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United States Senate

WASHINGTON, DC 20510

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

Dear Secretary Johnson:

U.S. Immigration and Customs Enforcement (ICE) holds tens of thousands of immigration detainees every day in federal detention facilities, private prisons, and local jails across the country, at a cost to taxpayers of about \$2 billion each year. ICE detains these immigrants for the limited purpose of ensuring they appear at their hearings and comply with final decisions in their immigration cases. Yet many are detained for months or even years while their cases are pending, often without receiving the most basic element of due process – and a core American value – a judge's review of the need to detain.

As a result, many individuals are subjected to prolonged detention even though they have substantial challenges to their removal. Indeed, under federal law, if they are not subject to mandatory custody, many detainees may be granted release on bond or conditional parole contingent on a finding that they pose no significant danger to public safety or flight risk. Nonetheless, unnecessary detention continues to cause harm to individuals and their families and impose a significant financial burden for taxpayers. There are two administrative actions that the Department of Homeland Security (DHS) can take immediately to help resolve this inexcusable denial of due process rights and to roll back the unnecessary costs of physical detention.

First, DHS should provide immigration judge bond hearings to all individuals detained for more than six months. The U.S. Court of Appeals for the Ninth Circuit has recently adopted this six-month rule, and last month the U.S. District Court for the District of Massachusetts agreed that this is the optimal approach to prevent violation of due process rights. This simple bright-line rule establishes six months as the maximum amount of time detainees can remain in custody before receiving a bond hearing – which does not guarantee release, only the opportunity to be heard. Notably, two-thirds of those granted bond hearings in the Central District of California were ordered released by immigration judges, suggesting that many of the costly detentions that have not been reviewed are unnecessary. If an immigration judge concludes that a detainee does pose a danger to the safety of others and/or is a flight risk, the detainee would remain in custody pending a decision on their removal.

Second, DHS should adopt an interpretation of mandatory “custody” under 8 U.S.C. § 1226(c) that includes forms of custody short of physical detention, such as electronic monitoring or house arrest. DHS should not waste resources to needlessly hold immigrants who could successfully and safely be released. The cost of detaining an individual in a government facility for a single day can exceed \$150, whereas alternative forms of custody cost a fraction of that, with proven effectiveness in appearance rates for removal proceedings. The Supreme Court has never interpreted “custody” to require physical incarceration; indeed, in an opinion by former Chief Justice Rehnquist in the criminal justice context the Court held that it is the custodian’s identity that matters for whether someone is considered to be “in custody,” not the form of custody. Nor is there any textual definition of custody included in the language of § 1226(c). DHS should therefore interpret the § 1226(c) requirement of custody to allow officials to exercise discretion in appropriate cases to use restrictive forms of supervision like electronic monitoring, curfews, and home detention.

These two administrative actions can, and should, be taken as soon as possible. I urge DHS to adopt these changes in order to rectify the indefensible denial of due process rights to ICE detainees and to reduce the unnecessary costs of physical detention. Thank you for your prompt attention to this important request.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard Blumenthal". The signature is fluid and cursive, with the first name "Richard" being the most prominent part.

Richard Blumenthal
United States Senate