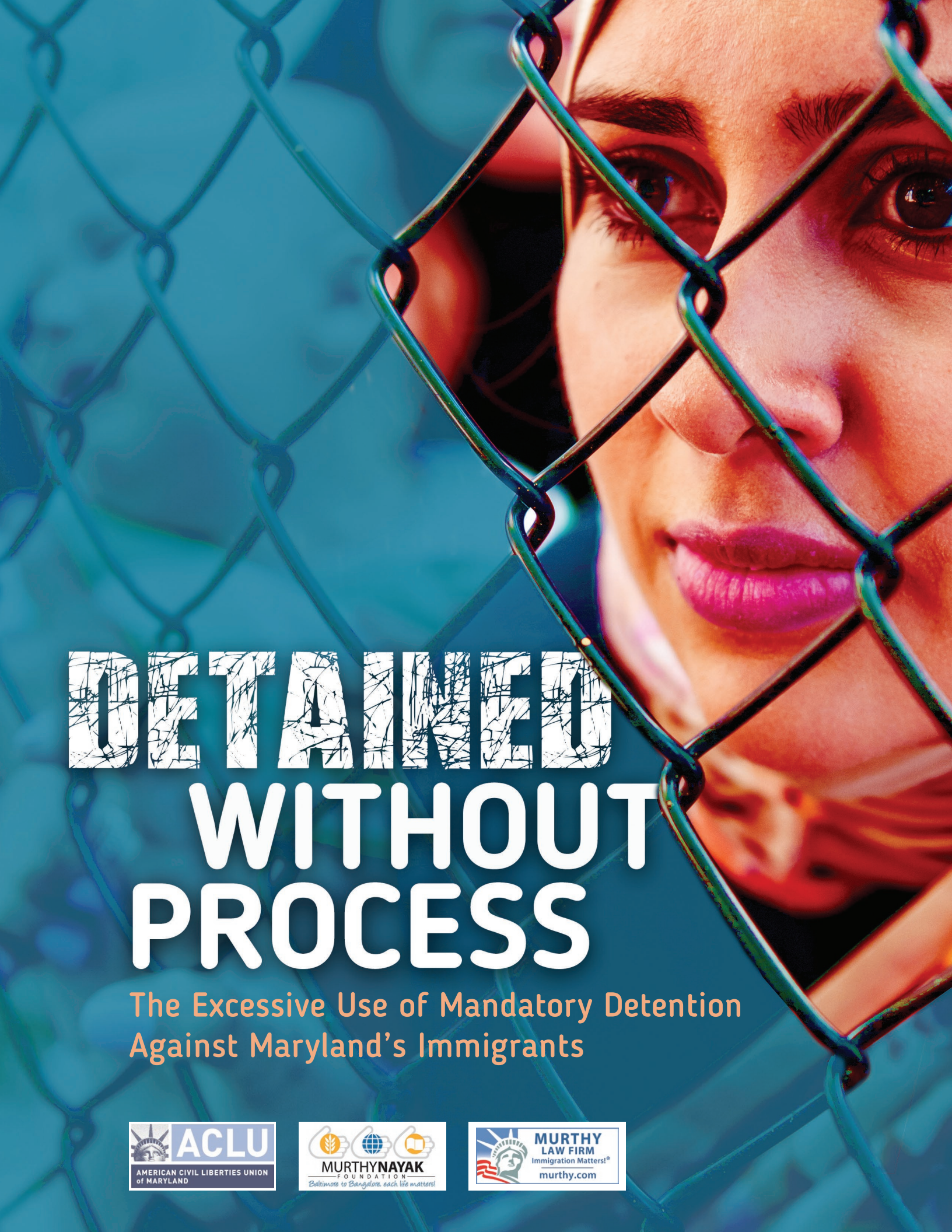

DETAINED WITHOUT PROCESS

The Excessive Use of Mandatory Detention Against Maryland's Immigrants

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ACKNOWLEDGMENTS

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The authors of this report are Sirine Shebaya,[1] formerly a Staff Attorney with the ACLU of Maryland, and Robert Koulish, University of Maryland Joel J. Feller Research Professor of Government and Politics. The report was conceived by Sirine Shebaya, Robert Koulish, and Maureen Sweeney, Associate Professor and Director of the Immigration Clinic at the University of Maryland Carey School of Law. The data set analyzed in this report was obtained from Immigration and Customs Enforcement through a Freedom of Information Act request by Robert Koulish and Mark Noferi, then an Enforcement Fellow at the American Immigration Council. Nicole Miles created the layout and design.

Special thanks to Maureen Sweeney and to Michael Tan, Staff Attorney with the American Civil Liberties Union Immigrants' Rights Project, for extensive review and feedback on multiple drafts of this report; to Sara Mohaved, who conducted a large share of the data analysis and provided invaluable ongoing research support for the project; and to Amy Cruice, Legal Program Administrator at the ACLU of Maryland, for help with the interviewing process.

This report is dedicated to our courageous, inspiring clients, and to the hundreds of thousands of immigrants who are needlessly targeted, criminalized, wrenched away from their homes and families, detained without due process for months or years while their immigration cases wind their way through the system, and generally treated without compassion or justice by a broken, inhumane immigration enforcement system.

CONTENTS

1 Sirine Shebaya is no longer with the ACLU of Maryland. She can now be reached at sirine.shebaya@aya.yale.edu.

EXECUTIVE SUMMARY

- A family man who has lived in the United States for three decades, has lawful permanent resident and U.S. citizen family members, and a wife and daughter with significant medical needs, and whose only conviction was a theft offense for which he served no time in jail.
- An elderly lawful permanent resident woman who some years ago was convicted of a theft offense but who otherwise has no criminal history and has lived peacefully in the United States for decades.
- A man who has lived in the United States for two decades, who has five U.S. citizen children and only a single non-violent drug possession conviction for which he served less than six months in jail.
- A man who has lived in the United States for decades, who has a U.S. citizen wife and relatives, and whose only conviction was a single drug possession conviction from 20 years ago for which he served less than six months in jail.
- A lawful permanent resident mother of two small U.S. citizen children with two shoplifting charges involving diapers and food.

These are just some of the people who are placed in immigration detention in Maryland and whose lengthy and unnecessary detention our taxpayer dollars are funding. In addition to being costly and wasteful, the detention of each of these individuals raises serious due process concerns. Each had substantial challenges to their removability, many were eligible for relief, and at least three were detained for a prolonged period of time. Their stories will be described in detail in this report.

In the criminal justice system, the presumption is that everyone is eligible for release on bond and given an opportunity to argue their equities at a hearing before a neutral arbiter. In the immigration system, that presumption is reversed for most detainees. Immigrants are routinely and automatically subjected to detention pending their removal cases without ever having an opportunity to present their case for release to an immigration judge. They remain detained for the entire duration of their immigration proceedings, even when they have strong immigration cases and are ultimately able to win and remain permanently in the United States.

In 1996, Congress enacted a provision, 8 U.S.C. § 1226(c), requiring the mandatory, no bond detention of immigrants facing deportation based on certain criminal convictions. It did so because of an assumption that people with criminal records posed a heightened risk of flight or danger. But recent government data shows that this is untrue: individuals detained under § 1226(c) pose no greater flight or public safety risk than the general population of immigration arrestees.

Combining qualitative interviews and quantitative analysis of a three-month data sample of immigration custody determinations in Maryland, this report describes and illustrates the needless overuse of "mandatory" (no-bond) detention for persons who pose little flight or public safety risk. Our analysis produced the following basic findings:

- Of 485 individuals entering ICE custody in Maryland during a three-month period in 2013, 96 individuals were held without bond under the mandatory detention statute, 8 U.S.C. § 1226(c), which requires the detention of noncitizens placed in removal proceedings due to their criminal records.

- As a group, mandatory detainees did not pose a higher flight or safety risk than the general population of ICE arrestees, by the assessment of ICE's own risk classification tool. In fact, those detained under § 1226(c) were collectively the lowest flight risk category among all ICE arrestees.
- About 41 percent of people classified as mandatory detainees had convictions that either clearly did not subject them to mandatory detention under § 1226(c), or raised a substantial question as to whether they did so. Nonetheless, all were automatically placed in mandatory detention without regard to substantial legal doubts regarding their classification.
- Of those classified as mandatory detainees, at least half may have been eligible for some form of relief from deportation and therefore likely to be legally entitled to reside in the United States.

