TESTIMONY OF CHRISTOPHER NUGENT

Before the Committee on the Judiciary

Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law

Hearing on *H.R. 750, the "Save America Comprehensive Immigration Act of 2007"*

November 8, 2007

Madame Chair and honorable Members of the Subcommittee, my name is Christopher Nugent. It is a privilege and honor for me to testify before you today at this important hearing on H.R. 750*, the "Save America Comprehensive Immigration Act of 2007"* . I am a full-time *pro bono* Senior Counsel who works exclusively on domestic and international immigration law and policy issues and individual client cases with the international law firm of Holland & Knight LLP. I have two decades of experience in immigration law dating back to summer, 1987 when as a college student and volunteer paralegal at a non-governmental organization in Indiantown, Florida, I had the privilege to help hard-working rural farm-workers legalize their immigration status under the Immigration Reform and Control Act of 1986. I have worked extensively in the area of immigration detention since 1990 including as a Director of the American Bar Association Commission on Immigration Policy, Practice and Pro Bono from 1998 to 2000 where I had the exceptional opportunity to help Legacy Immigration and Naturalization Service finalize and implement Detention Standards which govern access to counsel and fair and humane treatment of detained aliens. In my current capacity, I am privileged to act as counsel to many non-governmental immigration and refugee organizations (NGOs) working for positive changes in governmental policy and practices in the area of immigration proceedings and detention involving vulnerable populations including but not limited to the Women's Commission for Refugee Women and Children, the Rights Working Group and the National Immigration Law Center. The statements, opinions, and views expressed today however are my own.

H.R. 750 represents a precedent-setting piece of legislation carefully crafted by Congresswoman Sheila Jackson lee to effectively fix a fundamentally broken United States immigration system through providing both increased access to immigration status while fortifying enforcement through the use of "smart" immigration enforcement measures. My remarks today will be limited to focus on the innovative provisions of Sec. 621 concerning oversight and Sec. 622 concerning secure alternatives to detention and Secs. 1201 and 1202 concerning fairness in asylum and refugee proceedings.

IN FY 2007, United States taxpayers funded the Department of Homeland Security (DHS) at a record 945 million dollars to detain a daily average population of 27,500 aliens at more than 325 facilities nationwide. The annual DHS detainee population exceeds 261,000. While this detention is intended to be civil and not punitive since the detainees are being held for civil immigration removal proceedings, the vast majority of detainees, including non-criminal asylum-seekers, are detained in actual prisons and thus unfortunately commingled with America's finest criminal convicts. In this regard, DHS only owns and operates 9 civilian detention facilities. Thus, the vast majority of private prisons contracted by DHS operate for profit, as well as state and county jails, given that DHS' per diem cost is higher than their actual cost of detention. Average DHS daily detention cost per detainee is $95 per day or $34,765 annualized (which would apply to asylum-seekers and others in DHS custody).

Sec. 622(a)(3) of the Save America Act provides a positive means to redress the dysfunctional, hazardous and quasi-punitive status quo for immigration detainees. Conditions of confinement for immigration detainees have been the subject of mounting criticism from a variety of quarters including the U.S. Commission on International Religious Freedom, an independent, bipartisan federal agency in their report "Asylum Seekers in Expedited Removal" (2005); Federal Judge Margaret Morrow of the Court for Central District of California in *Orantes-Hernandez v. Gonzales*, 504 F.Supp.2d 825 (C.D. Cal. 2007), finding systemic facility non-compliance with DHS' own Detention Standards; the United States Governmental Accountability Office in its report Alien Detention Standards (GAO 07-875, July 2007); and DHS' own Inspector General in "Treatment Of Immigration Detainees Housed at Immigration and Customs Enforcement Facilities" (OIG-O7-01, December 2006). Sec. 621 of the Save America Act would mandate that the Office of Civil Rights and Liberties (OCRCL) monitor *all* facilities that are being used to hold detainees for more than 72 hours including evaluating whether the facilities are in compliance with the Detention Standards. This innovation is welcome and salutary considering that the OCRCL has only been sporadically engaged detention oversight issues on either an as needed or ad hoc basis given their currently limited staffing and competing demands. Engaging OCRCL is essential to reinforcing reform of conditions of confinement for detainees whether OCRCL reports are ultimately made available to the public or not- the preference being within DHS that OCRCL resolves problems internally albeit without any public or Congressional oversight.

As regards Sec. 622(b) of the Save America Act concerning secure alternatives to detention, this provision provides necessary reform to a detention system which to date has failed to provide any national binding criteria and guidance prosecutorial discretion as to who needs to be detained. *See, e.g.,* "Immigration Enforcement: ICE Could Improve Controls to Help Guide Alien Removal Decision Making" (GAO-08-67, October 2007). Sec. 622(b) of the Save America Act creates a secure alternative detention program to be designed with reputable NGOs and academic institutions intended for the most vulnerable populations in DHS custody who present neither a risk of flight or danger to the community and can be integrated into the community and comply with removal orders. Sec. 662(b) of the Save America Act prioritizes the most vulnerable in detention for eligibility including alien parents detained with their children; aliens with serious medical or mental health needs; aliens who are mentally retarded or autistics; pregnant alien women; elderly aliens who are over the age of 65; and aliens placed in expedited removal proceedings after being rescued from trafficking or criminal operations by Government authorities. The provision exempt aliens such as unaccompanied alien children subject to release to sponsors under *Flores v. Ashcroft*, Case No. CV85-5455 RJK (C.D. Cal. 1996); as well as aliens seeking asylum who have passed credible fear interviews, positing the clear law that they are eligible for bond redetermination hearings before the Executive Office for Immigration Review (EOIR) when they are placed in removal proceedings under Sec. 240 of the Immigration and Nationality Act.[1]

