (ICE). The *Wall Street Journal* reports our nation will soon detain 45,000 individuals on a daily basis, in a sprawling network of immigration detention facilities largely operated by private prison companies and local jails.¹ On the basis of our experiences as immigration jurists, we know this expansion comes at the expense of basic rights and due process.

Our immigration detention system already undermines the statutory right to counsel for immigrants in removal proceedings. Rapid expansion will only exacerbate this crisis.

A shocking 86% of immigrants in detention are unable to obtain legal representation.² We have all presided over cases in which a young man or woman struggles, from detention and without a lawyer, to understand our complex maze of immigration laws and put forward a coherent legal defense to removal. The results are not surprising: immigrants in detention with lawyers are twice as likely to obtain relief as those proceeding without lawyers.³ As ICE scrambles to expand its bed space, with no concurrent expansion in funding for legal service provision, these already disturbing statistics will only worsen.

Recommendations:

- In recognition of the alarmingly low rates of representation in detention, decrease the numbers of those in detention in line with the recommendations set out below.
- Do not enter into new contracts with facilities or renew existing contracts without a thorough assessment of the viability and proximity of access to legal services.

Most recent arrivals on the southern border merit protection under our refugee laws, not incarceration. Detention unnecessarily traumatizes vulnerable populations.

We have all borne witness to the testimony of the men, women and children fleeing violence across our southern border. Their histories of past trauma and their fear of return entitle them to

¹ Devlin Barrett, Wall Street Journal, "Record Immigrant Numbers Force Homeland Security to Search for New Jail Space," Oct. 21, 2016.

² Ingrid Eagly and Steven Shafer, American Immigration Council, *Access to Counsel in Immigration Court* (Sept. 2016).

³ *Id.*

protection from death, torture, rape, and other abuse at the hands of gangs, drug cartels, and corrupt governments in home countries where civil society has broken down. The vast majority are eligible for protection under the law and likely to secure relief if they are properly represented and able to cogently present and document their claims.⁴ Yet these individuals are prioritized for detention under your 2014 enforcement priorities. Previous estimates placed between 11,000 and 15,000 families and asylum seekers in ICE detention on any given day;⁵ these numbers will surely increase as overall numbers rise.

Although ICE detention is intended to be civil, these asylum seekers are jailed. With few exceptions, ICE detention facilities are jail-like facilities operated by private prison companies or local jails contracting with ICE.⁶ These facilities regularly receive passing marks in their inspections even as deaths in custody are determined to be attributable to sub-standard medical care.⁷ Sub-par detention conditions will only worsen, based on reports that DHS's own officials are concerned that new detention space may not conform with the most recent detention standards or the requirements of the Prison Rape Elimination Act.⁸

Senator Patrick Leahy, ranking member of the Senate Judiciary Committee, his colleagues, and many experts in the field of immigration and human rights law have recommended that you and the administration use available statutory Temporary Protected Status ("TPS") to protect these vulnerable individuals. TPS would offer immediate protection while deferring the more complex questions of asylum and other types of more durable protection and removing most of these cases from the active dockets of our Immigration Courts. This would allow the restoration of at least some semblance of fairness and equitability to currently out of control court dockets. Unlike Immigration Court hearings involving asylum and other forms of protection, TPS claims can be adjudicated efficiently by U.S. Citizenship and Immigration Services. When necessary, *de novo* review of TPS in Immigration Court ordinarily takes a few minutes, rather than hours to complete.

Recommendations:

- End the detention of families, as recommended by ICE's own Advisory Committee on Family Residential Centers.⁹
- End the mass detention of asylum seekers. This can be accomplished by: 1) utilizing regular removal proceedings rather than the flawed expedited removal procedures that have been roundly criticized by the U.S. Commission on International Religious Freedom;¹⁰ and 2)

⁴ See UNHCR, *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection* (2014); UNHCR, *Women on the Run: First Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras and Mexico* (2015).

