

REVIEW OF DEPARTMENT OF JUSTICE IMMIGRATION DETENTION POLICIES

HEARING BEFORE THE SUBCOMMITTEE ON IMMIGRATION AND CLAIMS OF THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES ONE HUNDRED SEVENTH CONGRESS FIRST SESSION

DECEMBER 19, 2001

Serial No. 55

Printed for the use of the Committee on the Judiciary



Available via the World Wide Web: <http://www.house.gov/judiciary>

U.S. GOVERNMENT PRINTING OFFICE

76-810 PDF

WASHINGTON : 2002

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512-1800; DC area (202) 512-1800
Fax: (202) 512-2250 Mail: Stop SSOP, Washington, DC 20402-0001

COMMITTEE ON THE JUDICIARY

F. JAMES SENSENBRENNER, JR., WISCONSIN, *Chairman*

HENRY J. HYDE, Illinois	JOHN CONYERS, JR., Michigan
GEORGE W. GEKAS, Pennsylvania	BARNEY FRANK, Massachusetts
HOWARD COBLE, North Carolina	HOWARD L. BERMAN, California
LAMAR SMITH, Texas	RICK BOUCHER, Virginia
ELTON GALLEGLY, California	JERROLD NADLER, New York
BOB GOODLATTE, Virginia	ROBERT C. SCOTT, Virginia
ED BRYANT, Tennessee	MELVIN L. WATT, North Carolina
STEVE CHABOT, Ohio	ZOE LOFGREN, California
BOB BARR, Georgia	SHEILA JACKSON LEE, Texas
WILLIAM L. JENKINS, Tennessee	MAXINE WATERS, California
CHRIS CANNON, Utah	MARTIN T. MEEHAN, Massachusetts
LINDSEY O. GRAHAM, South Carolina	WILLIAM D. DELAHUNT, Massachusetts
SPENCER BACHUS, Alabama	ROBERT WEXLER, Florida
JOHN N. HOSTETTLER, Indiana	TAMMY BALDWIN, Wisconsin
MARK GREEN, Wisconsin	ANTHONY D. WEINER, New York
RIC KELLER, Florida	ADAM B. SCHIFF, California
DARRELL E. ISSA, California	
MELISSA A. HART, Pennsylvania	
JEFF FLAKE, Arizona	
MIKE PENCE, Indiana	

PHILIP G. KIKO, *Chief of Staff-General Counsel*

PERRY H. APELBAUM, *Minority Chief Counsel*

SUBCOMMITTEE ON IMMIGRATION AND CLAIMS

GEORGE W. GEKAS, Pennsylvania, *Chairman*

DARRELL E. ISSA, California	SHEILA JACKSON LEE, Texas
MELISSA A. HART, Pennsylvania	BARNEY FRANK, Massachusetts
LAMAR SMITH, Texas	HOWARD L. BERMAN, California
ELTON GALLEGLY, California	ZOE LOFGREN, California
CHRIS CANNON, Utah, <i>Vice Chair</i>	MARTIN T. MEEHAN, Massachusetts
JEFF FLAKE, Arizona	

GEORGE FISHMAN, *Chief Counsel*

LORA RIES, *Counsel*

CINDY BLACKSTON, *Professional Staff*

LEON BUCK, *Minority Counsel*

CONTENTS

DECEMBER 19, 2001

OPENING STATEMENT

	Page
The Honorable George W. Gekas, a Representative in Congress From the State of Pennsylvania, and Chairman, Subcommittee on Immigration and Claims	1
The Honorable Sheila Jackson Lee, a Representative in Congress From the State of Texas, and Ranking Member, Subcommittee on Immigration and Claims	1
The Honorable John Conyers, Jr., a Representative in Congress From the State of Michigan, and Ranking Member, Committee on the Judiciary	4

WITNESSES

Mr. Joseph R. Greene, Acting Deputy Executive Associate Commissioner for Field Operations, Immigration and Naturalization Service	
Oral Testimony	16
Prepared Statement	17
Mr. Edward McElroy, New York District Director, New York District Office	
Oral Testimony	20
Prepared Statement	17
The Honorable Paul H. Thomson, Office of the Commonwealth's Attorney for the City of Winchester	
Oral Testimony	23
Prepared Statement	24
Ms. Margaret H. Taylor, Professor of Law, Wake Forest University School of Law	
Oral Testimony	25
Prepared Statement	27

APPENDIX

STATEMENTS SUBMITTED FOR THE RECORD

The Honorable Sheila Jackson Lee, a Representative in Congress From the State of Texas	45
The Honorable John Conyers, Jr., a Representative in Congress From the State of Michigan, and Ranking Member, Committee on the Judiciary	46
Bishop Thomas Wenski, Auxiliary Bishop of Miami, Chairman, United States Conference of Catholic Bishops, Committee on Migration	48

MATERIAL SUBMITTED FOR THE RECORD

Letter from Mr. Ralston H. Deffenbaugh, Jr., President, Lutheran Immigration and Refugee Service	56
--	----

REVIEW OF DEPARTMENT OF JUSTICE IMMIGRATION DETENTION POLICIES

WEDNESDAY, DECEMBER 19, 2001

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON IMMIGRATION AND CLAIMS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 2 p.m., in Room 2237, Rayburn House Office Building, Hon. George W. Gekas [Chairman of the Subcommittee] presiding.

Mr. GEKAS. The hour of two o'clock having arrived, the Committee will come to order.

We note the presence of the lady from Texas, the Ranking Minority Member, and note the presence of the Chair, thus qualifying as a full hearing with the quorum of two being present and in attendance.

The purpose of today's hearing is, as everyone knows by now, to review the policies of the Immigration and Naturalization Service as they pertain to detention, detention of people entering our country and who either come in illegally or do illegal acts thereafter and in some way violate their welcome to our country.

It should be noted that this is not a late awakening on the part of this Committee on the questions of detention, nor were they fomented by the horrific events of September 11, although they have accelerated our interest in it, but rather our interest goes back to years before when we have noted horror stories emerging out of that same detention policy about which we speak. Needless to say, even before September the 11th many of us saw a need for replenishing our knowledge and thinking about the questions of detention, and this hearing is going to focus on some of the what we perceive as flaws and, hopefully, on some of the remedies that have evolved during this time and remedies that may be proposed by members of this panel. So, we are anxious to hear the testimony.

The question of detention that may lead to—or release from detention that may lead to terrorism is not just an imagined possibility, far-flung possibility, but rather the testimony will demonstrate that indeed that is a reality, that release from detention can cause an atmosphere which can create a terroristic act; and, therefore, it is appropriate before September 11, since September the 11th and from now until the foreseeable future.

With that, I yield to the lady from Texas for an opening statement.

Ms. JACKSON LEE. I thank the distinguished Chairman of the Subcommittee.

I welcome the witnesses. I look forward to their testimony.

Mr. Chairman, you are absolutely right. Let me thank you for holding this timely oversight hearing and to reinforce your statement that these issues are relevant preceding September 11 and post September 11. Clearly, what we have the responsibility of doing is fixing whatever is broken. Might I add, however, for those who are part of the INS family who is in the audience, let me also say happy holiday to you, that I believe with the leadership of Commissioner Ziglar we have the opportunity as Members of Congress to work together to solve some of these problems. We simply need to have these problems highlighted so we can collectively and collaboratively work together.

I would be remiss as I review the remarks that I would like to present to this Committee if I don't emphasize another concern or point that I think is extremely important, and that is balance. The INS is charged with both facilitating legal immigration and enforcing the Nation's laws to prevent illegal immigration. That balance should be kept in mind as we explore possible changes to INS policy. It can be both tempting and comforting to err on the side of shutting all our borders tight, locking up all those we think are dangerous. That is not the constitutional bedrock the country was built upon nor the strength of our Nation. However, it is the obligation and right of the Nation to protect its citizens and its sovereign rights.

I, too, want to be assured that we are not allowing those who wish to do harm to innocent persons into our Nation. We abhor the absolute, unspeakable violence of September 11 when innocent persons were killed on the basis of some of the individuals who came into this country legally, who were overstaying. There is no doubt that we need to confront that.

At the same time, Mr. Chairman, though we may not directly focus on this during this hearing, I cannot help but say that I am greatly concerned about 5,000 individuals who are detained with no understanding to the extent—are they there only because of their ethnic background, their religious background, or are they there for any reason? Five thousand of those individuals, are they providing us with succinct and very crucial information to help us ferret out Osama bin Laden or any other terrorist? If that was the case, I would welcome their detention, but we do not know.

So I think as we look at the question of detention and whether or not the INS has erred and whether or not we need to do more, we must again balance the needs and necessities of this particular act and these particular responsibilities.

This delicate balance can be seen in recent decisions by the Supreme Court, who appear to be moving toward a higher degree of protection of civil liberties for noncitizens, while the Attorney General and the President are seeking additional power to detain aliens who they think might be dangerous.

Under the new PATRIOT Act, the Attorney General only has to certify that an alien is likely to engage in or support a bad act and the alien is subject to mandatory detention. This detention would be mandatory even for aliens who have been granted asylum. This could present problems. If detainees are not allowed an opportunity to contest their likelihood of engaging in terrorist activity, due

process problems seem to be certain to arise. These issues of due process and proper balance arise in the area of mandatory detention and the rights of asylum seekers.

Provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 require mandatory detention of most criminal and certain categories of noncriminal aliens and asylum seekers, taking away the INS discretion to release these groups. Again, as the Chairman referred to, problems preceding before September 11, but this has caused more practical problems like creating the issue of detention space. Where do we house all these people? And what we do want to do with them if they do not pose a credible threat to national security and they are not a danger to the community or risk of flight? What do we do with the children and families who have been detained in very uncomfortable and certainly unsatisfactory conditions?

We will hear testimony today from the INS that, from fiscal year 1994 to 2001, the average daily detention population has more than tripled, from 5,532 to 19,533. And in fiscal year 2000 alone, the INS admitted more than 188,000 aliens into detention.

I have visited detention centers particularly in New York and I do under the crisis that we face. Surely we cannot continue to detain people at that rate.

The New York district model purports to have the answer. In the New York district the number of inadmissible aliens arriving at JFK dropped 63 percent from fiscal year 1992 to fiscal year 1999. The number of asylum applications dropped 91 percent in that same period. This occurred while the passenger traffic increased 18 percent at JFK. The way the New York model does it is by detaining all aliens who are inadmissible for fraud or documented-related reasons.

Is this an applicable model throughout the Nation, and do we have enough beds in-house to house all these persons, and what do we want to do? We do want to stop the types of incidences that occurred in Virginia in the Bell case. We will hear from Commonwealth Attorney Paul H. Thomson.

Something must be done to prohibit anyone, alien or not, who has a criminal history and is a danger to the community from having uninhibited freedom. We agree with that.

Another possible option comes from the INS detention policy expert Margaret Taylor, Professor Margaret Taylor, who suggests a concept of supervised release as an option to detention. This option was tested from 1997 to 2000 in New York at the request of the INS on noncitizens including asylum seekers, individuals facing removal as a result of a criminal conviction, and undocumented workers apprehended at work sites. The project entailed answering the question of what type and what level of supervision will increase people's rate of appearance in court and compliance with immigration law rulings. Professor Taylor will discuss the results.

Finally, Mr. Chairman, we are not asking for a free-for-all. We are not asking for the terrible tragedy that occurred with those who had visas who entered legally and illegally that perpetrated the heinous crimes of September 11 not being trapped and not being assessed that they were here illegally and therefore procedures not moving forward, but I will say to you that we can do a

better job. I believe with the INS committed to helping us do a better job we are getting to the problems and then the solutions. We can do that.

But I simply would say that, even as we attempt to find solutions, let us not be so hasty that the mounting detainees, 5,000 and 10,000 based upon their Muslim background, become the rule of the day and not the exception. We can do better than that here in America.

I thank the distinguished Chairman. I yield back my time.

Mr. GEKAS. We thank the lady.

Let the record indicate that the gentleman from Utah, Mr. Cannon, is present; that the gentleman from Michigan, Mr. Conyers, the Ranking Member of the full Judiciary Committee is present; and that the lady from California, Ms. Lofgren, is also in attendance.

It is the intent of the Chair to allow each Member to submit an opening statement for the record and thus expeditiously to move to the testimony at hand.

Ms. JACKSON LEE. Mr. Chairman, may I make an inquiry, please?

Mr. GEKAS. Proceed.

Ms. JACKSON LEE. Mr. Chairman, the Ranking Member is here. My understanding was that he wanted to make a few brief opening remarks.

Mr. GEKAS. That is why I asked. If I am persuaded that the gentleman wishes to make opening remarks, which I am, he may proceed.

Ms. JACKSON LEE. Thank you, Mr. Chairman.

Mr. CONYERS. Just a few, Mr. Chairman.

I want to thank Chairman Gekas for his fairness in pulling this together. After all, we did get one out of four witnesses. So that's not so bad, is it?

But my comment is really centered around the whole question of a mandatory detention. Now, preventative detention is one thing, but mandatory detention really contemplates that, from the beginning, you lock people up; and I think all the witnesses may likely agree that we just don't have the space to lock everybody up that initially comes up on the screen.

So, we have got this problem of locking people up first, and either they through legal proceedings, battle their way out of prison or they get deported as a result of losing their case. Now, it may appeal to the simple of mind that that is—that what is wrong with that? But the answer is, plenty. We aren't set up to do it. So I don't want to go back into 1996 legislation with this kind of a circumstance.

Secondly, are we sure that this is the best use of resources, to incarcerate people who don't even present a risk that neither the courts or the U.S. Attorney can determine exists? So there is a very practical aspect about this that I am hoping will be fairly considered here with all the witnesses that are before us.

In 1996, we tore families asunder by sending detainees to prisons, and was this an accident a long way from home? I mean, it looks like we are trying to create more problems on the home front than are necessary. So the question that might be considered

maybe after this is the detention of hundreds of people, maybe over a thousand, that have followed the September 11 tragedy that we have got to find out what is going on there.

You know, in the Detroit area, the Chief of Police in Detroit refused to send the letters out. So here was the poor U.S. Attorney in his first week on the job, the first thing he had to do, poor Jeffrey Collins, is send out these friendly letters. And, to his credit, he put the best face on it. He said, you know, we could just go out and ask your employer and your neighbors what all the things we want to know or we could send you a letter and invite you to come in.

That sounds like the better course, if you think either course is what we should be doing. So here we go. I appeal to my friend of great seniority that chairs the Committee that we consider at your earliest convenience what we are going to do with all these people that are being rounded up, being sent letters—and, yes, somebody may have overstayed the terms of their visa, but I don't think INS, of all the agencies and all the Government—I mean, these are the least likely people, with all due respect to them and their—there is a new leadership crew now, but in the past even the ones that I knew and liked, they couldn't get the ball down the field. Something like the Detroit Lions. I mean, it was just difficult.

Mr. GEKAS. It can't be that bad.

Mr. CONYERS. It was that bad. Almost that bad. Nothing is really that bad. But I thank the Chairman.

Ms. JACKSON LEE. You are from—

Mr. CONYERS. I am from Detroit where the Lions come from. Thank you very much.

Mr. GEKAS. We thank the gentleman.

Let the record also indicate that the gentleman from Texas, Mr. Smith, former Chairman of this very Committee, is in attendance.

With that, we will proceed with the introduction of the witnesses.

First, we introduce Joseph R. Greene, the Acting Deputy Executive Associate Commissioner for Field Operations at INS headquarters. He received his master's degree in philosophy from Fordham, has served with the INS since 1973 in a variety of positions. For instance, he started out as an immigration inspector at JFK, promoted to criminal investigator. In 1980, he transferred to the Miami district office as an immigration examiner. He also served as supervisory special agent in Miami.

He supervised the criminal investigation of Bhagwan Shree Rajneesh, an Indian guru whose cult intended to take over a small town in central Oregon. For his work he was awarded the Attorney General's Award for Distinguished Service and was appointed Deputy District Director for the Portland District.

In January, 2001, he assumed the position of Assistant Commissioner for Investigations and is currently acting as Deputy Executive Associate Commissioner for Field Operations. He directs the operational activities for all INS enforcement programs throughout the United States and nationwide.

After him, we will come to the testimony of Edward J. McElroy, the District Director of the New York District of the Immigration and Naturalization Service. He graduated from Fordham University with a bachelor of science degree, served in the United States

Air Force, began his INS career as a special agent in Newark, New Jersey, transferred to the New York district in 1985 where he served in various managerial positions including Assistant District Director for Detention and Deportation. He has served as the district director of the New York district as of 1994.

In connection with his testimony I will, without objection, be entering into the record a document prepared by Mr. McElroy's office titled: *New York District Detention and Parole Policy, an Overview*. This document lays out the parole and release policy of the New York district office and its reasons for adopting that policy. This was presented to my staff during an oversight trip to Mr. McElroy's office in October. Information relating to specific individuals in this document has been redacted to ensure those individuals' privacy. In offering this document, I make no representations with respect to same but believe that it will assist this Subcommittee in its consideration of these issues.

[The information referred to follows:]

New York District Detention and Parole Policy **An Overview**

I. Background

In Fiscal Year 1992, 14,688 Inadmissible Aliens arrived at JFK, representing an average of 41 encountered each day. In Fiscal Year 1999, the number had dropped to 5,509 (15 per day)—a 63% decrease from the earlier part of the decade. Over the same period, the number of asylum applications dropped from a high of 9,180 in FY1992 to 842 in FY1999, a decrease of 91%. These dramatic results occurred while passenger traffic through JFK increased 18% and alien passenger traffic increased 20%. How did the New York District manage to transform the airport from a minor inconvenience for illegal immigrants into a port known for its efficient and effective operations? There is no single answer. Yet there is one factor which, more than any other, has contributed to this historic turnaround: an effective District detention and parole policy.

Much like other successful border enforcement operations like Operation Gatekeeper and Operation Hold-The-Line, the New York District's parole policies frequently draw criticism from immigrant advocacy organizations, social service organizations, and the press. This is to be expected. Any successful enforcement operation is almost sure to receive such criticism. Enforcing the immigrations laws is not always easy, particularly in a city where over 40% of the residents are the sons or daughters of immigrants or are themselves immigrants. Yet, in an effort to best insure that the laws are consistently applied, the New York District has developed a common-sense and serious approach to detention and parole of arriving aliens. As such, the New York District's policy will eventually be viewed as the success that it is. Discontinuing the policy in favor of the "revolving door" policy of the early 1990's would be a disaster and an invitation for intending illegal immigrants to flood the port of entry.

The New York District's detention and parole policy serves as a model of the proper way to do business. Instead of paroling inadmissible aliens for exclusion proceedings (for which the alien was unlikely to appear), the District now detains all aliens who are inadmissible for fraud and document-related reasons. With hearings conducted within detention facilities, the process is controlled and efficient. This policy enhances the integrity of the lawful immigration process while ensuring the security of the United States and increasing compliance immigration laws.

II. The Law and Congress's Intent

Section 602(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)—entitled *LIMITATIONS ON USE OF PAROLE*—stat.

Section 212(d)(5)(A) (8 U.S.C. 1182(d)(5)) is amended by striking "for emergent reasons or for reasons deemed strictly in the public interest" and inserting "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit".

As amended, Section 212(d)(5)(A) of the Act now reads:

The Attorney General may, except as provided in sub paragraph (B) [concerning refugees] or in section 214(f) [concerning crewmen], in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

As is evident in a reading of this passage, the idea of granting parole to every person who applies is inconsistent with the letter of the law, and certainly with the spirit of the law. The phrases "urgent humanitarian reasons" and "significant public benefit" are stronger than the previous wording of section 212(d)(5) and demonstrate Congress's intent to restrict the use of parole for truly emergent situations and situations which would benefit the United States government. The phrase "case-by-case" speaks for itself, ruling out the concept of a blanket or universal parole policy as a matter of law. Even a casual observer must see that in the IIRIRA, Congress has provided the INS with the tools needed to tighten up a parole policy which had been abused by those seeking to circumvent normal immigration procedures. Had Congress not intended to restrict the use of parole, the statutes would not have been amended and the wording "*LIMITATIONS ON THE USE OF PAROLE*" would not have been adopted.

