



Testimony of

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Management”

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Madam Chairwoman and distinguished Members of the Subcommittee, my name is Donald Kerwin and I am Vice President for Programs at the Migration Policy Institute (MPI). MPI is an independent, non-partisan, non-profit think tank headquartered in Washington, D.C., and dedicated to the analysis of the movement of people worldwide. I appreciate the opportunity to testify before you today on the U.S. immigration detention system.

On August 6, 2009, Homeland Security Secretary Janet Napolitano and the Assistant Secretary of U.S. Immigration and Customs Enforcement (ICE), John Morton, announced plans to restructure the nation's immigration detention system.¹ On October 6, 2009, ICE released a report by Dr. Dora Schriro, the first director of ICE's Office of Detention Policy and Planning (ODPP), which has been charged with designing a detention system based on the agency's civil detention authorities.² The report affirmed that ICE detention facilities:

- have been "built, and operate, as jails and prisons to confine pre-trial and sentenced felons";
- rely on "correctional incarceration standards designed for pre-trial felons and on correctional principles of care, custody and control";
- "impose more restrictions and carry more costs than are necessary to effectively manage the majority of the detained population."³

As part of the new initiative, ICE intends to centralize management of its detention system, reduce its reliance on local jails and private prisons, and revamp the standards governing those in its custody. The Schriro report represented a milestone in agency candor. It also highlighted the challenges that ICE faces in transforming its detention system, including:

- the diversity of ICE detainees by country of origin, gender, age, criminal history, immigration status, detention status, time in custody and claims to remain;
- the size of the system (nearly 380,000 detained in FY 2008) and its six-fold growth since 1994;
- the hundreds of facilities within ICE's system, the multiple types of facilities, their geographic diversity and the misalignment between detention capacity and demand;
- ICE's extensive alternative-to-detention programs;
- the multiple enforcement programs that feed into the detention system, many of which ICE does not oversee or control;
- longstanding problems in its information systems; and
- the law enforcement culture of ICE detention staff and the criminal standards that govern its facilities.⁴

¹ U.S. Immigration and Customs Enforcement, "ICE 2009 Immigration Detention Reforms" (Fact Sheet, August 6, 2009), http://www.ice.gov/pi/news/factsheets/2009_immigration_detention_reforms.htm.

² Ibid.

³ Dr. Dora Schriro, "Immigration and Detention Overview and Recommendations" (Washington, D.C.: Immigration and Customs Enforcement, October 6, 2009), 2-3, http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf.

⁴ Donald Kerwin and Serena Yi-Ying Lin, *Immigrant Detention: Can ICE Meet Its Legal Imperatives and Case Management Responsibilities?* (Washington, D.C.: Migration Policy Institute, September 2009), 22-23, <http://www.migrationpolicy.org/pubs/detentionreportSept1009.pdf>; Dr. Dora Schriro, "Immigration and Detention Overview and Recommendations," 5-13.

Given the early stage of the transformation process, it remains an open question how a civil detention system will differ from the current system. An initial challenge may be the lack of an analogous civil detention population. Suitable standards for immigrant detainees may differ markedly, for example, from standards that are appropriate for persons detained for mental health or public health reasons. As a preliminary task, **ODDP should analyze potentially analogous civil detention systems in the United States, study immigrant “reception centers” and alternative housing models from other nations, and work closely with non-governmental organizations (NGOs) in developing suitable detention standards.**

This testimony will focus on three issues. First, it will discuss the need for discretion in placing persons in removal proceedings and, thus, subjecting them to detention. It will outline which immigrants should be eligible for alternative-to-detention programs and which should be detained and under what conditions. Second, it will highlight deficiencies in ICE’s information systems that must be remedied in order for detention reform to succeed. Third, it will describe the extent to which ICE relies on private corporations to manage its detention system, and the implications of privatization for ICE’s detention reform initiative.

