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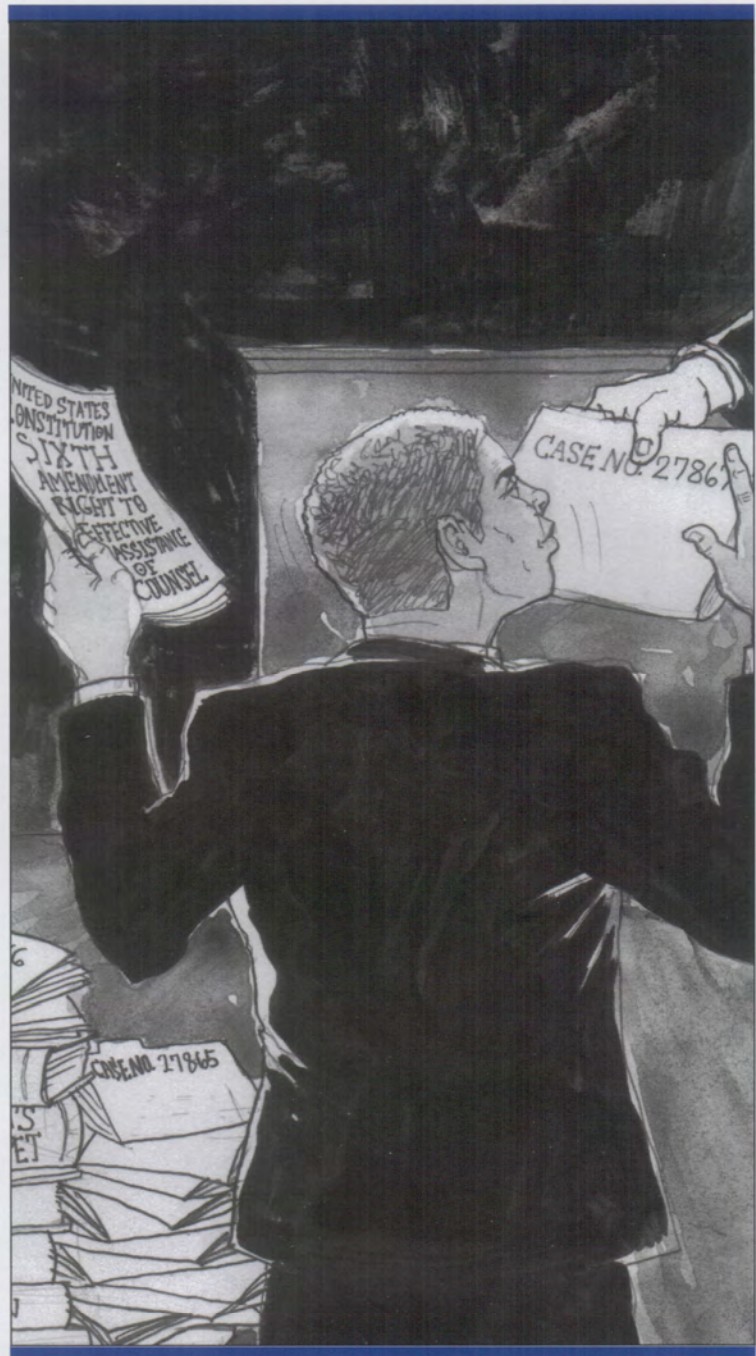
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# THE CRIMINAL CHARACTER OF THE CIVIL IMMIGRATION LAW SYSTEM

by Sean R. Olender, Esq. and Jonathan C. Dunten, Esq.



Sean R. Olender, Esq.



Jonathan C. Dunten, Esq.