From this, it is evident that Congress recognized the abuse of parole and indeed intended to restrict its use. For years, aliens arriving in the United States were routinely granted parole for the purpose of attending exclusion hearings, deferred inspections, or other administrative or humanitarian reasons. Trends developed which demonstrated consistent and significant abuse of the old parole provisions by many intending immigrants. Arriving with fraudulent documents or with no documents at all was not a serious problem for an intending immigrant. With the Service having little detention space and with laws that provided for often-lengthy exclusion proceedings in almost every case, and with inadequate resources to apprehend an alien once paroled into the United States, undocumented or under-documented aliens melted into the population only to surface again when eligible for a benefit or after apprehension for unauthorized employment or criminal activity. With the passage of the IIRIRA and related legislation,

two of the three conditions which allowed this abuse have been addressed, and with a consistent detention policy, the third condition is no longer a practical consideration.

The New York District, in 1997, increased detention space for housing inadmissible aliens with the opening of the Wackenhut contract facility near JFKIA. Though this facility operates at or near capacity, it has provided the District with a capability it notably lacked in the early part of the 1990s. Further, the law now provides that those aliens who are inadmissible under 212(a)(6)(C) [relating to fraud and misrepresentation] or 212(a)(7) [relating to documentation requirements] are no longer entitled to a hearing before an immigration judge, precluding the need for parole for exclusion proceedings in document-related cases. It is precisely these cases which have traditionally been a problem for the Service. Counterfeit and altered documents give few clues as to an individual's identity and the identification of those who arrive with no documents at all is nearly impossible to do in a short time. Detention of these arrivals until such time as they can be identified is an essential part of ensuring the security of the community. Further, detention of inadmissible aliens ensures the appearance of the alien. This reduces the Service's obligations in manpower and resources when it comes to locating and apprehending those who were paroled but failed to appear for hearings—a nearly impossible task. And, though the District does—in individual cases justifying urgent humanitarian consideration or significant public interest—parole certain aliens, it is much easier to supervise a small number of such aliens than it is to try to manage the tremendous numbers resulting from a “parole them all” policy.

III. Credible Fear, Detention, and Parole

Though Expedited Removal proceedings no longer provide for a hearing before an immigration judge, any applicant for admission who expresses an intention to file for asylum or who demonstrates any fear of persecution is referred for a Credible Fear Interview before an Asylum Pre-Screening Officer (APSO). There is little question that Congress expects the Service to detain those making credible fear claims. That the Service recognizes this intent is also clear as is reflected in the Code of Federal Regulations at 8 C.F.R., 235.3(b)(4)(ii), which states:

Detention pending credible fear interview. Pending the credible fear determination by an asylum officer and any review of that determination by an immigration judge, the alien shall be detained. Parole of such alien in accordance with section 212(d)(5) of the Act may be permitted only when the Attorney General determines, in the exercise of discretion, that parole *is required to meet a medical emergency or is necessary for a legitimate law enforcement objective.* (emphasis added)

If, after interview by an asylum officer, an alien is found to have a “credible fear”, that alien is given an opportunity to file an application for asylum and have that application reviewed by an immigration judge. An asylum officer finding that an alien has a “credible fear of persecution” does not necessarily equate to a finding that an alien

is likely to qualify for asylum. Further, such a finding does not necessarily mean that the alien's identity has been determined. Asylum officers are trained to give credible fear claimants every benefit of the doubt in determining whether credible fear exists. It should be clear, therefore, that a finding of credible fear should have very little, if any, weight in determining whether parole is in order for a particular alien. This point is lost on advocacy organizations and others who would have the Service release any aliens found by an APSO to have a "credible fear". Still, section 212(d)(5) does provide for parole as a matter of discretion, "...only on a case-by-case basis for urgent humanitarian reasons or significant public benefit...". Between April 1, 1997 (the beginning of the credible fear/expedited removal processes) and the end of FY1999, JFK Inspectors referred 1,558 aliens for credible fear interviews. Of those, 265 withdrew their claims before the interview (usually after being advised of penalties for filing frivolous claims), leaving 1,293 to be considered by APSOs. Of these 1,293, APSOs found credible fear in 1,183 cases (91%). A negative finding was reached in only 49 cases (4%), and on HQ review, many of those were reversed to a positive finding. The remaining 61 cases were pending credible fear determination at the end of the fiscal year. Of the 1,183 aliens found to have a credible fear, 409 were paroled. Of those remaining within the jurisdiction of the District, 43 (12%) were ordered removed in absentia, 47 (12%) failed to surrender for removal following an order, 24 (6%) were granted asylum by an immigration judge, and 12 (3%) were denied asylum by an immigration judge. The remaining 278 were either paroled for change of venue (and no longer tracked by this office) or are awaiting an asylum decision.

IV. Arguments Against Universal Parole

Apart from legal requirements, there are several reasons why an alien should be held even after a finding that he or she has a credible fear. These reasons, while fairly easy to separate for the purpose of identification, all contribute to the overall problem. Discussing any one of the following factors without understanding the relationships between them or discussing them without the understanding that in most cases many or all of the factors apply, might lead a person to discount the extent of the total problem—historically or presently.

First, as mentioned previously, a finding that an alien has a credible fear does not equate, in any meaningful way, to an alien's eligibility for asylum. Though the INS defines "credible fear of persecution" as meaning that there is, "...a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 208" [section 235(b)(1)(B)(v)], history does not reflect that this standard is met in every case. For FY1999, for instance, all but 7 credible fear claimants were found to have a credible fear. Against 470 positive credible fear findings, this figure is virtually nothing (1.5%). Since beginning of the credible fear interviews in April, 1997, only 4% of claimants at the New York Asylum Office have been rejected for not establishing a credible fear. And this rejection rate is

the *highest* in the nation. One of two things is happening here; either New York is impossibly lucky in receiving only high-quality credible fear claimants, or referrals for asylum hearings are being made regardless of whether the requirement that a "significant possibility...that the alien could establish eligibility for asylum..." is met. The latter is unquestionably the case. In some cases where credible fear was found, a prospective asylum applicant was statutorily ineligible for asylum for criminal or terrorist-related reasons. In other cases, "other factors as are known to the officer" simply would not justify a grant of asylum. Still, in order to be as fair as possible, and to provide potential asylees with every consideration, only a very limited number of claims are dismissed by asylum officers. Experience shows that HQ Asylum tends to reverse even the very small number of dismissals issued by the Asylum Office. In effect, everyone who claims or demonstrates a credible fear at JFK will have a hearing before an immigration judge unless he or she chooses to withdraw their claim. As such, paroling persons into the United States—even where credible fear has been found—only serves to return the Service to the ineffective policy (commonly known as the "revolving door" policy—even though the "door" only fed one way) of the early 1990s. Aliens paroled into the population tend to obtain illegal employment and/or fraudulent documents, thus feeding the criminal immigration networks. They further ignore orders to appear for hearings—particularly when their claims are marginally "credible" and when entire families are paroled. The fact that such aliens have been able to skirt the law is no secret in immigrant communities here or to intending illegal immigrants abroad. This knowledge fuels the burgeoning alien-smuggling trade. As such, returning to a parole policy which allows such actions would only encourage illegal immigration and related criminal enterprises, compounding other problems the Service's Interior Enforcement Strategy seeks to address. The result of such a policy, as was seen in the early 1990s, was runaway fraud, abuse of the asylum process, and waves of inadmissible aliens who had little or no respect for the immigration laws.

A second reason for continuing detention of credible fear cases is that as soon as they are paroled, aliens begin to accumulate equities in the United States. Indeed, a large number of those paroled into the United States for exclusion proceedings prior to IIRIRA never appeared for their hearings and resurfaced only after marrying a United States citizen and filing for adjustment of status. As these aliens had been paroled, and as the Service held jurisdiction in these matters, the result was that the Service usually granted adjustment of status. In effect, after entering the United States with improper documentation, after accepting unauthorized, after ignoring Service orders to appear for a hearing, and after being ordered "excluded and deported", an alien would be rewarded with permanent residence! Such instances indicate the folly of paroling every alien into the United States and the absurdity of allowing persons to abuse parole to circumvent normal immigration procedures. Based on the no-show rate of those paroled under today's more restrictive policies, the situation has not changed very much. Of the 131 aliens paroled into the local communities for which immigration judge decisions have been issued, 95 (75%) either failed to appear for their hearing or failed to surrender for removal following the issuance of a removal order. A more liberal parole policy would

result in a much higher no-show rate. One should also remember that a number of those parolees who *did* appear for a hearing did so because a family member was still in detention. Their best interests dictated that they appear. With a universal parole policy, many of those who did appear would likely not have done so had there not been the family-based incentive. Detention throughout the process makes sense. The process is fair, efficient, and effective.

A third reason for limiting parole is the effect such a policy has on potential illegal immigrants overseas. Until changes in asylum procedures in 1995, aliens arriving in the United States could make a safe assumption that, unless they engaged in criminal activity or were apprehended in a worksite enforcement operation, they could live and work in the United States with relatively few troubles from the INS. New York District's policy of detaining inadmissible aliens (credible fear or not) has sent a clear message to those who counted on asylum-based parole as their foot in the door to the United States; if you plan to circumvent the normal immigration procedures in immigrating to the United States, you better find a port of entry other than JFK. This message goes far in supporting the Overseas Deterrence elements of the Interior Enforcement Strategy, and coupled with the effective Carrier Training Program and better intelligence, has resulted in a dramatic drop in the numbers of inadmissible aliens arriving in the United States through JFK. In the last three years, artificial "goals" for the identification of fraudulent documents at JFK could not be met. Failure to meet the goals was not due to inactivity or sloppy work, but rather the goals were rendered obsolete by the reestablishment of positive control over the port of entry. With this in mind, reinstating a liberal parole policy would reverse the District's successful efforts to institute a meaningful deterrence program and render Congress's efforts to curb illegal immigration useless.

Another consideration—and an extremely important one—is that of the safety and security of the United States, her citizens, and lawful permanent residents. In many instances, inadmissible aliens found to have a credible fear were later found to have significant criminal or terrorist links. Thanks to a consistent detention and parole policy, these aliens were identified and removed to the Service Processing Center or contract detention facilities to be treated as the more serious cases they were. Absent such a policy, these aliens might have disappeared into the population to reemerge on the front page of the New York Times as a suspect in criminal or terrorist operations. The number of instances where such identification has occurred is significant and recent events underscore the necessity of positively identifying all aliens before entertaining any thought of parole. Had Gazi Ibrahim Abu-Maizar (convicted "Brooklyn Bomber") been detained pending his asylum hearing, he would not have been at liberty to construct five bombs and come within four hours of destroying a subway train [note that Abu-Maizar was paroled by another port, NOT JFK]. Ramzi Yousef (convicted World Trade Center bomber) was paroled into the United States after he requested asylum. Under present policies, he would be detained until his case was completed. Under a "parole on finding credible fear" policy, he would likely be released after meeting the low credible fear standard. Angel Maturino Resendez, arrested for a string of murders in Kentucky and

Texas, would have been detained and ultimately removed had he entered at JFK. Events on the northern border in December further strengthened the argument for positive identification of any alien released into the community. In the above cases and others like them, media and political backlash was understandably severe. Following Abu-Maizer's arrest, Senator Alfonse D'Amato asked, "...are we going to deal with other potential terrorists in the same manner?" The New York District answer is, "No".

Nearly 100% of aliens detained for credible fear interviews attempt entry without documents or with counterfeit documents. In these cases, it is often impossible to positively identify the alien for several days or even longer. Concealed criminal records or terrorist affiliations might similarly be unknown to an inspector, an asylum officer, or even an immigration judge until well into the process. For these reasons, the American public is better served and protected when these aliens go through the full asylum interview and subsequent hearing process in a controlled and secure environment.

Following are specific examples of how loosely the phrase "...a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 208..." is applied to credible fear cases. Each of the following examples posed a very serious risk to the security of the United States or her citizens, yet--absent a well-managed case-by-case parole policy--could well have been walking the streets today.

1. [REDACTED] entered the Wackenhut Corrections Facility (WCC) on August 6, 1997. During his credible fear interview, he stated that he killed a witch doctor. He was transferred to York County Prison on October 3, 1997. Though murder statutorily precludes asylum, credible fear was found on October 21, 1997--over two weeks after the credible fear interview.
2. [REDACTED] entered WCC on August 7, 1997. He displayed violent behavior, twice trying to bite officers. He refused to allow his fingerprints to be taken, even for his asylum application. Yet, on September 19, 1997, he was found to have credible fear. Eventually, he was ordered removed by the immigration judge and was removed with escorts.
3. [REDACTED] entered WCC on September 20, 1997. During his credible fear interview, he stated that he threw a fire bomb into the home of a Vice President of [REDACTED] Corporation, killing the Vice President's mother. He fled Nigeria to avoid prosecution. Asylum found credible fear. He was transferred to York County Prison.
4. [REDACTED] entered WCC on November 15, 1997. An APSO found credible fear on November 17, 1997. Subsequently, he was questioned by the Joint Terrorist Task Force as a suspected member of a terrorist organization. He was ordered removed by an immigration judge and his case is now on appeal.

5. [REDACTED] entered WCC on December 27, 1997 and was determined to have a credible fear. Identified by the Joint Terrorist Task Force as a member of a terrorist organization, he was placed in the custody of the U.S. Marshals Service on February 5, 1998.
6. [REDACTED] entered WCC on December 31, 1997. During his credible fear interview, he admitted membership in a terrorist organization, and he was transferred to York County Prison on January 23, 1998. He was found to have a credible fear on January 29, 1998--six days after this admission.
7. [REDACTED] entered WCC on August 18, 1997 following his journey as a stowaway on a ship. On August 26, 1997, he was found to have a credible fear. Afterwards, while still in the facility, he became so violent with officers and other detainees that he had to be transferred to Wicomico Prison.
8. [REDACTED] entered WCC on May 11, 1998. During his credible fear interview, he claimed membership in a militant organization and was classified a risk to national security. Nevertheless, he was found to have credible fear on July 21, 1998.
9. [REDACTED] entered WCC on July 17, 1998. During his credible fear interview, he stated that he was wanted for murder in Pakistan. He was found to have credible fear by the APSO. He is now in Wicomico Prison.

These cases cover just the first fifteen months of credible fear interviews. As can be seen in just these examples, the idea that credible fear is truly based on a "significant possibility" that a person might qualify for asylum is ridiculous. Murderers, terrorists, narcotics carriers, and persons of other-than-good-moral-character are all routinely found to have credible fear. To parole these persons into society would be a terrible mistake. Above are just nine instances of potential Ramzi Yousefs or Angel Maturino Resendezs who could be engaging in terrorist or criminal activity under the old parole policies. Allowing such persons into the population is unconscionable and is a betrayal of the public trust.

V. Conclusion

Numbers do not lie. In FY 1992, JFKIA was overrun by inadmissible aliens and asylum seekers. An average of 40 inadmissible aliens and 25 asylum seekers were encountered every *day* of that period. Today, having reestablished positive control of the port of entry through a number of innovative and common sense programs, the numbers have dropped dramatically. In FY 1999, JFKIA processed an average of 15 inadmissible aliens per day (down 63% from FY 1992). Even more striking is the decrease in asylum seekers. In FY 1999, JFKIA could expect an average of 2.3 asylum seekers each day (a

decrease of 91% from the FY 1992 average of 25 per day). Clearly, something is working.

To attribute the success solely to a consistent detention/parole policy would be a mistake. However, this policy is the most important part of the picture. The Carrier Training Program, overseas intelligence, and increased access to law enforcement information systems have certainly played their parts in the success. But without a consistent detention policy, and without a perception on the part of intending illegal immigrants that New York takes its mission seriously, the other efforts would be considerably minimized in their effectiveness. Interior Enforcement Strategies and Border Control Management mean very little to an alien who knows that he or she can arrive, say "credible fear" and walk off into the sunset.

The New York model works. To think otherwise is to ignore the facts. At a time when the Service is attempting to reestablish the respect that has eroded over the last decade, for New York to abandon its detention/parole policy would be—in effect—raising the white flag. Reverting to policies which have been proven ineffective would only serve to send a signal to those who are seeking to establish themselves in the United States that—despite Congress, despite the Commissioner's Priorities, and despite the interests of the United States—the Immigration and Naturalization Service does not intend to take its mission seriously.

NYC Detention/Parole
Revised 10/24/01
Page 9 of 9

Mr. GEKAS. He is joined at the table by Paul H. Thomson, Commonwealth's Attorney for the City of Winchester, Virginia, first elected Commonwealth's Attorney for Winchester in 1985. He is a graduate of Washington and Lee University in Lexington, Virginia, captain of both the cross-country and track teams for 3 years at Washington and Lee, served in the United States Army in the 137th arctic and mountain field artillery in Fort Richardson, Alaska, attended the University of Puget Sound School of Law in Washington State and worked as a back county ranger at Olympic National Park in Port Angeles, Washington, before returning to Lexington, Virginia.

He is a graduate of Washington and Lee School of Law in June 1983. Active professionally, board member of the Virginia Association of the Commonwealth's Attorneys, instructor for the Rappahannock Criminal Justice Academy, and guest teacher at the University of Virginia Law School, active in the community, recipient of the 2000 Preservation of Historic Winchester Elsie Rosenberger Award for Outstanding Volunteer Service.

Then the final witness would be Margaret H. Taylor, Professor of Law, Wake Forest University School of Law, graduate of Yale Law School where she was editor of the Yale Law and Policy Review and University of Texas at Austin where she was Phi Beta Kappa. Author of various articles on immigration law, including, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*; and the 1996 Immigration Act, Detention

and Related Issues. She has spoken before numerous organizations, including the Migration Policy Institute and the Criminal Justice Institute at Harvard Law School; and she is a member of the American Bar Association's Coordinating Committee on Immigration Law.

As is the custom, we will entertain the written statements of each of the witnesses and, without objection, include them initially and finally as part of the record. In the meantime, we will ask the witnesses to try to review that written testimony within a bank of 5 minutes which we will be according by a timer to each of the witnesses. We will proceed as they were introduced, with the first testimony being from Mr. Greene, after we do further housekeeping and note the presence of the gentleman from California, Mr. Gallegly, a Member of the Committee, who is now in attendance.

Mr. GEKAS. Mr. Greene, you may proceed. Five glorious minutes are yours.

STATEMENT OF JOSEPH R. GREENE, ACTING DEPUTY EXECUTIVE ASSOCIATE COMMISSIONER FOR FIELD OPERATIONS, IMMIGRATION AND NATURALIZATION SERVICE

Mr. GREENE. Thank you, Mr. Chairman, and thank you Members of the Committee. I would like to thank the Committee today for the opportunity to testify. It is my pleasure to discuss with you detention policy in the INS from a national perspective.

Mr. GEKAS. Is the mike on?

Mr. GREENE. Is the mike on? Okay. My apologies, sir.

As I said, I will be discussing providing the Committee with information with respect to the INS detention policy from the national perspective. I leave it to my colleague, Mr. McElroy, to discuss the particular situation in New York.

As you know, since 1995 the Congress has worked very closely with the INS in increasing our capabilities and strengthening our capabilities to detain people who are in the United States in violation of law. We have seen, as Congresswoman Jackson Lee indicated, a dramatic growth in the INS's capabilities to deal with the problem of illegal detention and removal; and, in fact, at the same time INS detention policy has evolved and has been crafted to reflect a wide spectrum of public policy issues.