I. Civil Detention: Who Should Be Released, Who Detained and Under What Conditions?

The Schriro report recognizes the need to create “the requisite management tools and informational systems to detain and supervise aliens in a setting consistent with assessed risk.”⁵ Building on this proposition, **the goal of detention reform should be to ensure that persons in ICE custody are placed in the least restrictive setting necessary to ensure their appearances at all legal proceedings and, if necessary, to protect the public.** Under such a system, ICE would carefully screen each detainee, classify them and treat them as follows:

First, ICE would continue to detain persons who represent a danger to others. ICE’s detention system contains persons with violent criminal histories who pose a threat to others. As of September 1, 2009, 11 percent of ICE detainees with criminal records had committed violent crimes.⁶ ICE will need secure facilities for this population. However, an MPI report found that 58 percent of persons in ICE custody on January 25, 2009 did not have criminal records and, of those with criminal records, the most serious convictions included traffic-related (13 percent) and immigration-related offenses (6 percent).⁷ According to the Schriro report, ICE detainees behave differently from criminally incarcerated populations. The majority are “motivated by the desire for repatriation or relief, and exercise exceptional restraint”; “relatively few detainees file grievances, fights are infrequent

⁵ Dr. Dora Schriro, “Immigration and Detention Overview and Recommendations,” 3.

⁶ *Ibid.*, 6.

⁷ Donald Kerwin and Serena Yi-Ying Lin, *Immigrant Detention: Can ICE Meet Its Legal Imperatives and Case Management Responsibilities?*, 20.

and assaults on staff are even rarer.”⁸ For these reasons, less restrictive means of detention should be available to most immigrants, even those with criminal records.⁹

Second, ICE should ensure that certain immigrants not be placed in removal proceedings and, thus, not be subject to the detention regime. This list would include persons who are eligible for adjustment of status to lawful permanent residence, persons with credible claims to U.S. citizenship and refugees.¹⁰ **Overall, the Department of Homeland Security (DHS) should exercise discretion in placing persons in removal proceedings based on their immigration status, humanitarian and equitable factors, the severity of their offenses and likelihood of prevailing in immigration court.**¹¹ Like every successful law enforcement agency, ICE should assess “how most effectively to use its resources” and the “meaningful differences in culpability and equities” among those who are potentially subject to its authorities.¹² Given the overwhelming demands on the detention system and immigration courts, persons who enjoy legal status, who will soon obtain status or who otherwise are not likely to be removed should not be put into removal proceedings.

Third, ICE should release detainees who are not a danger or a flight risk, particularly those whose cases raise humanitarian concerns. In FY 2008, 51,000 detainees were released either through bond (29,000), an order of recognizance (12,000), an order of supervision (10,000) or parole (650).¹³ ICE has committed to developing an assessment tool to guide its decisions related to release, eligibility for alternative-to-detention programs and placement within its detention facilities.¹⁴ This tool should allow it to release bona fide asylum seekers, torture survivors, persons with strong family and equitable ties in the United States (particularly lawful permanent residents), pregnant and nursing women, primary caregivers, the elderly, families, survivors of human trafficking, and stateless persons and other detainees who cannot be removed.

Fourth, ICE should continue to expand and improve its alternative-to-detention programs.¹⁵ Alternative-to-detention programs can offer a cost-effective, humane alternative to detention, but they do not suit every detainee. Persons who represent a danger or a flight risk, even under the conditions of an alternative-to-detention program, should not be eligible for these programs. Likewise, alternative-to-detention programs are not appropriate for persons who would otherwise be released on parole, bond, supervision or their own recognizance.

⁸ Dr. Dora Schriro, “Immigration and Detention Overview and Recommendations, 21.

⁹ It should also be noted that ICE detainees have served whatever criminal sentence they have received prior to coming into ICE custody.

¹⁰ In recent months, ICE has placed lawfully admitted refugees who have committed no crime into removal proceedings because they have not adjusted to permanent resident status after a year in the country.

¹¹ Doris Meissner and Donald Kerwin, *DHS and Immigration: Taking Stock and Correcting Course* (Washington, D.C.: Migration Policy Institute, February 2009), 25, http://www.migrationpolicy.org/pubs/DHS_Feb09.pdf.

¹² *Ibid.*

¹³ Dr. Dora Schriro, “Immigration and Detention Overview and Recommendations,” 6.