⁵ American Civil Liberties Union, *Shutting Down the Profiteers: Why and How the Department of Homeland Security Should Stop Using Private Prisons* (Sept. 2016).

⁶ Human Rights First, *Jails and Jumpsuits: Transforming the U.S. Immigration Detention System – A Two-Year Review* (2011).

⁷ Civil Liberties Union, Detention Watch Network, and National Immigrant Justice Center, *Fatal Neglect: How ICE Ignores Deaths in Detention* (Feb. 2016).

⁸ Barrett, "Record Immigrant Numbers," *supra* note 1.

⁹ See DHS Advisory Committee on Family Residential Center, *Report of the DHS Advisory Committee on Family Residential Centers*, U.S. Immigration & Customs Enforcement (Sept. 30, 2016).

¹⁰ U.S. Commission on International Religious Freedom, *Barriers to Protection: the Treatment of Asylum Seekers in Expedited Removal* (Aug. 2016).

properly implementing ICE's 2009 Parole Directive.¹¹

- Grant TPS to individuals from the Northern Triangle and Haiti who have fled deteriorating conditions in their home countries.

Immigration Judges should be permitted to make individualized assessments of the propriety of continued detention.

Our detention system has moved far afield from the individualized assessments that are the hallmark of justice. As Immigration Judges, we are trained and experienced in assessing the individualized factors that determine whether an individual is a flight risk and/or poses a risk to the community.¹² Our judgment is sound: in 2015, 86% of individuals released from custody on the basis of a bond set by the Immigration Court appeared at their subsequent hearings.¹³ Nonetheless, that same year only half of the tens of thousands of immigrants in detention received a bond hearing before an Immigration Judge.¹⁴ DHS's overly aggressive use of expedited removal procedures and harsh interpretation of the federal detention statute has left Immigration Judges largely unable to do their job and assess whether detention is proper.

Recommendations:

- Follow the findings of numerous federal courts in interpreting the Immigration and Nationality Act – as the Constitution demands – to require individualized custody determinations of those deprived of their liberty for prolonged periods.¹⁵
- Adopt a common sense interpretation of the mandatory detention statute that 1) allows individuals subject to section 236(c) of the Immigration and Nationality Act to be released on restrictive forms of custody short of detention such as electronic monitoring or house arrest; and 2) limits the scope of section 236(c) to those apprehended by ICE at the time of release from criminal custody on the basis of a serious criminal conviction.¹⁶

Your agency oversees the detention and removal of hundreds of thousands of individuals each year. We have heard their stories. For some, removal is a death sentence. For others, detention results in U.S. citizen spouses and family members resorting to the public safety net. When making decisions regarding the deprivation of liberty and the permanent exile of individuals from our borders, due process must be paramount. The massive expansion of detention we witness today is fundamentally at odds with that imperative.

Thank you for your consideration of these issues. Please contact us via the Honorable Paul Wickham Schmidt at jennings12@aol.com.

¹¹ See Human Rights First, *Lifeline on Lockdown: Increased U.S. Detention of Asylum Seekers* (July 2016).

¹² *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006).

¹³ TRACImmigration, *What Happens When Individuals are Released on Bond in Immigration Court Proceedings?* (Sept. 14, 2016).

¹⁴ *Id.*

¹⁵ See, e.g., *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).

¹⁶ See *Shutting Down the Profiteers*, *supra* note 5.

Sincerely,

Hon. Sarah Burr

Former Assistant Chief Immigration Judge
Former Immigration Judge, New York
Years of service 1994 – 2012

Hon. Bruce J. Einhorn

Former Immigration Judge, California
Years of service 1990 – 2007

Hon. Christopher Grant

Former Assistant Chief Immigration Judge
Former Immigration Judge, Virginia
Years of service 1986 – 1996

Hon. Gilbert T. “Thad” Gembacz

Former Immigration Judge, California
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