There is a public interest in maintaining and promoting an orderly immigration system. There is a public interest in the inflexible enforcement of the immigration law. There is a public interest in maintaining an effective detention management system that reflects the proud tradition of jurisprudence with regard to due process in this country. There is a public interest in discharging our treaty obligations and our duty to protect bona fide asylum seekers in this country. There is a public interest in discouraging people from attempting to evade or abuse our generous immigration laws. There is a public interest in protecting public safety.

Within this context, we have crafted a national immigration detention policy that sets standards and accounts for local needs and requirements. Those national standards are contained in the 12 detention standards with which this Committee is well familiar, having to do with attorney access, having to do with counselor access. These are standards that evolved over a period of years and go di-

rectly to the professional standards that the American Corrections Association uses for all jails across the country.

But the policy establishes within it four priorities which are contained in the testimony. I will just review them briefly.

The first priority is mandatory detention requirements where the statute requires that the person in our custody shall be detained.

The second category deals with other criminals who are not subject to mandatory detention, including security and related crimes, aliens who are deemed to be a community or a flight risk and alien smugglers.

The third category includes inadmissible noncriminal aliens, aliens who have committed fraud or were smuggled into the United States, aliens who are captured at a work site in violation of their immigration status.

Finally, category four includes noncriminal border apprehensions, other aliens not subject to mandatory detention, aliens placed in 240 proceedings and for which bonds are set.

These are the national standards that are put into place, but importantly—the most important aspect of the INS detention policy is that each case requires a case-by-case evaluation that balances the various factors that we have discussed, that attempts to balance the various responsibilities that the Immigration Service has in connection with a public interest.

You know that when district directors such as Mr. McElroy and the position that I held in Denver for 11 years, you know that the three basic criteria that we look at when we make a decision to put somebody—to hold them in INS custody is whether they qualify under the mandatory detention mandate, whether they are a threat to public safety, and whether they are likely to abscond; and each district director reviews each individual case with an eye to those requirements.

Since the terrorist attacks of September 11, this policy, like all of the policies within the Government, has been subject to a review; and although the INS began a wall-to-wall review of detention policy within the framework of its national detention strategy, I can tell you that this effort has assumed new urgency since the attacks occurred.

We look forward to working with the Committee. We look forward to a fulsome discussion today. I will be happy to answer your questions after the statements are completed.

Mr. GEKAS. Thank you.

[The prepared statement of Mr. Greene and Mr. McElroy follows:]

PREPARED STATEMENT OF JOSEPH GREENE AND EDWARD MCELROY

Mr. Chairman and Members of the Subcommittee, I am pleased to have the opportunity today to testify on “The Department of Justice Immigration Detention Policies.” Strengthening the nation’s capacity to detain and remove criminal and other deportable aliens is a key component of the Immigration and Naturalization Service’s (INS) comprehensive strategy to deter illegal immigration and protect public safety. We believe that with the strong support from the Congress, INS has increased its effectiveness in the apprehension, detention and removal of criminal aliens and violators of immigration laws from the United States.

GENERAL OVERVIEW OF INS DETENTION POLICY

With the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress expanded the number of crimes that made people subject to removal. It also eliminated INS' discretion to release certain aliens by requiring that virtually any non-citizen subject to removal on the basis of a criminal conviction, as well as certain categories of non-criminal aliens, be detained without bond. As a result of IIRIRA, INS is required to detain a much larger number of people.

The provisions in IIRIRA requiring mandatory detention, along with the rise in sophisticated smuggling operations, and the increase in the number of criminal aliens have resulted in the need for significantly more detention space. From Fiscal Year (FY) 1994 to FY 2001, the average daily detention population has more than tripled from 5,532 to 19,533. In FY 2000 alone, INS admitted more than 188,000 aliens into detention. In fact, the average daily population of criminal aliens in detention between FY 1994 and FY 2001 more than tripled from approximately 3,300 to 13,210. At the same time, the number of criminal aliens removed by INS more than doubled from 32,512 in FY 1994 to 70,873 in FY 2001.

Currently, there are approximately 20,000 aliens detained by the INS while in immigration proceedings or awaiting removal after being issued a final order of removal. Of the aliens currently being detained, sixty-five percent are criminal aliens. INS detainees are housed in a variety of facilities across the country. The INS has access to 21,304 beds to detain aliens either at INS-owned and operated facilities or in state, local or FY 2001 was 40 days while the median length of stay was 14 days. Since FY 1995, total removals have increased 155 percent to nearly 176,000 in FY 2001. The Detention and Removal program currently employs 212 Detention and Deportation Officers, 617 Deportation Officers and 1,797 Detention Enforcement Officers.

INS detention policy sets forth guidelines for determining priorities in which aliens should be detained. This policy sets forth four major categories of aliens and classifies these individuals as required detention, high priority, medium priority and lower priority. The four categories are: Category I—mandatory detention; Category II—includes security and related crimes, other criminals not subject to mandatory detention, aliens deemed to be a danger to the community or a flight risk and alien smugglers; Category III—includes inadmissible non-criminal aliens (not placed in expedited removal), aliens who committed fraud or were smuggled into the United States, worksite apprehensions, and Category IV—includes non-criminal border apprehensions, other aliens not subject to mandatory detention, aliens placed in expedited removal referred to Full 240 procedures.

When an alien is apprehended at or near the border by a Border Patrol Agent (BPA), the alien is usually transported to the Border Patrol Station by the apprehending agent. Once the Border Patrol decides to proceed with the administrative or criminal processing of an alien, the detention process begins. There are three reasons INS detains an alien: risk of flight, risk of danger to the community, and requirement of law (such as mandatory detention of certain aliens). Once charged, aliens detained by the INS are either in proceedings before an Immigration Judge to determine whether or not they are eligible to remain in the United States, or they already received final removal orders and are awaiting removal from the United States.

MANDATORY DETENTION PROVISIONS

Detained aliens primarily fall into two general categories—those being detained during immigration proceedings and those that have already been issued removal orders and are waiting to be removed. Many aliens currently detained by INS are subject to mandatory provisions under the Immigration and Nationality Act (INA). There are two major categories of aliens subject to mandatory detention—arriving aliens placed in expedited removal proceedings (section 235 of the INA) and aliens subject to mandatory detention under section 236(c) of the INA. The latter group includes all aliens chargeable as terrorists and virtually all aliens who are chargeable as criminals. Additionally, aliens subject to final orders of removal as criminals or terrorists are also required to be detained in order to effectuate their removal from the United States.

BOND/PAROLE DETERMINATIONS:

Once arrested, an alien who will be placed in removal proceedings must be transported from the point of arrest to a processing center or District Office to be processed into custody. If there is no legal requirement for mandatory detention, signifi-

cant risk of flight or danger to the community, an alien may be released on his or her own recognizance, bonded out (see INA section 236(a) for general bond authority), or paroled into the community. Aliens who are eligible for bond are also eligible for a bond redetermination hearing before an Immigration Judge. In general, detention determinations are based on the danger posed by the alien to the community and the likelihood that he or she will appear for all scheduled hearings. Factors that the INS considers in making this determination include: prior criminal history, the severity of the crimes for which the alien was convicted, history of failure to appear for court, equities in the United States and evidence of ties to the community, availability of relief from removal and the likelihood of relief being granted, and prior immigration violation history. These factors have been repeatedly upheld by Immigration Judges and the Board of Immigration Appeals (BIA). In cases where an arriving alien asserts an asylum claim, INS policy favors release from custody if the alien is found to have a credible fear of persecution. (8 CFR 235.3).

In a bond redetermination proceeding, the Immigration Judge reviews the previous INS determination as to the alien's dangerousness and the possibility that he or she may not appear for hearings if released. The Immigration Judge may base that determination on any information that is available or that is presented by either party. Both the INS and the alien have the right to present evidence and witnesses to the Immigration Judge. The bond hearing is separate and apart from the removal proceeding. At the conclusion of the bond hearing, the alien or the INS may appeal the Immigration Judge's bond decision to the BIA.

POST-ORDER DETENTION & RELEASE DETERMINATIONS

Section 241(a) of the INA authorizes the Attorney General to detain aliens who are subject to final orders of removal in order to effectuate their removal from the United States. While detention following a final order is often discretionary, the INA provides for mandatory detention of criminal and terrorist aliens with a final order of removal. Section 241(a)(1) of the INA provides, as a general rule, that an alien with final orders shall be removed within 90 days. Following the 90-day removal period, the Attorney General has the authority to continue detention of certain aliens, including those determined to be a danger to the community or unlikely to comply with a removal order. The standards for determination of release for aliens subject to a final order of removal are set forth in 8 CFR 241.4. That regulation provides for automatic administrative custody review procedures for non-mandatory detention aliens at multiple levels and at periodic intervals. This review process provides the alien with numerous opportunities to provide evidence in support of release.

In *Zadvydas v. Davis*, 121 S. Ct. 2491 (2001), the U.S. Supreme Court held that under section 241(a)(6), the INA generally permits detention of aliens under a final order of removal only for a period reasonably necessary to carry out their removal from the United States. The Supreme Court held that detention of such aliens beyond the statutory removal period for up to six months after entry of a final removal order is presumptively reasonable. (121 S.Ct. at 2504–05). After six months, if an alien can demonstrate that there is good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the government must rebut the alien's showing in order to continue detention of the alien. Additionally, the Supreme Court recognized that there may be special circumstances, such as those involving terrorists or especially dangerous individuals, in which continued detention may be appropriate even if removal is unlikely in the reasonably foreseeable future. (Id. At 2505). The Court's decision does not apply to arriving aliens—those still technically at our borders and paroled in (including groups such as Mariel Cubans who are treated as still seeking admission). Based on the Supreme Court's decision, the INS recently issued regulations implementing the decision and setting forth the new review process. (66 FR 56967, November 14, 2001)

IMMIGRATION HEARINGS AND REMOVAL

When an apprehended alien decides to exercise his or her right to a hearing, the alien must await proceedings before an Immigration Judge. This process takes place under the auspices of the Executive Office for Immigration Review (EOIR). There are a number of potential outcomes to these hearings. If the alien is eligible for a bond redetermination hearing, that will be held first. Once a decision on the bond is made, another hearing is typically held to consider the removal charge. The most common outcome of the removal proceeding is a final order of removal. In such instances, the Immigration Judge has determined that an individual is removable from the United States or ineligible for admission into the United States.

During the removal hearing process, an alien may be granted relief, such as asylum, as a result of the facts presented at his or her hearing, the alien may be permitted to withdraw his or her application for admission, or the case may be terminated outright if it is determined that the removal charge is not sustainable or evidence comes to light that the alien is lawfully present.

An alien who has been ordered removed may pursue an appeal of the Immigration Judge's decision. Appeals of immigration hearings are the jurisdiction of the BIA. The BIA decisions may be appealed by aliens to the U.S. Courts of Appeals, thus moving from the administrative law process in the Executive Branch to the U.S. Courts for a final decision. The final authority for immigration appeals is the U.S. Supreme Court. The time it takes to proceed through the appellate process can be significant and often places a burden on INS to provide long-term detention. Another avenue for effecting an alien's removal is by reinstating a prior final order of removal. When an alien previously removed from the United States re-enters illegally, Sec. 241(a)(5) provides for reinstatement of the removal order.

RELEASE POLICY IN NEW YORK DISTRICT

INS policy requires a case-by-case custody determination for aliens determined to have passed the credible fear threshold. This policy balances the need to detain people in order to protect the public safety and ensure appearance for immigration hearings, and humanitarian concerns such as family reunification and medical history.

The decision of how to achieve this balance takes into consideration many national and local factors. The danger to the community, availability of appropriate detention space, the alien's identity, and family or community support, etc., are some or all of the factors considered in determining whether an alien will comply with the terms of their release from custody.

The New York District Office, as do all District Offices, examines these factors in each individual case before reaching their conclusion. The New York District is unique as compared to other INS districts in that it has two contract detention facilities dedicated solely to asylum seekers. As a result, almost all aliens are available for immigration proceedings and can be easily removed upon the issuance of a final order of removal. In September 2000, the General Accounting Office (GAO) issued a report on the expedited removal process. As part of that report, GAO determined that 42 percent of aliens who claimed credible fear and were released subsequently failed to appear at their immigration hearing and were issued an order of removal in absentia (termed "absconders"). The New York District has an absconder rate of 28 percent for this class of aliens. GAO recommended that INS analyze the characteristics of aliens claiming credible fear who appear for hearings and those who are absconders and use these results to re-evaluate existing policy on releasing aliens who claim credible fear. INS has contracted with a private company to accomplish this task. This analysis will examine the same database as that was used for the GAO Report and will then expand the database to look at many variables to determine which, if any, affect the rate at which an alien absconds. The results from the GAO study are disturbing. However, INS is taking into account GAO's recommendations in the study currently being conducted, and will make adjustments to the INS release policy as appropriate.

Commissioner Ziglar recently announced an initiative to enter the names of all aliens with final orders who fail to appear for removal into the Federal Bureau of Investigation's National Crime Information Center (NCIC). Previously, INS had only entered the names of criminal aliens and deported felons into NCIC. Entering the names of all absconders into NCIC will allow for increased identification and apprehension of those who fail to comply after completing the judicial process and receiving a final order of removal.

In conclusion, INS, with the help of Congress, has made great strides in the effective enforcement of our immigration laws. I stand ready to work with you as the INS continues to protect public safety while providing safe and humane treatment to all individuals in our custody. Thank you for the opportunity to appear, Mr. Chairman. I look forward to your questions.

Mr. GEKAS. We now turn to Mr. McElroy.

STATEMENT OF EDWARD McELROY, NEW YORK DISTRICT DIRECTOR, NEW YORK DISTRICT OFFICE

Mr. McELROY. Thank you, Mr. Chairman.

First, I would like to acknowledge Congresswoman Lee for coming to New York and visiting our Wackenhut facility and taking an interest in our detainees and how we are treating people there.

I would also like to recognize Congressman Gallegly for his trip to JFK, at which time I told him that I would not be turning out people with rose-colored glasses. What you see is what you get. If you want a direct answer, ask a direct question and you will get it. And I believe he got all of those things but not the rose-colored glasses.

Now, with regard to detention policy in New York, I wish to take you back to the early 1990's when the New York district was overrun by inadmissible aliens, many of whom filed for asylum and were then paroled into the U.S. For a hearing at which they never appeared. The parole policy at that time, coupled with the offer of employment authorized, led to abuse of the asylum process.

With the elimination of employment authorized and liberal parole policies as magnets to attract people, the number of inadmissible aliens arriving at JFK has declined 70 percent, from 14,688 in 1992 to 4,501 in 1997. At the same time, the number of asylum seekers dropped 93 percent, from 9,180 in 1992 to 620 in 1997. In fiscal year 1992, 63 percent of inadmissible aliens applied for asylum. Five years later, only 14 percent applied.

The results of the New York district's policy have been an effectively controlled port of entry, a weaker draw for those contemplating illegal entry and an effective counterterrorism element.

In considering these numbers, one must ask themselves—the question begs, where did the people go? If they knew they were coming into New York as being undocumented or photo substituted documents and they were facing detention, my belief is that they took alternate routes. So the criticism of the policy is, did I inconvenience people in having them go to another port of entry other than New York?

In section 602 of the Illegal Immigration Reform and Immigrant Responsibility Act entitled Limitations on Use of Parole, Congress amended the Immigration Nationality Act to authorize parole only on a case-by-case basis for urgent humanitarian reasons or significant public benefit. Clearly, Congress intended to give INS the tools needed to tighten up a parole policy which had been abused by illegal immigrants.

That Congress intended to be more restrictive in granting parole is evident from the words "limitations on use of parole." still, the New York district does grant parole in appropriate situations. In the period April 1997 to early 1999, of 63 aliens paroled into the local community, 41 percent failed to appear for hearings and only 2 percent were granted asylum.

One thing I believe we should consider, ladies and gentlemen, is the difference between an asylee and a refugee. A refugee is an individual outside the United States who is applying through the U.S. Embassy for the right to come to the United States. An asylee is someone applying for asylum in the United States. Oftentimes, these people have transversed various countries and just presented themselves. Is there a dual standard here where we hold off refugees and we entertain people coming into the country with fraudu-

lent documents that have the methods, means, and money to get here as opposed to refugees who did not?

Parole of all aliens found to have credible fear is not consistent with law, nor is it in the best interest of the United States. Inspectors refer all aliens who express any hint of credible fear or intention of filing asylum. Regardless of reason, they are referred. The asylum prescreening officers are instructed to give aliens every benefit of doubt in credible fear interviews. The result is that, of cases detained at Wackenhut, asylum was granted in only 34 percent of the cases where credible fear was found. And though section 235(b) defines credible fear as meaning a significant possibility that the alien could establish eligibility for asylum, that standard is not always met.

Since January, 1998, all but 30 cases referred by JFK Airport were found to have credible fear. Since the beginning of expedited removal process in April, 1997, 95 percent of all asylum prescreening officer decisions have resulted in the findings of credible fear.

Ladies and gentlemen, are we dealing with an absolute value that anyone who asks for credible fear receives it or almost, with the exception of 5 percent? As most credible fear referrals involve aliens who arrive in the U.S. With fraudulent or no documentation, it is often impossible to identify them and/or obtain immigration records until far in the process.

I think it was demonstrated with Mr. Gallegly's group. I provided them the opportunity to meet with individuals in secondary inspection to question them themselves to see if they could make a decision within the 45-second to 1-minute time period in which Congress expects the Immigration Service to clear a flight within the 45-minute time period. Paroling such aliens is not in the best interest of the United States.

The negative acts of Gazi Mazir, the Brooklyn subway bomber, and Ramzi Yousef, one of the first World Trade Center bombers, is an indication of what can be expected should the service parole those who are found to have credible fear and turn out to be less than genuine asylum applicants.

As a reflection on how the policy serves as a deterrent to illegal immigration asylum fraud, the numbers speak for themselves. Reverting to policies that are proven ineffective would only serve to send a signal to those who are seeking to establish themselves in the United States illegally that, despite Congress, despite the commissioners border control priorities, and despite the interests of the United States, the Service does not intend to take its mission seriously. That is not the case. We take it seriously, and we always will.

Thank you, Mr. Chairman.

Mr. GEKAS. We thank the gentleman.

[See page 17 for the Prepared Statement of Mr. McElroy.]

Mr. GEKAS. We turn to Paul Thomson.

**STATEMENT OF THE HONORABLE PAUL H. THOMSON, OFFICE
OF THE COMMONWEALTH'S ATTORNEY FOR THE CITY OF
WINCHESTER**

Mr. THOMSON. Thank you, Mr. Chairman and Members of the Subcommittee.

My name is Paul Thomson, and I am the elected prosecutor for the small town of Winchester, Virginia, which is about 60 miles west of here. I prosecuted the case of Edward Nathaniel Bell, which was a capital murder case in Winchester, and Mr. Bell is now sitting on death row in Virginia pending his appeal. I believe the facts of this case demonstrates in stark terms the need for immigration detention reform.

On October 30, 1999, Winchester police officer Rick Timbrook was shot in the face at close range by Mr. Bell and killed as Officer Timbrook was trying to arrest him. At the time of the killing, the defendant, Mr. Bell, was on liberty on a \$3,500 bond pending a removal proceeding in the immigration court in Arlington, Virginia. The INS had arrested, charged and detained Mr. Bell on grounds that he had been convicted of a concealed weapons offense in Winchester on August 26, 1997. The officer who had arrested Mr. Bell was Rick Timbrook in 1997.

Mr. Bell was admitted in the United States as a permanent resident alien 1992 from his native country of Jamaica. On May 16, 1997, Sergeant Timbrook had arrested him for possessing a loaded handgun which was concealed. That case went to trial. It was appealed to the circuit court, and he was convicted by a circuit court judge.