Several federal courts have recognized that § 1226(c) does not require mandatory detention where someone raises a good faith or substantial challenge to their removal, nor does it authorize mandatory detention beyond a reasonable period of time. Nonetheless, in many cases, the government imposes mandatory detention in an improperly broad manner to persons with minor convictions and strong equities, even where there are substantial doubts about whether they committed a crime that triggers the mandatory detention statute; even where they are likely to ultimately prevail in their immigration cases; and even when they are detained for unreasonably prolonged periods.

The report recommends that the government limit its application of § 1226(c) to its proper scope and provide bond hearings in cases where a person raises a substantial challenge to removal or where detention has become prolonged. Instead of presuming that a person is subject to mandatory detention, the presumption should be reversed. Detention without a bond hearing should be reserved only where the person has no substantial challenge to removal and should not be applied beyond a brief period of time.

INSTEAD OF PRESUMING THAT A PERSON IS SUBJECT TO MANDATORY DETENTION, THE PRESUMPTION SHOULD BE REVERSED.

METHODOLOGY

This report is a qualitative and quantitative analysis of mandatory detention in Maryland that aims to illustrate how our statutory scheme combined with the current tools Immigration and Customs Enforcement (ICE) uses to evaluate who is subject to mandatory detention result in a system that is biased towards excessive, costly, and unnecessary detention.

The data analyzed in this report were obtained from ICE by Professor Robert Koulish, Joel J. Feller Research Professor of Government and Politics and Director of the MLAW programs at the University of Maryland, and Marc Noferi, then Enforcement Fellow at the American Immigration Council, in response to a Freedom of Information Act (FOIA) request they submitted to ICE in April of 2013. ICE provided Koulish and Noferi with 505 Risk Classification Assessment (RCA) Detailed Summaries in a series of four productions from September 2013 to June 2014 covering custody classification assessments from March 2013 to June 2013. After excluding duplicates and incomplete samples, 485 samples remained. Of those samples, 96 were for individuals classified as subject to mandatory detention and in removal proceedings before an immigration judge (detained under 8 U.S.C. § 1226(c)). The analysis in this report is limited to the 96 cases of mandatory detention under § 1226(c).

The data were analyzed to uncover information about possible incorrect classifications as well as relief eligibility and other equities. The analysis was conceived by Sirine Shebaya, Maureen Sweeney, Robert Koulish, and Marc Noferi, and performed by Sara Movahed, Stephane Romano, Calvin Fisher, and Anne McCabe, all student participants in Robert Koulish's Spring 2015 Immigration Law and Policy Seminar at the University of Maryland Carey School of Law.

To analyze possible incorrect classifications of individuals under the mandatory detention statute, students researched and applied existing case law to the convictions described in the RCA sample, using both binding in-circuit precedent specifically on point for particular offenses and cases where existing case law suggests that a proper legal analysis would lead to the conclusion that the person should not be subject to mandatory detention. The purpose was to identify individuals placed in mandatory detention who may have substantial challenges to the classification of their offense as one that triggers mandatory detention. It was assumed in the analysis of this data that all RCAs obtained from the Baltimore Field Office reflected underlying criminal offenses that were violations of the Maryland criminal code.

To analyze relief eligibility, students considered factors that could make a person eligible for cancellation of removal such as U.S. citizen family ties, work authorization, and pending benefits applications with USCIS; whether their criminal convictions would statutorily bar eligibility for relief; and whether they might qualify for waivers or fear-based relief based on their country of origin. The purpose was to identify individuals placed in mandatory detention even where they ultimately may be eligible for relief from removal.

The stories documented in this report constitute a qualitative illustration of the negative effects of mandatory detention on individuals with minor criminal histories, strong ties to Maryland and the United States, and a strong claim to relief from deportation. The stories are the result of interviews conducted by the ACLU of Maryland with individuals who were held in mandatory detention. The ACLU of Maryland conducted multiple interviews in person and reviewed case files for all interviewees. All interviews were conducted by Sirine Shebaya, then a Staff Attorney for the ACLU of Maryland, some jointly with Amy Cruice, Legal Program Administrator for the ACLU of Maryland. The names of all interviewees have been modified and some identifying details removed in order to protect their anonymity and privacy.

INTRODUCTION

In the criminal justice system, defendants generally are presumed to be eligible for release on bond or on other conditions, unless prosecutors can show to a judge's satisfaction that they pose a danger to the community or a substantial risk of flight. In almost all cases, defendants receive a bond hearing before a neutral arbiter who determines whether the person poses a danger or flight risk that would justify continued detention. In most cases, the person facing charges is ordered released on bond or on other conditions even when the charges are relatively serious. Only rarely is a person deemed so risky that they are ordered detained without bond for the duration of their criminal proceedings.[i]

That presumption is completely reversed in the immigration system: many immigrants are detained without ever having the opportunity to present their case for release while their immigration proceedings are ongoing. This is true even though immigration proceedings are civil, not criminal, and even though most people charged with immigration violations are convicted of relatively minor offenses.[ii] Every year, thousands of people nationwide with a long history of living in the United States, significant family ties or other equities, preexisting lawful immigration status, and only minor criminal convictions end up detained for months or years, with draconian consequences for themselves and their families, many of whom are U.S. citizens or lawful permanent residents.

Especially over the past two decades, immigration detention has grown exponentially, reaching a record high of almost 478,000 detainees in 2012 and continuing to approach 34,000 on any given day.[iii] Hundreds of thousands of immigrants, including asylum seekers, victims of trafficking, families with small children, and persons with mental disabilities are routinely detained for months or even years while they await resolution of their civil immigration cases. This is true even when these individuals pose no danger to their communities or a level of flight risk that requires their detention, and even when alternatives to detention such as check-in requirements or other forms of supervision are available and highly effective at ensuring court appearance.[iv] In fact, ICE detains a far higher share of its arrestees–90 percent nationally, and almost 83 percent in Maryland–than criminal law enforcement agencies, which release most criminal defendants pretrial.[v]

A key contributor to the mass incarceration of immigrants is the government's overuse of so-called "mandatory" detention–that is, detention without a bond hearing for the entire duration of a person's immigration proceedings. As discussed more fully below, the mandatory detention statute, 8 U.S.C. § 1226(c), does require detention without bond for noncitizens facing removal based on certain criminal convictions. But under longstanding precedent, the statute must be interpreted in order to avoid serious due process concerns.[vi] Instead, immigration authorities routinely apply mandatory detention laws in the broadest manner possible. Thus, ICE routinely classifies people as being subject to mandatory detention, regardless of whether they have a strong chance of success in their immigration cases and regardless of whether those cases drag on for months or even years.

HUNDREDS OF THOUSANDS OF IMMIGRANTS, INCLUDING ASYLUM SEEKERS, VICTIMS OF TRAFFICKING, FAMILIES WITH SMALL CHILDREN, AND PERSONS WITH MENTAL DISABILITIES ARE ROUTINELY DETAINED.

Immigration detainees in Maryland are representative of this broader problem. Their stories will be developed more fully in this report, and they include:

Each of these individuals would almost certainly have been released on minimal bond if they had been provided the opportunity to seek release from an immigration judge.

- a lawful permanent resident mother of two small U.S. citizen children whose only convictions were for two minor shoplifting offenses;
- a long-time Montgomery County, Maryland resident and father of two U.S. citizen children whose family was experiencing serious medical problems and desperately needed his financial and emotional support, and who had been convicted only of a single misdemeanor theft offense for which he served no time in jail;
- a long-time Hyattsville, Maryland resident married to a U.S. citizen, beloved by his family and community, and who had been convicted only of a single misdemeanor drug offense two decades ago;
- a lawful permanent resident with a U.S. citizen wife and two U.S. citizen children who came to the United States as a refugee, had a strong asylum claim, and whose only convictions were for two misdemeanor theft offenses;
- a long-time lawful permanent resident who has lived and worked peacefully in the United States for decades but who was convicted of a single misdemeanor theft offense ten years ago;
- a long-time Maryland resident and father of five U.S. citizen children whose family members are experiencing severe financial difficulties and have lost their home as a result of his detention, and who was only convicted of a single misdemeanor drug offense.