¹⁴ U.S. Department of Homeland Security, “ICE Detention Reform: Principles and Next Steps” (Fact Sheet, October 6, 2009), http://www.dhs.gov/xlibrary/assets/press_ice_detention_reform_fact_sheet.pdf.

¹⁵ Congress appropriated \$70 million for alternative-to-detention programs in FY 2010. Committees on Appropriation, “FY2010 Conference Summary: Homeland Security Appropriations” (October 7, 2009), http://appropriations.house.gov/pdf/Homeland_Security_FY10_Conference.pdf.

As of September 1, 2009, ICE was supervising 19,160 people in its three alternative-to-detention programs.¹⁶ In July 2009, ICE reported to MPI that it does not collect “complete and accurate information” that allows it to assess the effectiveness or cost of these programs, and that “its previously released reports [were] sometimes incorrect.”¹⁷ It nonetheless reported that 87 percent of the participants in its Intensive Supervision Appearance Program (ISAP), 96 percent of those in its Enhanced Supervision Reporting (ESR) program and 93 percent of those in its Electronic Monitoring (EM) program appeared for their removal hearings.¹⁸ It estimated direct program costs, not including ICE staff time, to be \$14.42 per day for ISAP, \$8.52 per day for ESR and between 30 cents and \$5 per day for EM.¹⁹ By contrast, hard detention costs can exceed \$100 per day.²⁰ In October 2009, the *Houston Chronicle* reported that earlier ICE reports claiming 99 percent appearance rates for persons participating in the ISAP program did not include program participants whom ICE could not locate (i.e. absconders).²¹

While ICE record-keeping and information systems must improve, alternative-to-detention programs cost far less than hard detention and can ensure high court appearance rates. For this reason, **alternative-to-detention programs should be expanded. They should also be strengthened as follows:**

- **The screening of program participants should be based on a more reliable assessment of risk.** Screening has been shown to be crucial to the success of alternative-to-detention and supervised-release programs.²² As stated, ICE has committed to creating a risk assessment tool to determine who should participate in its alternative-to-detention programs.²³
- **The removal proceedings of persons in alternative-to-detention programs should be expedited.** Rates of absconsion and costs will necessarily increase the longer participants remain in alternative-to-detention programs.²⁴
- **Alternative-to-detention programs should assist participants to secure legal counsel and otherwise to obtain accurate and timely information about the removal process.** These factors have proven crucial to ensuring high court appearance rates.²⁵

¹⁶ Dr. Dora Schriro, “Immigration and Detention Overview and Recommendations,” 6.

¹⁷ Letter from Dr. Dora Schriro, Special Advisor, Office of the Assistant Secretary, U.S. Immigration and Customs Enforcement, to Donald Kerwin, Vice President for Programs, Migration Policy Institute (received July 2, 2009).

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ U.S. Department of Homeland Security, “ICE Detention Reform: Principles and Next Steps” (Fact Sheet, October 6, 2009).

²¹ Susan Carroll, “Flaws found in options for immigrant detention,” *Houston Chronicle*, October, 20, 2009.

²² Megan Golden, Oren Root and David Mizner, *The Appearance Assistance Program: Attaining Compliance with Immigration Laws Through Community Supervision* (New York: Vera Institute for Justice, 1998), 7-9.

²³ U.S. Department of Homeland Security, “ICE Detention Reform: Principles and Next Steps” (Fact Sheet, October 6, 2009).

²⁴ Dr. Dora Schriro, “Immigration and Detention Overview and Recommendations,” 21.

²⁵ Oren Root, *The Appearance Assistance Program: An Alternative to Detention for Noncitizens in US Immigration Removal Proceedings* (New York: Vera Institute for Justice, 2000), 3-4; Megan Golden, Oren Root and David Mizner, *The Appearance Assistance Program: Attaining Compliance with Immigration Laws Through Community Supervision*, 10-13.