Immigration agents were called by my office to assist in the apprehension of Mr. Bell both in his lower court conviction stage and later in his circuit court stage. They appeared, Mr. Bell appealed to the circuit court. He was then convicted, and then approximately 8 to 9 months later he was apprehended by INS agents on that conviction. He was detained on their recommendation of a \$6,500 bail. He then requested a bail determination proceeding, which he was granted; and the judge reduced the bond to \$3,500, which he posted.

During the process of fighting his removal, he obtained several continuances from the immigration court throughout 1998 and 1999. During the pendency of these proceedings not only did he kill the officer during this period of time before his final hearing but he also committed other crimes throughout that period of time which the INS should have been aware of and he should have had his bail revoked on.

Based on my extensive experience with this small town in dealing with Mr. Bell, I came to the firm conclusion that any alien in this status who is caught committing a weapons offense as defined by the United States Code should be detained without benefit of bond during removal proceedings. These removal proceedings should be accelerated on the immigration court docket for speedy disposition of cases involving dangerous resident aliens.

Dangerous criminals like Mr. Bell have no business being released whatsoever. They have the greatest motive to seek revenge, as is what happened here, or to run.

Obviously, tougher pretrial detention and release requirements would have seriously impaired Mr. Bell's ability to greatly harm law enforcement officers in the community. However, in my opinion, detention eliminates all risk of harm and would save, in my opinion, precious INS resources. For example, releasing a defendant on bond pending removal presents INS agents with the difficult task of tracking down potentially dangerous criminals who are motivated to kill Government agents associated with their deportation hearings.

Also, the immigration pretrial supervision of Mr. Bell was non-existent. There was no home electronic monitoring or other meaningful intensive reporting requirements, nor was there any curfew imposed on the defendant.

The time of the murder of Sergeant Timbrook was midnight on October 30, 1999. At this time resident alien Nathaniel Bell was on the streets of Winchester, Virginia, driving a stolen car, in possession of cocaine with intent to distribute it, which he was subsequently convicted of at his capital murder trial, and in possession of a hand gun with extra ammunition. He was also convicted of an exile offense at his murder trial. Further, Mr. Bell was particularly well known to display his hatred toward the police and Sergeant Timbrook in particular.

In conclusion, today my narrow recommendation to this Subcommittee is that Federal law be changed so that aliens who are charged with committing weapons offenses as defined in United States Code be immediately detained. They should not be afforded bail pending deportation hearings.

In the alternative, Federal law should provide for strong presumption of no bond unless and until a thorough background investigation is completed by INS agents in cooperation with local law enforcement.

Thank you.

Mr. GEKAS. We thank the gentleman.

[The prepared statement of Mr. Thomson follows:]

PREPARED STATEMENT OF THE HONORABLE PAUL H. THOMSON

Dear Chairman Sensenbrenner:

My name is Paul H. Thomson and I am the prosecuting attorney for the small city of Winchester, Virginia. I prosecuted the case of *Commonwealth of Virginia v. Edward Nathaniel Bell*, Winchester Circuit Court Docket No. 99-CR-478, Virginia Supreme Court Appellate Record No. 011777(2001). In this case, the defendant was sentenced to death on May 31, 2001, for the murder of Winchester Police Officer Sergeant Rick Timbrook while he was in the line of duty. The facts of this case demonstrate in stark terms the need for immigration detention reform.

On October 30, 1999, Winchester Police Officer Sgt. Rick Timbrook was shot in the face at close range and killed by resident alien Edward Nathaniel Bell as Timbrook attempted to arrest him. At the time of the killing, Bell was at liberty on a \$3,500 bond pending a removal proceeding in the Immigration Court, Arlington, Virginia. The I.N.S. had arrested, charged and detained Bell on the grounds that he violated Section 237(a)(2)(C) of the Immigration and Naturalization Act (as amended) in that he had been convicted of a weapons offense in Winchester on August 26, 1997.

The defendant Eddie Bell was admitted into the United States of America as a resident alien in 1992 from his native country of Jamaica. On May 16, 1997, while living in Winchester, Eddie Bell was caught in possession of a concealed and loaded handgun by the very officer he murdered two years later—Sgt. Rick Timbrook. Bell was convicted of this offense in Winchester Circuit Court on August 26, 1997. Bell was arrested by I.N.S. agents on September 17, 1998, and was detained on \$6,500 bail pending removal and deportation proceedings. Bell requested that the Immigra-

tion judge reduce his bail and it was reduced to \$3,500 on October 8, 1998. He made bond at this amount and he was released on October 9, 1998.

Bell began fighting the removal proceedings. He obtained several continuances from the Immigration Court throughout 1998 and 1999. During the pendency of these proceedings, not only did Bell shoot and kill Sgt. Timbrook, but he also committed other crimes that he failed to reveal on a subsequent application to become naturalized. Bell was scheduled for a final hearing in Immigration Court on November 2, 1999, several days after he killed the police officer.

Based on my extensive experience with this case, I came to the firm conclusion that *any* alien caught committing a weapons offense as defined in Section 921(a) of Title 18, United States Code, should be detained without benefit of bond during removal proceedings. Further, these removal proceedings could be accelerated on the Court docket for speedy disposition of cases involving dangerous resident aliens. Dangerous criminals like Bell have no business being released. They have a great motive to seek revenge as happened here, or to run.

Obviously, tougher pre-trial detention and release requirements would have seriously impaired Bell's ability to greatly harm law enforcement officers and the community. However, *detention* eliminates all the risk of harm and would save precious I.N.S. resources. For example, releasing a defendant on bond pending removal presents I.N.S. agents with the difficult task of tracking down potentially dangerous criminals who are motivated to kill government agents associated with their deportation proceedings. Also, the Immigration pre-trial supervision of Bell was non-existent. There was no home electronic monitoring or other meaningful intensive reporting requirements or curfew. The time of the murder was midnight on October 30, 1999. At this time, Bell was on the street in Winchester driving a stolen car, in possession of cocaine with the intent to distribute it, and in possession of a handgun with extra ammunition. Further, Bell was well known to constantly display his hatred towards police and Sgt. Timbrook in particular.

In conclusion, my narrow recommendation is that federal law be changed so aliens who are charged with committing weapons offenses be immediately detained and they should not be afforded bail pending deportation hearings. In the alternative, federal law should provide for a strong presumption of no bond unless and until a thorough background investigation is completed by I.N.S. agents in cooperation with local law enforcement. Thank you.

Mr. GEKAS. Let the record now indicate that the lady from Pennsylvania, Ms. Hart, has come to the Committee hearing as well as the gentleman from Massachusetts, Mr. Frank, and the gentleman from California, Mr. Berman.

We will proceed with the testimony of Professor Taylor.

Before the lady begins, we note that the gentleman, Congressman Flake, is also present.

**STATEMENT OF MARGARET H. TAYLOR, PROFESSOR OF LAW,
WAKE FOREST UNIVERSITY SCHOOL OF LAW**

Ms. TAYLOR. Mr. Chairman, Representative Jackson Lee and distinguished Members of the Committee, I appreciate the opportunity to testify before you today.

My remarks focus first on problems with mandatory detention for noncitizens with criminal convictions and second on the alternative of supervised released, and I address these issues in more detail in my written testimony.

There is a central paradox that governs immigration detention. The key to having a fair and efficient detention policy is to pay more attention and devote more resources to release decisions. I want to stress that this point is not inconsistent with the testimony of Mr. Thomson. Certainly there are people who should be detained by the INS prior to their deportation hearing, and he gives a compelling example. By the same token, there are many, many people detained by the INS, some of them pursuant to statutory mandates, who should be released. So I will also give you an example.

Hawa Said was the daughter of a U.S. Citizen. She immigrated to the United States when she was a year old. She served 30 days in jail for a drug conviction, and she was later detained by the INS pursuant to statutory mandates for 6 months, waiting for her deportation hearing. She was pregnant during part of that time.

The argument for her release becomes even stronger when you consider that not only did she have a compelling claim for relief from removal, she also had a claim of derivative citizenship because her father naturalized while she was a minor. In fact, in the end, after proceedings were terminated, the State Department determined that she was a U.S. Citizen; and, again, she spent six times the amount in mandatory detention than she had spent for her underlying criminal conviction.

I know that it is tempting to conclude that we should not have release decisions. The safest course, it seems, is to lock everybody up and not let them out until they are removed from the country. That is the approach that the 1996 act takes with criminal offenders, and I would like to briefly note four problems with mandatory detention.

First, the INS simply doesn't have the capacity in bed space, in management structure, in expertise in detention operations to incarcerate everyone that comes through the system or even everyone who is inadmissible or deportable on criminal grounds.

Second, it is an enormous strain on INS and taxpayer resources to lock up people who do not present a risk of flight or a danger to the community, and it deprives the INS of much-needed flexibility to make the best use of its limited detention space when the stats says that nonviolent offenders, including individuals who have never served a day in prison for their underlying criminal conviction, must be incarcerated during the pendency of their removal proceedings. It is far better, as Mr. Greene suggested, to have a case-by-case determination in this context.

Third, mandatory detention imposes the devastating consequence of detention without assessing whether someone has a viable claim for relief or perhaps is not even deportable, and my written testimony includes additional stories of individuals who are subject to mandatory detention and then succeeded in challenging their deportation.

Finally, freedom from imprisonment lies at the heart of liberty protected by due process. The Supreme Court recently reminded us in its decision in *Zadvydas v. Davis* that, quote, the due process clause applies to all persons within the United States including aliens, whether their presence here is lawful, unlawful, temporary or permanent.

The majority of district courts to consider the issue have concluded that the detention mandates in the Immigration and Nationality Act are unconstitutional. I am, of course, aware of studies suggesting that many aliens do not appear at removal hearings and that removal orders are seldom enforced against individuals who are not in INS custody, but that does not mean that everyone or even all criminal offenders should be detained for the reasons I noted above. Instead, it means that we need to pay more attention to the release side of the equation. The INS needs to develop an

effective system of reporting and supervision for aliens in proceedings.

It is worth noting that supervised release is woven into the fabric of our criminal justice system. The majority of criminal suspects are released pending trial. The vast majority of those who are released show up for their trial. By definition, then, most aliens who have been convicted of a crime and are in the midst of deportation proceedings have already demonstrated that they will comply with a supervised release program.

I was privileged to serve on the Advisory board when the Vera Institute of Justice ran a 3-year demonstration project of supervised release in the immigration context. The central idea, which was empirically tested and proven, was that the well-developed expertise on how to operate a supervised release program in the criminal context can be successfully applied to immigration proceedings.

The demonstration project had good results. The in-take process gave INS officers far more extensive and complete information to support their detention and release decisions, which by itself was a significant benefit of the program. Ninety-one percent of the participants subject to intensive supervision showed up at all of their hearings. And, finally, Vera's study demonstrated that supervision is more cost effective than detention to ensure appearance at immigration hearings.

The central message I hope to convey is that it is expensive and inhumane to assume that detention is the only tool in the INS enforcement arsenal that can be used to restore credibility to the immigration system. The experience of pretrial removal in the criminal context and Vera's study showed that supervised release is an effective alternative. The INS hasn't developed the capacity to do anything but detain in order to keep tabs on people and make sure they comply with the process, and that is the central failing of the immigration enforcement system.

I would be happy to answer any questions that you have. Thank you for the opportunity to testify.

Mr. GEKAS. We thank the witness.

[The prepared statement of Ms. Taylor follows:]

PREPARED STATEMENT OF MARGARET H. TAYLOR

My name is Margaret Taylor. I am a Professor of Law at Wake Forest University. Much of my work over the past ten years has focused on INS detention policy.

My remarks focus first on problems with mandatory detention embodied in INA § 236(c), and second on the alternative of supervised release. I will conclude by noting some additional concerns closely linked to these two issues.

I. THE PROBLEMS WITH MANDATORY DETENTION

There is a central paradox that governs immigration detention: The key to having a fair and efficient detention policy is to pay more attention and devote more resources to release decisions. I know that it is tempting to conclude otherwise—the safest course, it seems, is to lock everybody up and not let them out until they are removed from the country. That is the approach that the 1996 Act takes as to criminal offenders. INA § 236(c) require detention during the pendency of removal hearings for any alien inadmissible or deportable for a criminal offense; the only exception is for a single crime involving moral turpitude resulting in a term of imprisonment for less than a year. A wide array of nonviolent and minor offenses are encompassed in this mandate. The statute does not permit any consideration of whether

the individual presents a risk of flight or danger to the community. Here I'll briefly note four problems with the "lock'em all up" approach:

First, the INS simply doesn't have the capacity—in bed space, management structure, or expertise in detention operations—to incarcerate everyone who comes through the system, or even everyone who is inadmissible or deportable on criminal grounds. This is not a problem that the Service can outgrow. INS detention capacity has skyrocketed in recent years through increased reliance on state and local jails. This creates enormous problems of management and oversight, and has a devastating impact on INS detainees—including asylum seekers who are locked up with the criminal population in local jails. Additional rapid growth will only exacerbate these problems.

Second, it is an unnecessary drain on INS and taxpayer resources to incarcerate people who do not present a risk of flight or a danger to the community. Moreover, it deprives the INS of much-needed flexibility to make the best use of its limited bed space when the governing statute requires that nonviolent offenders—including individuals who have never served a day in prison for their underlying criminal conviction—be detained during the pendency of their removal proceedings.

Third, mandatory detention under INA § 236(c) is based on a *preliminary* assessment of whether the individual is inadmissible or deportable. In many instances, that conclusion turns out to be wrong. INS detention destroys lives, it robs U.S. citizen dependents of their only means of support, and it tears apart families. And yet, pursuant to the statutory mandate, these devastating consequences are imposed without any assessment of whether, in the end, an individual might be granted some form of relief or even found not to be deportable. To illustrate, consider the following stories of three people who were subject to mandatory detention but ultimately prevailed in contesting their deportation:

- *Joe Van Eeten*, a decorated Vietnam veteran, was detained by the INS for almost five months, until a district court in Oregon ruled held that his mandatory detention pursuant to INA § 236 (c) violated due process. Van Eeten claimed that he had been naturalized in a ceremony at Camp Pendleton, California just before being sent to Vietnam. But the INS disputed his claim to citizenship. Six months after he was ordered released, an immigration judge terminated removal proceedings against him. That decision was later upheld by the BIA. Were it not for the district court's order, Van Eeten would have been subject to mandatory detention for the duration of the administrative process that, in the end, established that he was not deportable. See *Van Eeten v. Beebe*, 49 F. Supp. 2d 1186 (D. Or. 1999), *appeal dismissed as moot*, No. 99-35470, 2000 U.S. App. LEXIS 22741 (9th Cir. Sept. 7, 2000); Don Hamilton, *Immigration Judge Decides Against Deporting Ex-Marine-Judge Michael H. Bennett Says Activist Joe Van Eeten Became a U. S. Citizen Before He Shipped Out to Vietnam in 1968*, Portland Oregonian, Sept. 21, 1999, at E1 (1999 WL 5374338).
- *Hawa Said* immigrated to the United States at the age of one, and her father naturalized when she was a minor—giving her a claim to derivative citizenship. Said was put in removal proceedings and subject to mandatory detention based on a drug conviction for which she served thirty days in jail. INS initially sent Said—who was pregnant at the time—to a detention facility in San Diego, more than 2,000 miles from her home, family, and legal counsel in Alaska. A district court subsequently ordered her returned to Alaska, stating that she had made a prima facie case of citizenship based on her father's naturalization. After six months in INS detention—six times what she had been required to serve for her state conviction—INS agreed to grant Said withholding of removal on the condition that she not pursue her claim to citizenship in immigration court. A few months after that, the U.S. State Department recognized her citizenship and issued her a passport. See *Said v. Eddy*, 87 F. Supp. 2d 937, 939 (D. Alaska 2000); *Said v. Eddy*, No. A99-0482-CV (D. Alaska Aug. 9, 1999); Anthony Lewis, *Cruel and Unneeded*, New York Times, Oct. 5, 1999.
- *Jodey Gravett*, a decorated Vietnam veteran and likely the son of an American serviceman, was detained by the INS for more than four months before his immigration proceedings were ultimately terminated. Adopted by American parents from a Japanese orphanage when he was 12 years old, Gravett has lived in the United States for over forty years. After serving a two-month jail term stemming from the discovery of three marijuana plants at his home, Gravett was placed in removal proceedings by INS for this and another drug possession conviction and was subjected to mandatory detention under § 236(c). A state court subsequently changed his more recent conviction and

erased the previous one entirely. Based on these changes, an immigration judge ruled that Gravett was no longer deportable and terminated his removal proceedings. Even if his convictions had not been altered, Gravett's immigration proceedings might have been terminated based on a claim of U.S. citizenship stemming from his military record in Vietnam and the citizenship of his father. See *Leonel Sanchez, INS Moves to Deport Vietnam Vet; Legal Immigrant Has Felony Record*, The San Diego Union Tribune, February 11, 1998, at B7 (1998 WL 3991627); *Leonel Sanchez, Deporting of Heroic Veteran is Blocked; Man's Criminal Record is Amended*, The San Diego Union Tribune, April 16, 1998, at B7 (1998 WL 4004476).

Finally, mandatory detention violates due process precisely because it does not allow an immigration judge to make custody determinations based on the facts of individual cases, such as those included in the stories above. Freedom from imprisonment lies at the heart of liberty protected by the Due Process clause. *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). The Supreme Court recently reminded us, in its decision in *Zadvydas v. Davis*, that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." 121 S.Ct. 2491, 2500 (2001). Mandatory detention violates due process because it infringes on the most fundamental of liberty interests indiscriminately, without any determination of whether the individual detained poses a risk of flight or a threat to the public. Cf. *United States v. Salerno*, 481 U.S. 739 (1987) (deprivation of fundamental liberty interest cannot be excessive in relation to the government's interest); *Zadvydas*, 121 S.Ct. at 2498 ("strict procedural safeguards" and a "sufficiently strong special justification" must be present to justify detention based on dangerousness). In addition, due process requires that persons detained by the government must have the opportunity to contest their continued incarceration before a neutral adjudicator. See *Leader v. Blackman*, 744 F. Supp. 500 (S.D.N.Y. 1990) (striking down an earlier incarnation of mandatory detention, noting that "there is a liberty interest that is implicated when one is detained, which creates the right to a bail hearing"); *St. John v. McElroy*, 917 F. Supp. 243 (S.D.N.Y. 1996). The majority of district courts to consider the issue have concluded that detention mandates in the Immigration and Nationality Act are in fact unconstitutional. See e.g. *Shurney v. INS*, No. 01CV1906 (N.D. Ohio Nov. 9, 2001); available at <http://www.ohnd.uscourts.gov/Clerk-s-Office/Notable-Cases/notable-cases.html> (collecting cases at footnote 2); *Small v. Reno*, 127 F. Supp. 2d 305 (D. Conn. 2000); *Sharma v. Ashcroft*, 158 F. Supp. 2d 519 (E.D. Pa. 2001); *Welch v. Reno*, 101 F. Supp. 2d 347 (D. Md. 2000); *Vang v. Ashcroft*, 149 F. Supp. 2d 1027, (N.D. Ill. 2001); *Kim v. Schiltgen*, No. C99-2257 SI, 1999 U.S. Dist. LEXIS 12511 (N.D. Cal. Aug. 10, 1999); *Martinez v. Greene*, 28 F. Supp. 2d 1275 (D. Colo. 1998).

II. SUPERVISED RELEASE AS AN ALTERNATIVE TO DETENTION

I am, of course, aware of the studies suggesting that many aliens do not appear at removal hearings, and that removal orders are seldom enforced against individuals who are not in INS custody. But that does not mean that everyone (or even all criminal offenders) should be detained, for the reasons discussed above. Instead, it means we need to pay more attention to the release side of the equation. The INS needs to develop an effective system of reporting and supervision for aliens in proceedings.