Each of these individuals would almost certainly have been released on minimal bond if they had been provided the opportunity to seek release from an immigration judge. Several of them were in fact released on very minimal bond during the pendency of their criminal charges, without ever missing a court date. Many never faced any jail time for their crime. All had strong immigration cases, and none posed a danger to the community or a risk of flight. Yet each was held in immigration detention for months or years until the resolution of their cases, without ever having an opportunity to make a case for their release. **Since our initial interviews in early 2015, four have won their immigration cases and are now reunited with their families after spending several months in detention; one has obtained administrative closure of his case after spending more than two years in immigration detention; and one was ultimately deported.** The extended time they spent in detention resulted in needless disruptions to their family lives and in severe economic hardship to them and their families. It has also resulted in wasteful expenditure of taxpayer dollars.[viii]

Data analysis of information obtained through a recent Freedom of Information Act (FOIA) request shows that these are not isolated cases. Instead, they are part of a pattern of overuse of no-bond mandatory detention. ICE classified 30 percent of incoming detainees as subject to mandatory detention under § 1226(c). Our analysis shows that that classification raised substantial questions in over 41 percent of those cases, and more than half may have been eligible for some form of relief from removal. This means that a large share of those placed in mandatory detention had a good chance of ultimately prevailing in their cases and remaining in the United States. As the case examples illustrate, these individuals often pay a heavy price for the extended time they are subjected to detention and torn away from their lives and families.[viii]

Even as a growing consensus is forming across the political spectrum about the pressing need to reduce over-incarceration in the criminal justice system, both the data and the qualitative research show that the government continues to ignore over-detention in the immigration context. Instead, it needlessly and wastefully detains people who had been living peacefully in their communities for decades and who in many cases will eventually return to those communities–albeit with newly-found financial problems, reentry challenges, lost jobs and homes, severe stress and hardship for family members who are often Lawful Permanent Residents or U.S. citizens, and other difficulties. This system should be revamped to allow bond hearings for persons with substantial immigration cases or whose detention has become unreasonably prolonged.[ix] This would allow a judge to make a case-by-case determination about whether a particular person should be detained, and would likely result in the release of many people in this situation.[x]

THE GOVERNMENT CONTINUES TO IGNORE OVER-DETENTION IN THE IMMIGRATION CONTEXT. INSTEAD, IT NEEDLESSLY AND WASTEFULLY DETAINS PEOPLE WHO HAD BEEN LIVING PEACEFULLY IN THEIR COMMUNITIES FOR DECADES.

II LEGAL BACKGROUND

Statutory Framework

In 1996, against the backdrop of rising anti-immigrant sentiment and inflammatory but factually incorrect rhetoric about immigration and crime,[xi] Congress enacted a series of draconian changes to the immigration laws that made it more difficult for non-citizens with criminal records to remain in the United States or to obtain discretionary release from detention during the course of their immigration proceedings.[xii] Perhaps the most damaging contributor to the over-incarceration crisis we are facing today in the immigration context was the enactment of the mandatory detention statute, 8 U.S.C. § 1226(c), which provided for the automatic no-bond detention of persons convicted of certain enumerated offenses of varying degrees of seriousness–ranging all the way from minor offenses like shoplifting and possession of small quantities of drugs to major crimes of violence.[xiii] The stated purpose behind this provision was to hold the most dangerous individuals and those who posed the highest risk of flight without bond in order to more quickly effectuate their removal from the United States.[xiv]

As a result of this statute, thousands of immigrants who otherwise would have qualified for release on bond or other conditions now end up in immigration detention every year for the entire duration of their immigration proceedings. Because of the complexity of immigration cases that involve charges based on prior crimes, these proceedings routinely take up to or longer than a year to resolve.[xv] This is particularly true for persons who have a strong chance of success in their immigration cases, because they have more reason to appeal faulty or questionable lower court decisions all the way up to the federal circuit courts.[xvi] The government does not consider the strength of an individual's challenge to removability or claim to relief from deportation in making the determination that he or she is subject to mandatory detention. Instead, ICE has interpreted the mandatory detention statute as authorizing it to detain anybody whose conviction arguably falls under the enumerated offenses, even where there are substantial legal arguments that they do not. Moreover, ICE subjects individuals to mandatory detention without regard to how long that detention lasts or is likely to last.

Matter of Joseph

Mandatory detainees can challenge that designation and obtain a bond hearing by moving for a redetermination of their custody status in immigration court. At that hearing, the immigration judge only considers whether a person is properly subject to mandatory no-bond detention based on the government's charges alone, and the standard detainees have to meet in order to prevail is exceedingly high and unconstitutional. In *Matter of Joseph*, the Board of Immigration Appeals found that mandatory detainees can only obtain a bond hearing if they can show that the government is "substantially unlikely" to prevail on the charges of removability it is making against them.[xvii] In practice, this is interpreted to mean that every legal or factual ambiguity is resolved in favor of the government, and the detainee bears the entire burden of proof in the proceeding.[xviii] So long as the government's charge is non-frivolous, the individual will remain in mandatory detention.

As one Ninth Circuit judge has noted, the Joseph standard is "not only unconstitutional, but egregiously so."

Commentators and scholars have pointed out that this standard is inappropriately deferential to the government and makes it all but impossible for individuals to obtain a bond hearing.[xix] As one Ninth Circuit judge has noted, the *Joseph* standard is "not only unconstitutional, but egregiously so."[xx] This is because it fails to strike the right balance between the three due process factors: the liberty interest individuals have in not being detained, the risk of erroneous determinations, and the government's interest in the detention.[xxi] Instead, it elevates above all else the government's charges of removability without giving proper consideration to any other relevant factors, such as a person's eligibility for relief from deportation or their likelihood of ultimate success.[xxii] The continuing validity of *Matter of Joseph* is also put into question by the fact that it was decided before the landmark Supreme Court decision in *Zadvydas v. Davis*, which recognized that immigration detention implicates a fundamental liberty interest and that due process requires detention to reasonably be related to the purpose of preventing flight risk or danger.[xxiii] Against that backdrop, requiring an immigration detainee to essentially prove that the government has no case in order to even be considered for release on bond does not meet constitutional standards.

Demore v. Kim

In 2003, the Supreme Court held in *Demore v. Kim* that the mandatory detention of immigrants in removal proceedings is constitutional in certain circumstances. In that case, the Court considered the general question of whether detention without a bond hearing is *ever* constitutional. It found, based on data that has since seriously been called into question, that such detention is usually brief in duration and serves the purpose of effectuating rapid deportation for persons who have already been found deportable or inadmissible. It therefore upheld the constitutionality of mandatory detention for persons who had no challenge to their deportability and whose detention had lasted for a relatively brief period of time. The Court's conclusion relied centrally on the understanding that average detention times were 45 days for most and around five months for persons who appeal their cases to the Board of Immigration Appeals (BIA). Those time frames have not subsequently been borne out by the facts, and also failed to take into account the amount of time it takes for immigrants to appeal their cases from the BIA to the federal circuit court, which often becomes necessary where complex legal claims are involved.[xxiv] For those individuals, detention time runs closer to a year or longer, in some cases lasting up to two years or more. For this reason, a number of courts have since found that detention without a bond hearing must be limited in duration.[xxv]

The Supreme Court in *Demore* also relied centrally on the fact that the person in that case had no challenge to the charge of removability and no claim to relief from deportation that would entitle him to acquire lawful permanent resident status and remain permanently in the United States.[xxvi] For this reason, several courts have recognized that mandatory detention is impermissible when applied to persons who have a substantial challenge to their removability that would entitle them to remain in the United States, and a number of other court cases are challenging mandatory detention on this basis.[xxvii]

Prolonged Detention

Since *Demore v. Kim*, six appellate courts have found that mandatory detention must be of limited duration. The Second and Ninth Circuits found that all persons detained without bond under § 1226(c) must be given a bond hearing when their detention reaches or approaches the six-month mark.[xxviii] The Ninth Circuit also found that anybody who remains detained after their first bond hearing should receive periodic bond hearings every six months to determine the continuing necessity of detention. At these hearings, the government must bear the burden of proving, by clear and convincing evidence, that they pose either a flight risk or a danger to the community that warrants their continued detention.[xxix] The First, Third, Sixth, and Eleventh Circuits have all found that mandatory detention must be reasonable in duration, without specifying a precise bright line but noting that the criteria include the length of time a person's detention is likely to continue given the particular circumstances or posture of his or her case. [xxx] Each of these courts found that in order to avoid constitutional concerns, § 1226(c) must be interpreted as including an implicit time limit on the length of detention.