- **Alternative-to-detention programs should be treated – particularly if they are strengthened in the ways set forth above – as alternative *forms* of detention, and thus opened to mandatory detainees.** Mandatory detention laws broadly cover significant numbers of persons who, with proper supervision, would not be a flight risk. Given that 66 percent of ICE detainees must be detained,²⁶ the significant expansion of alternative-to-detention programs – and the resulting cost savings to the government and benefit to the affected individuals – will depend on whether alternatives to detention are found to be soft detention or constructive custody.

Fifth, ICE should expand its efforts to identify alternative housing options for detainees, including the use of “converted hotels, nursing homes, and other residential facilities.”²⁷ It should also aggressively explore and adopt standards that reflect its civil detention authorities and the needs of those in its custody. It should collaborate with a wide range of stakeholders, including NGOs, in identifying alternative housing and developing appropriate standards.

In September 2000, the Immigration and Naturalization Service (INS) issued 36 national detention standards, covering security, the exercise of religion, medical care, visitation, telephone access, legal access and transfers.²⁸ In 2008, ICE announced plans to develop the performance outcomes that its national detention standards are intended to achieve.²⁹ ICE will continue to phase in its performance-based standards – which include new standards on media interviews and tours, searches, sexual abuse and staff training – throughout 2010.³⁰

The national detention standards do not cover ICE detainees who are held in Bureau of Prisons (BOP) facilities. In addition, they do not apply in their entirety to the local jails covered by inter-governmental service agreements (IGSAs).³¹ IGSA agreements allow localities to establish “alternative” practices that “meet or exceed the intent” of different sections of most of the standards. Moreover, even when the standards apply, compliance remains spotty. Recent reports by the DHS Office of Inspector General (OIG) and respected NGOs have found:

- non-compliance with standards related to detainee transfers, including with the requirement that detainees receive medical examinations within 14 days of arriving at a facility.³²

²⁶ See, e.g., *Yong v. INA*, 208 F. 3d 1116, 1118 (9th Cir. 2000) (release to a halfway house held to be a form of civil custody).

²⁷ U.S. Department of Homeland Security, “ICE Detention Reform: Principles and Next Steps” (Fact Sheet, October 6, 2009).

²⁸ DHS subsequently added two more standards, bringing the (then) total to 38.

²⁹ U.S. Immigration and Customs Enforcement, *Operations Manual: ICE Performance Based National Detention Standards (PBNDS)* (last modified October 7, 2009), <http://www.ice.gov/partners/dro/PBNDS/index.htm>.

³⁰ U.S. Immigration and Customs Enforcement, “Detention Management Program” (last modified February 20, 2009), <http://www.ice.gov/partners/dro/dmp.htm>.

³¹ Dr. Dora Schriro, “Immigration and Detention Overview and Recommendations,” 10.

³² U.S. Department of Homeland Security, Office of Inspector General, *Immigration and Customs Enforcement's Tracking and Transfers of Detainees* (Washington, D.C.: US Department of Homeland Security, Office of Inspector General, 2009), 6-9, 11, http://www.dhs.gov/xoig/assets/mgmttrpts/OIG_09-41_Mar09.pdf.

- widespread violations of multiple standards based on a review of previously confidential assessments by ICE, the American Bar Association and the United Nations High Commissioner for Refugees.³³
- violations of the standards governing access to legal materials, legal orientation presentations and attorneys.³⁴
- exponential increases in detainee transfers in recent years, and the deleterious impact of transfers on legal representation.³⁵

The ICE standards are broadly modeled on American Correctional Association (ACA) standards for adult local detention facilities, which apply to persons who are awaiting criminal trial or serving relatively short criminal sentences. In many particulars, the ACA standards are not suitable to immigrant detainees. For example, the ACA standards allow for only 25 square feet of “unencumbered space” for inmates in multiple occupancy rooms and only 35 square feet of “unencumbered space” for those confined in excess of 10 hours per day.³⁶ The ACA access to counsel standard stipulates only that counsel is “ensured” and that inmates “will be assisted in making confidential contact with their attorneys,” a standard altogether inadequate for civil detainees who are not guaranteed counsel at government expense.³⁷ In other ways, ACA standards provide for more generous treatment than many ICE detainees receive, requiring for example that facilities be “geographically accessible to . . . community agencies, and inmates’ lawyers, families and friends.”³⁸