It is worth noting that supervised release is woven into the fabric of our criminal justice system. The majority of criminal defendants are released subject to supervision pending trial. Appearance rates vary slightly from jurisdiction to jurisdiction, and across the range of criminal charges. But a recent study of felony defendants suggests that, on average, 76% of those who were released pending trial reported for all court appearances. Most of those who missed a single appearance were later returned to court, and only a small fraction—5%—of felony defendants released pending trial were considered fugitives. This data shows that we do not need to reinvent the wheel to create an effective supervision program. It also tells us that most aliens who have been convicted of a crime and are in the midst of deportation proceedings have already demonstrated that they will comply with a supervised release program.

I was privileged to serve on the advisory board when the Vera Institute of Justice ran a three-year demonstration project of community supervision for people in immigration proceedings, known as the Appearance Assistance Program. The central idea, which was empirically tested and proven, was that the well-developed expertise on how to operate a supervised release program in the criminal context can be successfully applied to the immigration proceedings. The AAP intake process gave INS officers far more extensive and complete information to support their detention

and release decisions—which by itself was a significant benefit of the program. Moreover, AAP intensive participants appeared in immigration court at significantly higher rates than the comparison group—91% showed up at all of their hearings. Finally, Vera’s study documented that supervision is more cost effective than detention to ensure appearance at immigration hearings. Full information on the AAP may be found in Sullivan, et al, *Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program*, Final Report to the Immigration and Naturalization Service, August 1, 2000. The report is available on the Vera website, www.vera.org.

III. RELATED CONCERNS

A. Preventive and “Symbolic” Detention

Mandatory detention is closely tied to two other issues: preventive detention—locking people up because we think they might be dangerous—and what I call “symbolic” detention—an idea I have developed in some of my writings. I want to briefly note concerns about these two issues.

The Supreme Court in *Zadvydas* stressed that the Constitution imposes stringent limits on preventive detention, and these limits apply in the immigration context. 121 U.S. at 2499–2502. The goal of INS detention is to effectuate removal from the United States. And detention loses legitimacy when it is severed from this goal. *Id.* at 2504–05.

For that reason, I’m concerned with a growing “symbolic” component of immigration detention—the idea that we need to ratchet up the level of immigration detention to signal that the government is “getting tough” in a particular area of immigration enforcement. Mandatory detention of all criminal offenders, regardless of the risk of flight or danger to the public, has a symbolic component. And the hundreds of post-9/11 detainees from the Middle East, who have been cleared of any possible involvement in terrorism but are nevertheless being held for minor visa violations, are the most recent example of individuals who are being detained as part of a symbolic “crackdown.”

Sweeping lots more aliens into INS custody is a very visible way to convince the general public that something is being done about a particular problem. But these episodic detention sweeps and the broad criminal detention mandates are of questionable utility, and are fundamentally unfair. We should not, in other words, deprive people of liberty primarily to “send a message.”

B. Recent Rules Expanding INS Authority and Contracting IJ Review over Detention Decisions

Consistent with the due process requirement for a neutral adjudicator to decide custody status, immigration judge jurisdiction should expand to three contexts where IJ’s do not at present make custody determinations: (1) detained asylum seekers in the expedited removal process who have passed the “credible fear” screen and are awaiting a removal hearing; (2) returning lawful permanent residents who are considered “applicants for admission;” and (3) post-order detainees who have not been removed within the statutory 90-day removal period. Instead, the Department of Justice has recently acted to *contract* IJ authority, and to insulate INS custody decisions from any time limitations or further review, via two interim rules. These regulations conflict with the procedures that Congress enacted in the USA-PATRIOT Act and raise serious constitutional concerns.

First, an interim rule on custody procedures issued September 17, 2001 extends the time for the INS to make charging and custody determinations to 48 hours. “[I]n the event of an emergency or other extraordinary circumstance,” however, the rule specifies that such determinations must be made “within an additional reasonable period of time.” 66 Fed. Reg. 48334, 48335. The interim rule provides no guidance on how to interpret these phrases, but information from representatives of some detainees suggests that at present detainees routinely are held for weeks without charge. This practice conflicts with an intervening Act of Congress. The USA-PATRIOT Act established certification by the Attorney General as the only exception to established custody procedures, and limited the detention of a certified alien to a maximum of seven days before charges are initiated. The regulations must be interpreted in light of the limitations embodied in this new statute.

Second, an interim rule issued on October 31, 2001 grants the INS authority to stay an IJ’s release decision in any case in which a district director ordered the alien held without bond or set a bond of \$10,000 or more. 66 Fed. Reg. 54909 (Oct. 31, 2001). This rule permits the INS unilaterally to retain someone in custody throughout the entire administrative process in any case where the original bond reaches the threshold amount (a factor that is within the exclusive control of INS),

regardless of the charges lodged. As a practical matter, the automatic stay provision bypasses the important (and constitutionally required) step of an IJ bond determination. In many cases where the new rule might be invoked, hearings on custody status are now simply continued—without ever having the judge reach a decision—because all participants know that the INS can simply nullify an outcome that it does not like. The interim rule conflicts with the limited authority and strict time limits provided in USA-PATRIOT. Both regulations also raise significant constitutional concerns pursuant to the due process precedent discussed above.

The central message that I hope to convey today is that it is expensive, and it is inhumane, to assume that detention is the only tool in the INS enforcement arsenal that can be used to “restore credibility” to the immigration system. The experience of pretrial supervision in the criminal context, and the Vera Institute Appearance Assistance Program, show that supervised release is an effective alternative. To date, the INS has failed to develop the capacity to do anything but detain in order to keep tabs on people in the midst of proceedings and make sure they comply with the process. This is a central failing of the immigration enforcement system.

Congress has recently appropriated money to fund alternatives to INS detention, which is a step in the right direction. Repeal of the detention mandates—so that IJs again can make individualized determinations of whether a criminal offender presents a risk of flight or danger to others, or has a viable claim for relief that makes him a good candidate for release—is the next step. And IJ jurisdiction needs to expand, not contract, to ensure that all individuals deprived of the liberty are entitled to a bond hearing before a neutral adjudicator, as due process requires.

I appreciate the opportunity to testify before you today, and would be happy to answer any questions.

Mr. GEKAS. Now it is the time for Members of the Committee to pose questions to the various members of the panel. We will accord each Member of the Committee 5 minutes for that cross-examination, and we will begin with the Chair indulging himself in such 5 minutes.

Mr. McElroy, I am very interested in putting on the record the data on Yousef from beginning to end. How did he come to the United States first?

Mr. MCELROY. I don’t recall the case specifically, but I will submit that to the Committee.

Mr. GEKAS. Well, at the time that he—well, wasn’t he detained in New York?

Mr. MCELROY. Yes, he was.

Mr. GEKAS. Do you know when that was?

Mr. MCELROY. No, I don’t recall the date.

Mr. GEKAS. Why was he detained?

Mr. MCELROY. I believe it was a matter of documentation.

Mr. GEKAS. Immigration violation you are saying?

Mr. MCELROY. Yes.

Mr. GEKAS. No criminal background at that juncture?

Mr. MCELROY. No. The difficulty of achieving a criminal background is if you take a person’s fingerprints who comes from an area that has never been printed before, the prints are not in the database in the United States, nor may they be in Interpol. So saying that a person does not have a criminal record based on fingerprints is not a true picture of what exists.

Mr. GEKAS. Then he was released from detention, is that correct?

Mr. MCELROY. That is correct.

Mr. GEKAS. When was that?

Mr. MCELROY. I don’t recall the date.

Mr. GEKAS. Well, I will need a chronology of the events with respect to Yousef. That is very important because that is an example

of the system in one way or another permitting someone released from detention to engage in terroristic activities.

Mr. McELROY. Yes. I will give you the background on Mr. Yousef as well as Mr. Abu Mazir at the same time.

Mr. GEKAS. Yes, I thank you for that.
[The information referred to follows:]

GAZI IBRAHIM ABU MEZER
A86 365 223

- 1) 1993: Gazi Ibrahim Abu Mezer entered Canada on a student visa. His background was not checked by Canadian authorities, but those authorities later stated that he would likely have been admitted anyway.
- 2) 1993: Abu Mezer applied for U.S. Visa in Toronto and was rejected.
- 3) 1993–1996: Abu Mezer twice arrested in Canada for stealing checks and a misdemeanor assault.
- 4) Summer 1996: Abu Mezer arrested trying to cross Ross Lake in North Cascades National Park in Washington state. Park Ranger turned Abu Mezer over to INS who returned him to Canada without being charged with illegal entry.
- 5) Summer 1996: Six days after Ross Lake crossing attempt, Abu Mezer was arrested 65 miles west of Ross Lake, “wearing a Walkman personal stereo as he casually jogged into the United States”. Abu Mezer had U.S. and Canadian money, but no identification. Again, he was returned to Canada without being charged.
- 6) January 14, 1997: Abu Mezer was arrested along with two others while boarding a bus in Bellingham, Washington. Abu Mezer admitted being in the United States illegally.
- 7) January 14, 1997: INS charged Abu Mezer with illegal entry and set bail at \$15,000. Canada refused to accept Abu Mezer. Abu Mezer applied for asylum, claiming that he could not return to Israel stating, “I was not a member of Hamas, but I knew of persons who were.”
- 8) INS officials said they had no information to link Abu Mezer to terrorists, and did not oppose a motion to reduce his bond to \$5,000.
- 9) After his release, Abu Mezer informed the court that he no longer intended to seek asylum. He disappeared without attempting to redeem his bond.
- 10) July 30, 1997: Abu Mezer’s roommate tipped off the New York City Police Department that Abu Mezer was building pipe bombs in a Brooklyn apartment and planned to blow up a nearby subway station.
- 11) July 31, 1997: NYPD raided the apartment and arrested Abu Mezer and Lafi Khalil.
- 12) July 23, 1998: Abu Mezer was convicted of all counts related to the bombing plot, including Conspiracy to Use a Weapon of Mass Destruction. Lafi Khalil was convicted of Possession of a Fraudulent Alien Registration Card and acquitted on the more serious charges.
- 13) March 1, 1999: Abu Mezer sentenced to life in prison after a U.S. District Judge declared him a terrorist risk.

RAMZI AHMED YOUSEF

February 1993: Under the influence of Sheik Omar Abdel Rahman, Ramzi Ahmed Yousef organizes Mohammed Salameh and three others in plotting and carrying out a bombing at New York’s World Trade Center that caused mass destruction, six deaths and more than a thousand wounded. The group is comprised of Egyptians and Palestinians. Yousef, travelling on an Iraqi passport, entered the United States in September 1992 without a visa, but was allowed to enter the country provisionally after asking for asylum, because of lack of detention space. His companion, a Palestinian named Ahmad Ajaj, who arrived on a fake Swedish passport, was arrested and found to have bombmaking videos and manuals in his luggage. Salameh entered the United States in 1988 on a Jordanian passport and a visitors visa

issued in Amman, Jordan. He applied for legal residence status [presumably asylee status], was turned down, and continued to be in the country on appeal of that decision. Abdel Rahman, an Egyptian religious leader charged with inciting a 1989 riot in Egypt, obtained a visa in Khartoum, Sudan which had no automated lookout system that would have identified him as a security threat. He entered as a tourist and applied for political asylum and received legal residence. An immigration judge ordered him deported in March, 1993, but he was still in the country four months later when he is arrested for terrorist acts.

Chronology:

September 1, 1992: Arrived in the US at JFKIA. Presented Iraqi passport with no visa. Detained, fingerprinted, and released to file an asylum claim. (Consistent with general INS detention/parole policies at the time)

November 9, 1992: Filed police report with Jersey City Police Department claiming that he had lost his passport.

December 31, 1992: Applied for replacement passport at Pakistani consulate in New York using photocopies of one Abdul Basit. Consulate suspected photocopies and denied him a new passport, instead issuing a six month "temporary" passport.

February 26, 1993: Departed for Pakistan using fake "temporary" Pakistani passport. That same day, Mr. Yousef's co-conspirators set off the WTC bomb.

Mr. GEKAS. Mr. Thomson, on the question of Bell, did you say that the first bond that was imposed upon him was \$6,500 and then reduced to \$3,500?

Mr. THOMSON. That is correct, Mr. Chairman.

Mr. GEKAS. Was this after the murder was committed?

Mr. THOMSON. No, sir. It was after he was taken into custody by the agents. He asked for a redetermination of his bail before an immigration judge.

Mr. GEKAS. So it was after he was released on the lower bond that he committed the murder?

Mr. THOMSON. That is correct.

Mr. GEKAS. And the bond, of course, was stated at the discretion of the judge at that point? There were no guidelines for him, were there, with respect to the type of attention to which Bell had been incarcerated?

Mr. THOMSON. From the best what we can tell from the records, Mr. Chairman, what we did after the murder was we issued subpoenas for all of the INS files, including the lawyers' notes from court representing the agency. They opposed the reduction in bond, the lawyers did, and the judge did it over their objection. There was some testimony taken and cross-examination regarding Mr. Bell's request for bond, such as his connections to the community, his family, how long he had been in the country and that sort of thing, routine questions you would ask in a bond hearing.

Mr. GEKAS. Professor Taylor says that that is not uncommon or it is no different from an American citizen being charged with crimes and being given bond on the basis of connections to the community, relatives, et cetera. Was there anything other than the alien status to make it different in this case?

Mr. THOMSON. Mr. Chairman, my position would be that, as Mr. McElroy stated, in the alien's native country, they do not have the sophisticated method of tracking criminal behavior that we have developed in the United States through the printouts of NCICs. In Virginia, we call it a VCIN.

As a matter of fact, as I reviewed the record of this case for this testimony here today, I see that the Jamaican embassy certified no criminal history from Jamaica on Mr. Bell, when, in fact, after we

got going on the murder case, we found out by sending an agent there that he had been convicted of a crime in Jamaica.

So I guess my position is that, for a normal bond hearing for an American citizen who has been here for a substantial period of time, they would have records that we could go to. If you are born in this country, if the crime is in Winchester and you spent the majority of your life in California or Florida, I could find out pretty much everything about you for that bond hearing; and we routinely do that. But the fact of the matter is that a lot of these folks are coming in here from countries and we do not have access to their criminal history information.

Mr. GEKAS. The time of the Chair has expired.

We now allocate 5 minutes to the lady from Texas, Ranking Member Ms. Lee.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman.

I again emphasize the importance of this hearing because I hope that it will delineate the need for an immigration policy covering a myriad of issues, and hopefully as we all listen to the testimony we can find common agreement even though this is not a hearing on 245(i).

The point of knowing that there are distinctions in what we are talking about, bad actors, if you will, and how we find bad actors and detain them versus an immigration policy that is necessary to comport with the values that we have in this country—245(i), for example, happens to deal with reuniting people and providing access to immigration or legal immigration.

In this instance, many of the witnesses I agree with. Mr. Thomson, I truly agree that anyone on a weapons charge, it baffles my mind why they would have been released and certainly, unfortunately, they are not supervised, which is horrific.

I have a series of questions for you. My time is limited, so let me start with Professor Taylor.

If you can detail briefly but in more detail the Vera project and how it started and its success rate.

Ms. TAYLOR. Yes. I will detail it based on my impressions as an advisory board member.

The study was turned over to the INS, and I refer the entire study to you. It was, in fact, right in Mr. McElroy's district and it was a contact with the INS, as I said, to test supervised release as an alternative to INS detention. There were some changes in the law as the project was being set up which changed as the project was going, the populations that it was supervising, but it had good results for every part of the population that it supervised.

Again, one thing I want to stress is that the program, because it had intake, you get more complete information about a person, you verify the addresses. When they say they have a relative, you find out whether they have a relative. When they say they live at such and such address, you go to that address and verify that information. And that, in fact, helps INS officers make better detention—

Ms. JACKSON LEE. Do you know the percentages of return, meaning how many showed up for the hearings? Did you give us that number?

Ms. TAYLOR. In my testimony I have the general number which I believe was 91 percent. It varied slightly from category to category, but it was statistically significant in each component of people supervised.

Ms. JACKSON LEE. And there was criteria—was any of them individuals with violent backgrounds, to your knowledge?

Ms. TAYLOR. When the project started, there was a very small period of time that the project operated—they had a small number of criminal offenders that were in the project. Then the detention mandates of the 1996 act took effect in 1998, and that kind of shut off that population to be in the program.

As the program was originally designed, the Vera Institute suggested that the criminal offenders would be amenable to supervision, those who were not obviously a risk of flight or a danger to the public, in part because, as I said before, they—most of them had successfully completed supervision as part of the criminal process that they had been through and—

Ms. JACKSON LEE. There should be criteria you are saying.

Ms. TAYLOR. Yes. You could screen nonviolent versus violent criminals—

Ms. JACKSON LEE. A pregnant detainee would certainly fall in that category, and certainly she appeared not to be a threat. I just want to focus the—

Ms. TAYLOR. The example I gave was someone who did fall into the detention mandates but was someone who didn't present a threat, and I think under the detention mandates there are people who are not a threat to the public who are being detained.

Ms. JACKSON LEE. Thank you very much.

Mr. Thomson, let me then pose my question to you. I absolutely agree that some who had a weapons charge—I understand that he had the weapons charge as he went in to be detained. It was a preceding weapons charge for Mr. Bell, is that correct?

Mr. THOMSON. It was the predicate conviction for the detention of him by INS agents.

Ms. JACKSON LEE. All right. With that in mind then, can you see the potential of a criteria which goes to violent criminals, weapons charges, and can you see the distinction and would you be open to the distinction that talks about a pregnant detainee, as someone whose parent is naturalized? Are you making that distinction here that Mr. Bell falls in a different category?

Mr. THOMSON. Yes, ma'am, I am; and that is why my testimony is confined to that narrow issue. In other words, we view this as a loophole, if you will, in the law, that someone who would be convicted of a weapons offense or even taken into custody for a weapons offense would not be detained.

Ms. JACKSON LEE. I thank you for that.

Mr. Greene, let me ask you how can we work better with criteria to enhance the discretionary aspect of detainees? Because I don't know where you are going to put everyone, and I think the pregnant detainee is an example of a problem, as is Mr. Bell an example of a problem.

Mr. GREENE. Thank you, ma'am.

The situation with the carrying a concealed weapon conviction is now within the category of a mandatory detention. It was not in

1998. So the sort of situation that we—this sad, sad case is one that is unlikely to happen under the current set of circumstances. But the problem of the larger set of criteria is difficult because just in general it is difficult to predict who is likely to offend again once they are released.

In response to some research that we did pursuant to a subpoena from this Committee, we looked at the recidivism rates, as you know, and we also looked in sort of the larger context of how that stacked up against the national recidivism rate for people who are likely to offend again, and the percentages were not really outside of or dramatically either higher or lower than the national recidivism rate.

One of the purposes of the policy review, as I spoke to you earlier, was to take advantage of all of the literature and all of the research that has been done to try to refine our predictive process better. Because I agree with other members of this panel that classification that is being able to determine the likelihood that a person will offend or the likelihood that a person will show up for future immigration hearings is very critical.

One of the difficulties in terms of the data is that, in the data sets that we have looked at, people are more likely to show up for immigration hearings than they are to report for removal, and that becomes one of the difficulties for us in terms of making the decision to detain or not. We would be likely in some cases to detain a person even where there are some predictive factors that they will show up for a hearing based on our experience as an agency that once they get the final order of removal they will simply abscond.

Mr. GEKAS. The time of the lady has expired.

We now turn to the gentleman from Utah, Mr. Cannon, for 5 minutes.

Mr. CANNON. Thank you, Mr. Chairman.

I thank the witnesses for their testimony and being with us here. It has been enlightening. I have a question for Mr. Greene, for Mr. McElroy and Ms. Taylor if you would like to.