*If you don't have enough evidence to charge someone criminally but you think he's illegal, we can make him disappear.*

*(James Pendergraph, former Executive Director of the Immigration and Customs Enforcement (ICE) Office of State and Local Coordination, August 21, 2008.)<sup>1</sup>*

The U.S. Government and now local police agencies are using immigration law as a means to arrest, jail and hold human beings in custody for indefinite periods of time without the constitutional safeguards afforded criminal defendants. While the Supreme Court has long maintained that a civil litigant's right to an appointed

attorney exists only in the most limited of situations, immigration detention is proving often longer, more dangerous and more deadly than many types of criminal incarceration that give rise to a Sixth Amendment right to counsel under *Gideon v. Wainwright*.<sup>2</sup>

Brutality and rising death rates of prisoners in immigration custody render meaningless the constitutional distinction between a criminal proceeding and a civil immigration one. A criminal proceeding that results in a sentence of a day in jail affords full Sixth Amendment protections and a civil immigration detention lasting four or five years and ultimately resulting in the death of the "detainee" is treated conceptually as a harmless administrative detention with no right to counsel. At least in the immigration context, the distinction should be revisited. This could occur as an extension of Sixth Amendment protections to criminal-like (quasi-criminal) civil proceedings, including those where litigants must endure brutal detention practices. Or Congress could criminalize violation of the immigration laws. This latter system would entail ending the civil immigration law system and creating a criminal law framework for removal cases where removal is among the criminal penalties imposed.

Finally, the rise of private, for-profit prison corporations and the power of their lobbyists and campaign contributions create a fundamental risk of corruption in this most dangerous area of state power: the application of direct force and restrictions on the physical freedom of individuals. In the prison business, every new body is a profit. A lack of prisoners means falling profits, no bonus and reduced dividends for shareholders. The natural desire of a prison business is for more prisoners.

Lobbying, campaign contributions and direct contact with legislators to influence law and policy regarding the detention of criminals creates disturbing incentives and ulterior motives for government policy. But applied to a politically powerless group like foreign nationals, there is simply little counterweight for money-seeking politicians

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to do other than the prison corporations' bidding. Resulting policy will necessarily be couched in law-and-order terms, protecting the public, keeping us safe from danger, but prison corporations are not concerned with protecting the public. They are concerned with increasing the volume of product, which is prisoners, so it is only natural that such advocacy will be disguised as part of the law-and-order agenda.

### The Imprisoned Immigrant Gold Rush

Immigration detention has been increasingly privatized and has grown increasingly profitable. It is now a large industry that employs lobbyists in Washington, D.C. who influence the ability of private prison corporations to obtain government contracts. There is a good likelihood that private prison corporation lobbying influences immigration law and policy as well. A few weeks after September 11, the chairman of Cornell Companies, a prison corporation based in Houston, Texas told investors, "It is clear that since September 11, there's a heightened focus on detention. More people are gonna get caught. So I would say that's positive. The federal business is the best business for us, and September 11 is increasing that business."<sup>3</sup>

Immigration and Customs Enforcement fugitive operations teams have tripled since January 2006 and by late 2006 the number of immigrant fugitives arrested had grown 260 percent.<sup>4</sup>

Prison companies charge an average \$95 *per diem* for immigrants in detention.<sup>5</sup>

ICE *per diem* costs for immigration detainees in New Jersey average \$80 per bed per day. But contracts vary radically. Local news reported that the corporate prison company GEO Group was charging ICE \$225 per bed per day to hold detainees at its Queens, New York facility.<sup>6</sup>

Immigration and Customs Enforcement cannot contract directly with a private prison corporation. To evade this restriction, private prison corporations work with local governments and the federal government, using the fig leaf of local government participation. For example, the medium security T. Don Hutto Residential Center in Taylor, Texas, is run by the largest for-profit prison corporation in the United States: Corrections Corporation of America (CCA). To allow CCA to contract with the Department of Homeland Security to house immigrant families in removal proceedings at that facility, DHS arranged the contract through Williamson County, which serves as the federal contract signatory. The County in return is paid \$1 per detainee per day.

An average of 30,000 immigrants are in detention facilities each day, including asylum seekers, survivors of torture and human trafficking, permanent residents, and parents of U.S. citizen children, triple the number in custody a decade ago.<sup>7</sup>

ICE paid \$55.2 million to house detainees at 13 local jails in California in fiscal year 2008, up from \$52.6 million the previous year. ICE will likely spend \$57 million this year.<sup>8</sup> Cities across Southern California have found a growing source of income in immigration detention.

