AMERICAN IMMIGRATION LAWYERS ASSOCIATION

Testimony of Gregory Chen
Director of Advocacy
American Immigration Lawyers Association

Submitted to the Subcommittees on National Security and Health Care, Benefits and Administrative Rules of the Committee on the Oversight and Government Reform of the U.S. House of Representatives

Hearing of February 25, 2015

"A Review of the Department of Homeland Security's Policies and Procedures for the Apprehension, Detention, and Release of Non-Citizens Unlawfully Present in the United States"

Chairmen DeSantis and Jordan, Ranking Members Lynch and Cartwright, and members of the Subcommittees:

I am Gregory Chen, Director of Advocacy of the American Immigration Lawyers Association (AILA). AILA is the national association of immigration lawyers established to promote justice, advocate for fair and reasonable immigration law and policy, advance the quality of immigration and nationality law and practice, and enhance the professional development of its members. AILA has over 13,000 attorney and law professor members. Thank you for the opportunity to testify today.

The enforcement of immigration law is one of the most controversial subjects in American discourse. As the national bar association of immigration lawyers, AILA recognizes the importance of the rule of law and the need for the effective enforcement of immigration law. At the same time, our laws and Constitution rest upon fundamental principles of due process, fairness and liberty that sometimes come into direct conflict with the federal government's interest in apprehending, detaining or removing non-citizens. AILA evaluates the Department of Homeland Security's (DHS) enforcement activities through the lens of these often competing goals. Immigration enforcement must be achieved, and indeed can only be accomplished successfully, if done while protecting the founding principles of our nation and its laws.

During the past decade the DHS has dramatically increased its immigration enforcement activities and is functioning at unprecedented levels in key areas of performance measurement. While there is unquestionably room for improvement, it cannot be said that President Obama or his immediate predecessor President Bush has implemented a lax enforcement policy. As the subcommittees review DHS's enforcement policies and practices, AILA urges a close examination not only based on how robustly enforcement is being pursued, but also of whether

AILA National Office
1331 G Street NW, Suite 300, Washington, DC 20005
Phone: 202.507.7600 | Fax: 202.783.7853 | *www.aila.org*

AILA Doc. No. 15022467. (Posted 2/24/15)

enforcement is being done effectively and in a manner that is consistent with due process, liberty, and fairness.

Key measures of federal immigration enforcement

- In fiscal year 2013, the most recent year for which data is available, total removals reached an all time high of over 438,000 individuals. In the first six years of the Obama administration, DHS removed about 2.4 million people--more than any other president during a time when net migration to the U.S. was low and border apprehensions were at a 40-year low.

- Immigration detention continues to rise and in fiscal year 2013 totaled more than 440,000 individuals. The DHS budget for detention is also at a high point of about $2 billion annually. Moreover, last year, DHS requested additional funding of more than $870 million to enable it to detain thousands of families and unaccompanied children who arrived at our southwestern borders seeking asylum from violence in Central America.

- The Department of Justice is now prosecuting more people than at any time in history for federal immigration related offenses, the vast majority of which are for illegal entry and reentry. The Obama Administration has averaged 90,000 such prosecutions each year, more than double the yearly average in President Bush's administration.

- DHS is employing more rapid removal procedures that abrogate due process protections. DHS now removes the vast majority of non-citizens using summary procedures like "expedited removal" which enable an immigration officer to order removal without giving the individual an opportunity to appear before a judge. In fiscal year 2013, more than 363,000 were removed by such measures constituting 83 percent of all removals.

- For the past six years DHS has maintained about 21,000 Border Patrol Agents, twice the staffing levels compared to a decade ago. In the past ten years, DHS has also greatly increased fencing, drones, and other methods of border surveillance.

- The funding for federal immigration enforcement has also increased dramatically, and has averaged about $18.5 billion annually over the past five years. Currently, more is spent on federal immigration enforcement than all other federal criminal law enforcement agencies combined, which averaged over $15 billion annually.