I supported exploring alternatives to detention to enable the Government to better focus our detention resources on those who must be detained and release some of the nonviolent asylum seekers and possibly some other long-term immigration detainees who lack family members, sponsors, that sort of thing, to faith- and community-based organizations who screen them for community ties or link them to necessary services and help assure their appearance at court hearings.

I asked Ms. Peggy Philbin, the Active Director of the Executive Office for Immigration Review at the INS, about alternatives to detention as part of this Subcommittee's INS oversight hearings on May 15, 2001, and she gave some very positive responses about the promise of using these alternatives to greater effect.

As you may be aware, an alternative to the detention pilot program has been tested in three sites with a success rate of over 93 percent of participants appearing at all of their hearings and at a net savings of \$4,500, \$4,600 per person. Additional funding was made available in the fiscal year 2002 Commerce, Justice, State appropriations bill to expand these pilot programs.

Do you have any experience with these alternatives to detention programs, and do you believe that better utilization of such alternatives with nongovernmental organizations could be part of the solution to improving on appearance rates and the unwitting release of high-risk detainees by the INS?

Mr. McELROY. Is that for me, Congressman? I would like it to be known for the record that with regard to the Vera contract, I was unable to get a copy of the contract to read the list of the deliverables. I spent significant time in the Government as a contracting officer and I wanted to make sure that the contract was properly let.

The concept of having people appear for hearings as a use of resources makes sense right up until the point that at the hearing—or at a hearing, you don't get the benefit you want. We have heard several statistics about a 90 percent show rate to hearings, but we haven't heard a statistic about people who have been denied a benefit and whether or not they presented themselves to be removed from the United States.

So, I had—when I was unable to receive a copy of the Vera contract, I called the Office of the Inspector General and advised them that I thought that this was a \$6 million waste of the Government's funds because they were building a model that was so small, comparatively speaking, to the 200,000-person docket that I administrate, that the sampling group would pick and choose the people that they have and come in and build the criteria, you could almost ensure success. But the Government, if you were—

Mr. CANNON. Let me interject. Are you going to get a copy of that contract and take a look at it with specificity so you can draw those conclusions based upon consideration of the actual contract?

Mr. McELROY. The action of the inspector general approximately a year after I turned in the complaint was to come to me and ask me, now that I was administrating the contract, I considered it a dead issue. I will not be seeking the contract.

Mr. CANNON. I didn't understand the timing of the attempt to seek the contract. So you have been through this process with the inspector general. Did he report back?

Mr. McELROY. The inspector general did not report back to me. The inspector general sent an audit team up not to look at the veracity of my complaint, not to look at how it was illogical in its application or look at how disparately—the model could never fit into the New York model with 200,000 cases to oversee. What they did was they wanted to see how my administration of the contract was.

[NOTE: The Vera Contract, submitted for the Hearing Record, is not reprinted here but is on file with the House Judiciary Committee.]

Mr. CANNON. So we haven't joined the issue with any kind of review as to whether the thing would work or not. In other words, you raised some concerns; those weren't joined by the IG and so we have never really—

Mr. McELROY. They are never joined by the OIG. I submitted a rebuttal to every report, that Vera report. I never heard a final rebuttal of it. I look forward to using the concept of alternative resources; however, this was not the way to do it and my issues were never addressed. This was a done deal and there was a proclama-

tion of victory afterwards, without any tangible results being seen to surface.

Mr. GEKAS. The time of the gentleman has expired. We turn to the lady from California Ms. Lofgren for a period of 5 minutes.

Ms. LOFGREN. Thank you, Mr. Chairman. It makes me appreciate the first-come/first-testify rule. And I would like to explore some of these issues. You know, I think all of us in this post-September 11th world are concerned that we are doing everything we need to do to make sure that our country is safe from those who would harm us. And I think that is absolutely not only understandable but totally appropriate and necessary for us in the Government, and therefore this hearing is especially useful.

However, having said that, I think it is worth noting that of the 19 people who were on the flights that caused such damage, three had overstayed their visas. So there is obviously a problem elsewhere in the system, which is reviewing who is getting visas and making sure that we know who people are before they are brought in, and making sure that the information is shared in an appropriate way.

I frankly think the PATRIOT Act will go a long ways toward making sure that our agencies that are collecting intelligence information get that information to the agencies in charge of immigration and consular affairs.

It is important that we make distinctions. I think the idea that every single person who has overstayed their visa or had a violation of some sort is going to be incarcerated is impossible to do. That is millions of people. If we were to spend all our money doing that, we wouldn't have enough money to do the enforcement efforts and other things that we need to do.

One of the particular concerns I have has to do with the policy relative to asylum seekers. That is so broad that I think not only does it serve us poorly as a Nation but also sometimes inflicts injustice.

I want to raise a particular issue which I only recently raised with the Commissioner and that has to do with young men who have been in custody now for quite some time. You know, sometimes you use the phrase, well, he is such a Boy Scout. These really are Boy Scouts; four Boy Scouts who came this summer to the International Boy Scout Jamboree. They left the jamboree to hitchhike down to see parents in this area. They are teenagers, aged 14 to 17. Then they applied for political asylum. They had valid visitors' visas. They have been incarcerated since July, and they are Boy Scouts.

I guess the question in my mind is: What are we doing here? I mean, that we have got Boy Scouts locked up and their visas don't even expire until January, and when we are releasing—apparently no longer releasing people with weapons charges, and I would agree that is a very good indicator of who ought not to be released. Can you address that, Mr. Greene? I didn't talk to you about it, but I did alert the commissioner to this question.

Mr. GREENE. Yes, ma'am. Thank you. I have—I have some information with respect to this case and I would be able to provide you fuller information for the record if the answer I give you now doesn't suffice. These four young men are in INS custody in a shel-

tered-care facility. We are sort of gauging and making decisions about the conditions under which they are in our custody based on the circumstances of their case. So, to discourage any impressions that might have been left with the Members of the Committee, these are not young men who are in jail by any means.

Ms. LOFGREN. It is a locked facility, is it not?

Mr. GREENE. Yes, it is. It is a secure facility. It is a sheltered-care facility, it is not a jail.

Ms. LOFGREN. I would like to point out, having been in local government for 14 years, locked facilities are penal in nature.

Mr. GREENE. Yes, ma'am. I would only say, though, that even in the local and State system there are juvenile holding facilities that are distinct.

Ms. LOFGREN. The point I am trying to make, I would like further information; I think it is an embarrassment to the United States that the Boy Scouts are treated in such a manner. It really goes to the distinction how we make judgments about who is dangerous and who isn't and whether or not it is appropriate to say, broadbrush, every person who feels they have been persecuted who is here is going to be locked up whether they have—you know, they are pregnant, whether they are a Boy Scout who is 15 years old. What are the criteria to use that? I realize Congress actually created this problem, and how unsatisfactory are the words "I told you so" that these issues would arise. Do you have any—

Mr. GREENE. I would only add to your concern, because it is a concern of course that we have, juvenile detention raises a whole variety of issues over and above those that we have to address in detention decisions about adults. But as you know, in many cases our decision to keep juveniles in a sheltered-care facility or under some sort of supervision is driven as much by concerns for the welfare of the children, of the juveniles, as it is for our concerns about security of the public at large.

Ms. LOFGREN. My time is up. I would just ask when you report further on this, I think the case of *Flores v. Reno* does really indicate a different approach to juveniles than you are outlining to the Committee today.

Mr. GEKAS. We thank the lady. We turn to the gentleman from California, Mr. Gallegly.

Mr. GALLEGLY. Thank you, Mr. Chairman.

Mr. McElroy, good to see you again. I appreciated your comments. I would concur, I thought we had a very candid visit in New York. I think it is only appropriate that I say that the second part of that trip to Miami I don't think was treated quite as candidly. In fact, not only were we given rose glasses there, but we were given dark glasses to cover the rose glasses just for fear there may be some level of truth that would creep through. I think that is a matter of public record.

Mr. McElroy, you mentioned on our trip—and you correct me if I am wrong, things have changed somewhat as you have said in your testimony earlier—however, at the time that we visited New York and Kennedy—I mean New York and Miami, the numbers that we were given as it related to those that were classified as low flight risk and released, would you correct me, if I am wrong, that

those that actually showed up for their hearing that were considered low flight risk was only 6 or 7 percent at the time?

Mr. McELROY. Sir, that percentage only relates to people who were found with credible fear. The expanse of the universe of immigration when I mentioned before about having a nondetained docket of 200,000 cases, the no-show rate for those cases ranges between 93 and 80 percent of nonappearance.

Mr. GALLEGLY. Which means that literally 10 or 15 percent probably shows up. Doesn't that make the argument for the purpose of a detention—or why even process them anyway?

Mr. McELROY. Well, I am not going to make the argument for or against detention. I am going to state the facts, and the laws will play out as they will. But I can say with a docket of 200,000 people to administrate, that in my period in an executive position since 1991, I have seen the rate fluctuate between 93 and 98 percent that they do not show. The figure that I mentioned before had to do with individuals that were indicated to have a credible fear.

Mr. GALLEGLY. I still think the thing that is mind-boggling to me is that anyone that is released and considered a low flight risk, with only 1 out of 10 on a best-case basis ever showing and the other 90 percent disappearing into the landscape, that would intimate to me that the system is broken.

Mr. McELROY. It would indicate certainly, as you said before, that the people should have been detained to begin with. However, when you go back to the resources that I mentioned and interior enforcement which would be the area that would cover abscondee, we have 180 agents that cover the 14 southern-most counties of New York and that is a population base of 12 million people in which the demographers guesstimate that there are between 300,000 and 750,000 illegals.

Mr. GALLEGLY. Given those numbers, would it be a reasonable assessment that there is little or no enforcement interior?

Mr. McELROY. Yes.

Mr. GALLEGLY. Professor Taylor, I listened to your testimony about the reason that we shouldn't detain and so on and so forth. I am sure there are instances where that takes place. But were you aware of a GAO report recently that showed that over 40 percent of those that came into this country that were declaring asylum and had a credible risk after being here 3 years—because that is when the report took place—40 percent had never filed a claim for asylum?

And what do you—how do you feel—do you feel that there should be no detention for folks that just disappear into the landscape, just because they say I have credible fear? Are you aware of the fact that 40 percent, according to GAO, never even filed a claim once they got their “home free” card?

Ms. TAYLOR. I am not aware of that particular study. I am aware of the high rates of failure to appear. My central message is I think that you are right, the system is broken. And the answer, though, is to get a range of options across a range of cases; that when it is either/or, you detain prehearing for months and months and months and months and then the person has relief, that is a problem as well. And that in fact, from other systems we can borrow

other solutions that can build credibility without trying to use the heavy-handed detention in every case.

Mr. GALLEGLY. Thank you, Professor Taylor.

Mr. Greene, very quickly, I have the yellow light. Based on your assessment of the current national situation, being sympathetic to the issues that Professor Taylor has made a point of, would you say that we need or do not need additional detention space, or do we need significant or an insignificant amount of additional detention space in—

Mr. GREENE. Yes, sir. We are doing two things. First of all, the Congress has provided for additional money for detention space for this fiscal year, and for that we are grateful because we think that is—

Mr. GALLEGLY. How much do we need?

Mr. GREENE. You provided us with 31 million.

Mr. GALLEGLY. How many beds do you need?

Mr. GREENE. I will have to get back to you. I don't know.

[The information referred to follows:]

RESPONSE OF TIM HAUGH TO QUESTION FROM REPRESENTATIVE GALLEGLY

In accordance with the Administration's 2003 budget, 21,309 beds are needed by the INS to detain aliens.

Mr. GEKAS. Is the lady from Pennsylvania ready to pose questions? Then I will defer to the gentleman from Massachusetts, Mr. Frank. The other Members would be wise to repair to the floor.

Mr. FRANK. Mr. Thomson, let me say that I agree with you that we should be giving special attention to the problems of people who are here illegally and using guns. That is one reason why we are so disappointed that Attorney General Ashcroft decided to show leniency in one respect and one respect only toward people in the post-September 11th sweep, and that is to decide that he couldn't possibly see whether or not they bought guns when they shouldn't have. Regardless of whether or not he is right that that is what the law says, if he is right do you think we should amend the law so that the gun registration system that we have got under the Brady bill would be used to check to see whether people in that category have bought guns?

Mr. THOMSON. One thing that we have to bear in mind is Virginia has very liberal—

Mr. FRANK. It is a simple straightforward question. Do you think that the Attorney General should have the authority to check that registry to see whether people who are here illegally might have tried to buy guns?

Mr. THOMSON. Yes.

Mr. FRANK. I appreciate that.

Mr. THOMSON. I would like to add something to that.

Mr. FRANK. I only have 5 minutes so that is really all I needed at this point.

I did want to ask Mr. Greene, I have a question, we are talking about detention in general and it again has to do with the post September 11th. There is a question in my mind. I do understand if people are subject to a detention order or they are in removal proceedings, if they are in removal proceedings subjected to a removal order, yes, they can be detained. What is the law, what is

the practice with regard to people who are here legally, or at least against whom there is no charge that they are here illegally? Are there a number of those people in detention now, and what is the predicate for detaining them, particularly beyond 7 days?

We have had confusion about this, because in the law we said up to 7 days. Let me ask you this: Can you, in the INS's opinion, legally detain someone who is an alien but who is here legally for more than 7 days, absent some suspicion; or what is the story?

Mr. GREENE. That is not our position, Congressman. The people who are in detention now are in detention because we are charging them with specific violations of the immigration law. There is no one that we are—

Mr. FRANK. So no one can be detained for more than 7 days, no noncitizen without a charge?

Mr. GREENE. And those 7 days are days which allow us to—

Mr. FRANK. I understand that. Next point I want to make from this—I am glad the gentleman from California raised this. Understand I am sympathetic to much of what you say, except for one point when you say, well, we don't have enough space, we don't have enough that. We are a very rich country. We have enough space to lock up people that ought to be locked up if they are a danger. Lack of space, lack of administration law judges, lack of physical resources, ought not to enter into the public policy. And I think Congress is much more at fault here than the Immigration Service.

I don't think we should necessarily detain everybody. I do believe that we are a rich enough country we ought to be using our resources so that important policy decisions, either about people's liberty or about freedom or about safety of the public, should not be driven by resource considerations. If we don't have enough bedspace, et cetera, let's do it. Part of that has to do with liberty. One of the reasons we get complaints about detention is that people are detained for inordinately long periods of time, waiting for their adjudication. If we simply did our job as Members of Congress and appropriated enough funds so that we had decent holding facilities and appropriate judges, et cetera, and the detention period—it doesn't take a long time to litigate these cases. Mr. Greene, what is the average time, once the case gets before the judge, that it is litigated?

Mr. GREENE. Thirteen or 14 days.

Mr. FRANK. We are not talking about month-long trials. So that is, I think, the problem. If we were in fact to appropriate the resources so that we had adequate facilities for holding pregnant women or young people, if we had enough judges, if we had enough all these things, then we would get—and there would be some tough choices. There are some tough choices.

Mr. Thomson, I would say this. You stressed the fact that it was a gun. I would stress one of the things, that the fact that this is already in the appeal stage, seems to me once you have been convicted, I think there is a very very heavy burden that we are going to let you walk away. I think the likelihood of something being overturned on appeal is sufficiently small, so that over and above the question of the gun, that is the way I would go.

Mr. Chairman, so we can all get to vote, that is enough for me.

Mr. GEKAS. Thank you, Mr. Frank. We will yield to the gentleman from California for one question. Then we can adjourn the hearing.

Mr. BERMAN. Thank you, Mr. Chairman. I just want to—Mr. Greene, in response to Mr. Frank's first question to you. There have been all these reports about large numbers of people since September 11th being detained. There have been issues of who are they, where are they, what are the charges? Are you saying that there is no one in detention at the present time for longer than 7 days unless they have been indicted or charged with a violation of immigration laws?

Mr. GREENE. I can only speak for those people who are in INS custody, sir. And for those people who are in INS custody, the 460 who are currently in INS custody for events arising out of the terrorist attacks, they are charged with violations of the immigration law and we are pursuing their case before immigration judges in the manner that is consistent with our outstanding law and regulations.

Mr. BERMAN. And where else would people be detained besides—

Mr. GREENE. You know, the Marshal Service would hold people who are being held for material witnesses or who are separately charged with the violations of the Title 18 Code.

Mr. GEKAS. We thank the gentleman.

Mr. MCELROY. Could I address something that the Congressman said, that would only take about a minute and a half?

Mr. GEKAS. Proceed.

Mr. MCELROY. Congressman Frank, you brought up the issue of judges and the timeliness of the disposition of the case. The judges of the Immigration Court of Review are not part of the Immigration Service. However, their actions are interlinked with the Immigration Service as far as its resources of beds and the use of offices. I think that what we failed to bring up is that there should be some sort of management accountability inasmuch as they do work for the Attorney General of the United States. There should be an issue of consideration of—

Mr. FRANK. I appreciate that, Mr. McElroy. I will tell you, in the current situation if you try to get the Attorney General to do something you would probably have greater luck than I would.

Mr. MCELROY. I will try my best. Thank you.

Mr. GEKAS. Without objection, we offer into the record the testimony of Bishop Thomas Wenski, an Auxiliary Bishop of Miami, and the statement of John Conyers, Jr., the Ranking Member of the Judiciary Committee.

Mr. GEKAS. We thank the Members for their indulgence and for their testimony. I exercise the discretion of the chair and adjourn this hearing. Thank you very much.

[Whereupon, at 3:23 p.m., the Subcommittee was adjourned.]

APPENDIX

STATEMENTS SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF TEXAS

Thank you, Mr. Chairman for holding this timely oversight hearing on INS detention and release policies. I say timely not just in light of September 11th but also at a time where the Subcommittee is reviewing the overall structure and function of the INS with respect to the nation's immigration system.

The INS is charged with both facilitating legal immigration and enforcing the nation's laws to prevent illegal immigration. That balance should be kept in mind as we explore possible changes to INS policies. It can be both tempting and comforting to err on the side of shutting all our borders tight and locking up all those we think might be dangerous. That is not the constitutional bedrock the country was built on nor the strength of our nation. However, it is the obligation and right of the nation to protect its citizens and its sovereign rights.

This delicate balance can be seen in recent decisions by the Supreme Court who appear to be moving toward a higher degree of protection of civil liberties for non-citizens while the Attorney General and the President are seeking additional power to detain aliens who they think might be dangerous. Under the new Patriot Act, the Attorney General only has to certify that an alien is likely to engage in or support a bad act and the alien is subject to mandatory detention. This detention would be mandatory even for aliens who have been granted asylum. This could present problems. If detainees are not allowed an opportunity to contest their likelihood of engaging in terrorist activity, due process problems seem certain to arise.

These issues of due process and proper balance arise in the area of mandatory detention and the rights of asylum seekers. The provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) require mandatory detention of most criminal and certain categories of non-criminal aliens and asylum seekers taking away the INS's discretion to release these groups. But this has caused more practical problems creating the issue of detention space. Where do we house all of these people? And do we want to if they don't pose a credible threat to national security, are a danger to the community or a risk of flight?

We will hear today testimony from the INS that from Fiscal Year (FY) 1994 to FY 2001, the average daily detention population has more than tripled from 5,532 to 19,533. And in FY 2000 alone, the INS admitted more than 188,000 aliens into detention. Surely, we cannot continue to detain people at that rate. The New York District model purports to have the answer. In the New York District, the number of inadmissible aliens arriving at JFK dropped 63% from FY 1992 to FY 1999. The number of asylum applications dropped 91% in that same period. This occurred while the passenger traffic increased 18% at JFK. The way the New York model does it is by detaining all aliens who are inadmissible for fraud or document-related reasons. Is this an applicable model throughout the nation? And do we have enough beds to house all these people? And do we want to?