Yet even within these circuits, the government continues to indefinitely detain individuals whose detention extends beyond a reasonable period of time, forcing them to file habeas petitions in federal district court in order to try to obtain a bond hearing or release. In Maryland and the Fourth Circuit, this is a developing area of law, and the ACLU of Maryland has filed habeas petitions in district court on behalf of individuals kept in prolonged mandatory detention.

IN MARYLAND AND THE FOURTH CIRCUIT, THIS IS A DEVELOPING AREA OF LAW, AND THE ACLU OF MARYLAND HAS FILED HABEAS PETITIONS IN DISTRICT COURT ON BEHALF OF INDIVIDUALS KEPT IN PROLONGED MANDATORY DETENTION.

FERNANDO

Fernando[xxxi] has lived in the United States since the late 1980s, with only one brief return to his home country to visit family members. He has five U.S. citizen children who relied solely on him for financial support. He was convicted of one minor drug possession offense for which he served very little time in jail, and was arrested by immigration authorities after he was released on probation and placed in removal proceedings. Even though an immigration judge granted him relief from deportation, the government continued to keep him in mandatory detention while it appealed the immigration judge's decision to the Board of Immigration Appeals. Numerous delays in his case, including bureaucratic errors by the immigration courts, caused him to be detained for almost two years. His family, meanwhile, lost their home and suffered severe economic and emotional hardship. His youngest child was born while he was in detention and for the entire time he was in detention, he only met him briefly twice–once in immigration court and once during a jail visit separated by a glass partition. At no point did Fernando receive a bond hearing to determine whether his detention was warranted. Ultimately, Fernando's case was administratively closed and he was released and returned to his family.

SARA

Sara[xxxii] is in her late fifties. She is a longtime lawful permanent resident who came to the United States in the late 1980s. She was convicted of misdemeanor theft and received a suspended sentence, serving no time in jail. About five years later, she applied to become a U.S. citizen. Instead of granting her application, two immigration agents showed up outside her apartment building in the early morning and arrested her as she was on her way to the bus station. She was detained for almost a year without a bond hearing–only to ultimately win her immigration case and release from detention with her lawful permanent resident status restored. Unfortunately during the time that she was in detention, she lost her home and her employment and experienced deteriorating mental health conditions, and became homeless as a result.

JOHN

John[xxxiii] had been living in the United States for almost thirty years. In 1996, he had a brief run-in with the law and was convicted of a single, non-violent drug possession offense for which he served a total of six months in jail. Since that time, he moved on with his life and has lived in the United States without incident. His wife and most of his family are U.S. citizens. A few years ago, he applied for and was granted Temporary Protected Status (TPS) under one of the administration's deferred action programs. He applied for and was granted renewal of this status a year later. But when he applied for renewal a second time, the government denied his request and placed him in removal proceedings based solely on his single decades-old conviction. He was detained at taxpayer expense for more than two years while his case proceeded through the immigration courts and up to the Fourth Circuit, causing great hardship to him and his family, as the government sought to deport him to a country he had not visited since he first arrived in the United States and to which he had a valid fear of return. After a long period of detention, he ultimately lost his case and was deported.[xxxiv] At no point during his prolonged detention did he receive the basic process of a bond hearing before an Immigration Judge to determine if his detention pending resolution of his case was necessary. Most poignantly, his prolonged detention meant that he never had a chance to say proper goodbyes to his longtime partner and other family members or to adequately prepare for return to a country he had not set foot in in thirty years.

Substantial legal challenges

When a person is placed in removal proceedings by the government, she can defend herself in two ways. First, she can challenge her removability as a threshold matter by contesting the government's charges–for example, by showing that the factual basis for the government's claims is incorrect, or by showing that the prior crime that forms the basis for her removability does not actually subject her to deportation. This area of the law is in flux and has rapidly been changing over the past few years, with the Supreme Court issuing a series of decisions limiting the government's broad interpretation of removability.[xxxv] In some cases, she can also vacate or modify the original conviction through post-conviction proceedings in criminal court and then move to terminate her case in immigration court.

But even if she loses her challenge to removability or concedes removability as a threshold matter, she can still challenge her ultimate removability by applying for relief from removal, for example in the form of cancellation of removal; asylum or other fear-based relief; or by applying for discretionary waivers of removability and gaining or regaining lawful permanent resident status.

In either case, if she prevails, she will ultimately be able to remain in the United States and the government will not be able to deport her.

Due process considerations–and common sense–suggest that the strength of a person's immigration case should matter in the assessment of whether or not she should be subject to mandatory detention. This is because the entire point of detention without bond is to facilitate quick removal from the United States by ensuring that only people who pose a heightened danger or flight risk are held in custody during their immigration proceedings. If the chances that a person will ultimately be removed are low, either because she has a strong challenge to removal or because she has a strong claim to relief from removal, then that purpose is not served. Her mandatory detention violates due process because it is not reasonably related to a legitimate government objective. Instead, it needlessly disrupts her work and family life and imposes pointless, wasteful expenses on taxpayers.

Courts have recognized that this issue was not decided in *Demore v. Kim*.[xxxvi] Several courts have found the mandatory detention of persons with a substantial challenge to removal unconstitutional,[xxxvii] and several other judges have noted that such detention raises serious constitutional concerns.[xxxviii]

Applying the categorical approach in initial custody determinations

Generally, neither immigration officials nor immigration courts are considering evolving legal standards in their custody determinations, despite the fact that those standards are in substantial flux and are restricting the government's expansive interpretation of whom it can subject to deportation.[xli] Instead, they resolve every legal or factual ambiguity in favor of the government, keeping the challenger in mandatory detention unless he or she had essentially already prevailed in their immigration case. One particular area of evolving law is especially relevant to a person's classification as a mandatory detainee and should routinely be taken into consideration by immigration officials and courts. In a series of recent decisions, the Supreme Court reaffirmed that the question of whether a particular conviction constitutes an "aggravated felony" or a "crime involving moral turpitude"–terms of art for crimes that can be very minor but that often result in placement in mandatory detention–is determined by whether there is a categorical "match" between the elements of the state offense and the 'generic' federal definition of that offense, or the way it is commonly understood.[xlii] The Fourth

RODRIGO

Rodrigo[xxxix] has been in the United States since 1984. His wife is a lawful permanent resident and both his children are U.S. citizens. At the time of his detention by immigration officials, his wife was recovering from a life-threatening medical condition and his daughter had an ongoing medical issue for which she required and continues to require significant help. His family relies on him for financial, logistical, and emotional support. He has deep and far-reaching family and community ties and is beloved by dozens of people who showed up to support him and to testify on his behalf in immigration court. In the course of running his construction business, he unwittingly became entangled in a theft that was undertaken by a person in his employ. Although he had no intention of stealing anything from anyone and gained nothing from the transaction, he accepted a plea agreement for no jail time and ended up with a conviction for a misdemeanor theft offense. Almost two years later, immigration officials showed up at his door and detained him. He had a strong immigration case and was predictably very likely to prevail against the government's attempts to deport him. Nonetheless, the government wrenched him away from a family that desperately needed him and kept him detained for almost six months, refusing to allow him an opportunity to demonstrate that he does not pose a flight risk or danger and should be released on bond. He ultimately prevailed in his immigration case, obtained lawful permanent resident status, and has now been reunited with his family. His detention caused great, needless hardship to his family and community, and unnecessary taxpayer expense.

ANGELA

Angela[xl] is in her early twenties. She is a young lawful permanent resident who came to the United States with her mother when she was fifteen years old. She has two U.S. citizen children ages two and five. She endured an abusive relationship for two years until she finally mustered the courage to call the police on her abuser. During this intensely difficult period in her life, she was convicted of two misdemeanor theft offenses, involving shoplifting from a large department store. Because of these convictions, immigration officials placed her in deportation proceedings and classified her as a mandatory detainee. Even though it was predictable that she would ultimately prevail against the government's attempts to deport her, and even though she has strong family ties and two small children who desperately needed her, the government detained her and denied her the opportunity even to argue for release on bond so that she could be reunited with her children while her immigration case proceeded. She ultimately was able to win post-conviction relief in criminal court and her immigration case was dismissed. But in the meantime, she ended up spending over six months in detention. During that time, her two children were separated from each other and had an intensely difficult time, experiencing psychological and behavioral issues as a result of her absence from their lives. After she was reunited with them, it also became clear that her younger daughter, who was two years old at the time, had been severely abused in her absence. Her children are experiencing ongoing effects of the time they spent separated from her.