- DHS and Pew Research Center estimates of the total unauthorized population show that it has fallen about 8 percent in the seven year period (from 2007 to 2012) from almost 12 million to just over 11 million. Though this decline is partly attributable to the recession that began in 2007, it must also be credited to more robust and effective enforcement.

Prosecutorial discretion and DHS enforcement priorities

Even at the current unprecedented levels of enforcement, critics have argued that President Obama is not adequately enforcing immigration law, and moreover that some of his current policies are designed to circumvent and decrease enforcement of immigration law.

With finite resources the federal government cannot possibly apprehend, detain and remove everyone who is living unauthorized in the United States. Under the well-established principle of prosecutorial discretion, DHS and every other enforcement agency bear the responsibility for making choices about how and to what extent to pursue enforcement based on established priorities. This authority of all law enforcement agencies to exercise discretion is well-accepted in both the civil and the criminal law enforcement fields. Since the 1950s, legacy Immigration and Naturalization Service (INS) and DHS, under both Republican and Democratic administrations, have issued policies on prosecutorial discretion. Prosecutorial discretion is such an important principle that, in 1999, twenty-eight Republican and Democratic members of Congress wrote to the Attorney General emphasizing the importance of prosecutorial discretion in immigration enforcement.

Absolute enforcement against every unauthorized person is not only unrealistic but also an unwise policy choice that runs counter to fundamental American values. Mass deportation would gravely fracture American society, negatively impact businesses, and hurt the economy. For these very reasons, both Republican and Democratic leaders have spoken against the idea of deporting over 11 million undocumented immigrants. Keeping America safe by focusing on those who present real threats to our national security and public safety is the right focus.

In the November 20 memorandum on enforcement priorities, DHS Secretary Jeh Johnson identified national security, public safety and border security as the priorities for immigration enforcement. On November 20, 2014, the Secretary also announced programs which could provide temporary relief from deportation for millions of people, the expansion of Deferred Action for Childhood Arrivals (DACA) and the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). It is AILA's judgment that DAPA and DACA are valid exercises of prosecutorial discretion that rest within DHS's legal authority to prioritize enforcement.

Impact of prosecutorial discretion on local law enforcement

Many local law enforcement leaders across the country have asserted that the federal government's ability to exercise discretion in immigration enforcement actually promotes public safety and makes it easier for police to root out criminal activity. In January 2015, two national police chiefs' associations and 27 individual police chiefs and sheriffs, in addition to more than 30 mayors of major cities across the country, filed amicus briefs in the Texas lawsuit supporting

the President's November 20th deferred action reforms.[1] The law enforcement officials' brief stated:

> "The Deferred Action Initiative supports community policing by legitimizing the presence of otherwise law-abiding immigrants with already strong ties to their neighborhoods, and reassuring them that their cooperation with law enforcement will not separate them from their lives and families in the United States.

The mayors' brief pointed out: "the fear that undocumented immigrants have of interacting with local law enforcement and government officials is often a tremendous barrier to providing protection and service to the entire community… Not only does such fear leave immigrants vulnerable and unable to get help, but violent criminals will remain free, potentially able to target others." The prioritization and prosecutorial discretion exercised through DAPA and DACA will foster trust in local law enforcement and encourage cooperation with police leading to better public safety outcomes.

The better way to support local law enforcement in their public safety mission is for DHS to focus on individuals who present a threat to public safety or national security rather than individuals who are otherwise productive members of our communities. In this way, the President's executive actions can encourage these family and community members to come out of the shadows and begin to develop a stronger relationship of trust with police.

Immigration detention

While the federal government seeks to protect the public and our nation from danger, its authority to detain non-citizens is limited by the Constitution and our laws. Detention should be a last resort, used only when release or other methods of ensuring appearances are not feasible, and especially when more cost effective alternatives to detention are available.