We do want to stop the types of incidents that occurred in Virginia in the Bell case as we will hear from Commonwealth Attorney, Paul H. Thompson. Something must be done to prohibit anyone, alien or not, who has a criminal history and is a danger to the community from having uninhibited freedom. Another possible option comes from INS detention policy expert, Professor Margaret Taylor, who suggests the concept of "supervised release" as an option to detention. This option was tested from 1997 to 2000 in New York at the request of the INS on noncitizens including asylum seekers, individuals facing removal as a result of a criminal conviction, and undocumented workers apprehended at work sites. The project entailed answering the question of what type and what level of supervision will increase peo-

ple's rate of appearance in court and compliance with immigration law rulings. Professor Taylor will discuss the results.

Mr. Chairman, I want to reiterate that we are a nation of immigrants, and a strong one at that. Therefore it is crucial that we seek a balance in our immigration laws addressing due process concerns, the reality of detention space and the need to protect our nation and its citizens.

Thank you, Mr. Chairman.

STATEMENT OF JOHN CONYERS JR.

Subcommittee on Immigration and Claims
Oversight Hearing on Department of Justice Immigration
Detention Policies
December 19, 2001

I fear that there are some who would use the tragedies of September 11 to further erode civil liberties and allow even greater latitude to detain immigrants. We've been down this road before. In 1996 Congress passed legislation that has torn apart families by sending detainees to prisons far from their homes. It has imperiled U.S. citizen children who are dependent on non-citizen parents forced into detention for nonviolent crimes and minor offenses.

I am astounded that this subcommittee has planned this hearing without addressing the real issue now facing our country involving immigrant detention - namely, the detention of over a thousand people following the September 11th terrorist attacks.

Our government rounded up people around the country and threw them into jail with violent criminals - eventually charging some with immigration violations. All other detention issues pale in comparison right now.

According to the Justice Department - which has stubbornly refused to provide details on these detainees - there are still over 550 people detained on immigration charges. Despite many requests, we still have no information from the Department or the INS on the exact nature of these charges and why they are grounds for indefinite detention. Have these people been convicted of violent crimes? Are they convicted criminals determined to be a flight risk? Or are they just victims in a public relations game to show the country that the Government is trying to do something to protect America from terrorists?

As I have said before, these detentions are a serious threat to our system of civil liberties and this committee must exercise its oversight to ensure that these aliens are treated fairly. I expect some straight-forward and detailed answers from our INS panelists today.

PREPARED STATEMENT OF BISHOP THOMAS WENSKI

I am Bishop Thomas Wenski, Auxiliary Bishop of Miami, Florida, and chairman of the United States Conference of Catholic Bishops' Committee on Migration. Thank you for this opportunity to submit testimony to you today on the vital topic of the Department of Justice immigration detention policies.

Mr. Chairman, concern for the immigrant and the experience of immigration are both deeply imbedded in Church teaching. The task of welcoming immigrants, refugees, and displaced persons into full participation in the Church and society with equal rights and duties has long been an integral part of the Roman Catholic faith tradition.

The experience of the Church in the United States has provided the U.S. bishops with a special sensitivity to newcomers in our midst. Arguably no other institution in American life has had as much experience dealing with the integration of newcomers as the Catholic Church, especially through her parishes and schools. Since 1976, the bishops have been clear in their affirmation of the Church's solicitude for newcomers:

The Church, the People of God, is required by the Gospel and by its long tradition to promote and defend the human rights and dignity of people on the move, to advocate social remedies to their problems and to foster opportunities for their spiritual growth.¹

It is with these values in mind that I address to you my concerns and the concerns of the U.S. Catholic Bishops regarding the immigration detention policies of the Immigration and Naturalization Service (INS). The United States Conference of Catholic Bishops supports enactment of legislation that would reduce the number of the instances where aliens are held in Immigration and Naturalization Service (INS) detention and improve the manner in which detained aliens are treated. While the Church has long acknowledged the right and duty of the government to safeguard its citizens, and understands that detention is sometimes necessary to fulfilling this obligation, we have serious concerns about some of the INS's current practices and interpretations regarding detention. I appreciate the opportunity to submit this testimony outlining the following five areas of particular concern to us, and our recommendations for responding to these concerns:

- *Mandatory Detention.* We support legislation that would restore discretion to the Attorney General to release from detention individuals who are not a danger to the community or a flight risk, but who are currently mandatorily detained.
- *Alternatives to Detention.* We support continued funding and expansion of "Alternatives to Detention" programs.
- *Legal Orientation Presentations.* We support continued funding and expansion of legal orientation presentations to INS detainees.

¹National Conference of Catholic Bishops, "Resolution on the Pastoral Concern of the Church for People on the Move," November 11, 1976, as quoted in *One Family Under God*, NCCB Committee on Migration, September, 1995, p.7

- *Unaccompanied Minors in INS Detention.* We support passage of legislation that would provide clear guidelines for the standard of care of unaccompanied alien minors.
- *Interim INS Regulations on Detention.* We urge Congress to hold the Department of Justice accountable when issuing regulations implementing statutes and Supreme Court decisions on INS detention.

These concerns span both long-standing INS detention policies and those which have been put in place since September 11, 2001. Each concern and recommendation is discussed in further detail below. In addition, Mr. Chairman, I would like to submit into the record an editorial published in the Miami Herald on December 13, 2001, in which I addressed similar concerns.

MANDATORY DETENTION

Mr. Chairman, as you know, the number of people being detained by the INS has risen dramatically in recent years, making INS detainees the fastest growing prison population in the country. The INS' detention budget is now over \$1 billion a year. More than 20,000 persons are currently detained by the INS, and the number is growing. Sixty percent of these detainees are held in local and county jails. The rest are detained in INS facilities, Bureau of Prisons facilities, and private facilities.

A majority of the aliens in INS detention are being held pursuant to laws enacted in 1996 mandating that the Immigration and Naturalization Service detain them. The remaining detainees are being detained by the INS at its discretion.

To be sure, a number of persons who are being detained by the INS should, indeed, be detained either because they are a danger to themselves or the community or because they are in removal proceedings and are in danger of absconding. But a great number of those in INS detention are neither dangerous nor flight risks. This number includes many children, asylum seekers, and longtime residents who have U.S. citizen or Lawful Permanent Resident family members in the United States. For them, and many others, INS detention is completely unwarranted and imposes an unacceptably high human cost on them and their family members.

Therefore, we support a change in law that would afford the Attorney General more discretion to release those currently held under the mandatory detention laws. In addition to that, changes in other aspects of our detention policies and practices could do much to improve the efficiency of our immigration court systems, reduce the costs of detention, and treat persons who are currently subject to INS detention with greater compassion and humanity.

ALTERNATIVES TO DETENTION

As noted above, many INS detainees are neither a danger to themselves nor their communities and are not a flight risk. Detaining such individuals wastes valuable federal resources that could be put to better use. Detention is not only costly in terms of dollars; it is costly, as well, in terms of human suffering as people are needlessly separated from loved ones. Often, the person in detention is the breadwinner for United States citizen and/or lawful permanent resident children or spouses. In these instances, the individual in detention, the family members, and the communities all suffer. Mr. Chairman, I ask that a report on immigrants in detention published by the Catholic Legal Immigration Network, Inc. (CLINIC) be included in the record.

The Church acknowledges and recognizes the right and duty of the government to provide for the public safety and welfare of its citizens. This obligation requires that certain dangerous individuals in removal proceedings should be held in detention pending a resolution of their proceedings rather than permitted to remain in the country at large. But along with this duty should be an obligation to assess whether each individual in detention is actually a threat to the safety of the country. Human rights considerations, respect for basic dignity, and the practicalities of cost and efficiency mandate that individuals in proceedings who are not threats to the public safety should not be detained.

In addition to providing a more humane and compassionate response to individuals currently detained, viable alternatives to detention for deserving individuals could save millions of dollars in detention costs and free up costly detention space for more urgent uses. For these reasons, Mr. Chairman, we are heartened by the inclusion of three million dollars for alternatives to detention in the fiscal year 2002 budget. We urge you to press INS to use this money to begin pilot programs on alternatives to detention.

We know that workable alternatives to detention exist. For example, the INS recently funded a pilot project which allowed for the supervised release of more than

500 non-citizens in three categories: asylum-seekers, individuals in removal proceedings due to a criminal conviction, and undocumented persons apprehended at work sites. The results were remarkable. Ninety-one percent of supervised non-citizens in the project appeared in court compared to 71 percent of non-citizens released on bond or parole. Sixty-nine percent of Appearance Assistance Program (AAP) supervised participants complied with final orders of removal compared to 38 percent of a group released on bond or parole. The project showed that supervision costs only \$12 per day, as compared to the \$61 cost per day for INS detention.²

There are also other successful models for alternatives to detention including one operated by Catholic Charities in New Orleans that finds jobs, housing and needed counseling for released asylees as well as long-term detainees.

LEGAL ORIENTATION PRESENTATIONS

In addition to the many other problems faced by individuals in INS detention, these detainees often carry the added burden of being without easy or affordable access to legal representation. Many of the facilities where they are held are in remote locations, far from legal help. Persons in INS detention do not have access to government appointed counsel, and, because most are indigent and cannot afford a lawyer, more than 90 percent go unrepresented. "Legal orientation" presentations, which provide detainees with a briefing on their rights under U.S. law, could offer hope to these unrepresented individuals as well as improve efficiencies in the immigration system, help identify detainees worthy of relief, and reduce detention costs.

Again, Mr. Chairman, we are pleased that one million dollars was included in the fiscal year 2002 budget for legal orientation presentations. We urge you to ensure that the Executive Office for Immigration Review (EOIR) is the body administering this program and that it does so expeditiously so that detainees are fully apprised of their rights.

UNACCOMPANIED MINORS IN INS CUSTODY

Mr. Chairman, we are particularly concerned about the increasing numbers of unaccompanied minors being held in INS detention. We believe that unaccompanied minors in removal proceedings are deserving of special treatment and that the INS should place as many as possible with family members, in foster care or in privately run shelter-care facilities. Yet a large percentage (approximately 30 percent) are still regularly detained in county or municipal juvenile correction centers, despite the fact that many of these minors have not committed any crime, are not considered flight risks, and do not present disciplinary problems. Detention in these jails greatly impairs the minor's access to counsel, and the inherently harsher conditions of confinement can result in the minor being too demoralized and/or discouraged to seek help or to participate meaningfully in court proceedings.

Unaccompanied minors enter the United States under a variety of circumstances. Some seek to reunite with family members, others are asylum seekers who have experienced persecution, some are children who have been smuggled into the country and are at risk of being caught again by smugglers and forced into sweatshop labor or worse. Whatever their circumstances, these children deserve special care. The guiding principle in placing these children in appropriate settings should be the best interests of the child. Therefore, we believe that the care and placement of unaccompanied minors apprehended by the INS should be provided by child welfare agencies experienced in serving the special needs of children. Unaccompanied minors should not be held in any type of secure facility unless absolutely necessary for the child's or society's safety. When used to detain unaccompanied minors, secure facilities should protect these children from potential dangers and separate them from criminal offenders.

Regardless of their status upon entry into the United States, all unaccompanied children warrant special consideration because of their physical and emotional age, their separation from family and country of origin, and because they may have fled persecution in their home countries. Mr. Chairman, legislation introduced in the House of Representatives (H.R. 1904) by Representative Zoe Lofgren (D-Cal.) and Chris Cannon (R-Utah) and in the U.S. Senate (S. 121) by Senator Dianne Feinstein (D-Cal.) would provide clear guidelines for the standard of care of unaccompanied minors, ensuring that they are housed in appropriate shelter or with foster families if their own relatives are unable to care for them. We ask that you expeditiously consider this important legislation.

²*Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program*, Final Report of the Immigration and Naturalization Service, August 1, 2000.

I would now like to turn your attention, Mr. Chairman, to a number of Department of Justice proposed rules and actions relating to the detention of non-citizens that have been issued in the wake of the September 11, 2001, terrorist attacks on the United States. These include:

- an interim rule increasing the amount of time that an alien may be held without charges;
- an interim rule providing for an automatic stay of an immigration judge's bond order; and
- an interim rule on the "indefinite detention" of aliens that contravenes the U.S. Supreme Court ruling in *Zadvydas v. Davis*.

Together these and other actions undermine the intent of Congress in enacting the USA Patriot Act, and the holding of the U.S. Supreme Court in its decision in *Zadvydas v. Davis*.

INTERIM REGULATION ON CUSTODY PROCEDURES

Mr. Chairman, the Committee on Migration has serious concerns about the Interim Rule on Custody Procedures issued by the INS on September 20, 2001.

The Interim Rule increases from 24 to 48 hours the amount of time in which the INS must make a determination whether to continue to hold an alien in custody, release the alien on bond or recognizance, and whether a notice to appear and warrant of arrest will be issued. The Interim Rule also creates an exception to this 48-hour rule, "in the event of an emergency or other extraordinary circumstances," in which case these determinations will be made "within a reasonable period of time."

While the U.S. Bishops have condemned the horrific attacks on the American people on September 11th and support the U.S. Government's efforts to bring to justice persons involved with the terrorist acts, we are deeply concerned that the Interim Rule will trample on the very rights and freedoms that are the foundation of our democracy. The Interim Rule goes far beyond the recently enacted provisions of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), by authorizing the potential indefinite detention of someone without charging them and without providing a custody determination. This offends the most basic tenets of due process and fairness.

Catholic diocesan immigration programs throughout the United States assist detained aliens in removal proceedings. These agencies regularly respond to calls from anxious family members when their relatives have been apprehended and detained by the INS. Under the law and regulations prior to the Interim Rule, family members could be assured that a legal representative could at least discern the charges against the detainee and that a hearing would be held to determine whether the person could be paroled or bonded out of detention.

Under the Interim Rule, no such assurance can be made. In fact, the rule would allow the INS to detain an alien, without any charges or evidence that they pose a threat or flight risk, for an open-ended period of time. The trigger for this broad and unprecedented authority would be "in the event of emergency or other extraordinary circumstances." Such broad language invites abuse. A person innocent of any wrongdoing could, under this rule, be detained indefinitely without any charges ever being brought against him. Furthermore, because no charges would be filed, the person would have no forum in which to contest his detention or appeal that decision. This is counter to all notions of fair play and justice.

Standard for Invoking "Emergency or Other Extraordinary Circumstances"

As stated, the Interim Rule stipulates that an exception to the 48-hour detention period will exist "in the event of emergency or other extraordinary circumstances." In the event such circumstances arise, the INS is free to hold a person without any specific limit, other than "a reasonable period of time." The language that triggers this broad exception in the Interim Rule is too vague. For example, does an "emergency" include a government shut down due to a budget impasse with Congress, or does it only mean emergencies related to national security? Who has the authority to declare such an emergency and what is the standard used to do so?

The other proposed language "extraordinary circumstances" is even more vague. Conceivably, any INS arrest and detention after September 11, 2001, could be considered in "extraordinary circumstances" since the terrorist attack and subsequent investigation is unprecedented in U.S. history. The Interim Rule's language is ambiguous and would lead to unnecessary confusion and, possibly, abuses of detention power. More importantly, Mr. Chairman, you and your colleagues in Congress recently gave the Attorney General the power to detain someone suspected of terrorist

activities for seven days prior to charging them with a crime or immigration violation. This new law addresses the concern that purportedly spurred this Interim Rule—the need for the government to be able to hold a suspected terrorist while determining through international and domestic intelligence whether or not charges should be brought against him.

The Interim Rule states that in the event of emergency or other extraordinary circumstances, the INS may detain a person without charge or custody determination for a “reasonable period of time.” The language defining the time limit for the exception in the interim rule is unacceptably open-ended. In its current form the rule could result in a life sentence for a person based on no more than a mere suspicion of some immigration violation.

The language must be changed at least to conform with the USA PATRIOT Act, which states that the Attorney General may hold non-citizens considered suspected terrorists for up to seven days before charging them with a crime or beginning deportation proceedings. Preferably the language granting any exception should be deleted since the USA PATRIOT Act affords the Attorney General the authority he needs to detain suspected terrorists in a time of national emergencies, making the Interim Rule language unnecessary. If the language is not omitted, the time limit should be specified and less than seven days. If the Attorney General is limited to holding suspected terrorists for seven days before charging them, then certainly a person held for a much less specific and serious reason should be held for less time.

We urge you to hold the Department of Justice accountable in order to avoid excesses or abuse in INS detention, particularly in light of the fact that Congress just enacted The PATRIOT Act which adequately addresses the concerns that led to the issuance of this Interim Rule.

INTERIM REGULATION ON AUTOMATIC STAY OF BOND ORDERS

Another interim regulation affecting the detention of immigrants that the Committee has concerns about is the interim regulation regarding custody determinations published October 31, 2001. This interim regulation grants the INS broad authority to invoke an automatic stay of an immigration judge’s bond order and the Board of Immigration Appeals’s decision on the appeal of such an order.

The interim regulation undermines non-citizens constitutionally-protected right to be free from detention unless they are dangerous or present a flight risk. As written, the regulation will ensure that non-citizens suffer unwarranted detention for significant periods of time while they wait for INS bond appeals to be processed by the Board of Immigration Appeals and certified to the Attorney General. The regulation overrides both the liberty interest of non-citizens and the function of the judges of the Immigration Court system and the Board of Immigration Appeals as neutral guarantors of a fair bond system. It undermines the authority of Immigration Judges and Board Members and gives INS personnel the unilateral authority to hold non-citizens in detention for significant periods of time regardless of the decision rendered by an Immigration Judge or the BIA. It confers decentralized, standardless authority over critical detention decisions to the INS, an agency where diffusion of authority and lack of accountability have repeatedly become problematic.

The regulation is not narrowly tailored to achieve a legitimate government objective. Its scope is broad in that it applies to all categories of immigration offenses regardless of the seriousness of the underlying offense charged, or of the level of the bond determination made by the Immigration Judge. The problem that the regulation purports to solve—the bureaucratic challenge of timely filing of stay motions by the INS and issuance of interim stays by the BIA prior to bond being posted for a non-citizen—has not actually been a problem, even in the wake of widespread detention of non-citizens as part of the post-September 11 dragnet.

The inclusion of all types of offenses, no matter how innocuous, in the automatic stay provision is a significant departure from the preexisting regulation promulgated after passage of the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA). That regulation subjects non-citizens charged with deportability for commission of a broad range of offenses, including involvement in terrorism or conviction of aggravated felonies and many lesser crimes, to mandatory detention and an automatic stay where an Immigration Judge grants bond. In justifying that regulation, the government argued that the combination of an initial high bond *and* the requirement that the non-citizen have committed “a serious criminal offense” justified the draconian provision. 63 Fed. Reg. at 27447. Obviously, the new regulation eliminates the requirement that the non-citizen be accused of a serious offense. Any offense can trigger the automatic stay provision, provided that the local INS office has set a bond of \$10,000 or more. Unlike the bond level requirement,

the conviction requirement was objective and not subject to manipulation by the INS.

INTERIM REGULATION ON CONTINUED DETENTION OF ALIENS SUBJECT TO FINAL
ORDERS OF REMOVAL

The Committee on Migration welcomed the Supreme Court's decision in *Zadvydas v. Davis* holding that the Immigration and Nationality Act (INA) limits an alien's post-removal-period detention to a period "reasonably necessary to bring about that alien's removal from the United States. It does not permit indefinite detention." Many indefinite detainees and their families were heartened that the Supreme Court had recognized their plight and that a statute permitting indefinite detention would have violated their due process rights under the U.S. Constitution. The immigrant community and its advocates awaited the new INS regulations that would give effect to the Supreme Court's decision.