[1] *See, e.g.,* Matter of X-K-, Respondent, 23 I&N Dec. 731 (BIA 2005) finding bond eligibility for "certain other aliens" (not arriving aliens), who are "physically present in the U.S., without having been admitted or paroled following inspection by an immigration officer at a designated port-of-entry, who are encountered by an immigration officer within 100 air miles of any U.S. international land border, and who have not established to the satisfaction of an immigration officer that they have been physically present in the U.S. continuously for the 14-day period immediately prior to the date of encounter."

Sec. 622(b) of the Save America Act will promote optimal efficiency and effectiveness of the federal government in its detention capacity to enforce the United States border. The Department currently lacks adequate or sufficient facilities to hold *all* aliens subject to expedited removal until removal is effectuated. Sec. 622(b) of the Save America Act provides a safety valve to allow people who have every safeguard in place to comply with removal orders be released pending their actual removal so that Customs and Border Protection (CBP) can continue to arrest and detain the maximum numbers of immigration violators at the border. Otherwise, CBP has scant incentive to arrest *all* aliens if Immigration and Customs Enforcement (ICE) lacks bed-space to house them. Sec. 622(b) provides the teeth for DHS' catch and remove approach. Additionally, most notably, Sec. 622(b) does not create any independent right or legal review of the implementation of the program exception through a report to Congress which is Congress' preeminent and essential prerogative in exercising its oversight function of executive branch agencies.

Sec. 622(b) will be particularly instrumental if and when expedited removal is to be invoked system-wide including the interior under Section 235(b) of the Immigration and Nationality Act (INA) and not only within 100 miles of land borders of the United States as under current policy.

The sheer innovation of Sec. 622(b) is that it allows a wide variety of alternatives to detention conferred to DHS discretion including individual placements to sponsors, group homes to facilities under armed guard at the perimeter- as had appeared in its initial incarnation as an amendment offered by Representative Sheila Jackson Lee to the Border Protection, Antiterrorism and Illegal Immigration Control Act (H.R. 4437). Through this program, the Department will thereby have a range of humane and more cost-effective alternatives besides prisons and jails to ensure an alien's appearance before immigration officials for their removal. This program is based on the best practices utilized by the Appearance Assistance Program of the Vera Institute and DHS' Intensive Supervision Appearance Program which have achieved remarkably high compliance rates for aliens including a 94 percent appearance rate at final removal hearings. Additionally, the program will be implemented by NGOs in order to achieve a cost-savings for DHS. With this provision, catch and detain can truly become catch and remove with the most vulnerable in safe and secure situations pending removal.

By focusing on DHS' arrest and detention capacity constraints and prioritizing key vulnerable populations, Sec. 622(b) differs materially from Sec. 177 of the STRIVE Act of 2007 (H.R. 1645). Sec. 177 of the Strive Act establishes a secure alternatives program for aliens without specifying rigorous criteria for participation such as vulnerable populations who pose no flight risk or danger to the community and triggered by detention capacity constraints. Sec. 177 further does not designate as extensive options of alternatives under Sec. 622(b) including, for example, facilities under armed guard at the perimeter. Given the chronic state of deplorable conditions of confinement for immigration detainees under DHS mismanagement, immigration detainees obviously would prefer *any* non-penal facility run by a reputable non-governmental organization as a preferable and viable alternative to detention- even if there were a guard posted at the perimeter for security purposes. The STRIVE Act would benefit from incorporating these pragmatic considerations from The Save America Act into its provision concerning secure alternatives to detention.

Turning to Secs. 1201 and 1202 of the Save America Act, under current law, children of refugees or asylees are eligible for derivative status when their parents are granted asylum or refugee status. If, however, the child is over age 21 at the time of the parent's approval, the child is no longer consider a “child” for immigration purposes under the INA and is not eligible for the derivative status. The Child Status Protection Act (CSPA), Pub.L. 107-208 (Aug. 6, 2002), provided age-out protection for children included on parents' applications filed before the child has attained age 21. CSPA however failed to address the unique and compelling predicament of children over age 21 who have aged out of protection but are mentally disabled and dependent on their parents as caregivers despite their chronological age. Secs. 1201 and 1202 would correct this injustice by facilitating the admission of refugee and asylee children who are severely impaired by mental retardation, autism, or some other disability of that type who have aged out of classification as a “child.” While this may appear to be a small class, it is among the most vulnerable of asylees and refugees and warrants redress through this legislation.

I personally recall meeting an unaccompanied refugee child in a camp in Guinea suffering from severe mental retardation. The camp had no specialized services to offer him and he remains in Guinea now as an adult with no prospect for any future besides becoming a beggar. Secs. 1201 and 1202 protection will allow such vulnerable children to reunify with the parents or legal guardians as refugees or asylees in the United States to receive the care they need and deserve to become productive, contributing members of the United States. I thank you for your consideration and look forward to your questions.