U.S. Immigration and Customs Enforcement

STATEMENT

OF

GARY MEAD
EXECUTIVE ASSOCIATE DIRECTOR
ENFORCEMENT AND REMOVAL OPERATIONS

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT
DEPARTMENT OF HOMELAND SECURITY

REGARDING A HEARING ON

"H.R. 1932, The Keep Our Communities Safe Act"

BEFORE THE

U.S. HOUSE OF REPRESENTATIVES
JUDICIARY COMMITTEE

SUBCOMMITTEE ON IMMIGRATION POLICY AND ENFORCEMENT

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INTRODUCTION

Chairman Gallegly, Ranking Member Lofgren, and distinguished Members of the Subcommittee:

On behalf of Secretary Napolitano and Director Morton, I would like to thank you for the opportunity to discuss non-removable aliens and the impact of *Zadvydas v. Davis*, 533 U.S. 678, 121 S. Ct. 2491 (2001), on the day-to-day operations of U.S. Immigration and Customs Enforcement (ICE).

As the largest investigative arm of the Department of Homeland Security, ICE utilizes its immigration and customs enforcement authority to protect America and uphold public safety. ICE does this by dismantling terrorist and criminal organizations that seek to exploit our borders and by vigilantly identifying, apprehending, and removing criminal and other illegal aliens from the United States. In both 2009 and 2010, ICE removed a record number of illegal immigrants. In Fiscal Year 2010, ICE recorded the removal of more than 392,000 illegal aliens. Half of those removed—more than 195,000—were convicted criminals, the most ever removed from our country in a single year.

ICE, through the Office of Enforcement and Removal Operations (ERO), is responsible for detaining and removing aliens who violate U.S. immigration laws, consistent with our enforcement priorities, and for assuring that aliens released on orders of supervision comply with the conditions of their release. ICE is responsible for working with the consulates and embassies of foreign governments to assist removable aliens in obtaining travel documents so that ICE may remove them.

Prior to the U.S. Supreme Court's decision in *Zadvydas*, aliens subject to final orders of removal from the United States could potentially be detained indefinitely if they posed a threat to the community or posed flight risks. However, after *Zadvydas,* many aliens with final orders of removal, including aliens determined to pose a threat to the community or flight risks, may not be detained beyond a period of six months if there is no significant likelihood of removal in the reasonably foreseeable future. Only a small number of aliens who pose certain health and safety risks may continue to be detained for a prolonged period of time. These include aliens with highly contagious diseases, aliens who pose serious adverse foreign policy consequences of release, security or terrorism concerns, and aliens found after a hearing to be "specially dangerous" criminal aliens as provided in relevant regulations.

The decision in *Zadvydas* has presented ICE with both challenges and opportunities. As a result, ICE has taken steps to strengthen and improve related removal procedures. For example, ICE has made make significant changes not only in identifying and reviewing cases subject to *Zadvydas'* limitations, but also in how the agency identifies and tracks aliens released on orders of supervision. Further, it required ICE to change the post-order custody review process and the information we maintain on long-term detainees. It has also required us to strengthen our relationship with the Department of State (DOS) in order to more effectively work with foreign governments to overcome delays or refusals in obtaining travel documents for their nationals.

IMPACT ON CUSTODY DETERMINATIONS

The U.S. Supreme Court in *Zadvydas* analyzed the post-order custody provisions of the Immigration and Nationality Act (INA) in the context of review of petitions for writ of habeas corpus. The Court avoided Constitutional implications and decided the case based on the statutory removal period. In doing so the Court held that six months is the presumptively reasonable period of detention to effectuate removal. Thereafter, if there is good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the government must furnish evidence to rebut that or establish that special circumstances exist that require continued detention.

In accordance with *Zadvydas*, the former Immigration and Naturalization Service developed policies and procedures to provide for regular review of detained cases with final orders of removal that are now used by ICE. This process is referred to as Post-Order Custody Review (POCR). POCRs are regularly conducted for aliens who are detained in ICE custody after receipt of a final order of removal, in order to ensure that detention is justified and in compliance with governing laws and regulations. Initial reviews occur locally no later than 90 days after the issuance of a final order (if in custody when final order is issued), or no later than 90 days after coming into custody with an outstanding final order. If the alien has not been released or removed by the expiration of three month period after the review, jurisdiction regarding the decision to continue detention is transferred from the local field office to ICE's Case Management Unit (HQCMU) to determine whether or not continued detention is justified pursuant to 8 C.F.R.§ 241.4 (continued detention of inadmissible, criminal, and other aliens beyond the removal period), §241.13 (determination of whether there is a significant likelihood of

removing a detained alien in the reasonably foreseeable future), or § 241.14 (continued detention of removable aliens on account of special circumstances). If a significant likelihood of removal in the reasonably foreseeable future exists, detention is continued and reviewed by ICE at periodic intervals until the alien is removed.