The Los Angeles County Sheriff's Department holds the largest federal contract in California. It operates a 1,400-bed detention center in Lancaster dedicated to housing immigrants either awaiting deportation or fighting their cases in court. The department received \$34.7 million in 2008, up from \$32.3 million the previous year. Some smaller cities have seen their income rise much faster. Glendale received nearly \$260,000 in 2008, triple what it got the previous year. In Alhambra, last year's \$247,000 was more than double the previous year's payments. According to Santa Ana, California's Police Chief Paul Walters, his department expects as much as a 15%



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budget cut and has had a hiring freeze since October, leaving more than 60 positions remaining vacant. To offset reductions, Walters plans to convert two multipurpose rooms at the 480-bed jail into dormitory rooms this spring. The conversion will accommodate an additional 32 immigrant detainees, which he expects will bring in \$1 million more in revenue each year. He also hopes to get approval to raise the nightly price per detainee from \$82 to \$87.<sup>9</sup>

When Russell Davis, Santa Ana's jail administrator, was interviewed about construction of his new jail and the future of immigration detention, he said if he had it to do over again, he would have built another floor on the jail. The immigration agency "is inundated with detainees," he said. "If I had 100 more beds, they'd fill them."

Management and Training Corporation, another for-profit prison corporation, opened a \$63 million tent city in 2007 in Raymondville, Texas. The Willacy County Processing Center was built in 90 days and charges Immigration and Customs Enforcement \$78 per detainee per day.<sup>10</sup>

### Conditions in Immigration Detention Facilities

International law counsels that alien detainees should be kept in a place of detention or imprisonment reasonably near his usual place of residence.<sup>11</sup>

Detention close to home allows not only for maintenance of family ties but also facilitates access to counsel. But immigration attorneys who are retained, often at great hardship to the families, often find their clients shipped halfway across the United States to detention facilities, an arrangement undermining access to counsel.

An inadequate number of phones, sometimes 2 to 3 phones for 40 inmates; lack of updated phone lists to legal service providers, the immigration court and other government offices, and the inability to contact legal

service providers because they don't accept collect calls compound the detainee's ability to obtain counsel.

Immigration detainees are often housed with prisoners who are serving time for criminal convictions. International law counsels that administrative detainees should be kept separate from prisoners in criminal custody, but international law standards do not require it.<sup>12</sup>

ICE holds many child prisoners at T. Don Hutto Residential Center. The American Civil Liberties Union brought suit against ICE in 2007 alleging that the conditions of detention at T. Don Hutto violated the provisions of *Flores v. Meese*, a 1997 court settlement establishing minimum standards for the housing and release of minors in federal immigration custody.<sup>13</sup>

Children at T. Don Hutto had been required to wear prison uniforms, allowed little time outdoors, and prison guards disciplined children by threatening to separate them from their parents.

A note from one child to Canadian Prime Minister Stephen Harper noted "this place is not good for me" and asked that Prime Minister Harper grant a visa to allow the family to leave the United States.

The ACLU reached a settlement with ICE in the T. Don Hutto litigation that included the release of 26 immigrant children between the ages of 1 and 17 who were detained at Hutto with their parents, almost all of whom were seeking asylum. Andrea Restrepo, a 12-year-old child from Colombia, who had been held in Hutto in a small cell for nearly a year with her mother and 9-year-old sister, noted upon her release, "I feel much better, I feel tranquil, I can do things now I couldn't do there." Restrepo added, "I am trying to forget everything about Hutto. I feel free. It was a nightmare."<sup>14</sup>

ICE reported that between 2004 and 2007, 62 immigrants died in administrative custody.<sup>15</sup> The previous estimate of 20 ICE custody deaths for that period was

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compiled by the United Nations' Special Rapporteur on the Human Rights of Migrants from information provided by lawyers, relatives, and news media. The discrepancy suggests that lack of access to information causes advocates, human rights workers and other non-government agencies to radically underreport all types of human rights violations occurring in ICE immigration detention.<sup>16</sup>

When Department of Homeland Security released the number and names of those who died in immigration custody after much Congressional and news media pressure, at least one name was not listed, Ahmad Tanveer, 43, a Pakistani who died of a heart attack.<sup>17</sup>