More to the point, ICE and ACA standards are not *generally* appropriate to civil detainees. While hardly an exhaustive list, civil detention standards should:

- ensure that ICE detainees can wear their own clothes, rather than prison uniforms;
- provide for detainee access to outdoor recreation throughout the day, and not just a minimum of one hour each day of exercise “outside the cell, and outdoors, when practicable”;
- allow detainees to keep personal possessions with them, including family photographs;
- guarantee that legal orientation presentations are provided to all detainees;

³³ Karen Tumlin, Linton Joaquin and Ranjana Natarajan, *A Broken System: Confidential Reports Reveal Failures in U.S. Immigrant Detention Centers* (Los Angeles: National Immigration Law Center, 2009), <http://www.nilc.org/immlawpolicy/arrestdet/A-Broken-System-2009-07.pdf>.

³⁴ Amnesty International, “Jailed Without Justice” (Amnesty International, March 2009), 30-36, <http://www.amnestyusa.org/immigrant-rights/immigrant-detention-report/page.do?id=1641033>; Human Rights *First*, “U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison” (New York, NY: Human Rights *First*, April 2009), 55-59, <http://www.humanrightsfirst.org/pdf/090429-RP-hrf-asylum-detention-report.pdf>.

³⁵ Human Rights Watch, “Locked Up Far Away” (New York: Human Rights Watch, December 2, 2009), <http://www.hrw.org/en/reports/2009/12/02/locked-far-away>; U.S. Department of Homeland Security, Office of Inspector General, “Immigration and Customs Enforcement Policies and Procedures Related to Detainee Transfers” (Washington, D.C.: U.S. Department of Homeland Security, Office of Inspector General, November 2009), 2-4, http://www.dhs.gov/xoig/assets/mgmttrpts/OIG_10-13_Nov09.pdf.

³⁶ *Performance-Based Standards for Adult Local Detention Facilities, Fourth Edition* (Lanham, MD: American Correctional Association, June 2004), 4.

³⁷ *Ibid.*, 99.

³⁸ *Standards for Adult Local Detention Facilities, Third Edition* (Lanham, MD: American Correctional Association, 1991), 33.

- ensure the separation of detainees without criminal histories from those with criminal histories;
- prohibit the use of shackling, strip searches, handcuffing, solitary confinement and tasers on non-violent detainees;
- preclude transfers that would negatively affect a detainee’s legal case or an attorney/client relationship;
- place detainees in facilities near legal counsel and, for persons with special medical or other needs, near appropriate care; and
- allow contact visits with family members and ensure that visits are not limited to the current 30-minute minimum.³⁹

Sixth, ICE should be particularly vigilant in reviewing the custody of persons who have been confined for more than six months, particularly those who have been ordered removed from the country. According to the Schriro report, less than 1 percent of all ICE detainees are detained for one year or more.⁴⁰ However, it does not follow that ICE does not have a significant number of long-term detainees in its custody. MPI found that 4,154 of those in ICE custody on January 25, 2009 had already been detained for more than six months *as of that date*.⁴¹ Of these, 992 had been detained for more than six months following receipt of a removal order.⁴² The latter is a particularly significant figure since the Supreme Court has held that detainees must be released within six months of a removal order unless the government can show that there is “significant likelihood of removal in the reasonably foreseeable future.”⁴³

II. The Need to Strengthen ICE’s Information Systems

In September 2009, MPI released a report on the immigration detention system, titled *Immigrant Detention: Can ICE Meet Its Legal Imperatives and Case Management Responsibilities?*⁴⁴ The report examines whether ICE’s information systems allow it to determine which detainees:

- fall within “mandatory” detention categories, meet the narrow exceptions for release under these laws or ultimately will become eligible for release;
- have a viable claim to U.S. citizenship;
- have special medical conditions, mental illness or disability, or other humanitarian issues that necessitate special care;
- have been treated in compliance with the national detention standards;
- are eligible for the custody review procedures available to persons who have been ordered removed, but who cannot be removed within 90 days;

³⁹ U.S. Immigration and Customs Enforcement, *Operations Manual: ICE Performance Based National Detention Standards (PBNDS)*, PBNDS 5, 13, 18, 29, 32, 37 and 41.