Circuit has recently found using this analysis that a number of common Maryland or Virginia state offenses, such as theft and simple assault, are not aggravated felonies or crimes involving moral turpitude.[xliii] In many cases, the state offense is broader than the common understanding of the crime, and courts are finding that such offenses do not qualify as removable offenses and should not subject a person to mandatory detention.

ICE fails to perform this categorical analysis in its assessment of whether a person should be subjected to mandatory detention. Instead, it places in mandatory detention anyone whose offense is even arguably a mandatory detention offense and has not yet been explicitly decided on by the Board of Immigration Appeals in a published decision or by the circuit court of the jurisdiction in which the person is located. This results in lengthy, costly detention for persons who predictably will ultimately be found not to have properly been subject to mandatory detention (and in many cases, not to be removable or to qualify for relief as a result).

Several of the interviewees whose stories are included in this report had convictions that are being contested as bases for deportation using the categorical approach. For example, Sara was exactly in this situation. Under the categorical approach, her theft conviction is not an "aggravated felony" and so does not make her deportable. Indeed, the Board of Immigration Appeals had reached this conclusion in an unpublished decision, and the Fourth Circuit had ruled that a similar Virginia statute was not an aggravated felony. But because the Fourth Circuit has not yet ruled on the precise statute under which she was convicted, the government refused to drop her case and continued to keep her detained without a bond hearing while her case wound its way through a slow and backlogged court system. Eventually, the Board of Immigration Appeals ruled that her conviction under that statute was not an aggravated felony and she was released after spending ten months in detention. She would never have been detained and would not have lost her home and livelihood had ICE been employing the categorical approach consistently in its decisions on mandatory detention classifications, and favoring release on bond for individuals whose classification as mandatory detainees is questionable.

SARA WOULD NEVER HAVE BEEN DETAINED AND WOULD NOT HAVE LOST HER HOME AND LIVELIHOOD HAD ICE BEEN EMPLOYING THE CATEGORICAL APPROACH CONSISTENTLY IN ITS DECISIONS ON MANDATORY DETENTION CLASSIFICATIONS.

Since 2013, immigration custody determinations have mostly been made after assessment by a computerized tool called the Risk Classification Assessment (RCA). RCA was adapted from criminal justice tools and designed to set priorities for and standardize ICE's decisions about whether or not an arrestee should be placed in detention during the pendency of his or her immigration proceedings. The risk tool assesses public safety and flight risk, even for mandatory detainees, for whom it still recommends detention or release, the amount of bail, and levels of detention or supervision.[xliv] During the time period covered by the Koulish-Noferi data set, 96 out of 485 detainees were subjected to mandatory detention because they had prior convictions that ICE interpreted as rendering them subject to 8 U.S.C. § 1226(c).

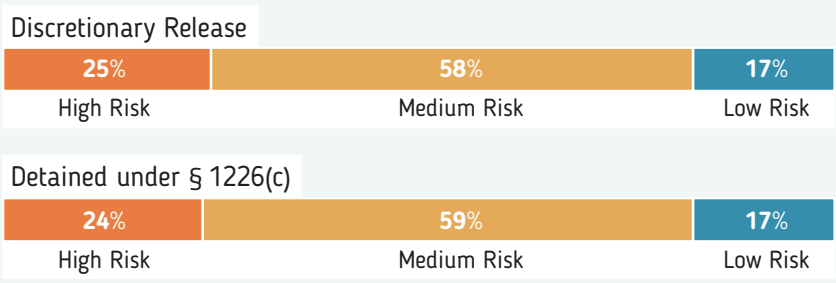
This section of the Report examines whether the 96 detainees held without bond under § 1226(c) were: 1) actually dangerous per RCA's own criteria–that is, truly riskier than those detained based on a discretionary decision; 2) indeed convicted of offenses that trigger mandatory detention; and 3) possibly eligible for relief from removal. The analysis shows that most mandatory detainees did not pose a high public safety or flight risk. Over 41 percent had convictions that may not have qualified as offenses that trigger mandatory detention, and in a few cases clearly did not qualify under existing Supreme Court, Fourth Circuit, and Board of Immigration Appeals precedent. Finally, over half may have been eligible for some form of relief from removal.

Public Safety and Flight Risk

Analysis of the Koulish-Noferi data set shows that, contrary to Congress' understanding in 1996 when it enacted the statute, mandatory detainees do not categorically pose a heightened risk of flight or danger, often because their crimes are relatively minor and they have significant equities.

Indeed, mandatory detainees as a group pose a *lower* flight risk than those in immigration custody generally and those released.[xlv] Those mandatorily detained for prior crimes and placed in proceedings before an immigration judge are collectively *the lowest flight risk category of any subset in ICE custody*, reporting the strongest stability factors such as U.S. citizen family members, stable residence, and community ties.[xlvi]

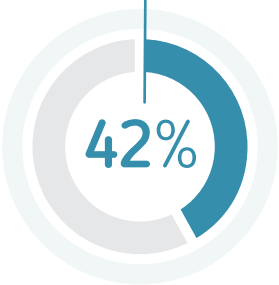
As a group, mandatory detainees also had public safety risk profiles that were generally almost identical to those who were subject to discretionary detention and then released from custody, with more than three quarters being rated a low or medium risk to public safety.[xlvii]



Thus, the analysis shows that although in theory, the mandatory detention statute was intended to apply to the most dangerous individuals and individuals who posed a heightened risk of flight, in practice this is not how the system operates. This is true even though ICE's risk classification tool takes no account of several equities such as, for example, eligibility for relief based on family relationships or an asylum claim; entry as a minor; or any time-based factors such as length of time since the last criminal

conviction.[xlviii] Thus, among many mandatory detainees the conviction may have occurred more than a decade prior to the person's coming into ICE custody, but the RCA tool takes no account of that fact in its assessment. Others are very young or have family and community ties and only minor crimes, but are still rated as medium risk for flight and public safety. Thus, a full consideration of equities would likely result in an even greater percentage of low and medium risk classifications.

Those mandatorily detained under § 1226(c) who should potentially have been subject only to discretionary detention under § 1226(a).



Mandatory Detention Classifications Subject to Substantial Legal Challenge

More significantly, a large share of those classified by the RCA tool as being subject to mandatory detention appear to have substantial legal challenges to that classification.[xlix] This shows that at least in some instances, ICE is not performing the due diligence it should be to ensure that those it classifies as mandatory detainees are actually so as determined by existing case law directly on point, and is detaining under § 1226(c) persons who should actually be provided a bond hearing under § 1226(a). It also shows that ICE places in mandatory detention anybody who could arguably fall under the purview of the statute, even where a substantial legal argument to the contrary exists. Rather than being weighted in favor of the minimal process of a bond hearing, ICE determinations are thus systematically weighted in favor of mandatory detention, likely reflecting the standard the BIA articulated in *Matter of Joseph*.[l]

Based on our analysis of this data set, about 42 percent of those mandatorily detained for prior crimes had a substantial legal challenge to that classification, and should potentially have been subject only to discretionary detention under § 1226(a) for that reason. This would have allowed them the opportunity to argue for release on bond or on other conditions at a bond hearing before an immigration judge.

The RCA appears to incorrectly categorize several Maryland criminal offenses as subject to mandatory detention. For example, at the time the data was gathered, the RCA continued to categorize Maryland theft convictions as mandatorily detainable even though that classification was highly tenuous.[li] ICE similarly erred in mandatorily detaining individuals with convictions for second-degree assault.[lii]

75% Low to medium risk to public safety

94% Low to medium risk for flight

Eligibility for Relief from Deportation

A significant proportion of mandatory detainees in this data set also may have been eligible for some form of relief from deportation. The analysis presented here considered possible eligibility for cancellation of removal, refugee or fear-based relief based on country of origin, and possible eligibility for waivers of minor crimes or inadmissibility through a qualifying family member. The RCA data set did not provide sufficient information to perform a complete analysis, but based on available data, over half of those in mandatory detention may well have been eligible for some form of relief, for example because they are not barred from cancellation of removal, have a U.S. citizen spouse or family member, previous lawful permanent resident status, or other special factors.