After Tanveer died September 9, 2005, a fellow inmate wrote a note in broken English describing Tanveer's chest pains and his pleas for medical attention that prison guards had ignored. The fellow inmate's note explained, "Death... need to be investigated... We care very much because that can happen to anyone of us."<sup>18</sup>

According to witnesses, many of the immigrants who died at privately owned for-profit prisons had pleaded for medical care for days or weeks before their deaths and guards had ignored them. ICE Officials have indicated that they consider an autopsy by an outside medical examiner to provide sufficient scrutiny of detention conditions.<sup>19</sup>

### Attorney General Mukasey's *Compean* Decision Overturning *Lozada*

On April 13, 1988 the Board of Immigration Appeals issued a decision called *Matter of Lozada*,<sup>20</sup> recognizing a right to effective assistance of counsel in immigration proceedings and holding that ineffective assistance of counsel may violate the Fifth Amendment's right to due process. The Board held that aliens able to show, among other things, that their attorneys' ineffective assistance affected the outcome of the cases were entitled to a rehearing.

In the last weeks of the Bush administration, Attorney General Michael Mukasey issued a decision overturning *Lozada*, holding that because there is no right to counsel in immigration proceedings, there is no right to effective assistance of counsel. (*Matter of Enrique Salas*

*Compean*<sup>21</sup>). Thus the failure of an alien's counsel to meet minimum standards of professional competence and performance does not result in a violation of the constitution's Fifth Amendment Due Process guarantees. According to Mukasey, Due Process is something that the government may not impugn, but the government is not responsible for the actions or failure to act of a private attorney and a private attorney acting as an adversary to the government cannot be held to be an agent of the government.

On June 3, 2009, Attorney General Eric Holder reversed Mukasey's holding in *Compean*, noting that the proper place for such radical change in administrative case law is a rule-making affording interested parties an opportunity for public comment. In a press release on June 3 Holder said, "The integrity of immigration proceedings depends in part on the ability to assert claims of ineffective assistance of counsel, and the Department of Justice's rule-making in this area will be fair, it will be transparent, and it will be guided by our commitment to the rule of law."

The issue may be influenced by the US Supreme Court this fall in *Padilla v. Commonwealth of Kentucky*.<sup>22</sup> *Padilla* nibbles at the intersection of Sixth and Fifth Amendment Due Process thought by asking whether a criminal defense attorney's failure to advise a non-citizen client that pleading guilty to an aggravated felony will result in mandatory removal from the United States warrants setting aside the guilty plea; that is to say whether an attorney's failure to advise a criminal

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law client of a decidedly civil law consequence of his guilty plea impugns the client's Fifth or Sixth Amendment Due Process rights, or perhaps both.

### The Sixth Amendment Provides a Right to Counsel in Criminal Cases where a Jail Sentence or Suspended Jail Sentence May Result.

In 1972 the United States Supreme Court held in *Argersinger v. Hamlin* that defense counsel must be appointed in any criminal prosecution, "whether classified as petty, misdemeanor, or felony, that actually leads to imprisonment even for a brief period."<sup>23</sup>

In 1979 the Court held in *Scott v. Illinois* that counsel does not have to be appointed if the defendant is fined only[,] and is not sentenced to jail time.<sup>24</sup> In 2002 the Court affirmed in *Alabama v. Shelton* that, "absent a knowing and intelligent waiver, no person may be imprisoned for any offense ... unless he was represented by counsel at his trial," holding that even when a defendant receives a sentence of imprisonment suspended to probation, he must be afforded the right to counsel.

*[t]he non-right to effective assistance of counsel in civil cases is the rule even when the proceeding though nominally civil involves liberty or even life, as in a capital habeas corpus case, where the Supreme Court has held that there is no right to effective assistance of counsel.<sup>25</sup>*

The Supreme Court has recognized a due process right to Government-appointed counsel, and thus a constitutional right to effective assistance of counsel, in civil proceedings that pose the same threat to a defendant's physical liberty as a criminal trial that may result in incarceration.<sup>26</sup> But these cases involved the right to Government-appointed counsel, and the Supreme Court limited these holdings to specific contexts.