ERO created the Monthly Post-Order Custody Review Report and established performance measures to ensure compliance with ERO's policies and procedures concerning POCR. ICE relies upon the knowledge and experience of officers assigned to its Travel Document Unit (TDU) to determine whether there is a significant likelihood of removing a detained alien in the reasonably foreseeable future under 8 C.F.R. § 241.13. These TDU officers are experts in the steps necessary to facilitate the removal of aliens to their designated countries and have established points of contact with the consulates and embassies of countries all over the world.

In addition, the TDU obtains additional, pertinent background from case officers in the field and the detainee's family members. TDU officers further consider other factors, such as the embassy/consulate's historical issuance practices and other extraordinary country conditions such as natural disasters or civil unrest.

The conclusion reached in each case is subject to an intensive fact-specific inquiry and TDU officers use these facts and their own experiences and knowledge regarding a given country to make their determination as to whether or not removal is significantly likely in the reasonably foreseeable future. Following consultation with the TDU, HQCMU officers examine each case on its own merits and make a custody determination based on the specifics of the case.

IMPACT ON THE RELEASE OF CRIMINAL ALIENS

Some aliens who may have to be released under *Zadvydas* have criminal records that include a wide variety of illegal activity including, but not limited to, arson, assault, property damage, extortion, forgery or fraud, homicide, kidnapping, weapons offenses, embezzlement, controlled substance offenses, and sexual offenses. Those aliens detained after a determination that there is no significant likelihood of removal because their home country will not accept them, may remain in detention based on 8 CFR § 241.14(f) as "specially dangerous" aliens under specific limited circumstances set out in regulations. Subject to the limitations of the federal courts, under 241.14(f), ICE is authorized to continue to detain certain "specially dangerous" aliens, even when the removal is not reasonably foreseeable, following a hearing before an immigration judge.

Pursuant to regulatory authority, with the approval of an immigration judge, ICE may continue to detain an alien whose release would pose a special danger to the public, if: the alien has previously committed one or more crimes of violence as defined in 18 U.S.C. § 16; due to a mental condition or personality disorder and behavior associated with that condition or disorder, the alien is likely to engage in acts of violence in the future; and no conditions of release can reasonably be expected to ensure the safety of the public. However, the courts of appeals for the Ninth Circuit and the Fifth Circuit have barred reliance on these procedures as exceeding the scope of statutory authority. *Tran v. Mukasey*, 515 F.3d 478 (5th Cir. 2008); *Tuan Thai v. Ashcroft*, 366 F.3d 790 (9th Cir. 2004.

More specifically, when an alien who has previously committed one or more acts of violence and, due to a mental condition or personality disorder and behavior associated

with that condition or disorder is deemed likely to engage in acts of violence in the future and an ICE Health Service Corps physician has determined after a full medical and psychiatric exam that there are no conditions that can be placed upon the alien's release that would ensure the safety of the public, ICE has the regulatory authority to invoke the procedures outlined under 8 CFR § 241.14(f), including a hearing before an immigration judge, in order to continue his or her detention beyond the *Zadvydas* period.

Since the beginning of FY 2009, ICE has released 12,567 individual aliens, including both criminal and noncriminal aliens, under the terms of the *Zadvydas* settlement. Of this amount, 868 individuals were re-booked into ICE custody, which is a relatively low re-detention rate of 7 percent. Of this number, 686 individuals were booked into ICE custody one additional time, 134 individuals were booked in twice, 30 were booked in three times and 18 were booked in four times.

IMPACT ON LENGTH OF STAY

Unlike the Federal Bureau of Prisons (BOP), ICE's detention system is not designed to handle detainees for long periods of time. ICE's constitutional, statutory and regulatory authorities related to detention are different from those given to the BOP, in that ICE holds individuals fundamentally for purposes of removal from the United States. As a practical matter, immigration detention has a finite end point in most cases as the vast majority of aliens are readily removed in a matter of days, weeks, or months after a removal order becomes final. *Zadvydas* directly addressed the minority of cases in which a finite end to detention is not readily apparent. It also addressed the chief reason that the U.S. government is unable to remove aliens who have been ordered removed -- the inability to obtain valid travel documents in a timely manner.

IMPACT ON REPATRIATION

The majority of the more than 200 countries in the world accept the return of their citizens. There are a few countries that refuse to accept their nationals who are under final orders of removal and there are some countries that often delay the removal process. These refusals or delays have often forced ICE to release aliens subject to *Zadvydas*.

There are various reasons that countries may refuse to accept their nationals. For example, Cuba lacks formal relations with the United States and accepts only aliens from a very short list related to the Mariel boatlift. Under the U.S.-Vietnam Repatriation Agreement, Vietnam refuses to accept anyone who entered the United States prior to July 12, 1995, the date that relations with the U.S. were reestablished.