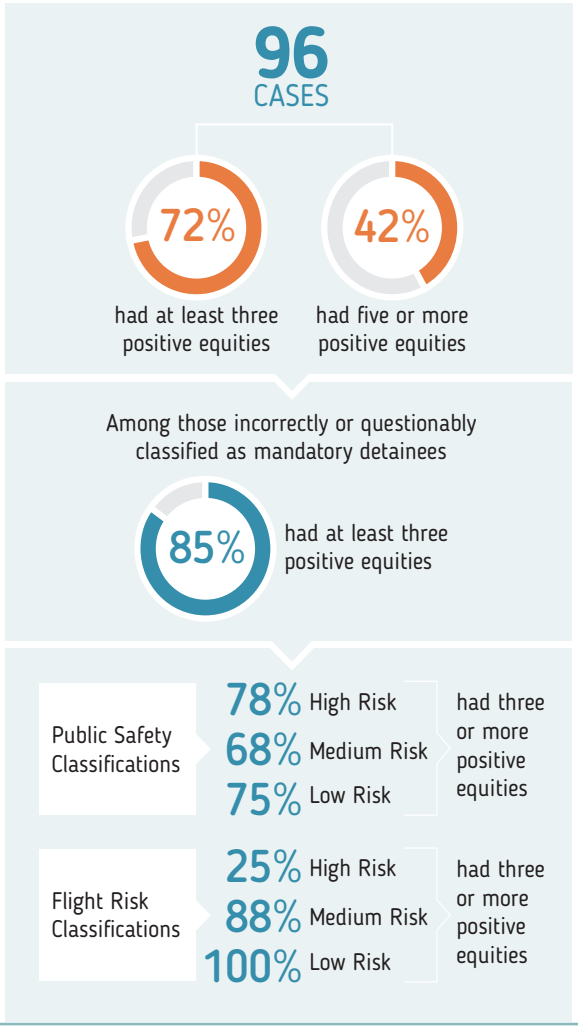
This category is significant because it captures people who may ultimately be able to remain in the United States.[liii] This means that their often-lengthy detention at taxpayer expense, without so much as the minimal process of a bond hearing, both violates due process and could ultimately turn out to be completely pointless.[liv] About half the individuals in this data set may have been eligible for (and some may eventually have obtained) relief from removal. The RCA assessed 75 percent (37 of 49) of individuals in this category as low or medium risk to public safety and 94 percent (46 of 49) as a low or medium risk for flight, further confirming that this group would have been especially appropriate for alternatives to detention.

Positive Equities

These assessments of flight and safety risks rely only on ICE's own RCA assessments, which as previously discussed do not take account of important equities such as the age of a crime, eligibility for asylum, and other factors. Thus a more generous analysis would likely result in an even larger sample size of individuals who should be classified as low or medium risk. Significant percentages of individuals within this data sample had strong equities that could result in a more favorable rating if the tool were calibrated a little bit differently.

Equities considered include:

U.S. citizen spouse or child	38 percent
Stable address	63 percent
Living at address for more than six months	57 percent
Work authorization	24 percent
Living with immediate family members	54 percent
Local family and community support	24 percent
Own property or considerable assets in the local community	8 percent
Established family or community support	74 percent
Pending USCIS benefit application	2 percent
Have legal representation	13 percent
Enrollment in school or training	6 percent



Of the 96 individual cases, 72 percent had at least three positive equities; and 42 percent had five or more positive equities. Among those incorrectly or questionably classified as mandatory detainees, fully 85 percent had at least three positive equities. Within ICE's public safety classifications, 78 percent of those assessed as high risk, 68 percent of medium risk, and 75 percent of low risk had three or more positive equities. Within its flight risk classifications, 25 percent of those assessed as high risk, 88 percent of medium risk, and 100 percent of low risk had three or more positive equities.

* * *

ICE interprets the mandatory detention statutes very broadly to claim authority to detain anybody whose conviction arguably falls under the offenses enumerated in § 1226(c), even where there are substantial arguments that this is not the case, and regardless of how long their detention lasts or is likely to last. It does so even though § 1226(c) mandatory detainees do not pose a greater public safety or flight risk than those eligible for discretionary release. This section has provided support for excluding from mandatory detention and providing bond hearings to persons who have a substantial legal challenge to their designation as mandatory detainees or who have a substantial claim to relief. The failure to do so results in a far higher share of immigrants in ICE custody who could be very strong candidates for alternatives to detention or for release on bond or other conditions.

IV RECOMMENDATIONS

In light of the foregoing analysis, it is clear that many of those placed in mandatory detention should not be denied the minimal and very basic process of a bond hearing. The recommendations of this report seek to ensure that the existing statutory framework is interpreted in a manner that comports with due process. Immigration officials can and should reduce the unnecessary detention of individuals by providing bond hearings to persons whose detention has become prolonged; where individuals raise substantial challenges to their classification as a mandatory detainee; or where persons have a substantial claim to relief.

1 **Individuals in prolonged detention should routinely be provided with a bond hearing at six months.** As described in this report, six circuit courts have found that prolonged detention raises serious constitutional concerns, and two have specified that all mandatory detainees should receive a bond hearing at six months. Prolonged detention is costly and unnecessary, particularly in light of the data showing that mandatory detainees do not pose a greater flight or public safety risk than others in immigration proceedings. Thus, individuals detained pending the conclusion of their removal proceedings should routinely be provided a bond hearing at the six-month mark.

2 **Individuals who have a substantial challenge to removability or a substantial claim to relief should not be classified as subject to mandatory detention.** Many who are subjected to mandatory detention have legal avenues available to them that could enable them to remain permanently in the United States. Many ultimately prevail in their immigration cases, making their detention pointless and imposing needless costs on taxpayers and on their families and communities. In order to reduce unnecessary and potentially unconstitutional detention, the application of mandatory detention should be limited to its proper scope, and bond hearings should be provided to persons with substantial immigration cases.

3 **Mandatory detention classifications should routinely be subject to a categorical analysis of whether the state crime matches the generic federal offense, and where ambiguities exist, bond hearings must be provided.** As described in this report, the proper classification of state offenses as ones that trigger removability or mandatory detention is an area of law that is currently in significant flux. Numerous Supreme Court, Fourth Circuit, and other circuit decisions have been limiting the government's expansive interpretation of what counts as a removable offense. The same reasoning applies to offenses that trigger mandatory detention. ICE should routinely conduct that analysis in its custody classifications, and where substantial legal ambiguities exist, should not subject a person to mandatory detention.

4 **Where detention is not necessary, use alternatives to detention.** As described in this report, mandatory detainees do not pose a greater flight or public safety risk than others in ICE detention. Thus, even persons properly subject to mandatory detention under the current statutory framework do not need to physically be incarcerated in order to satisfy the mandatory custody requirements of § 1226(c). Instead, where possible, ICE should make greater use of electronic monitoring or other forms of custody short of detention for persons subject to the statute but who have strong equities or whose detention is not otherwise deemed necessary by a consideration of all relevant factors.

ICE should make greater use of electronic monitoring or other forms of custody short of detention for persons subject to the statute but who have strong equities or whose detention is not otherwise deemed necessary.

These measures would conform the government's detention practices to the law and go some way towards mitigating the harmful effects of mandatory no-bond detention, which routinely deprives immigrants in removal proceedings of the most basic opportunity to be found eligible for release on bond or other conditions. This would decrease both the human and the economic costs associated with the current mass incarceration of immigrants.

V CONCLUSION

Over the past decade, we have begun to see a gradual movement away from over-incarceration in the criminal justice system and towards a more evidence-based, community-friendly system that disfavors harsh sentences and focuses on rehabilitation and reentry. The Obama administration has embraced this approach, enacting guidelines and policies around non-violent drug convictions and even granting release or commutation to persons whose sentences are deemed to have been too harsh for the underlying crime.[lv] Yet, we have not seen this attitude carry over into the immigration context, where the most minor offenses continue to carry devastating consequences.

This report has shown that that outcome is not inevitable. At the very least, a more discriminating approach to the application of mandatory detention would go a long way towards reducing mass incarceration in the immigration context. To that end, before condemning immigrants to detention without process, the government should conduct a more fine-grained analysis of their substantial challenges to removal, and should generally implement a stronger presumption in favor of a bond hearing or of alternatives to detention.