Mike Keefe/Denver Post

Mukasey argues that the "pre-eminent generalization that emerges" from these cases is that the right to Government-appointed counsel "has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation."<sup>27</sup> He notes that although an alien may be detained during the course of a removal proceeding, he does not "lose his physical liberty" based on the outcome of the proceeding. That is, the point of the proceeding is not to determine or provide the basis for incarceration or an equivalent deprivation of physical liberty, but rather to determine whether the alien is entitled to live freely in the United States or must be released elsewhere.

Mukasey correctly notes that for private action to trigger scrutiny under the Fifth Amendment's Due Process Clause, there must be a "sufficiently close nexus" between the federal government and the conduct of the private party so that the action of the latter may be fairly treated as that of the government itself.<sup>28</sup> He also raises the irony that where an alien represents himself in removal proceedings, he does not have a constitutional right to seek to reopen proceedings because his own performance was incompetent, even where he represented himself because he could not afford an attorney. There are serious equal protection concerns with construing the Constitution to confer greater rights on an alien who chose to avail himself of the privilege to retain

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counsel than on an alien who did not do so or who could not do so because he was indigent.<sup>29</sup>

### Civil Gideon

Inscribed above the entrance to the United States Supreme Court are the words "Equal Justice Under Law."

At present 58% of aliens in deportation proceedings do not have a lawyer during those proceedings and 84% of detained aliens do not have an attorney during removal proceedings.<sup>30</sup>

In 1981 the Supreme Court ruled there is no Fourteenth Amendment due process right in cases where the state seeks to terminate parental rights (the Supreme Court did

hold a state court may appoint counsel).<sup>31</sup> The American Bar Association urged the Supreme Court in an amicus brief to rule that counsel must be appointed for indigent parents in civil proceedings that could terminate their parental rights because "to minimize [the risk of error] and ensure a fair hearing, procedural due process demands that counsel be made available to parents, and that if the parents are indigent, it be at public expense."

While the Court recognized that the complexity of a termination of parental rights proceeding might overwhelm a parent unrepresented by an attorney, it held that the appointment of counsel was not required in every case. Instead, trial courts must balance three factors to determine whether due process requires that an indigent parent be appointed a lawyer at government expense: "the private interest at stake, the government's interest and the risk that the procedures used will lead to erroneous decisions." The court then applied the standard in a way that excluded the appointment of counsel except in extraordinary circumstances, in particular by overlaying on the three-part due process test an additional presumption against appointed counsel where there is no risk of loss of physical liberty.

As Justice Black in *Gideon v. Wainwright* wrote:

*That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the*

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### **The Need for the US to Follow International Law**

In 2000 INS published detention standards for immigration detainees, but these are only guidelines and are not legally enforceable. In September 2008 ICE announced 41 new guidelines to take effect at all facilities holding immigration detainees by January 2010. These are also merely guidelines and are not legally or equally unenforceable.<sup>32</sup>

The UN Working Group on Arbitrary Detention has stated that where the detention of unauthorized immigrants is mandatory, regardless of their personal circumstances, it violates the prohibition of arbitrary detention in Article 9 of the Universal Declaration of

Human Rights (UDHR) and Article 9 of the International Covenant on Civil and Political Rights.

### **Mandatory Detention and the Bias to Detain**

Federal law requires that all individuals apprehended at the border "shall be detained" pending deportation proceedings<sup>33</sup> and are not entitled to a bond hearing before an immigration judge, but may be released on parole on a case-by-case basis for urgent humanitarian reasons or significant public benefit where the alien presents neither a security nor a flight risk. This may include lawful permanent residents barred from re-entry at the US border. An ICE Field Office Director or ICE officer makes this determination.