Even with the value our nation places on individual liberty, the use of immigration detention has increased steadily: In the past two decades, it has increased five-fold, reaching a record high in fiscal year 2012 of 477,523 individuals detained. This escalation in detention continued while illegal immigration remained steady or declined during certain periods. ICE frequently detains asylum seekers and other vulnerable people unnecessarily. Many are held for prolonged periods

[1] Brief for Major Cities Chiefs Association, Police Executive Research Forum, and Individual Sheriffs and Police Chiefs as Amici Curiae in Opposition to Plaintiffs' Motion for Preliminary Injunction, Texas v. United States, No. 1:14-cv-00254 (filed Jan. 12, 2015), available at http://www.azcentral.com/story/news/politics/immigration/2015/01/13/police-chiefs-sheriffs-amicus-brief-executive-action/21693485/ and Brief for Amici Curiae, The Mayors of New York and Los Angeles, The Mayors of Thirty-One Additional Cities, The United States Conference of Mayors, and the National League of Cities in Opposition to Plaintiffs' Motion For Preliminary Injunction., No. 1:14-cv-254 (filed Jan. 27 2015), available at http://www.lexisnexis.com/legalnewsroom/immigration/b/outsidenews/archive/2015/01/29/mayors-defense-of-daca-dapa-brings-critical-voice-to-legal-battle.aspx.

despite the fact that they have families and jobs and pose no threat to public safety. It is AILA's judgment that greater protections are needed to ensure fairness and due process in the practice of detention.

Last year, Senator Grassley (IA) and Congressmen Goodlatte (VA) and Smith (TX) criticized Immigration and Customs Enforcement (ICE) for failing to detain and deport over 36,000 individuals with criminal convictions during fiscal year 2013. By releasing these individuals, they asserted, ICE was jeopardizing the safety of American citizens and law-abiding immigrants.

The circumstances in these cases are not fully known, but in many of them ICE could not lawfully continue to detain them and was required to release them pursuant to the Supreme Court's decision in *Zadvydas v. Davis*. Though most countries accept the return of their nationals, some countries delay or refuse to accept nationals who are under final orders of removal. As a result, these individuals who cannot be returned are held for long periods of time in U.S. immigration detention. In 2001, the Supreme Court concluded in *Zadvydas* that "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem."[2] The Court interpreted the immigration detention statutes to authorize detention for a presumptively reasonable six month period of time, during which ICE may detain non-citizens while attempting to deport them. The *Zadvydas* Court held that "government detention violates [the Due Process] Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections, or in certain special and narrow nonpunitive circumstances where a special justification, such as harm-threatening mental illness, outweighs the individual's constitutionally protected interest in avoiding physical restraint."[3]

In those cases where ICE has the legal authority to detain and the discretion to release, it is required to evaluate whether the person detained poses a flight risk or a public safety threat before releasing the detainee. ICE would not release anyone deemed to pose a danger to the public or whose risk of flight cannot be mitigated by the imposition of conditions or supervision.

In physical appearance immigration detention facilities are no different from prisons. From a legal perspective, however, immigration detention is a form of *civil* detention, not a form of *criminal* punishment. Non-citizens are subject to the same criminal laws that apply to all persons in the United States. Any non-citizen convicted of a crime has already been sentenced by a judge with access to all available information concerning the offense and the perpetrator. Immigration detention for those convicted of crimes occurs after the sentence has been served or the criminal justice system has otherwise finished with the individual. For that reason ICE should not be detaining a non-citizen, including someone who has a criminal conviction, unless ICE has a firm basis to believe that the individual poses a flight risk or a threat to public safety.

[2] 533 U.S. 678, 690 (2001).
[3] *Id*. (citations omitted).

Detention of families

AILA is gravely concerned by the recent and dramatic increase in the detention of families fleeing violence in Central America last year. In 2009, DHS severely restricted the practice of family detention after reports of abuse and a lawsuit compelled it to shut down a large facility in Texas. But in 2014, the refugee crisis in El Salvador, Guatemala, and Honduras resulted in a surge in the number of unaccompanied minors and families fleeing violence and seeking asylum at our borders. The Obama Administration responded by escalating the use of detention on families--mothers and mostly young children--in order to deter more asylum seekers from coming: a practice that violates the Constitution and U.S. asylum and humanitarian law.