ENDNOTES

[i] Available data from recent years illustrates this stark contrast. In FY2013, for example, Immigration and Customs Enforcement (ICE) detained nearly 80 percent of noncitizens it placed in deportation proceedings nationwide. In New York City from 2005 to 2010, ICE detained 91 percent of its arrestees and denied bond to nearly 80 percent. By contrast, in New York in 2010, state criminal judges released 68 percent of defendants, with judges' detention decisions in nearly opposite proportions to ICE's. Nationwide data from 2006 shows that state criminal judges outright released 56 percent of defendants, and 2009 data from the 75 largest U.S. urban countie shows release of 62 percent of felony defendants, with only one in ten denied bail. *See* Noferi, Mark L. and Koulish, Robert, The Immigration Detention Risk Assessment, 29 Georgetown Immigration Law Journal 45 (2014) at 47-48.

[ii] *See, e.g.*, American Immigration Council, *Misplaced Priorities: Most People Deported in 2013 Were a Threat to No One*, March 28, 2014, *available at* http://www.immigrationpolicy.org/just-facts/misplaced-priorities-most-immigrants-deported-ice-2013-were-threat-no-one; Ginger Thompson & Sarah Cohen, *More Deportations Follow Minor Crimes, Record Shows*, NYTimes April 6, 2014, *available at* http://www.nytimes.com/2014/04/07/us/more-deportations-follow-minor-crimes-data-shows.html?_r=0; Esther Yu-Hsi Lee, *Speeding Tickets, Minor Infractions, Account For At Least Half of Deportations, Report Finds*, Think Progress, April 9, 2014, available at http://thinkprogress.org/immigration/2014/04/09/3423686/trac-report-deportations-mainly-minor-offenses/; TRAC Immigration, *Further Decrease in ICE Detainer Use Still Not Targeting Serious Criminals*, http://trac.syr.edu/immigration/reports/402/; Esther Yu-His Lee, *More Proof That Immigrants Aren't All Criminals*, Think Progress, September 9, 2015, *available at* http://thinkprogress.org/immigration/2015/09/09/3699386/trac-report-pep-program/.

[iii] *See* Department of Homeland Security, *Immigration Enforcement Actions: 2012*, *available at* https://www.dhs.gov/publication/immigration-enforcement-actions-2012.

[iv] *See* Office of Inspector General Report, *U.S. Immigration and Customs Enforcement's Alternatives To Detention*, February 4, 2015, *available at* https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-22_Feb15.pdf (showing among other things that 95 percent of immigrants in alternative programs such as ISAP II appeared at their court hearings).

[v] In the criminal context, high levels of pre-trial release are consistently associated with high appearance rates before the courts–for example an 88 percent appearance rate in the District of Columbia. *See* Bruce Beaudin, *The D.C. Pretrial Services Agency: Lessons from Five Decades of Innovation and Growth,* Case Studies 2:1, *available at* http://www.pretrial.org/download/pji-reports/Case%20Study-%20DC%20Pretrial%20Services%20-%20PJI%202009.pdf.

[vi] *See Zadvydas v. Davis*, 533 U.S. 678 (2001).

[vii] *See, e.g.,* Human Rights First Fact Sheet, *Immigration Detention: How Can the Government Cut Costs*, January 2013, *available at* http://www.humanrightsfirst.org/uploads/pdfs/immigration-detention-fact-sheet-jan-2013.pdf; Mario Moreno, *Detention Costs Still Don't Add Up To Good Policy*, National Immigration Forum Blog, September 24, 2014, *available at* https://immigrationforum.org/blog/detention-costs-still-dont-add-up-to-good-policy/.

[viii] An additional 33 percent of incoming ICE arrestees were classified as subject to mandatory detention for other reasons. As a group, less than a quarter of those mandatorily detained in both categories were rated a high risk to public safety, and less than 20 percent were rated a high risk for flight.

[ix] Ideally, nobody should be subject to mandatory detention, but so long as legislative reform is not possible, many immigrants will continue to be denied the opportunity to present a case for release through a bond hearing. However, five circuit courts have now found that prolonged mandatory detention raises serious constitutional problems, and have construed the detention statutes to require that individuals receive a bond hearing after six months or an unreasonable period of time. *See infra* Section II. In addition, the mandatory detention of persons with substantial challenges to removability or claims to relief raises serious due process concerns, as several courts have recognized, and is currently being litigated.

[x] *See* ACLU of Southern California and ACLU Immigrants' Rights Project Report, *Restoring Due Process: How Bond Hearings Under Rodriguez v. Robbins Have Helped End Arbitrary Immigration Detention*, December 2014, *available at* https://www.aclu.org/sites/default/files/assets/restoringdueprocess-aclusocal.pdf (showing 69 percent release rate for immigrants held in prolonged mandatory detention who received a bond hearing at or after the six-month mark pursuant to the Ninth Circuit's ruling in *Rodriguez*).

[xi] *See, e.g.,* Margaret H. Taylor, *The Story of Demore v. Kim: Judicial Deference to Congressional Folly*, in David A. Martin & Peter H. Schuck, eds., *Immigration Law Stories*, Foundation Press 2015; American Immigration Council, *The Criminalization of Immigration in the United States*, July 2015, *available at* http://immigrationpolicy.org/special-reports/criminalization-immigration-united-states.

[xii] Those changes dramatically expanded criminal grounds of deportation and eliminated important discretionary measures intended to temper the effects of harsh grounds of deportability–for example, the elimination of discretionary waivers of deportation for lawful permanent residents under INA § 212(c) that previously allowed immigration judges to consider mitigating circumstances including family ties, nature of offense, criminal record, and proof of rehabilitation, *see* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [hereinafter "IIRIRA"], Pub. L. No. 104-208, 110 Stat. 3009, 628; the addition of 3- and 10-year bars for persons who departed the United States after remaining unlawfully for six months or more, *see* IIRIRA, Pub. L. No. 104-208, 110 Stat. 2009-546, codified as amended at 8 USC § 1182(a)(9)(B); and the significant expansion of detention of asylum seekers, *see* IIRIRA, Pub. L. No. 104-208, 110 Stat. 2009-546, 8 USC § § 1225(b)(1)(A)(ii) and 1225(b)(1)(B)(ii). See generally Zoe Lofgren, *A Decade of Radical Change in Immigration Law: An Inside Perspective*, 16 Stan. L. & Pol'y Rev. 349 (2005); Taylor, *The Story of Demore, supra* note xi; Michael Tan, *Locked Up Without End: The Indefinite Detention of Immigrants Will Not Make America Safer*, American Immigration Council Immigration Policy Center Special Report on Immigration, October 2011, *available at* http://www.immigrationpolicy.org/sites/default/files/docs/Tan_-_Locked_Up_Without_End_100611.pdf.

[xiii] See IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009-546, codified at 8 USC § 1226(c).

[xiv] *See, e.g.,* Taylor, *The Story of Demore, supra* note xi.

[xv] *See, e.g.,* American Civil Liberties Union, *Prolonged Detention Fact Sheet, available at* https://www.aclu.org/sites/default/files/assets/prolonged_detention_fact_sheet.pdf.

[xvi] *See, e.g.,* TRAC Immigration, Legal Noncitizens Receive Longest ICE Detention, *available at* http://trac.syr.edu/immigration/reports/321/.

[xvii] 22 I&N Dec. 799 (BIA 1999).

[xviii] *See, e.g.,* Julie Dona, *Making Sense of "Substantially Unlikely": An Empirical Analysis of the Joseph Standard in Mandatory Detention Custody Hearings*, 26 Geo. Immig. L. J. 65 (2011).

[xix] *See, e.g., id.;* Shalini Bhargava, *Detaining Due Process: The Need for Procedural Reform in "Joseph" Hearings After Demore v. Kim*, 31 N.Y.U. Rev. L. & Soc. Change 51, 54-55 (2006); Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law,* 86 N.Y.U. L. Rev. 1669, 1760 (2011).

[xx] Tashima, J., concurring, *Tijani v. Willis*, 430 F.3d 1241, 1249 (9th Cir. 2005). *See also* Bhargava, *supra* note xix; Dona, *supra* note xvii.

[xxi] *See Mathews v. Eldridge*, 424 U.S. 319 (1976) for an authoritative discussion of the factors that should be included in a procedural due process analysis.