We and many others were dismayed by the contents of the current interim rule published on November 14, 2001 implementing the *Zadvydas* decision. The interim rule turns the *Zadvydas* decision on its head. The rule appears to lengthen the statutory 90-day removal period to six months by eliminating all references to "90-days" in the existing regulation and avoiding any time limitation for the INS in assessing the likelihood of removal. The interim rule creates a number of issues the INS must review prior to releasing a person, such as the detained person's compliance with obtaining travel documents, State Department information regarding the likelihood of removal to a particular country, and whether there are any "special circumstances" meriting continued detention. However, the interim rule contains no timeline for the INS to make such considerations or issue decisions. The interim rule, as it stands, will simply result in the very indefinite detention that the *Zadvydas* decision prohibits.

In addition, although the Supreme Court focused the bulk of its majority opinion on discussing the "serious constitutional problem" that would be raised by a statute permitting indefinite detention, the current interim rule focuses on the few exceptions to indefinite detention briefly referenced in the decision. The interim rule focuses on detaining persons under these exceptions, rather than on releasing the vast majority of detainees who are neither "terrorists" nor "specially dangerous" persons.

Not only does the interim rule give undo focus to the exceptions to release of indefinite detainees, the interim rule exceeds any authority given by statute or decision in terms of justifications for further detention. The interim rule also fails to provide important procedural safeguards for any such exceptions to be invoked.

THE INTERIM REGULATIONS AND THE USA PATRIOT ACT

In drafting the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, 107-56, 115 Stat. 272 (October 26, 2001), Congress provided for two carefully-limited extensions of the INS' power to detain non-citizens. First, it provided that a non-citizen could be held without being charged with an immigration or criminal offense for seven days. The seven-day limitation was enacted after rejection of longer time frames. Second, it allowed the Attorney General—or the Deputy Attorney General acting under authority delegated by the Attorney General—to detain indefinitely a non-citizen where he certifies that he has "reasonable grounds to believe" that the non-citizen is involved in terrorist activities, subject to ongoing review of the certification every six months and habeas corpus review in federal District Court. Both the nondelegation language limiting this authority to the Attorney General and the Deputy Attorney General, and the judicial review language were added in the course of the debate over the USA PATRIOT Act. The narrowness of these limitations was the product of serious debate and an honest effort to balance our country's legitimate security needs and the civil rights of non-citizens present here.

Both of the interim regulations cited above authorize through administrative action what the administration could not achieve in the legislative process: a broad, almost standardless mechanism for ensuring that non-citizens can be held for months in detention by the INS. Both the Congress, in the PATRIOT Act, and the Supreme Court in its decision in *Zadvydas v. Davis*, have spoken clearly against this kind of detention.

Any terrorism or state of emergency provisions should be consistent with the Patriot Act and be invoked by action of the Attorney General or Deputy Attorney General. The interim regulation now in effect is fatally flawed from a constitutional point of view in that it includes all immigration offenses, including the most innoc-

uous, has no time limitation on when it is effective, and allows local INS personnel to ensure non-citizens' long detention without review. It is essential that any provisions that would trigger a general automatic stay be limited in time, and be triggered only by the personal authorization of the Attorney General or Deputy Attorney General. This is the model that was created by Congress and the administration in the USA PATRIOT Act, and it is essential that the Department of Justice draft its regulations in conformity with our laws and Constitution.

CONCLUSION

Each of these views, Mr. Chairman, is offered respectfully, recognizing that all of us involved in the complex issues of migration—whether government officials, private agency personnel, or the faithful—are doing our best to address the challenges of migration in our increasingly globalized world.

Mr. Chairman, it is the view of the U.S. Bishops that we, in the United States, must renew our commitment to welcome newcomers to our shores and to offer them humane and compassionate treatment. By doing so, we serve our own vital interests and act as an example to other nations.

On behalf of the nation's Catholic bishops, I thank you and your colleagues on the Subcommittee for allowing me the opportunity to present our views and for your leadership on this issue of vital national importance.

OTHER

The Miami Herald (Interviews)
12/13/01

Don't compromise fairness and due process

President Bush and members of his Cabinet have urged all Americans to be respectful of Arab Americans and Muslims, noting that neither ethnicity nor religious belief make terrorists.

Pronouncements of tolerance by government officials, though, should be followed by policies that treat individuals with dignity and justice. But since Sept. 11, such policies have not been evident in the case of non-U.S. citizens. In fact, there are ominous signs that the administration, with assistance by Congress, is leading us down a path that fundamentally could alter how our nation treats immigrants and refugees.

A disturbing series of recent governmental actions targeting noncitizens is worrisome:

- The moratorium on refugee admissions has left thousands of refugees worldwide vulnerable.
- Anti-terrorism legislation and a set of proposed and interim regulations could lead to a dramatic expansion of indefinite detention.
- Eavesdropping on attorney-client conversations and creating military tribunals may erode further already-limited due-process protections for noncitizens.

Certain security actions are necessary: improved intelligence sharing and screening, visa and passport security enhancement, and more-intensive monitoring of visa overstayers. Others, especially indefinite detention and suspension of due process, require closer scrutiny.

The U.S. Catholic bishop



THOMAS G. WENSKI

acknowledge the government's responsibility to protect the common good of its citizens against outside threats — in a just, balanced and fair manner.

That balance pits our security interests against our historical national interest to welcome immigrants to the United States. To navigate this terrain, we should neither cut a wide swath simply to feel more secure nor neglect necessary security safeguards. To veer too far in either direction endangers our nation's future.

In 1996, for example, Congress passed the Anti-Terrorism and Effective Death Penalty Act, designed in part to respond to the 1993 attack on the World Trade Center. The law has led to the deportation and detention of many immigrants, some unjustly, but it did not prevent a second, more-devastating attack.

LAW-ABIDING PATRIOTS

The vast majority of immigrants are law-abiding residents, many of whom share in our grief and have contributed to recovery efforts. Immigrants, whether U.S. citizens or not, have responded with patriotism to the Sept. 11 events.

How can we walk the fine line between security and the freedom of a democratic society accepting of newcomers? It is not easy, especially as we try to identify an elusive enemy. But we must not abandon fundamental principles of fairness and due process along the way.

Instead of erecting broad obstacles to our immigration system, as anti-immigrant groups and some in Congress propose, we should enact targeted measures that help ensure our security.

However, we should resist the temptation to construct a fortress America that permanently alters our fundamental character as an immigrant

nation. Reforms must ensure that asylum-seekers retain access to protection here; that immigrant families that abide by the law are allowed to reunite in a timely manner; that noncitizens are not detained arbitrarily; and that waiting times and costs for visas do not become an impenetrable barrier to legal immigration.

After the attack on Pearl Harbor, President Roosevelt signed an executive order permitting the War Department to house all those of Japanese ancestry in "relocation" centers. The order was viewed as a reasonable response to a national-security threat. In 1982, the Commission on Wartime Relocation and Internment of Civilians, created by Congress to study the policy, concluded that the unjust detention of Japanese Americans was the result of "race prejudice, war hysteria, and failure of political leadership."

Immigrants have responded admirably to the Sept. 11 events.

Sixty years after Pearl Harbor, we should remain mindful of the lessons of history. We must act thoughtfully and maturely and use our knowledge and experience to protect our nation without violating constitutional principles or forsaking our national heritage. Sacrificing our values and identity as a nation of immigrants will not make us safer but weaker, an outcome that any terrorist craves.

Thomas G. Wenski, auxiliary bishop of Miami, is chairman of the U.S. Conference of Catholic Bishops' Committee on Migration.

MATERIAL SUBMITTED FOR THE HEARING RECORD



December 18, 2001

Immigration and Claims Subcommittee of the House Committee on the Judiciary
The Honorable George W. Gekas
Chairman of the Immigration and Claims Subcommittee of the House Committee on the
Judiciary
B-370B Rayburn House Office Building
Washington, D.C. 20515

Re: Hearing of the Immigration and Claims Subcommittee of the House Committee on
the Judiciary "A Review of the Department of Justice Immigration Detention Policies"

Dear Representative Gekas:

We would like to submit the attached written testimony for the Immigration and Claims
Subcommittee of the House Committee on the Judiciary hearing, "A Review of the
Department of Justice Immigration Detention Policies" on December 19, 2001. It
highlights the concerns of the Detention Watch Network (DWN) about the Immigration
and Naturalization Service (INS) civil immigration detention system.

The DWN was founded in 1997 by the Catholic Legal Immigration Network Inc., the
Florence Immigrant and Refugee Rights Project and Lutheran Immigration and Refugee
Service in response to the rapid growth of the immigration detention system in the United
States. The network is coordinated by Lutheran Immigration and Refugee Service and
includes an advisory committee of 20 nongovernmental organizations. Our members
include over 100 religious, civil, immigrant and human rights organizations and over
1,500 concerned individuals.

We greatly appreciate your consideration to enter this testimony into the official written
record for this hearing.

Sincerely,

Ralston H. Deffenbaugh Jr.
President
Lutheran Immigration and Refugee Service



Testimony submitted to the Immigration and Claims Subcommittee of the House Committee on the Judiciary at the December 19, 2001 hearing: "A Review of the Department of Justice Immigration Detention Policies" by the following organizations:

Church World Service, IRP
 Citizens and Immigrants for Equal Justice
 Florence Immigrant and Refugee Rights Project
 Hebrew Immigrant Aid Society (HIAS)
 Lawyers' Committee for Civil Rights Under Law of Texas, Immigrant & Refugee Rights Project
 Lawyers Committee for Human Rights
 Lutheran Immigration and Refugee Service
 National Immigration Law Center
 Pennsylvania Immigration Resource Center
 Political Asylum/Immigration Representation Project
 Southeast Asia Resource Action Center
 United Methodist Committee on Relief (General Board of Global Ministries)

The Detention Watch Network

The organizations listed above of the Detention Watch Network (DWN) respectfully submit the following written testimony highlighting our concerns about our nation's civil immigration detention system. The DWN was founded in 1997 by the Catholic Legal Immigration Network Inc., the Florence Immigrant and Refugee Rights Project and Lutheran Immigration and Refugee Service in response to the rapid growth of the immigration detention system in the United States. The network is coordinated by Lutheran Immigration and Refugee Service and includes an advisory committee of 20 nongovernmental organizations. Our members include over 100 religious, civil, immigrant and human rights organizations and over 1,500 concerned individuals. Many Network members provide direct legal, social, medical and pastoral services to people in immigration detention; others are personally affected by the 1996 detention policies; and all are committed to creating more just immigration laws and regulations. We are deeply concerned about the vast increase in the past decade of the numbers of immigrants who are subject to detention and are particularly concerned about the most vulnerable including torture survivors, asylum seekers, women, children, long-time legal permanent residents, refugees and others held in indefinite detention.

We strongly condemn the attacks of September 11, and share ongoing security concerns with our fellow Americans. However, we are concerned that, in the process of bringing to justice those involved with the attacks, our government preserve basic fairness and common sense that must inform any public policy, particularly federal enforcement policy. We DWN members who sign

on to this statement are particularly concerned that Congress and the INS continue to address the overall chronic systemic problems of immigration detention. While preserving public safety, we believe in the basic foundations of humane treatment and fair process for all who are subjected to detention.

I. Brief overview of the decade of expansion of immigration detention in the United States

The U.S. immigration detention system represents the most rapidly expanding prison program in the country today. The INS detains more than 22,000 individuals on any given day. This is almost quadruple the number detained in 1992. Even though INS detention is supposed to be “civil” detention, approximately 60 percent are detained in penal facilities including over 800 city and county jails and state prisons scattered across the country. These are often in remote locations far from family and access to legal counsel. The expansions of immigration detention in our nation’s history have coincided with moments of anti-immigrant sentiment and often had destructive consequences. The quadrupling of immigration detention over the last decade is unprecedented. We are deeply concerned about this continued increase.

The United States is a nation of immigrants. We value fair and reasonable immigration laws that reflect our immigrant heritage, protecting those fleeing oppression and respecting family values. While we are sensitive to the current national security concerns, we believe that it is possible to assure safety while providing a fair process for all those detained. We believe that thoughtful, common sense policies rooted in these values can help assure fairness, humane treatment, safety, and fiscal responsibility.

II. Overview of the problems of immigration detention

Detention is a confusing, lonely, and painful experience, both for the people in detention and for their waiting spouses and children, many of whom are U.S. citizens or legal permanent residents. Detention is especially difficult because of its indefinite nature; immigration detainees almost never know how long their imprisonment will last. Conditions in detention facilities and jails vary greatly, but immigration detainees often suffer hardships such as crowded conditions, poor medical care, lack of outdoor recreation, inappropriate use of solitary confinement, verbal and even physical abuse. These conditions, combined with separation from family and uncertainty about the length of their detention, lead even people with a good chance of winning their cases to give up and accept deportation.

Almost 90% of immigration detainees must navigate a complex legal system on their own and are not represented by legal counsel. Although *pro bono* and private attorneys work on behalf of asylum seekers and other immigrants, there is no guarantee of legal representation for immigration detainees. The burden is on detainees to find and pay for their own legal counsel. Finding an attorney from detention can be difficult, especially for people who do not speak English, or who are held in detention centers or jails in isolated locations or where access to telephones is limited. According to the Executive Office of Immigration Review, only about 10% of immigrants in detention are represented by counsel. What’s more, detainees who already

have an attorney may be transferred to a far-away facility, without any notice to their attorney or their family.

Detention separates families and causes needless suffering. Under the 1996 immigration laws, many legal permanent residents face mandatory detention and deportation. A minor offense committed ten years ago means deportation even if the person is completely rehabilitated and a productive member of society. Because of mandatory provisions, such a person likely has no opportunity to be considered for release from detention during immigration proceedings, or relief from deportation, regardless of family circumstances or community ties. This includes people who have lived almost their entire lives in the United States, served in the U.S. military, and have U.S. citizen spouses and children. Today, hundreds of families are suffering as a result of this separation.

Asylum seekers fleeing persecution often find imprisonment in the United States. While asylum seekers are technically eligible for release from detention after they have been shown to have "credible fear," many remain detained until they are granted asylum. Even asylum seekers with families in the United States who are ready and waiting to care for them are often not released. This means months, and if the case is appealed, *years*, behind bars, separated from family, all at taxpayers' expense. In a recent case, a Chinese woman fleeing political persecution was held in INS detention for almost 20 months even though she could have been released to family in the United States. In the end, she was granted asylum. According to the INS, 5,000 - 6,000 asylum seekers are detained annually.

A majority of detainees are held in local jails. Even though they are supposed to be in "civil" detention, almost sixty percent of all immigration detainees are held as if they were criminals in local county or city jails, mixed with those who are serving time for criminal convictions. These jails are often located far from family and legal counsel. People held for immigration reasons are administrative detainees and are not being detained for punishment. For asylum seekers and children in particular, detention in a correctional institution is not appropriate.

County jails housing INS detainees have not been subject to standards for access and treatment. In January 1998, the INS issued 17 standards for the treatment of immigration detainees. However, these standards only applied to detention facilities operated by the INS (called "Service Processing Centers") or contract detention facilities operated for the INS by private correctional companies. This constitutes less than half of the total detained population. In January 2001, the INS added an additional 19 standards. The 36 standards continue to apply to the facilities mentioned above. Under the INS implementation plan, all facilities used by the INS, including county jails, are scheduled to be in compliance by the end of 2002. They will be subjected to annual standards reviews to ensure the guidelines are being met. In the past, the INS has claimed to have little ability to require the jails to adhere to the detention standards even though the agency often pays county jails housing immigration detainees up to twice the amount per day that jails receive for the incarceration of those serving criminal sentences. Advocates are concerned that there will not be full and effective implementation of the standards at all facilities used by the INS.

Completely unrelated to the September 11 tragedy, hundreds of immigrants who cannot be deported have been imprisoned indefinitely in the United States. For the United States to send people who have been ordered deported back to their home countries, the INS must secure travel documents for their return. This can be very difficult, if not impossible, for people from countries with which the United States has no diplomatic relations, countries with inadequate infrastructure due to wars or poverty, or countries that refuse to accept the return of their citizens. People from countries such as Cuba, Laos, Cambodia, Vietnam, Iraq, Iran, Libya, China and others may fall into these categories. For many people with these home countries, their detention has literally no end in sight. Some people have been held for three years, and even longer.

Despite the recent Supreme Court decision, *Zadvydas v. INS*, calling for INS to release indefinite immigration detainees, nearly 1,000 continue to be held. They include stateless people, people of the four core nationalities (Vietnamese, Laotian, Cambodian, Cuban), and people who have been detained well beyond the six months outlined by the Supreme Court—some three, four, five times that long. We support INS's release of approximately 1,000 individuals pursuant to *Zadvydas*. We are very concerned about the non-release of at least 1,000 other individuals covered by the Supreme Court order, most of whom have no legal counsel. We are also concerned about the lack of an independent adjudicator to assure a fair, impartial decision. As it stands, the Immigration Service is judge, jury and jailer.

Women are more likely to be detained in jails and denied service. Women make up about 7% of the overall detained population. Because of the smaller numbers, INS has less space reserved for women in their own facilities, and is more likely to place women detainees in local jails mixed with the general criminal population. Additionally, because of their small numbers, women sometimes are denied services that are provided to men in the same facility, such as translation services and English classes.

Families are often separated in detention, husbands from wives, mothers from children. There are few facilities to hold families together during immigration proceedings. A mother may be placed in county jail while her child is shipped to a facility in another state.

III. DWN policy recommendations regarding INS detention

Restrict the use of immigration detention to carrying out its narrow purpose. INS detention is civil, not criminal. Its use at all should be narrowly prescribed for the civil purposes of facilitating the process of either removal or permission to remain in the United States legally. Where the government can make these determinations without using detention they should do so. Adherence to this principle would mean INS detention would not increase and in fact would be reduced. For example, when an individual is determined to be neither a flight risk nor a danger to the community the INS should facilitate this process without using detention. Truly vulnerable populations, such as asylum seekers and children, should be detained only under exceptional circumstances. Anyone whose physical safety would be in jeopardy in detention should be released. Based on past experience, some of the most vulnerable groups facing potential harm include: asylum seekers, children, women, survivors of torture, the mentally and physically ill, gays and lesbians, and victims of domestic violence. Family members who must be detained should be detained as a family unit in the least restrictive setting possible.

Implement a fair process. The process of determining whether an individual is placed in, or remains in detention, should be made by an independent adjudicator, not affiliated with the INS. All individuals have a right to full and fair hearings on their custody. Alternatives to detention should be considered and implemented, including release, reasonable bond, supervised release accompanied by comprehensive legal, social and reintegration services, and the use of group housing or shelters.

Individuals placed in immigration detention should be entitled to federally-funded legal assistance. When detention is deemed necessary as a last resort, each individual should have access to federally-funded legal assistance and should receive a comprehensive range of rights information.

If detention is used, it should be in the least restrictive manner and setting. In those exceptional circumstances when detention is used, it should be for the least amount of time, in the least restrictive setting possible, and in the most humane conditions. Full access should be granted to legal, social, medical and psychological, religious and pastoral service providers.

INS detention standards should be enforced for every facility used by the INS for detention. Existing and new contracts with facilities where noncitizens are, and will be detained, should meet all standards. INS should not use any facility that is not in full compliance with the standards. The INS detention standards outline the minimum that is required and the INS should go beyond the standards.

Our concerns with the use of detention are not merely isolated problems; they point to serious systemic flaws within the immigration detention system itself. The United States has long been known as a safe haven and a place of freedom. The chronic problems of the detention system, such as lack of legal counsel, lack of due process, lack of an independent adjudicator, separation of families, imprisonment of asylum seekers and children, use of local jails, and indefinite detention, cause America to fall far short of its ideals.

We greatly appreciate the Subcommittee on Immigration and Claims' careful consideration of our concerns and recommendations regarding INS detention.