Since last July, volunteer AILA lawyers began representing the detained families, providing counsel and assistance to about 1200 individuals so far. Extremely high percentages of these detained women and their children are likely to qualify for asylum. According to statistics from U.S. Citizenship and Immigration Services covering July 2014 through most of January 2015, nearly 70 percent of these families were found in preliminary interviews conducted by asylum officers to have the credible fear of persecution that could render them eligible for asylum.[4] In October and November between 80 to 90 percent were found preliminarily eligible. Consistent with those overall statistics are the asylum grant decisions in cases represented by AILA volunteer lawyers brought to completion in merits hearings before immigration judges: in 14 out of 16 asylum cases, the judges granted asylum--an extraordinary rate that serves as compelling evidence that high percentages of these families are *bona fide* refugees deserving of humanitarian protection.

These families are not a border security problem although the Administration has continued to describe them in such terms. They are among the most vulnerable immigrants, seeking safety and the opportunity to tell their story to a judge. The humanitarian situation demands a humanitarian response by the United States, not a show of force.

On February 20, 2015, a federal district court enjoined DHS from detaining families who have been found to have a credible fear in these initial screenings for the purpose of deterring future immigration. The injunction strikes a blow to the position the government has taken in nearly all these cases that these vulnerable mothers and their children pose a threat to national security. The court wrote that the "incantation of the magic word 'national security' without further substantiation is simply not enough to justify significant deprivations of liberty."[5] The federal court's decision underscores the principle that detention must be justified on specific information demonstrating a safety threat and that general assertions of such dangers are not adequate to overcome the individual's liberty interest.

---

[4] See USCIS data sheet: http://www.uscis.gov/sites/default/files/USCIS/Outreach/PED-CF-RF-family-facilities-Jul2014-Jan2015.pdf.

[5] *RILR v. Johnson.* https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2015cv0011-33.

Improving enforcement to ensure efficiency, due process and fairness

The rapid expansion of enforcement in over a decade has also resulted in problems that require urgent attention. Years of inadequate funding for the immigration court system has resulted in a shortage of immigration judges and support personnel and consequently a backlog of nearly 400,000 cases that await review. More substantial increases in funding for immigration courts would greatly reduce the long waits for court dates which further delay decisions in removal proceedings.

Reforms are also needed to ensure due process, fairness, and accountability in the enforcement system. In its deportation of 438,000 people in fiscal year 2013, DHS relied heavily on summary removal procedures that bypass immigration courts and offer extremely limited judicial review. DHS continues to hold many noncitizens, including lawful permanent residents and asylum seekers, in detention without ever providing a custody determination hearing before a judge—a fundamental deprivation of due process. In addition to the expansion of family detention, DHS's use of rapid removal procedures for family asylum seekers fleeing violence in Central America has grossly degraded U.S. asylum and humanitarian law.

Finally, there have been well-documented reports of rights violations and abusive practices by Border Patrol officers, most notably many examples of improper or excessive use of force, including lethal force. Abusive CBP detention practices—including keeping facilities at dangerously cold temperatures, verbal and physical intimidation, and lack of basic health and hygiene provisions—are routinely reported by men, women, and children held at ports of entry or in Border Patrol detention facilities. Widespread reports of racially motivated arrests, coercive interrogation tactics, and denial of the right to counsel are also of concern. These problems, which undermine the rights of both citizens and non-citizens, are made worse by the lack of any uniform or effective complaint mechanism to address misconduct by CBP officers.

Unchecked, these practices threaten to compromise fundamental constitutional values such as due process and fairness. Congress should conduct more rigorous oversight of DHS and pass reforms to bring these enforcement practices back on track.