Immigration judges do not have authority to review decisions made by ICE Field Office Directors regarding detention of aliens apprehended at the border. But immigration judges do have the power to grant release on bond to other foreign nationals in removal proceedings.<sup>34</sup>

The grounds requiring mandatory detention under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) include national security or terrorist risk, two crimes involving moral turpitude, an aggravated felony, a firearms offense, or a controlled substance violation; if seeking admission to the United States, mandatory detention is proper if

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the alien has been convicted of one crime involving moral turpitude, prostitution, domestic violence, or if his criminal sentences in aggregate total five years or more. Detainees may challenge mandatory detention, but must show that ICE is substantially unlikely to establish the charge of deportability if they are to prevail.<sup>36</sup>

Amnesty International reported that ICE uses restraints, including handcuffs and ankle chains, to excess; even shackling pregnant women in labor at the hospital. Detainees are often handcuffed or shackled together, sometimes in groups of six or seven, and seated in the back of the courtroom, making it difficult or impossible for them to pay attention to the proceedings and take notes on important information; for example, deadlines to file certain documents.

Even US citizens aren't completely safe. Roughshod tactics have resulted in ICE deporting US citizens. ICE deported a mentally disabled US citizen to Mexico in 2007. It took his mother months to locate him and secure his re-entry into the US.<sup>37</sup>

ICE held a US citizen in immigration detention in Florence, Arizona because, although he was born in Minnesota, he could not produce proof of his citizenship. He worked in the prison kitchen for one dollar a day to earn the \$30 to order a copy of his birth certificate. He was released upon proving his citizenship.

## Alternatives to Detention

While the removal of aliens who entered without inspection or who otherwise violated the terms of their status may be just and necessary, detaining foreign nationals during the immigration court process is not only very expensive to taxpayers, but because so much of the system is outsourced to profit-seeking companies, it creates incentives to minimize costs by minimizing services, especially medical services, and packing as many prisoners into a cell as possible. It also creates a perverse commercial demand for prisoners that is certain to have undesirable long-term effects.

ICE has developed two programs as alternatives to detention, the Intensive Supervisions Appearance Program (ISAP) and Enhanced Supervisions Reporting Program (ESR). In 2004 ICE implemented ISAP as a pilot project in some cities and the program is run through a private contract with Behavioral Interventions, Inc. using electronic bracelets and other monitoring. ICE started ESR in 2007. ISAP can supervise 6,000 detainees and ESR 7,000, which together is about 5% of all immigration detainees.

In its report, Amnesty International made several recommendations that it urged ICE to adopt. Among these were:

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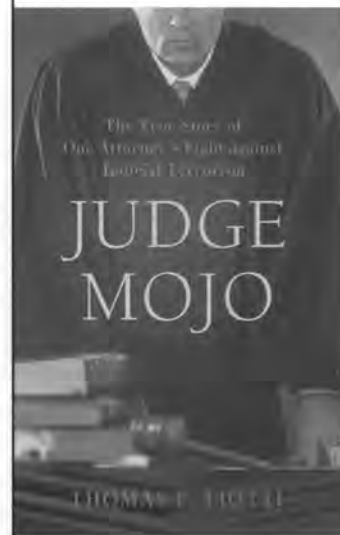
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- Ensure presumption against detention of immigrants and asylum seekers;
- Ensure that all decisions to detain immigrants are subject to judicial review;
- Ensure that alternatives to detention are available;
- Ensure safeguards against arbitrary detention;
- Ensure that detention facilities provide regular interpretation and translation services, a handbook of the rules and procedures in effect at the detention facility and a copy of the ICE *National Detainee Handbook*, information regarding the right to make free phone calls to consulates, immigration courts and *pro bono* legal service providers, and the availability of legal rights presentations;
- Department of Homeland Security should ensure that detainees are held in a facility in close proximity to the Immigration Court with jurisdiction over the case as well as the detainee's attorney and family;
- Congress should ensure that detainees can make confidential complaints directly to an independent agency such as an ombudsman and involve the US Government General Accounting Office (GAO) or the Office of the Inspector General (OIG);
- At least an hour a day of exercise/recreation outside and during daylight hours (often detention facilities provide outside recreation only very early in the morning when prisoners must choose between adequate sleep and time outside).