[xxii] *See* Dona, *supra* note xviii. Note also that *Matter of Joseph* was decided before the Supreme Court decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001) which made explicit the application of standard due process protections in the immigration context because immigration detention implicates a fundamental liberty interest, and which set a presumptive six-month limit on the constitutionality of detention without a bond hearing in the post-removal context.

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

[xxiv] *See* ACLU Prolonged Detention Fact Sheet, *supra* note xv.

[xxv] *See infra* (section on prolonged detention).

[xxvi] See *Demore* at 522 n.6.

[xxvii] *See infra* (section on substantial legal challenges)

[xxviii] *See Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015); *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015).

[xxix] *See Rodriguez, supra* n. xxviii.

[xxx] *See Reid v. Donelan*, 819 F.3d 486 (1st Cir. 2016); *Diop v. ICE/Homeland Sec.*, 656 F.3d 221 (3d Cir. 2011) & *Chavez-Alvarez v. Warden York County Prison*, 783 F.3d 469 (2015); *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003); *Sopo v. Attorney General*, 2016 WL 3344236 (11th Cir. June 15, 2016).

[xxxi] Name modified to protect interviewee privacy.

[xxxii] Name modified to protect interviewee privacy.

[xxxiii] Name modified to protect interviewee privacy.

[xxxiv] The decision in his case was arguably at odds with longstanding Fourth Circuit precedent on how the categorical approach should be interpreted. Regardless, there was no reason for him to be detained for the entire duration of his proceedings, and he could instead have been released on conditions or on bond. Although he ultimately lost his case, it was not clear at the outset that he would, and he had very strong equities and ties to the United States. His case illustrates both the harms of mandatory detention and the harms of an immigration system that allows the deportation of individuals based on decades-old minor offenses without regard to individual circumstances.

[xxxv] *See, e.g., Descamps v. United States*, 133 S.Ct. 2276 (2013); *Moncrieffe v. Holder*, 133 S.Ct. 1678 (2013); *Mellouli v. Lynch*, 135 S.Ct. 1980 (2015); *Leocal v. Ashcroft*, 543 U.S. 1 (2004); *Lopez v. Gonzales*, 549 U.S. 47 (2006). The Fourth Circuit has similarly limited the government's reach in a series of decisions based on Supreme Court precedent including *Omargharib v. Holder*, 775 F.3d 192 (4th Cir. 2014); *Mena v. Lynch*, 820 F.3d 114 (2016); *Castillo v. Holder*, 776 F.3d 262 (4th Cir. 2015); *U.S. v. Aparicio-Soria*, 740 F.3d 152 (4th Cir. 2014); *Prudencio v. Holder*, 669 F.3d 472 (4th Cir. 2012).

[xxxvi] *See, e.g., Gonzalez v. O'Connell*, 355 F.3d 1010, 1019-20 (7th Cir. 2004).

[xxxvii] *See, e.g., Papazoglou v. Napolitano*, 2012 WL 1570778, *5 (N.D. Ill. May 3, 2012); but see *Gayle v. Johnson*, 81 F.Supp.3d 371 (D. N.J. 2015).

[xxxviii] *See, e.g., Papazoglou; Casas v. Devane*, 2015 WL 7293598 (N.D. Ill. November 19, 2015); *Tijani v. Willis* (Tashima, J., concurring), *supra* note xx; *but see Gayle v. Johnson.*

[xxxix] Name modified to protect interviewee privacy.

[xl] Name modified to protect interviewee privacy.

[xli] *See supra* note xxxv.

[xlii] See Descamps v. United States, 133 S.Ct. 2276 (2013); Moncrieffe v. Holder, 133 S.Ct. 1678 (2013); Omargharib v. Holder, 755 F.3d 92 (4th Cir. 2014); Prudencio v. Holder, 669 F.3d 472 (4th Cir. 2012); Matter of Chairez, 26 I&N Dec. 349 (BIA 2014).

[xliii] *See supra* note xxxv.

[xliv] *See* Noferi & Koulish, *supra* note i.

[xlv] *See id.*

[xlvi] *See id.*

[xlvii] *See* Noferi & Koulish, *supra* note i. Individuals in the discretionary release category were assessed at 25 percent high risk; 58 percent medium risk; and 17 percent low risk, while those detained under § 1226(c) were assessed at 24 percent high risk; 59 percent medium risk; and 17 percent low risk.

[xlviii] *See id.*

[xlix] This is because under existing case law, a number of state offenses categorically do not qualify as aggravated felonies or as crimes involving moral turpitude. In some cases the misclassification was clear–for example, a person was convicted only of second-degree assault and the Fourth Circuit has ruled that that is categorically not an aggravated felony, but the person was classified as subject to mandatory detention anyway. In other cases, there was no in-circuit precedent directly on point for that particular crime, but a legal analysis based on the approach required by the Supreme Court–matching the elements of the state offense to the generic definition of the crime–would result in

the same conclusion. For example, as the BIA has now twice found in unpublished opinions, the Maryland theft statute should not qualify as an aggravated felony under this analysis, but there is no precedential case directly on point and persons with theft convictions continued until very recently to be classified as subject to mandatory detention.

[l] *See* Section II, *supra*.

[li] *See, e.g., Omargharib v. Holder*, 775 F.3d 192, 200 (4th Cir. 2014) (finding Virginia larceny not an aggravated felony). Applying the same analysis, the BIA twice found in unpublished decisions that Maryland theft is not categorically an aggravated felony. Similar reasoning applies to the question of whether Maryland theft is a crime involving moral turpitude: the statute punishes temporary takings, and the BIA and numerous courts have found that in order for a theft offense to qualify as a crime involving moral turpitude, it must involve a permanent taking. Thus, although there is no controlling precedent exactly on point, an application of the categorical approach mandated by the Supreme Court would lead to the conclusion that those persons are more likely than not *not* subject to mandatory detention. ICE now appears to have changed its practice of charging persons convicted of Maryland theft with aggravated felonies–in a much-belated recognition that their previous legal position was incorrect and that all those previously charged on that basis should not have been placed in mandatory detention. Yet, they continue to charge Maryland theft as a crime involving moral turpitude, even though the same legal analysis should lead to the opposite conclusion.

[lii] *See United States v. Royal*, 731 F.3d 333, 340 (4th Cir. 2013) (holding that Maryland's second degree assault statute is not an aggravated felony).

[liii] Notably, the DHS Inspector General's own report criticized the RCA tool for failing to have the ability to improve its predictive capabilities over time. For example, ICE headquarters did not evaluate the rate at which those in detention were later granted relief, those determined not to be vulnerable who were later assessed as requiring specialized care, or those initially assessed a high bond who had their bond lowered because of inability to pay. *See* OIG Report, U.S. Immigration and Customs Enforcement's Alternatives to Detention, February 4, 2015, *available at* https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-22_Feb15.pdf at 12.

[liv] *See* Section II, *supra*.

[lv] *See* Sari Horwitz, *Justice Department set to free 6,000 prisoners, largest one-time release*, Washington Post, October 6, 2015, *available at* https://www.washingtonpost.com/world/national-security/justice-department-about-to-free-6000-prisoners-largest-one-time-release/2015/10/06/961f4c9a-6ba2-11e5-aa5b-f78a98956699_story.html; Sari Horwitz and Ann E. Marimow, *President Obama grants early release to 61 more federal drug offenders*, Washington Post, March 30, 2016, *available at* https://www.washingtonpost.com/world/national-security/president-obama-grants-early-release-to-61-more-federal-drug-offenders/2016/03/30/7256bb60-f683-11e5-8b23-538270a1ca31_story.html. Of those released, roughly 2000 or a third were immigrants who did not benefit from the pardon and instead were immediately detained by ICE and thereafter deported. *See* Sari Horwitz, T*he U.S. is set to release thousands of prisoners early. Here's where they're headed*, Washington Post, October 7, 2015, *available at* https://www.washingtonpost.com/news/post-nation/wp/2015/10/07/the-u-s-is-set-to-release-thousands-of-prisoners-early-heres-where-theyre-headed/?utm_term=.42b2b7382fc9. *See also* American Civil Liberties Union and other organization sign-on letter to ICE Re: Processing of Immigrants Set for Early Release from BOP, https://www.aclu.org/letter/sign-letter-ice-re-processing-immigrants-set-early-release-bop.

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