⁴⁰ Dr. Dora Schriro, “Immigration and Detention Overview and Recommendations,” 6.

⁴¹ Donald Kerwin and Serena Yi-Ying Lin, *Immigrant Detention: Can ICE Meet Its Legal Imperatives and Case Management Responsibilities?*, 19.

⁴² *Ibid.*, 17.

⁴³ *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001).

⁴⁴ Donald Kerwin and Serena Yi-Ying Lin, *Immigrant Detention: Can ICE Meet Its Legal Imperatives and Case Management Responsibilities?* (Washington, D.C.: Migration Policy Institute, September 2009), <http://www.migrationpolicy.org/pubs/detentionreportSept1009.pdf>.

- constitute a risk to abscond (if released) or a threat to others, whether within the detention setting or outside of it.

Over the years, government and human-rights organization reports have harshly criticized ICE's detention system for its failure to adhere to legal standards related to custody and release, and its failure to abide by its national detention standards. The MPI report raised the issue of whether ICE *could* comply with the law and adhere to its standards. Underscoring the need for reform, ICE disclosed on August 17, 2009 that 10 persons whose deaths had not previously been reported had died in its custody between 2004 and 2007.⁴⁵

MPI's report detailed the legally significant information that ICE does not appear to track. It also stressed the need for timely, accurate and complete data entry into a consolidated database. As DHS's Office of Inspector General has warned, absent timely data entry, "family members and legal representatives could be misinformed of the whereabouts of detainees" and "there is a potential risk of improperly accounting for dangerous detainees."⁴⁶

The Schriro report recommends that ICE develop and implement standards and procedures "that specifically reflect the legal requirements of the detained population."⁴⁷ The report also identifies other severe problems in ICE's information systems. It concludes that:

- the "reliability, timeliness, distribution and storage" of detention information, including detainee complaints, "are not uniform and can hinder oversight";
- ICE does not produce the kind of reports that "[c]omparable detention systems routinely rely" upon, including "a daily count sheet of all detainees in custody by facility, a roster of the population assigned to alternative-to-detention supervision, a current list of all detention facilities with information about their operating and emergency capacities, the number of beds that are vacant and off-line for repair and per-diem pricing";
- the majority of computer entry screens are located at "centralized sites such as major facilities, field offices and sub offices, and not at the places of detention, particularly IGSA locations" and, thus, "the recording of the book-ins and book-outs frequently occurs after the actual events";
- ICE's information systems do not allow the agency to make population "forecasts" for the purposes of planning or detention policymaking;
- deportation officers, the primary ICE contact to detainees, do not consistently document their meetings with detainees; and
- detainees are not always assigned new deportation officers when transferred.⁴⁸

The health care provided to immigrant detainees has been a recurrent concern of Congressional oversight committees and human rights groups. The Schriro report recommends that ICE conduct "preliminary medical and mental health screening," develop

⁴⁵ U.S. Immigration and Customs Enforcement, "ICE identification of previously un-tracked detainee deaths highlight importance of detention reform" (August 17, 2009), <http://www.ice.gov/pi/nr/0908/090817washington.htm>.

⁴⁶ Dr. Dora Schriro, "Immigration and Detention Overview and Recommendations," 10.

⁴⁷ *Ibid.*, 18.

⁴⁸ *Ibid.*, 14, 16-18, 22.

a system for “the medical and mental health classification for detainees” and routinely assess those “who remain detained or who exhibit signs of distress.”⁴⁹ It reported that the agency:

- uses segregation cells to detain people with specialized medical needs, mentally ill persons and persons on suicide watch;
- provides only a brief mental health intake assessment that “does not lend itself to early identification and intervention”;
- has not developed a “mental health classification system”;
- lacks a policy related to “the maintenance, retention and centralized storage of medical records” and does not move medical files when detainees are transferred; and
- assigns immigrants to detention facilities prior to medical screening, and places them without reference to the proximity of necessary services or in appropriate facilities.⁵⁰