Other countries that eventually accept the return of their nationals will often delay the process. For example, China, India, Iran and Laos are very slow to issue travel documents to ICE. China and India both engage in lengthy background investigations to verify nationality and identity, thereby substantially delaying the issuance of travel documents. Similarly, Iran and Laos do not issue travel documents when ICE or the alien are unable to present a restricted set of that country's identity documents.

Countries that are recalcitrant in issuing travel documents or accepting return of their nationals in ICE custody are prioritized for removal because their recalcitrance result in the highest overall detention costs. Based on these factors, ICE has identified the following as countries of primary concern in this area:

Country	Average Issuance Time
Antigua And Barbuda	115 days
Bangladesh	106 days
Cambodia	227 days
Cuba	154 days
China	134 days
Democratic Republic of the Congo	171 days
Dominica	100 days
Guinea	102 days
India	155 days
Iran	104 days
Iraq	184 days
Jamaica	59 days
Laos	72 days
Liberia	205 days
Pakistan	117 days
St. Kitts And Nevis	165 days
St. Lucia	102 days
St. Vincent And Grenada	102 days
Sierra Leone	215 days
Somalia	344 days
Trinidad And Tobago	52 days
Vietnam	218 days
Zimbabwe	150 days
***** e-TD Dashboard from April 2008 through April 5, 2011	

ICE has worked with DOS to find solutions to address the timely issuance of travel documents. These efforts have included ICE interaction with the National Security Staff and various DOS working groups regarding specific countries that are uncooperative in ICE removal efforts. These working groups have reviewed various options and recommend steps to be taken in obtaining cooperation; however, there is still substantial work to be done in this area.

In an effort to decrease any delay in the removal process, in April 2011, ICE and the DOS Bureau of Consular Affairs (DOS/CA) signed a memorandum of understanding

(MOU) establishing ways in which DOS and the Department of Homeland Security will work together to ensure that other countries accept the return of their nationals in accordance with international law.

The MOU, among other things, establishes a target average travel document issuance time of 30 days and outlines measures to address those countries that systemically refuse or delay repatriation of their nationals. ICE and DOS/CA will pursue the following steps in an attempt to increase compliance among countries that systematically refuse or delay repatriation of their nationals:

- issuing a demarche or series of demarches at increasingly higher levels;
- holding joint meetings with the Ambassador to the United States, DOS Assistant Secretary for Consular Affairs and the Director of ICE;
- considering whether to provide notice of the U.S. government's intent to formally determine that the country is not accepting the return of its nationals and that the U.S. government intends to exercise the provisions of Section 243(d) of the INA to gain compliance;
- considering visa sanctions under Section 243(d) of the INA; and
- calling for an interagency meeting to pursue withholding of aid or other funding.

The MOU also established agreed-upon procedures for working with countries that delay or refuse repatriation of specific nationals. The Director of ICE and the DOS Assistant Secretary for Consular Affairs recently held meetings with the Ambassadors of Bangladesh and India under the implementation of this new agreement. We hope that our collective efforts will yield significant results in the future.

In addition, on February 28, 2011, ICE has prepared demarches requesting that the respective host governments should begin issuing travel documents expeditiously for their nationals subject to orders of removal from the United States for transmittal by the DOS for the following nine countries:

1. Antigua and Barbuda
2. Democratic Republic of the Congo
3. Dominica
4. Iraq
5. Liberia
6. St. Kitts and Nevis
7. St. Lucia
8. St. Vincent and the Grenadines
9. Trinidad and Tobago

The objectives of these demarches are to: (1) have the governments of the respective countries begin issuing travel documents expeditiously for all of their nationals who have been issued final orders of removal from the United States; (2) alert the respective governments to the seriousness with which the U.S. government views this matter; and (3) learn how the process of issuing travel documents can be expedited.

Lastly, ICE is resuming Repatriation Working Group meetings with DOS to identify alternative means to improve travel document issuance for countries where a demarche has already been issued or where issuing a demarche is not recommended.

Though this work with the State Department and foreign governments is difficult, it has had some results. ICE and the Department of State recently held promising

discussions with Chinese officials regarding repatriation issues, and ICE looks forward to continuing to work with China to implement solutions in the coming months.

CONCLUSION

The removal of criminal aliens is central to ICE's mission. It consumes time and poses challenges but will continue to be one of our highest priorities. Every alien's removal requires not only cooperation within the U.S. government but also the cooperation of another country. While ICE attempts to remove criminal aliens under the law within 180 days of issuance of final orders of removal in light of the *Zadvydas* decision, aliens whose removal is not reasonably foreseeable, outside of the limited circumstances of 8 CFR § 241.14, must be released from ICE custody while we continue working to effectuate their removal.

I thank the Committee for its support of ICE and our law enforcement mission. Your support is vital to our work. Your continued interest in and oversight of our actions is important to the men and women at ICE, who work each day to ensure the safety and security of the United States. I would be pleased to answer any questions you have at this time.