## Conclusion

It is unlikely that the founders of our nation foresaw the rise of an enormous federal government with such far-reaching powers. It is unlikely that they foresaw the dramatic expansion of bureaucratic power, employing a criminal-like detention. Modern civil detention in the immigration context deprives prisoners of liberty and sometimes life in ways virtually identical to criminal detention. With foreign nationals remaining in custody for sometimes four or five years, suffering random relocation to various facilities across the United States with little or no notice, even dying in custody, it is difficult to argue that such detention is qualitatively different from criminal detention. For these reasons, Congress should provide appropriate procedural safeguards in immigration cases, including a statutory right to counsel.

1 James Pendergraph speaking at the Police Foundation National Conference, *The Role of Local Police: Striking a Balance Between Immigration Enforcement and Civil Liberties*, Washington, D.C., quoted from [the] Amnesty International report, *Jailed Without Justice, Immigration Detention in the USA*.

2 *Gideon v. Wainwright*, 372 U.S. 335 (1963).

3 *The Immigrant Gold Rush: The Profit Motive Behind Immigrant Detention*, Submitted to the U.N. Special Rapporteur on the Rights of Migrants 2007 by, Judy Greene, Justice Strategies, Sunita Patel, Soros Justice Fellow.

4 *Id.*

5 *Id.* at 2.

6 *Id.*

7 *Jailed Without Justice: Immigration Detention in the USA*, Amnesty International.

8 "Cities and counties Rely on U.S. Immigrant Detention Fees," Anna Gorman, *Los Angeles Times*, March 17, 2009.

9 *Id.*

10 Hsu, Spencer S. and Sylvia Moreno. "Border Policy's Success Strains Resources." *The Washington Post*, February 2, 2007.

11 Amnesty Report at 117.

12 *Id.* at 133.

13 *Flores v. Meese*, Stipulated Settlement Agreement filed January 17, 1997 available at [http://www.aclu.org/pdfs/immigrants/flores\\_v\\_meese\\_agreement.pdf](http://www.aclu.org/pdfs/immigrants/flores_v_meese_agreement.pdf).

14 <http://www.aclu.org/immigrants/detention/31469prs20070827.html>.

15 "New Scrutiny as Immigrants Die in Custody," *New York Times*, Nina Bergstein, June 26, 2007.

16 *Id.*

17 "Immigrant Detainee Dies and a Life Is Buried, Too," *New York Times*, April 3, 2009.

18 *Id.*

19 *Id.* fn 15.

20 *Matter of Lozada*, 19 I&N Dec. 637 (1988).

21 *Matter of Enrique Salas Compean*, 24 I & N Dec. 710 (A.G. 2009).

22 *Commonwealth of Kentucky v. Padilla*, Supreme Court of Kentucky, Jan. 24, 2008; 2006-SC-00321-DG.

23 *Argersinger v. Hamlin*, 407 U.S. 25 (1972)

24 *Scott v. Illinois*, 440 U.S. 367 (1979)

25 *Stroe v. INS*, 256 F.3d 498, 500 (citing *Murray v. Giarratano*, 492 U.S. 1 (1989), and *Pennsylvania v. Finley*, 481 U.S. 551 (1987))

26 *Vitek v. Jones*, 445 U.S. 480, 496-97 (1980) (plurality) (holding that an individual has a constitutional right to appointed counsel in a civil proceeding[,] the outcome of which may result in physical confinement at a psychiatric institution); *In re Gault*, 387 U.S. 1, 36-41 (1967) (holding that a juvenile has a constitutional due process right to appointed counsel in a delinquency proceeding where he faces commitment to a juvenile-detention facility).

27 *Lassiter*, 452 U.S. at 25.

28 *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974); accord *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982) (stating that "constitutional standards" may be invoked to challenge private action "only when it can be said that the Government is responsible for the specific conduct of which the plaintiff complains").

29 *Cuyler v. Sullivan*, 446 U.S. 335, at 344 (1980).

30 Amnesty Report at 115-16.

31 *Lassiter v. Department of Social Services of Durham County*, 425 U.S. 18 (1981).

32 *Id.* at 29.

33 Amnesty report at page 47.

34 *Id.* at 55.

35 *Id.*

36 *Id.* at 80.

37 *Id.* at 87.