MPI’s report on ICE’s detention information systems includes a series of detailed recommendations, which are incorporated by reference in this testimony and can be found at <http://www.migrationpolicy.org/pubs/detentionreportSept1009.pdf>. Many of these recommendations concern ICE’s principal database, known as ENFORCE. The report’s overarching recommendation (repeated here) is that: **“ICE initiate a thorough inventory and review of its information systems, including ENFORCE, to ensure that they allow for informed decisions related to the substance and timing of:**

- **who ICE must detain and who it must consider for release, with a particular focus on when “mandatory” detainees become eligible for release;**
- **which detainees must be allowed to participate in ICE’s ... post-removal order, custody-review processes;**⁵¹
- **who should be placed in ICE’s alternative-to-detention programs; and**
- **ICE’s adherence to its national detention standards.”**⁵²

III. The Challenge of Privatization

The Schriro report recommends that ICE **“create capacity within the organization to assess and improve detention operations and activities without the assistance of the private sector.”**⁵³ MPI found that private corporations played an immense role in the management of the immigrant detention system, operating not just their own prisons under contract with ICE, but also administering the largest county jails with which ICE contracts.⁵⁴ According to the Schriro report, ICE holds roughly 50 percent of its detained population in 21 facilities.⁵⁵ As Exhibit 1 demonstrates, private corporations manage all but one of ICE’s own Service Processing Centers (SPCs) and its largest contract facilities: the one exception is

⁴⁹ Ibid., 25-26.

⁵⁰ Ibid.

⁵¹ ICE administers a custody review process for persons who have been ordered removed. It formerly administered a parallel process for “Mariel” Cubans who had been ordered removed.

⁵² Donald Kerwin and Serena Yi-Ying Lin, *Immigrant Detention: Can ICE Meet Its Legal Imperatives and Case Management Responsibilities?*, 25.

⁵³ Dr. Dora Schriro, “Immigration and Detention Overview and Recommendations,” 19.

⁵⁴ Donald Kerwin and Serena Yi-Ying Lin, *Immigrant Detention: Can ICE Meet Its Legal Imperatives and Case Management Responsibilities?*, 15.

⁵⁵ Dr. Dora Schriro, “Immigration and Detention Overview and Recommendations,” 10.

managed by a county, not ICE. The report also indicates that the agency relies on private contractors to:

- conduct most of the “on-site monitoring” of its detention facilities;
- annually assess compliance with detention standards at the facilities ICE uses; and
- manage two of its three alternative-to-detention programs.⁵⁶

In addition, ICE field office directors and staff are not required to “routinely tour” detention facilities within their regions.⁵⁷ In August 2009, ICE announced plans to hire 23 federal employees to provide oversight (on-site) at 23 facilities, which hold roughly 40 percent of its detainees.⁵⁸

A comparative review of the experience of several nations that use private prisons to detain immigrants argues for close government oversight. On the one hand, private prisons have a “built-in [profit] motive to provide adequate services.”⁵⁹ If managed properly, private contractors can also provide a degree of flexibility that benefits the government. However, poor accountability can result from: (1) overly close ties between private prisons and government decisionmakers; (2) lack of competition; (3) lack of oversight by civil society; and (4) the inordinate influence of private companies that seek to expand detention systems and weaken their regulation.⁶⁰

The large-scale privatization of the ICE detention system complicates the reform initiative. **ICE should adopt the Schriro report’s modest recommendation that it be able to assess and improve its detention system without outside assistance. ICE’s broader goal should be to expand its oversight, direct control and monitoring of its own facilities and programs so that it can successfully implement its civil detention reforms.** While a good preliminary step, the reforms announced by ICE to date – including the creation of ODPP and hiring 23 ICE employees to oversee certain facilities – will not ensure adequate oversight of ICE contractors.

IV. Conclusion

ICE deserves praise for its decision to bring its detention system into line with its civil detention authorities, for its candid assessment of its detention system, for the creation of ODDP and for its other reforms. As the detention transformation process moves ahead, ICE should:

- **Analyze potentially analogous civil detention systems in the United States, study immigrant “reception centers” and alternative housing models in other nations and work closely with NGOs in developing suitable civil detention standards.**

⁵⁶ Ibid., 14, 20.

⁵⁷ Ibid., 15.

⁵⁸ U.S. Immigration and Customs Enforcement, “ICE 2009 Immigration Detention Reforms” (Fact Sheet, August 6, 2009).

⁵⁹ Michael Flynn and Cecelia Cannon, “The Privatization of Immigration Detention: Towards a Global View (Geneva, Switzerland: Global Detention Project, September 2009), 16, http://www.globaldetentionproject.org/fileadmin/docs/GDP_PrivatizationPaper_Final5.pdf.

⁶⁰ Ibid., 16-17.

- Ensure that persons in its custody are placed in the least restrictive settings necessary to ensure their appearances at legal proceedings and to protect the public.
- Detain persons who pose a danger to others.
- Exercise discretion in placing persons in removal proceedings based on their immigration status, humanitarian and equitable factors, the severity of their offenses and their likelihood of prevailing in immigration court.
- Release detainees who are not a danger or a flight risk, particularly persons whose cases raise humanitarian concerns.
- Expand and strengthen its alternative-to-detention programs by: screening program participants based on a more reliable assessment of risk; working to expedite the removal proceedings of persons in alternative-to-detention programs; assisting program participants to secure legal counsel and otherwise to obtain accurate and timely information about the removal process; and treating alternative-to-detention programs as alternative *forms* of detention, and thus opening them to mandatory detainees.
- Expand its efforts to identify alternative housing options for detainees, including the use of “converted hotels, nursing homes and other residential facilities.”
- Adopt standards that reflect its civil detention authorities and the needs of those in its custody.
- Systematically review the custody of persons who have been confined for more than six months, particularly those who have been ordered removed from the country.
- Initiate a thorough inventory and review of its information systems, including ENFORCE, to ensure that they allow for informed decisions related to the substance and timing of: who ICE must detain and who it must consider for release, with a particular focus on when “mandatory” detainees become eligible for release; which detainees must be allowed to participate in ICE’s post-removal order, custody-review process; who should be placed in ICE’s alternative-to-detention programs; and ICE’s adherence to its national detention standards.
- Expand its oversight, direct control and monitoring of its own facilities and programs so that it can successfully implement its civil detention reforms.

EXHIBIT 1: Selected 22 Detention Facilities that Hold More Than 50 Percent of the Detained Population, FY 2009

Service Processing Centers	State	Private Contractor
Batavia SPC	Buffalo, NY	AHTNA Technical Services Inc (ATSI)
El Centro SPC	El Centro, CA	ATSI
Florence SPC	Florence, AZ	ATSI
Krome SPC	Miami, FL	ATSI
Port Isabel SPC	Los Fresnos, TX	ATSI
Varick Street SPC	New York, NY	ATSI
El Paso SPC	El Paso, TX	Doyon Akal Joint Venture Detention Center Services
Aguadilla SPC	Aguadilla, PR	MVM, Inc
Contract Detention Facilities		
Aurora ICE Processing Center	Aurora, CO	GEO
Broward Transitional Center	Pompano Beach, FL	GEO
Northwest Detention Center	Tacoma, WA	GEO
Pearsall	Pearsall, TX	GEO
Elizabeth Detention Center	Elizabeth, NJ	CCA
Houston Contract Detention Facility	Houston, TX	CCA
Otay Detention Facility	San Diego, CA	CCA
County Jail Facilities with IGSAs		
Eloy Federal Contract Facility	Eloy, AZ	CCA
Laredo Processing Center	Laredo, TX	CCA
Stewart Detention Center	Lumpkin, GA	CCA
Otero County Processing Center	Chaparral, NM	MTC
Willacy County Detention Center	Raymondville, TX	MTC
Jena/LaSalle Detention Facility	Jena, LA	GEO
Mira Loma Detention Center	Lancaster, CA	N/A; Los Angeles County Sheriff's Department

Sources: Dora Schriro, *Immigration and Detention Overview and Recommendations* (Washington, DC: Department of Homeland Security, October 6, 2009); website information of detention facilities and private contractors.